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(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

SCHOOL DISTRICT INVESTMENTS; DEPOSITORIES

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I. INTRODUCTION: Various state statutes impose requirements and restrictions upon the investment of funds a school district receives. This bulletin is intended to inform school board members and administrators of such requirements and restrictions.

II. REQUIREMENTS AND RESTRICTIONS:

A. General Rule. A school district may invest any public funds, not presently needed for other purposes or restricted for other purposes, in the manner and subject to the conditions set forth below.¹ Implicit in this provision is the requirement the school districts not invest public funds that are presently needed or that are restricted for other purposes. “Public funds” is defined as including all general, special, permanent, trust, and other funds, regardless of source or purpose, held or administered by a school district, unless otherwise restricted.²

B. Permitted Investments. Public funds may be invested in the following types of investment instruments:

1. United States securities, which include governmental bonds, notes, bills, mortgages (excluding high-risk mortgage-backed securities), and other securities, which are direct obligations or are guaranteed or insured issues of the United States, its agencies, its instrumentalities, or organizations created by an act of Congress.

For purposes of this paragraph, “high-risk mortgage-backed securities” are:

- a. Interest-only or principal-only mortgage-backed securities; and
- b. Any mortgage derivative security that:
 - (1) has an expected average life greater than 10 years;
 - (2) has an expected average life that:
 - (i) will extend by more than 4 years as a result of an immediate and substantial parallel shift in the yield curve plus 300 basis points; or
 - (ii) will shorten by more than 6 years as a result of an immediate and sustained parallel shift in the yield curve of minus 300 basis points; or
 - (3) will have an estimated change in price of more than 17% as a result

of an immediate and sustained parallel shift in the yield curve of plus or minus 300 basis points.³

2. State and local securities, consisting of:
 - a. A security which is a general obligation of any state or local government with taxing powers which is rated "A" or better by a national bond rating service;
 - b. A security which is a revenue obligation of any state or local government which is rated "AA" or better by a national bond rating service;
 - c. A general obligation of the Minnesota Housing Finance Agency which is a moral obligation of the State of Minnesota and is rated "A" or better by a national bond rating agency; and
 - d. Any security which is an obligation of a school district with an original maturity not exceeding 13 months and (i) rated in the highest category by a national bond rating service or (ii) enrolled in the credit enhancement program pursuant to section 126C.55.
 3. Commercial paper issued by United States corporations or their Canadian subsidiaries that are rated in the highest quality category by at least two nationally recognized rating agencies and maturing in 270 days or less.
 4. Time deposits (Certificates of Deposits) that are fully insured by any federal agency or bankers acceptances of United States banks. However, a Certificate of Deposit that is actively traded and that is not held in the name of the school district or joint powers entity may not be a legal investment. A Certificate of Deposit held in the name of the school district or joint powers entity that would be subject to an interest penalty for early redemption is a legal investment. A Certificate of Deposit in excess of the FDIC insurance coverage may be a legal investment if the financial institution furnishes collateral security or a corporate surety bond as discuss in Section III below.
 5. General obligation temporary bonds of the same school district issued under Minn. Stat. § 475.61, Subd. 6.
- C. Debt Service Funds. Notwithstanding the general provision cited above that general obligations purchased as an investment must be rated "A" or better by a national bond rating agency, funds held in a school district's debt redemption fund may be used to purchase any obligation, whether general or special, of an issue which is payable from that fund, at such price, which may include a premium, as shall be agreed to by the holder, or may be used to redeem any obligation of such an issue prior to maturity in accordance with its terms. The securities representing any such investment may be sold by the school district at any time, but the money so received remains part of the fund until used for the purpose for which the fund was created. Any obligation held in a debt service fund from which it is payable may be cancelled at any time unless otherwise provided in a resolution or other instrument securing obligations payable from the fund.⁴
- D. Contracts and Agreements. In addition to the investments described above, school districts may enter into the following types of contracts and agreements:

1. Repurchase Agreements: Repurchase agreements consisting of collateral allowable in Minn. Stat. § 118A.04, and reverse repurchase agreements may be entered into with any of the following entities:
 - a. A financial institution qualified as a “depository” of public funds of the school district;
 - b. Any other financial institution which is a member of the federal reserve system and whose combined capital and surplus equals or exceeds \$10,000,000;
 - c. A primary reporting dealer in United States government securities to the Federal Reserve Bank of New York; or
 - d. A securities broker-dealer licensed pursuant to Chapter 80A, or an affiliate of it, regulated by the securities and exchange commission and maintaining a combined capital and surplus of \$40,000,000 or more, exclusive of subordinated debt.

Reverse agreements may only be entered into for a period of 90 days or less and only to meet short-term cash flow needs. In no event may reverse repurchase agreements be entered into for the purpose of generating cash for investments, except as allowed in a security lending agreement.⁵
2. Securities Lending Agreements: Securities lending agreements, including custody agreements, may be entered into with a financial institution that has an office located in Minnesota and, either, is a financial institution qualified as a depository of public funds of the school district, or is a financial institution which is a member of the federal reserve system whose combined capital and surplus equals or exceeds \$10,000,000. Securities lending transactions may be entered into with entities with whom school districts can enter into repurchase agreements, as described above, and the collateral for such transactions shall be restricted to the securities described in Minn. Stat. §§ 118A.04 and 118A.05.⁶
3. Minnesota Joint Powers Investment Trust or Other Investment Companies: School districts may enter into agreements or contracts for:
 - a. Shares of a Minnesota joint powers investment trust (such as the Minnesota School District Liquid Asset Fund Plus) whose investments are restricted to securities described in Minn. Stat. §§ 118A.04, 118A.05 **and 118A.07, Subd. 7;**
 - b. Units of a short-term investment fund established and administered pursuant to Regulation 9 of the Office of the Comptroller of the Currency, in which investments are restricted to securities described in Minn. Stat. §§ 118A.04 and 118A.05;
 - c. Shares of an investment company which is registered under the Federal Investment Company Act of 1940 and which holds itself out as a money market fund meeting the conditions of Rule 2a-7 of the Securities and Exchange Commission and is rated in one of the two highest rating categories for money market funds by at least one nationally recognized statistical rating organization; or
 - d. Shares of an investment company which is registered under the Federal Investment Company Act of 1940, and whose shares are registered under the

Federal Securities Act of 1933, as long as the investment company's fund receives the highest credit rating and is rated in one of the two highest risk-rating categories by at least one nationally recognized statistical rating organization and is invested in financial instruments with a final maturity no longer than 13 months.⁷

4. **Guaranteed Investment Contracts:** The school district may enter into agreements for guaranteed investment contracts if they are issued or guaranteed by United States commercial banks, domestic branches of foreign banks, United States insurance companies, or their Canadian subsidiaries, or the domestic affiliates of any of the foregoing. The credit quality of the issuer's or guarantor's short- and long-term unsecured debt must be rated in one of the two highest categories by a nationally recognized rating agency. Agreements or contracts for guaranteed investment contracts with a term of 18 months or less may be entered into regardless of the credit quality of the issuer's or guarantor's long-term unsecured debt, provided that the credit quality of the issuer's unsecured debt is rated in the highest category by a nationally recognized rating agency. Should the issuer's or guarantor's credit quality be downgraded below "A", the government entity must have withdrawal rights.⁸

- E. **OPEB Trusts.** Funds deposited in a trust established to pay postemployment benefits to a district's employees or officers after their termination of service may be invested in additional instruments if PERA is the trustee, the funds in the trust will be invested by the State Board of Investment and the restrictions on those investments shall be the same as those generally applicable to the State Board of Investment. For trust assets invested by a trustee other than PERA, the assets may be invested only in investments authorized in Chapter 118A or Section 356A.07, subdivision 7. (Minn. Stat. § 471.6175, Subd. 5).

- F. **Joint Powers Investment Trusts; Negotiable Certificates of Deposit:** A Minnesota joint powers investment trust (such as MSDLAF) may invest funds in negotiable certificates of deposit or other evidences of deposit, with a remaining maturity of three years or less, issued by a nationally or state-chartered bank, a federal or state savings and loan association, or a state-licensed branch of a foreign bank, except that for obligations with a maturity of one year or less, the debt obligations of the issuing institution or its parent are rated in the top short-term rating category by at least two nationally recognized statistical ratings organizations and for obligations with a maturity in excess of one year, the senior debt obligations of the issuing institution or its parent are rated at least A or its equivalent by at least two nationally recognized statistical ratings organizations. Investments in these instruments shall not be subject to the collateralization requirement of section 118A. 03. (Minn Stat. § 118A.07, Subd. 7).

III. **COLLATERAL SECURITY:** To the extent that funds on deposit at the close of a financial institution's banking day exceed available federal deposit insurance (currently \$250,000), a school district shall require the financial institution to furnish collateral security or a corporate surety bond executed by a company authorized to do business in the State of Minnesota.⁹ For purposes of this provision, "banking day" has the meaning given in the applicable federal regulations and incorporates a financial institution's cutoff hour established under applicable statute.

- A. **Types of Collateral Security Allowed.** If collateral security is furnished in lieu of a corporate surety bond, the following are the allowable forms of collateral security:

1. United States government treasury bills, treasury notes, or treasury bonds;
 2. Issues of United States government agencies and instrumentalities as quoted by a recognized industry quotation service available to the school district;
 3. General obligation securities of any state or local government with taxing powers which is rated "A" or better by a national bond rating service, or revenue obligation securities of any state or local government with taxing powers which is rated "AA" or better by a national bond rating service;
 4. General obligation securities of a local government with taxing powers may be pledged as collateral against funds deposited by that same local government entity;
 5. Irrevocable standby letters of credit issued by Federal Home Loan Banks to a municipality accompanied by written evidence that the bank's public debt is rated "AA" or better by Moody's Investor Service, Inc., or Standard & Poor's Corporation; or
 6. Time deposits that are fully insured by the Federal Deposit Insurance Corporation.¹⁰
- B. Amount of Collateral. The total amount of the collateral, computed at its market value, shall be at least 10% more than the amount on deposit at the close of the financial institution's banking day, except that where the collateral is irrevocable standby letters of credit issued by Federal Home Loan Banks, the amount of collateral shall be at least equal to the amount on deposit at the close of the financial institution's banking day.¹¹ The school district should keep in mind that because of potential fluctuations in the amount on deposit and fair market value of the collateral, that monitoring of and adjustments to the collateral will be required. For instance, if a CD is taken out in a principal amount of \$250,000, it will exceed the FDIC insurance amount as interest accrues. The amount issued must either be reduced so the amount on deposit does not exceed \$250,000 at any time or collateral security or a corporate surety bond must be in place. The financial institution may furnish a combination of surety bond and collateral security, provided that the aggregated value of the two meets the requisite collateral amount.¹² The amount of collateral required applies to both original and substituted collateral. **Investments by joint powers investment trusts in negotiable certificates of deposit are not subject to these collateralization requirements.**¹³
- C. Assignment of Collateral. Any collateral pledged shall be accompanied by a written assignment to the school district from the financial institution. The written assignment shall recite that, upon default, the financial institution shall release to the school district on demand, free of exchange or any other charges, the collateral pledged. Interest earned on assigned collateral will be remitted to the financial institution so long as it is not in default.¹⁴
- D. Safekeeping of Collateral. All collateral shall be placed in safekeeping in a restricted account at a Federal Reserve Bank, or in an account at a trust department of a commercial bank or other financial institution that is not owned or controlled by the financial institution furnishing the collateral. The selection of the Federal Reserve Bank or other financial institution where the collateral is deposited shall be approved by the school district.¹⁵
- E. Substitution or Withdrawal of Collateral. A financial institution may withdraw excess collateral or substitute other collateral after giving written notice to the school district and receiving confirmation. The authority to return any delivered and assigned collateral rests with the school district. Thus, the collateral substituted must be acceptable to the school district.¹⁶ Interest earned on assigned collateral will be remitted to the financial institution so long as it is not in default.¹⁷

- F. Default. A default on the part of the depository financial institution shall include, but is not limited to, failure to make interest payments when due, failure to promptly deliver upon demand all money on deposit, less any early withdrawal penalty that may be required in connection with the withdrawal of a time deposit, or closure of the depository. It shall not be a default to require prior notice of withdrawal if such notice is required as a condition of withdrawal by applicable federal law or regulation.¹⁸ In the event of a default by any depository financial institution, the school district may sell the collateral to recover the amount due. Any surplus from the sale of the collateral shall be payable to the financial institution, its assigns, or both.¹⁹ If a depository financial institution closes, all deposits shall be immediately due and payable. If the depository financial institution is in default, the school district is not required to remit the interest earned on the assigned collateral to the depository financial institution.²⁰

IV. DESIGNATION OF DEPOSITORY: The school board of each school district shall designate as a depository of its funds, one or more financial institutions.²¹ A “financial institution” is a savings association, commercial bank, trust company, credit union, or industrial loan and thrift company.²² The school board may authorize the treasurer or chief financial officer to designate the depository of its funds.²³

- A. Conflict of Interest in Depository Designation. School board members are public officers who are prohibited from taking part in any contract in their official capacity that they may have a personal financial interest in or personally benefit financially therefrom.²⁴ However, Minn. Stat. § 471.88, Subd. 2, provides an exception to this general prohibition, for the act of designating a financial institution as the depository of funds, provided the following conditions are met:
1. There is a unanimous vote of the school board designating the depository summary;
 2. That funds deposited in the financial institution are protected in accordance with the requirements and restrictions for investing school district funds described elsewhere herein; and
 3. That the school board member/public officer having such a personal interest discloses that he or she is a director or employee of the financial institution, which disclosure shall be entered upon the school board minutes and shall be made when the financial institution is first designated as a depository or when such school board member is elected, whichever is later. This initial disclosure serves as notice of a conflict and need not be made with each successive transaction. In addition to school board members, the treasurer of a school district is considered a public officer, and is therefore also subject to the exceptions set forth above.²⁵
- B. Deposit of Funds. The law provides that the treasurer shall deposit the funds of the school district in the official depository.²⁶

In addition to this general grant of authority, the treasurer may also deposit money in the official depository in accordance with the following conditions:

1. The official depository is authorized by the treasurer to (i) arrange for the redeposit of the money into deposit accounts in one or more banks, savings and loan associations, or credit unions that are located in the United States, and (ii) serve as custodian for the district with respect to the money redeposited into such accounts.
2. The full amount of the redeposited district funds, plus accrued interest, if any, must

be ensured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. Any entity serving as custodian for the official depository shall have had at least five years of general custodial experience.²⁷

V. DELEGATION OF AUTHORITY: As an alternative to making its own determinations as to the investment of public funds and the designation of a depository for public funds, the school board may authorize the treasurer or chief financial officer to designate depositories of the funds and/or make investments of school district funds.²⁸ The treasurer or chief financial officer of the school district may at any time sell obligations purchased as an investment and the money received from such sale, and the interest and profits or loss on such investment shall be credited or charged, as the case may be, to the fund from which the investment was made.

VI. SAFEKEEPING OF INVESTMENTS, CONTRACTS, AND AGREEMENTS: Investments, contracts, and agreements may be held in safekeeping with:

- A. Any federal reserve bank;
- B. Any bank authorized under the laws of the United States or any state to exercise corporate trust powers, including, but not limited to, the bank from which the investment is purchased;
- C. A primary reporting dealer in United States government securities to the Federal Reserve Bank of New York; or
- D. A securities broker-dealer or an affiliate of it that meets the following requirements:
 - 1. it is registered as a broker-dealer under chapter 80A or is exempt from the registration requirements;
 - 2. is regulated by the Securities and Exchange Commission; and
 - 3. it maintains insurance through the Securities Investor Protection Corporation or excess insurance coverage in an amount equal to or greater than the value of the securities held.

Provided, however, that the school district's ownership of all securities must be evidenced by written acknowledgments identifying the securities by the names of the issuers, maturity dates, interest rates, CUSIP number, or other distinguishing marks.²⁹

VII. STATEMENT OF INVESTMENT RESTRICTIONS: Prior to completing an initial transaction with a broker, a school district shall provide annually to the broker a written statement of investment restrictions which shall include a provision that all future investments are to be made in accordance with Minnesota Statutes governing the investment of public funds. A broker must acknowledge annually receipt of the statement of investment restrictions in writing and agree to handle the school district's account in accordance with these restrictions. A school district may not enter into a transaction with a broker until the broker has provided this written agreement to the school district.³⁰ The state auditor is required to prepare a uniform notification form which shall be used by all government entities (which include school districts) and brokers, the most recent version of which is attached hereto as Attachment A.

VIII. PERSONAL LIABILITY FOR LOSS: Neither the school district, the treasurer, the chief financial officer, nor any other official responsible for the custody of funds shall be personally liable for any loss sustained from the deposit or investment of funds conducted in accordance with the provisions set forth above.³¹

¹ Minn. Stat. § 118A.04, Subd. 1

² Minn. Stat. § 118A.01, Subd. 4

³ Minn. Stat. § 118A.04, Subd. 6

- ⁴ Minn. Stat. § 118A.04, Subd. 8
- ⁵ Minn. Stat. § 118A.05, Subd. 2
- ⁶ Minn. Stat. § 118A.05, Subd. 3
- ⁷ Minn. Stat. § 118A.05, Subd. 4
- ⁸ Minn. Stat. § 118A.05, Subd. 5
- ⁹ Minn. Stat. § 118A.03, Subd. 1
- ¹⁰ Minn. Stat. § 118A.03, Subd. 2
- ¹¹ Minn. Stat. § 118A.03, Subd. 3
- ¹² Minn. Stat. § 118A.03, Subd. 3
- ¹³ Minn. Stat. § 118A.07, Subd. 7
- ¹⁴ Minn. Stat. § 118A.03, Subd. 4
- ¹⁵ Minn. Stat. § 118A.03, Subd. 7
- ¹⁶ Minn. Stat. § 118A.03, Subd. 5
- ¹⁷ Minn. Stat. § 118A.03, Subd. 4
- ¹⁸ Minn. Stat. § 118A.03, Subd. 6
- ¹⁹ Minn. Stat. § 118A.03, Subd. 4
- ²⁰ Minn. Stat. § 118A.03, Subd. 4
- ²¹ Minn. Stat. § 118A.02, Subd. 1
- ²² Minn. Stat. § 118A.01, Subd. 3
- ²³ Minn. Stat. § 118A.02, Subd. 1
- ²⁴ Minn. Stat. § 471.87
- ²⁵ See: Op. Atty. Gen. 90c-4, August 26, 1965.
- ²⁶ Minn. Stat. § 123B.14, Subd. 1(a)
- ²⁷ Minn. Stat. § 123B.14, Subd. 1(b)
- ²⁸ Minn. Stat. § 118A.02, Subd. 1
- ²⁹ Minn. Stat. § 118A.06
- ³⁰ Minn. Stat. § 118A.04, Subd. 9
- ³¹ Minn. Stat. § 118A.02

INSTRUCTIONS

Beginning January 1, 1997, government entities must annually obtain from their brokers certain representations regarding future investments. Minn. Stat. § 118A.04, Subd. 9 requires government entities to provide each broker with information regarding the government entity's investment restrictions. Prior to conducting any business with or for the government entity, the broker must acknowledge these investment restrictions and agree to conduct investment transactions in accordance with them. The state auditor has promulgated this uniform notification form to assist government entities in complying with this law.

"Broker" as used in this form is a broker-dealer, broker, or agent of a government entity, who transfers, purchases, sells, or obtains securities for, or on behalf of, a government entity.

Send this form to each broker with whom you conduct business annually. Follow these steps:

1. Fill in the information requested in Section I that is known to you.
2. Fill in sections II and III (if applicable) and attach copies of your investment policy and any government board resolutions that restrict your investments.
3. Send the form to your broker with instructions to fill in any blanks, sign and return to you.
4. Keep a copy of the completed form in your files.

NOTE: should you change your investment policy or should your governing body adopt any resolutions effecting future investments, your broker should be notified of the change. To avoid confusion, your broker should receive written notification, and copies of such correspondence should be kept on file with this form.

(No changes from 2014 Session)

School Law Bulletin
for
School Board Members and Administrators

EFFECT OF 18 YEAR OLD AGE OF MAJORITY LAW
ON CERTAIN SCHOOL DISTRICT POLICIES

Revised September 2014

Prepared by:

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I. INTRODUCTION.

The age of majority for most purposes in the state of Minnesota is 18 years of age.

Many school rules and policies should be examined to determine how individual policies may differ when applied to 18-year-old students versus students under the age of 18. This bulletin is an attempt to examine in this way several common rules or policies or kinds of conduct with respect to which schools generally place some restrictions, and to provide a framework for further analysis of particular rules and policies in individual districts.

II. CITATIONS.

A. Minn. Stat. § 645.451 provides:

“Subdivision 1. The terms defined in the following subdivisions shall have the meanings given them for the purpose of any statute or law of this state now in force, for the purposes of any statute or law hereinafter enacted unless a different meaning is specifically attached to the terms or the context clearly requires different meaning.

Subdivision 2. ‘Minor’ means an individual under the age of 18.

Subdivision 3. ‘Adult’ means an individual 18 years of age or older.

Subdivision 4. ‘Minority’ means with respect to an individual; the period of time during which the individual is a minor.

Subdivision 5. ‘Majority’ means with respect to an individual; the period of time after the individual reaches the age of 18.

Subdivision 6. ‘Legal age’ or ‘full age’ means 18 years of age or older.”

III. GENERAL PRINCIPLES.

A. School rules are presumed to be valid. All students, regardless of age, may be governed by a single set of rules provided the rules are reasonably applied to all students to achieve a legitimate school purpose. Minn. Stat. § 120A.20, Subd. 1.

B. In general, in the case of 18 year olds, if a rule is directed to apply to parents, the 18 year old should be treated as parents are treated; if the rule is directed to apply to students, 18 year olds should be treated as all other students are treated.

IV. PARTICULAR PROBLEMS AND POLICIES.

A. Residency. An 18-year-old may establish a residence separate from his or her parents. His or her residence will ordinarily be the place where he or she usually lives, eats, and sleeps. In determining residency of an 18-year-old pupil for the purpose of applying rules affecting transfers between districts and within districts, school districts are advised to make their determinations without regard to the residence of the pupil's parents. The rules should be made to apply to 18 year olds in the same way that they apply to parents of minor pupils.

B. Parental Access to Pupil Data.

1. Grades. Once a student has reached the age of 18, only the student may have access to his or her own grades with certain exceptions. Once the student reaches the age of majority, the individual inherits the rights formerly possessed by parents. This position comports with both the state data privacy law and the federal statute on the same topic.

20 U.S.C.A. § 1232g(d) provides: "For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." In the regulations for this federal statute, there is an exception to the consent requirement if the parent is the parent of a dependent student as defined by the IRS Codes. A dependent student, for purposes of the IRS code, is an individual who during each of five calendar months during the calendar year in which the taxable year of the parent begins is a full-time student or is pursuing a full-time course of instructional on-farm training.

The Minnesota Commissioner of Administration similarly found that under the Minnesota Government Data Practices Act parents of "dependent students" may also have access to student grades. According to the Commissioner, if a student who is 18 years of age or older qualifies as a "dependent student" under the IRS code definition, then the student's parents are entitled to gain access to the student's education records pursuant to 20 U.S.C. § 1232g(b)(1)(H). The relevant section of the IRS code defines a "dependent student" as an individual who during each of five calendar months during the calendar year in which the taxable year of the parent begins is a full-time student or is pursuing a full-time course of instructional on-farm training.

If this issue arises, school districts are advised to seek the student's permission first to avoid any issues or problems.

2. Parent access to records as to character and ability, interview reports, anecdotal notes, disciplinary records, psychological testing, and the like. Records belonging to individual staff members are generally not recognized as educational data that requires disclosure to the subject of the data as long as they are retained in the personal custody of the staff member, are not accessible or revealed to any other

individual except a substitute teacher, and are destroyed at the end of the school year. Minn. Stat. § 13.32, Subd. 1(a). While a pupil is under the dominion of his or her parents, there may well be justification for disclosure of some or all of this information to the parent, but such records should not be disclosed to the parent of an adult pupil, without the pupil's permission, unless the student is a dependent as defined above.

3. Notice to parents with respect to disciplinary proceedings. In 1974 the legislature passed "The Pupil Fair Dismissal Act of 1974". This Act places an obligation on school districts to observe certain procedures before suspending, excluding or expelling any student under the age of 21 years. Before a student may be expelled or excluded a notice of the proposed action must be sent to the pupil and the pupil's parent. Minn. Stat. § 121A.47. This obligation must be observed whether or not the student is 18 years old and otherwise considered an adult.
- C. Parental conferences. There appears to be no legal prohibition in school officials' conferring with parents of an adult pupil in the interest of the pupil's welfare. However, educational data should not be disclosed unless the student is a dependent as described above.
- D. Eligibility for free or reduced priced meals. The National School Lunch Act provides for free or reduced priced lunches for pupils from low-income households. If an 18-year-old establishes in good faith a household apart from his or her parents, income standards for a family of one should be applied and his or her own personal income should be measured against the standard. Of course, in considering his or her income, income derived directly or indirectly from parental support should be included.
- E. The capacity to contract. An 18-year-old has full capacity to contract and is responsible for his or her own bills. Parents can no longer be looked to to pay fees or bills charged for class rings and the like unless the parents agree to assume such responsibility.
- F. Student conduct rules. School authorities may continue to promulgate reasonable rules and regulations regarding student conduct, and need not generally distinguish between those students over and under 18. General prohibitions against smoking and drinking can be imposed against all students when they are under the supervision of school authorities.

Minn. Stat. § 120A.20, Subd. 1 states in part:

...Notwithstanding the provisions of any law to the contrary, the conduct of all students under 21 years of age attending a public secondary school shall be governed by a single set of reasonable rules and regulations promulgated by the school board.

As a practical matter, though the school is generally not obliged to treat adult pupils differently with respect to such activities as drinking, it may, in its reasonable discretion, choose to do so. The fact the state law now permits drinking for 21 year olds is grounds enough to make such a distinction. Thus, school authorities may choose to treat a 21 year old pupil attending a public function at the school as a mere spectator, as other adult pupil spectators are treated, even though to do otherwise would likely not be held unreasonable. As an example, the school authorities may make an exception to a general policy which refuses admission to such events to students who have consumed liquor and thus treat the adult pupil as all other adult spectators are treated. However, it would likely not be an abuse of discretion

to refuse to make an exception for the adult pupil in such a case.

If the school function is a closed one, or the adult pupil is a participant in the school event, the school clearly need not treat the adult pupil differently from other pupils. Thus, all pupils regardless of their age could be denied admission to a closed school dance for mere prior consumption of alcohol, even if the same standard would not apply to the chaperones.

- G. Excuses. An adult pupil may sign and be accountable for his or her own “excuse” statement. Schools should no longer look to the parents to accept responsibility for this. The same standards to determine what is an acceptable excuse should be applied to adult pupils as are applied to excuses written by a parent on behalf of a minor pupil.
- H. Hours of attendance and vacating of school. No distinction need be made between an adult pupil and a minor pupil with respect to required hours of attendance or with respect to policies about quitting school. An 18-year-old student may withdraw from school without parental consent as the statute reads that parental consent for withdrawal from school is required only for a student who is 17 years old. See Minn. Stat. § 120A.22, Subd. 8.
- I. Expulsion and exclusion. A student over 18 is entitled to due process in this area. Notice must be given to the student and it would be wise, particularly if the student resides with his or her parents, to give them similar notice.
- J. Nonprescription Pain Relievers. A secondary student may possess and use nonprescription pain relief if the district has received a written authorization from the students’ parent or guardian permitting the student to self-administer the medication. The written authorization by the parent or guardian must be submitted each school year. Minn. Stat. § 121A.222. Because the statute is specific as to parental authorization, a district would be wise to require the authorization from the parent or guardian rather than just from the adult student.

V. CONCLUSION.

The real question in age of majority issues will always be the reasonableness of the school rule or policy in its effect on all students. If particular problems arise, contact legal counsel for information or legal interpretation.

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

MINNESOTA'S OPEN MEETING LAW
Revised October 2014

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I. INTRODUCTION: The Minnesota Open Meeting Law was enacted in 1957. See Minn. Laws 1957, Ch. 773. In general, the Open Meeting Law applies to all meetings of a public body, including school board meetings. Its purpose is threefold: (1) to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning public bodies' decisions or to detect improper influences; (2) to assure the public's right to be informed; and (3) to afford the public an opportunity to present its views to the public body. See St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs., 332 N.W.2d 1, 4 (Minn. 1983). Because the Open Meeting Law was enacted for the public benefit, it is to be construed in favor of public access. Id. at 6. Nonetheless, there are numerous exceptions to the Open Meeting Law that have developed over the years. This bulletin outlines the Open Meeting Law, the general requirements of the law and the interpretations of the law by the Minnesota Attorney General, the Minnesota Department of Administration and the Minnesota courts.

II. MINNESOTA OPEN MEETING LAW:

A. 13D.01 MEETINGS MUST BE OPEN TO THE PUBLIC; EXCEPTIONS

Subdivision 1. In executive branch, local government. All meetings, including executive sessions, must be open to the public

- (a) of a state
 - (1) agency,
 - (2) board,
 - (3) commission, or
 - (4) department

when required or permitted by law to transact public business in a meeting;

- (b) of the governing body of a
 - (1) school district however organized,
 - (2) unorganized territory,
 - (3) county,
 - (4) statutory or home rule charter city,
 - (5) town, or
 - (6) other public body;

- (c) of any
 - (1) committee,
 - (2) subcommittee,
 - (3) board,
 - (4) department, or
 - (5) commission,
 of a public body; and

(d) of the governing body or a committee of:

- (1) a statewide public pension plan defined in section 356A.01, subdivision 24; or
- (2) a local public pension plan governed by sections 69.771 to 69.775, or chapter 354A or section 69.77, subdivisions 1 to 13.

Subdivision. 2. Exceptions. This chapter does not apply

- (1) to meetings of the commissioner of corrections;
- (2) to a state agency, board, or commission when it is exercising quasi-judicial functions involving disciplinary proceedings; or
- (3) as otherwise expressly provided by statute.

Subd. 3. Subject of and grounds for closing meeting. Before closing a meeting, a public body shall state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed.

Subd. 4. Votes to be kept in journal. (a) The votes of the members of the state agency, board, commission, or department; or of the governing body, committee, subcommittee, board, department, or commission on an action taken in a meeting required by this section to be open to the public must be recorded in a journal kept for that purpose.

(b) The vote of each member must be recorded on each appropriation of money, except for the payments of judgments, claims, and amounts fixed by statute.

Subd. 5. Public access to journal. The journal must be open to the public during all normal business hours where records of the public body are kept.

Subd. 6. Public copy of members' materials. (a) In any meeting which under subdivisions 1, 2, 4, and 5, and section 13D.02 must be open to the public, at least one copy of any printed materials relating to the agenda items of the meeting prepared or distributed by or at the direction of the governing body or its employees and:

- (1) distributed at the meeting to all members of the governing body;
- (2) distributed before the meeting to all members; or
- (3) available in the meeting room to all members;

shall be available in the meeting room for inspection by the public while the governing body considers their subject matter.

(b) This subdivision does not apply to materials classified by law as other than public as defined in chapter 13, or to materials relating to the agenda items of a closed meeting held in accordance with the procedures in section 13D.03 or other law permitting the closing of meetings.

B. 13D.02 MEETINGS CONDUCTED BY INTERACTIVE TV; CONDITIONS

Subdivision 1. Conditions. A meeting governed by section 13D.01, subdivisions 1, 2, 4, and 5, and this section may be conducted by interactive television so long as:

- (1) all members of the body participating in the meeting, wherever their physical location, can hear and see one another and can hear and see all discussion and testimony presented at each location at which at least one member is present;
- (2) members of the public present at the regular meeting location of the body can hear and see all discussion and testimony and all votes of the members of the body;
- (3) at least one member of the body is physically present at the regular meeting location; and
- (4) each location at which a member of the body is physically present is open and accessible to the public.

Subd. 2. Members are present for quorum, participation. Each member of a body participating in a

meeting by electronic means is considered present at the meeting for purposes of determining a quorum and participating in all proceedings.

Subd. 3. Monitoring from remote site; costs. If interactive television is used to conduct a meeting, to the extent practical, a public body shall allow a person to monitor the meeting electronically from a remote location. The body may require the person making such a connection to pay for documented marginal costs that the public body incurs as a result of the additional connection.

Subd. 4. Notice of regular and all member sites. If interactive television is used to conduct a regular, special, or emergency meeting, the public body shall provide notice of the regular meeting location and notice of any site where a member of the public body will be participating in the meeting by interactive television. The timing and method of providing notice must be as described in section 13D.04.

Subd. 5. School boards; interactive technology with an audio and visual link. A school board conducting a meeting under this section may use interactive technology with an audio and visual link to conduct the meeting if the school board complies with all other requirements under this section.

C. 13D.021 MEETINGS BY TELEPHONE OR OTHER ELECTRONIC MEANS; CONDITIONS.

Subdivision 1. Conditions. A meeting governed by this section and section 13D.01, subdivisions 1, 2, 4, and 5, may be conducted by telephone or other electronic means so long as the following conditions are met:

- (1) the presiding officer, chief legal counsel, or chief administrative officer for the affected governing body determines that an in person meeting or a meeting conducted under section 13D.02 is not practical or prudent because of a health pandemic or an emergency declared under chapter 12;
- (2) all members of the body participating in the meeting, wherever their physical location, can hear one another and can hear all discussion and testimony;
- (3) members of the public present at the regular meeting location of the body can hear all discussion and testimony and all votes of the members of the body, unless attendance at the regular meeting location is not feasible due to the health pandemic or emergency declaration;
- (4) at least one member of the body, chief legal counsel, or chief administrative officer is physically present at the regular meeting location, unless unfeasible due to the health pandemic or emergency declaration; and
- (5) all votes are conducted by roll call, so each member's vote on each issue can be identified and recorded.

Subd. 2. Members are present for quorum, participation. Each member of the body participating in a meeting by telephone or other electronic means is considered present at the meeting for purposes of determining a quorum and participating in all proceedings.

Subd. 3. Monitoring from remote site; costs. If telephone or another electronic means is used to conduct a meeting, to the extent practical, the body shall allow a person to monitor the meeting electronically from a remote location. The body may require the person making a connection to pay for the documented additional cost that the body incurs as a result of the additional connection.

Subd. 4. Notice of regular and all members sites. If telephone or another electronic means is used to conduct a regular, special, or emergency meeting, the public body shall provide notice of the regular meeting location, of the fact that some members may participate by telephone or other electronic means, and of the provisions of subdivision 3. The timing and method of providing notice is governed by section 13D.04 of the Open Meeting Law.

D. 13D.03 CLOSED MEETINGS FOR LABOR NEGOTIATIONS STRATEGY.

Subdivision 1. Procedure. (a) Section 13D.01, subdivisions 1, 2, 4, 5, and 13D.02 do not apply to a

meeting held pursuant to the procedure in this section.

(b) The governing body of a public employer may by a majority vote in a public meeting decide to hold a closed meeting to consider strategy for labor negotiations, including negotiation strategies or developments or discussion and review of labor negotiation proposals, conducted pursuant to sections 179A.01 to 179A.25.

(c) The time of commencement and place of the closed meeting shall be announced at the public meeting.

(d) A written roll of members and all other persons present at the closed meeting shall be made available to the public after the closed meeting.

Subd. 2. Meeting must be recorded. (a) The proceedings of a closed meeting to discuss negotiation strategies shall be tape-recorded at the expense of the governing body.

(b) The recording shall be preserved for two years after the contract is signed and shall be made available to the public after all labor contracts are signed by the governing body for the current budget period.

Subd. 3. If violation claimed. (a) If an action is brought claiming that public business other than discussions of labor negotiation strategies or developments or discussion and review of labor negotiation proposals was transacted at a closed meeting held pursuant to this section during the time when the tape is not available to the public, the court shall review the recording of the meeting in camera.

(b) If the court finds that this section was not violated, the action shall be dismissed and the recording shall be sealed and preserved in the records of the court until otherwise made available to the public pursuant to this section.

(c) If the court finds that this section was violated, the recording may be introduced at trial in its entirety subject to any protective orders as requested by either party and deemed appropriate by the court.

E. 13D.04 NOTICE OF MEETINGS. (2014 Session Change)

Subdivision 1. Regular meetings. A schedule of the regular meetings of a public body shall be kept on file at its primary offices. If a public body decides to hold a regular meeting at a time or place different from the time or place stated in its schedule of regular meetings, it shall give the same notice of the meeting that is provided in this section for a special meeting.

Subd. 2. Special meetings. (a) For a special meeting, except an emergency meeting or a special meeting for which a notice requirement is otherwise expressly established by statute, the public body shall post written notice of the date, time, place, and purpose of the meeting on the principal bulletin board of the public body, or if the public body has no principal bulletin board, on the door of its usual meeting room.

(b) The notice shall also be mailed or otherwise delivered to each person who has filed a written request for notice of special meetings with the public body. This notice shall be posted and mailed or delivered at least three days before the date of the meeting.

(c) As an alternative to mailing or otherwise delivering notice to persons who have filed a written request for notice of special meetings, the public body may publish the notice once, at least three days before the meeting, in the official newspaper of the public body or, if there is none, in a qualified newspaper of general circulation within the area of the public body's authority.

(d) A person filing a request for notice of special meetings may limit the request to notification of meetings concerning particular subjects, in which case the public body is required to send notice to that person only concerning special meetings involving those subjects.

(e) A public body may establish an expiration date for requests for notices of special meetings pursuant to this subdivision and require refiling of the request once each year.

(f) Not more than 60 days before the expiration date of a request for notice, the public body shall send notice of the refiling requirement to each person who filed during the preceding year.

Subd. 3. Emergency meetings. (a) For an emergency meeting, the public body shall make good faith efforts to provide notice of the meeting to each news medium that has filed a written request for notice if the request includes the news medium's telephone number.

(b) Notice of the emergency meeting shall be given by telephone or by any other method used to notify the members of the public body.

(c) Notice shall be provided to each news medium which has filed a written request for notice as soon as reasonably practicable after notice has been given to the members.

(d) Notice shall include the subject of the meeting. Posted or published notice of an emergency meeting is not required.

(e) An "emergency" meeting is a special meeting called because of circumstances that, in the judgment of the public body, require immediate consideration by the public body.

(f) If matters not directly related to the emergency are discussed or acted upon at an emergency meeting, the minutes of the meeting shall include a specific description of the matters.

(g) The notice requirement of this subdivision supersedes any other statutory notice requirement for a special meeting that is an emergency meeting.

Subd. 4. Recessed or continued meetings. (a) If a meeting is a recessed or continued session of a previous meeting, and the time and place of the meeting was established during the previous meeting and recorded in the minutes of that meeting, then no further published or mailed notice is necessary.

(b) For purposes of this subdivision, the term "meeting" includes a public hearing conducted pursuant to chapter 429 or any other law or charter provision requiring a public hearing by a public body.

Subd. 5. Closed meetings. The notice requirements of this section apply to closed meetings.

Subd. 6. State agencies. (a) For a meeting of an agency, board, commission, or department of the state **required or permitted by law to transact public business in a meeting:**

(1) the notice requirements of this section apply only if a statute governing meetings of the agency, board, or commission does not contain specific reference to the method of providing notice;

(2) all provisions of this section relating to publication are satisfied by publication in the State Register; **or posting on the Web site of the agency, board, commission, or department; and**

(3) a schedule of the regular meetings shall be kept on file at the primary offices or posted on the Web site of the agency, board, commission, or department.

Subd. 7. Actual notice. If a person receives actual notice of a meeting of a public body at least 24 hours before the meeting, all notice requirements of this section are satisfied with respect to that person, regardless of the method of receipt of notice.

F. 13D.05 MEETINGS HAVING DATA CLASSIFIED AS NOT PUBLIC.

Subdivision 1. General principles. (a) Except as provided in this chapter, meetings may not be closed to discuss data that are not public data.

(b) Data that are not public data may be discussed at a meeting subject to this chapter without liability or penalty, if the disclosure relates to a matter within the scope of the public body's authority and is reasonably necessary to conduct the business or agenda item before the public body.

(c) Data discussed at an open meeting retain the data's original classification; however, a record of the meeting, regardless of form, shall be public.

(d) All closed meetings, except those closed as permitted by the attorney-client privilege, must be electronically recorded at the expense of the public body. Unless otherwise provided by law, the recordings must be preserved for at least three years after the date of the meetings.

Subd. 2. When meeting must be closed. (a) Any portion of a meeting must be closed if expressly required by other law or if the following types of data are discussed:

- (1) data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults;
- (2) active investigative data as defined in section 13.82, subdivision 7, or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision;
- (3) educational data, health data, medical data, welfare data, or mental health data that are not public data under section 13.32, 13.3805, subdivision 1, 13.384, or 13.46, subdivision 2 or 7; or
- (4) an individual's medical records governed by section 144.291 to 144.298.

(b) A public body shall close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. If the members conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must be open. A meeting must also be open at the request of the individual who is the subject of the meeting.

Subd. 3. What meetings may be closed. (a) A public body may close a meeting to evaluate the performance of an individual who is subject to its authority. The public body shall identify the individual to be evaluated prior to closing a meeting. At its next open meeting, the public body shall summarize its conclusions regarding the evaluation. A meeting must be open at the request of the individual who is the subject of the meeting.

(b) Meetings may be closed if the closure is expressly authorized by statute or permitted by the attorney-client privilege.

(c) A public body may close a meeting:

- (1) to determine the asking price for real or personal property to be sold by the government entity;
- (2) to review confidential or nonpublic appraisal data under section 13.44, subdivision 3; and
- (3) to develop or consider offers or counteroffers for the purchase or sale of real or personal property.

Before holding a closed meeting under this paragraph, the public body must identify on the record the particular real or personal property that is the subject of the closed meeting. The proceedings of a meeting closed under this paragraph must be tape recorded at the expense of the public body. The recording must be preserved for eight years after the date of the meeting and made available to the public after all real or personal property discussed at the meeting has been purchased or sold or the governing body has abandoned the purchase or sale. The real or personal property that is the subject of the closed meeting must be specifically identified on the tape. A list of members and all other persons present at the closed meeting must be made available to the public after the closed meeting. If an action is brought claiming that public business other than discussions allowed under this paragraph was transacted at a closed meeting held under this paragraph during the time when the tape is not available to the public, section 13D.03, subdivision 3, applies. An agreement reached that is based on an offer considered at a closed meeting is contingent on approval of the public body at an open meeting. The actual purchase or sale must be approved at an open meeting after

the notice period required by statute or the governing body's internal procedures, and the purchase price or sale price is public data.

(d) Meetings may be closed to receive security briefings and reports, to discuss issues related to security systems, to discuss emergency response procedures and to discuss security deficiencies in or recommendations regarding public services, infrastructure and facilities, if disclosure of the information discussed would pose a danger to public safety or compromise security procedures or responses. Financial issues related to security matters must be discussed and all related financial decisions must be made at an open meeting. Before closing a meeting under this paragraph, the public body, in describing the subject to be discussed, must refer to the facilities, systems, procedures, services, or infrastructures to be considered during the closed meeting. A closed meeting must be tape recorded at the expense of the governing body, and the recording must be preserved for at least four years.

G. 13D.06 CIVIL FINES; FORFEITURE OF OFFICE; OTHER REMEDIES.

Subdivision 1. Personal liability for \$300 fine. Any person who intentionally violates this chapter shall be subject to personal liability in the form of a civil penalty in an amount not to exceed \$300 for a single occurrence, which may not be paid by the public body.

Subd. 2. Who may bring action; where. An action to enforce the penalty in subdivision 1 may be brought by any person in any court of competent jurisdiction where the administrative office of the governing body is located.

Subd. 3. Forfeit office if three violations. (a) If a person has been found to have intentionally violated this chapter in three or more actions brought under this chapter involving the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving.

(b) The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations, issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body.

(c) As soon as practicable thereafter the appointing authority or the governing body shall fill the position as in the case of any other vacancy.

Subd. 4. Other remedies; requirements; limits. (a) In addition to other remedies, the court may award reasonable costs, disbursements, and reasonable attorney fees of up to \$13,000 to any party in an action under this chapter.

(b) The court may award costs and attorney fees to a defendant only if the court finds that the action under this chapter was frivolous and without merit.

(c) A public body may pay any costs, disbursements, or attorney fees incurred by or awarded against any of its members in an action under this chapter.

(d) No monetary penalties or attorney fees may be awarded against a member of a public body unless the court finds that there was an intent to violate this chapter.

(e) The court shall award reasonable attorney fees to a prevailing plaintiff who has brought an action under this section if the public body that is the defendant in the action was also the subject of a prior written opinion issued under section 13.072, and the court finds that the opinion is directly related to the cause of action being litigated and that the public body did not act in conformity with the opinion. The court shall give deference to the opinion in a proceeding brought under this section.

H. 13D.065 USE OF SOCIAL MEDIA (2014 Session Change)

The use of social media by members of a public body does not violate this chapter so long as the social media use is limited to exchanges with all members of the general public. For purposes of this section, email is not considered a type of social media.

I. 13D.07 CITATION.

This chapter may be cited as the “Minnesota Open Meeting Law.”

III. GENERAL COMMENTS.

1. Labor Negotiation Strategy Exception: M.S. 13D.03, contains the following elements:

- (a) It authorizes a school board to hold a closed meeting to consider strategy for labor negotiations, including negotiation strategies or developments or discussion and review of labor negotiation proposals.
- (b) The decision to close the meeting must be made by majority vote at a public meeting.
- (c) The time of commencement and place of the closed meeting must be announced at the public meeting.
- (d) A written roll of the board members and all other persons present at the closed meeting must be made available to the public after the closed meeting.
- (e) The closed meeting must be tape recorded at the expense of the school board.
- (f) The board must preserve the tape of the meeting for two years after the contract discussed is signed. If more than one contract is discussed, the tape should be preserved for two years from the last date of signing.
- (g) The tape of the meeting must be made available to the public after the board signs all labor contracts for that current budget year.
- (h) If a lawsuit is brought claiming that other business was transacted at the closed meeting in violation of the Open Meeting Law, the judge reviews the tape privately (in camera). If the judge determines that no violation occurred, the tape remains sealed until otherwise available after all contracts for the period are signed. If the court determines a violation did occur, the tape can be introduced at trial subject to any protective orders deemed appropriate by the court.

1a. Mediation Meetings. Minn. Rule 5510.2810, Subp. 5 provides that a mediation meeting may be closed to the public by the Commissioner of the Bureau of Mediation Services when, in the Commissioner’s judgment, closing will facilitate resolution of the dispute. In all cases, a meeting will be closed only after receipt by the Bureau of a valid and timely petition for mediation or after initiation of mediation by the Commissioner. The Commissioner may close a meeting to the public prior to its start or at any time during the meeting. That rule also provides that use of recording devices, stenographic records, or other recording methods is prohibited in mediation meetings.

1b. Meetings of Governing Bodies. Minn. Rule 5510.2810, Subp. 5a provides that when the Commissioner of the Bureau of Mediation Services determines that it is in the interest of resolution of a dispute, the Commissioner may authorize a closed meeting of the school board for the purpose of review and discussion of the status of negotiations and the employer’s positions.

No closed meeting may be authorized unless the Bureau has received a valid and timely petition for mediation or unless mediation has been initiated by the Commissioner.

Also, no closed meeting may be authorized when the Commissioner or a representative of the Commissioner is not physically present at the meeting unless the Bureau has received a timely and valid notice of intent to strike. In the event the Commissioner of BMS determines that a closed meeting is necessary, but the Commissioner cannot be physically present at the meeting and a timely and valid notice of

intent to strike has been received by the Bureau, the Commissioner may authorize a closed meeting upon written notice to the governing body and the exclusive representative at least 24 hours prior to the closed meeting. The written notice must include the date, time, and place of the closed meeting and limit the purpose of the closed meeting to matters relevant to the dispute.

2. Availability of Materials During Open Meetings: M.S. 13D.01, Subd. 6, contains the following elements:

- (a) It applies to all meetings which must be open to the public pursuant to the Open Meeting Law.
- (b) It requires at least one copy of any printed materials relating to the agenda items of the meeting to be available in the meeting room for inspection by the public, if those materials are prepared or distributed by or at the direction of the governing body or its employees and if those materials are either distributed at the meeting to all members of the governing body, distributed before the meeting to all members, or available in the meeting room to all members.
- (c) The materials must be available to the public while the board considers their subject matter.
- (d) The law does not apply to materials which are classified as other than public (private or confidential if the material is data on individuals; nonpublic or protected nonpublic if the material is data not on individuals).
- (e) The law does not apply to the agenda items of a closed labor negotiation strategy meeting or of a closed meeting held in accordance with any other law.

3. Notice of Meetings. M.S. 13D.04, contains the following elements:

- (a) Regular Meetings. It requires a school board to adopt a schedule of regular meetings and to keep the schedule on file in its primary offices. Unless the board determines to hold a regular meeting at a date, time or place different than that specified in the adopted schedule, it is not required to publish, post or mail notice of a regular meeting. If the board decides to change the time, date or location of a regular meeting, it must give the same notice as required for a special meeting.
- (b) Special Meetings. For a special meeting which is not an “emergency meeting,” the board is required to post notice of the date, time, place and purpose of the meeting on its principal bulletin board or, if none, on the door of its usual meeting room. The notice must also be mailed or delivered to persons who have filed written requests for notice of special meetings. The notice must be posted or mailed at least three days before the date of the meeting, i.e. Monday for a Thursday meeting. As an alternative to mailing or delivering notice to those on the requestor list, the board may publish the notice once, at least three days before the meeting, in the official newspaper or, if none, in a qualified newspaper of general circulation within the district.

Note: These provisions also govern notice for regular meetings held at a time, place or date different from that adopted in the regular meeting schedule.

Requestor List. As stated above, the law provides for the establishment of a list of persons who have filed a written request for notice of special meetings. A person filing the request may limit the request to notification of meetings concerning particular subjects, in which case the board is required to give notice to that person only concerning special meetings involving those subjects. (Note, however, if this requirement creates an administrative burden, the board may notify the person of all special meetings regardless of their purpose.) The board may establish a common expiration date for requests for notices and require refiling of the request once each year. Not more than 60 days before the expiration date, the board must send notice of the refiling requirement to each person who filed during the preceding year. Thus, the board could establish a yearly expiration date of June 30. Notice would be sent to everyone on the list by May 1. Those who did not refile would be dropped from the list on July 1.

(c) Emergency Meetings. An “emergency” meeting is a special meeting called because of circumstances that, in the judgment of the school board, require immediate consideration by the board. For an emergency meeting, the school board must make good faith efforts to provide notice of the meeting to each news medium

that has filed a written request for notice if the request includes the news medium's telephone number. Notice shall be given by telephone or by any other method used to notify the board members. The notice is to be provided to the news medium as soon as reasonably practicable after notice has been given to the members. The notice must include the subject of the meeting. Posted or published notice of an emergency meeting is not required. If matters which are not directly related to the emergency are discussed at the emergency meeting, the minutes of the meeting must include a specific description of those matters. The notice requirement of this provision supersedes any other statutory notice requirement for a special meeting that is an emergency meeting, including the three day notice requirement for special meetings specified in M.S. 123B.09, Subd. 6.

(d) Recessed or Continued Meetings. If a meeting is a recessed or continued session of a previous meeting or public hearing and if the time and place of the recessed or continued meeting was established during the previous meeting and recorded in its minutes, no further published or mailed notice is necessary.

Note: That if improper notice is given of the original meeting and it is recessed or continued, the court may find a violation for both the original and the continued meeting. David Coalwell, et.al.v. John H. Murray, et. Al.. 1996 WL 438806 No. C6-95-2436 (1996) (unpublished decision). Reported in Finance and Commerce, August 9, 1996.

(e) Closed Meetings. The notice requirements apply to meetings which may be closed to the public by law. Thus, even if the meeting will be closed to the public to discuss litigation strategy with the district's attorney or to discuss labor negotiations strategy or for any other reason allowed by law (see Section V below), the same notice must be given as for a regular, special or emergency meeting, as applicable.

(f) Actual Notice. If notice of a meeting is given directly to a person at least 24 hours before the meeting, then all notice requirements are satisfied. Note: A district should not rely heavily on this provision because it is subject to judicial interpretation which may require the district to bear the burden of proving that notice was given directly to or was received by the person.

4. Data Classified as Not Public; Open and Closed Meetings. M.S. 13D.05, contain the following elements:

(a) Unless there is a specific provision stated in the Open Meeting Law, meetings may not be closed to discuss data that are not public data. (See Chapter 13 School Law Bulletin entitled "School Records - Privacy - Access to Data" for further discussion of classifications of data as public and nonpublic).

(b) Data classified as not public may be discussed at an open meeting without liability or penalty, if the disclosure:

- (1) relates to an issue the public body has control of; and
- (2) is reasonably necessary in order to conduct the business at issue before the public body.

(c) Data discussed at an open meeting retain the data's original classification. However, the record of the meeting, regardless of form (minutes, audiotapes, videotapes, etc.), shall be public.

(d) Any portion of a meeting must be closed if expressly required by another law. Certain portions of a meeting must be closed if the following types of not public data are discussed:

- (1) data that would identify victims of criminal sexual assault, domestic abuse, and maltreatment of minors or vulnerable adults;
- (2) active investigative information collected or created by a law enforcement agency under M.S. 13.82, Subd. 7 or internal affairs data relating to allegations of misconduct by law enforcement personnel;
- (3) educational information relating to students (which includes most information relating to students) unless it is designated as directory information or is released by consent; or
- (4) health data, medical data, welfare data or mental health data that are not public under M.S. Chapter 13 or an individuals' medical records governed by sections 144.291 to 144.298.
- (5) A public body must close one or more meetings to consider allegations or charges against an

employee or anyone subject to its authority. If the board members conclude after the initial consideration that discipline of any nature may be warranted as a result of those specific charges or allegations, any other meetings regarding the allegations held after that conclusion must be open. A meeting must also be open at the request of the individual who is the subject of the meeting.

(e) A public body may close a meeting to evaluate the performance of an individual who is subject to its authority.

- (1) the public body must name the individual to be evaluated prior to closing the meeting;
- (2) at its next meeting, the public body must state briefly its conclusions regarding the evaluation;
- (3) a meeting must be open at the request of the individual who is the subject of the meeting.

(f) Meetings may be closed if a Minnesota law states that it can be closed.

(g) Meetings may be closed if permitted by the attorney-client privilege.

(h) (1) A public body may close a meeting:

- (I) to determine the asking price for real or personal property to be sold by the government entity;
- (ii) to review confidential or nonpublic appraisal data under section 13.44, subdivision 3; and
- (iii) to develop or consider offers or counteroffers for the purchase or sale of real or personal property.

(2) Before holding a closed meeting for this purpose, the public body must identify on the record the particular real or personal property that is the subject of the closed meeting.

(3) The proceedings of a meeting closed for this purpose must be tape recorded at the expense of the public body. The recording must be preserved for eight years after the date of the meeting and made available to the public after all real or personal property discussed at the meeting has been purchased or sold or the governing body has abandoned the purchase or sale.

(4) The real or personal property that is the subject of the closed meeting must be specifically identified on the tape.

(5) A list of members and all other persons present at the closed meeting must be made available to the public after the closed meeting.

(6) If an action is brought claiming that public business other than discussions allowed under this paragraph was transacted at a closed meeting held under this paragraph during the time when the tape is not available to the public, the same provisions for judicial review in camera apply as in challenges of meetings closed to consider labor negotiation strategies.

(7) An agreement reached that is based on an offer considered at a closed meeting is contingent on approval of the public body at an open meeting.

(8) The actual purchase or sale must be approved at an open meeting after the notice period required by statute or the governing body's internal procedures, and the purchase price or sale price is public data.

(I) (1) Meetings may be closed to receive security briefings and reports, to discuss issues related to security systems, to discuss emergency response procedures and to discuss security deficiencies in or recommendations regarding public services, infrastructure and facilities, if disclosure of the information discussed would pose a danger to public safety or compromise security procedures or responses.

(2) Financial issues related to security matters must be discussed and all related financial decisions must be made at an open meeting.

(3) Before closing a meeting for this purpose, the public body, in describing the subject to be discussed, must refer to the facilities, systems, procedures, services, or infrastructures to be considered during the closed meeting.

(4) The proceedings of a meeting closed for this purpose must be tape recorded at the expense of the governing body, and the recording must be preserved for at least four years.

(j) Before closing a meeting, a public body must state on the record the specific grounds permitting the meeting is to be closed and describe the subject to be discussed.

5. Interactive Television. Meetings conducted by interactive television must meet the requirements specified in M.S. 13D.02.

IV. INTERPRETATIONS BY THE ATTORNEY GENERAL AND COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION: Since the original 1957 law the Attorney General and/or the Commissioner of the Department of the Administration have issued a number of interpretive opinions and public bodies should be aware of the law's scope:

1. Executive Sessions: Practice of the Austin City Council that declared itself to be in executive session, required spectators to leave the room, discussed the matter informally, and then, when discussion was finished, invited the public to come back into the room, constituted a violation of this section, though no actual business was transacted at session which was closed to the public. Op. Atty. Gen., 63-A-5, June 13, 1957.

2. Preboard Meeting: The provisions of the Open Meeting Law require that all meetings of the school board of Minneapolis be public and of record. Op. Atty. Gen. 161-A-16(b), Nov. 20, 1957.

3. School Board Minutes: A formally established committee of the board is required to keep minutes of the meeting, including a record of members' votes. See Op. Atty. Gen. 1035 (Aug. 23, 1999). Minutes of school board meetings need not include the reasons for a vote of members. See Op. Atty. Gen., 161a-20 (Nov. 16, 1961). However, there may be circumstances where it would be advisable to include in the minutes information over and above that required by statute, such as when the reasons for reaching a particular decision could be crucial in defending a challenge to the board's action. See Op. Atty. Gen. 851-C (March 5, 1992). Because the Open Meeting Law does not define what constitutes a "record of a meeting," which is required to be made public pursuant to Minn. Stat. § 13D.05, a public entity has discretion to decide what it will include in its record of a meeting when an employee is to be disciplined. Accordingly, a public entity may refer to private data and record the votes of members in its minutes, as required by the Open Meeting Law, without disclosing any underlying private personnel data. See Advisory Op. No. 05-029 (Sept. 28, 2005).

4. Balloting: (a) The provisions of this section relating to the manner of casting of ballots by members of governing bodies, boards, departments or commissions is mandatory, and unless a secret ballot could be taken in such a manner as to enable the council to comply with and to serve the purposes of this provision, the council could not vote by secret ballot. Op. Atty. Gen., 471e, Aug. 20, 1962.

(b) While the charter provisions of a city authorized a vote by ballot, the provisions of this section would require that the vote by ballot indicate the vote of each member on any appointment made, unless the vote is unanimous. Op. Atty. Gen. 471e, Sept. 18, 1962.

5. Place of Meeting: While a village council cannot hold regular meetings in a place outside the village limits, it could on a temporary basis use a convenient site located outside the village limits, providing that there were no convenient and adequate facilities inside the boundaries. Op. Atty. Gen. 471-e, Nov. 2, 1965.

6. Notice: (a) Where general public had no notice of meeting of the county board held in a location in the county other than the county seat and called without the notice provisions of M.S. 375.07, salary resolution adopted raising the salaries of commissioners was invalid. Op. Atty. Gen. 125-a-14, Sept. 8, 1970.

(b) Where matters acted upon by city council were never raised at a prior public meeting or hearing, the council was required to give advance notice to the public of the time and place of a special meeting dealing with such matters. Op. Atty. Gen. 63a-5, Jan. 11, 1972.

(c) The board of supervisors did not comply with Minn. Stat. § 13D.04, Subd. 2, when they posted a notice for a special meeting that contained the statement: "Other Legal issues may be discussed." See Advisory Op. No. 07-014 (June 27, 2007).

(d) The Olmsted County Regional Rail Authority Board did not comply with the Open Meeting Law when the meeting was noticed for 4:15 p.m. but the board meeting was commenced and matters were acted upon at 3:30. See Advisory Op. No. 11-004 (April 8, 2011).

7. Taping of Meetings: The public may tape record proceedings of meetings where such transcription will not have a significantly adverse effect on the order of the proceedings or impinge on constitutionally protected rights and neither the public body nor any member may prohibit dissemination or broadcast of the tapes. Op. Atty. Gen. 63a-5, Dec. 4, 1972. Once a school board signs all labor contracts for the current budget period, the school board would be required to make public audiotapes of a meeting closed for purposes of discussing labor negotiations after the expiration of two years from the signing of the labor contract, including any labor relations data, otherwise classified as private or nonpublic pursuant to Minn. Stat. § 13.37, discussed at the meeting. See Advisory Op. No. 05-027 (Aug. 10, 2005).

8. Special Meetings: Advance notice to the public of special meetings of the city council of Faribault is required where matters acted on by the council were never raised at a prior public meeting or hearing. Op. Atty. Gen. 63a-5, Jan. 11, 1972. Notice of a special meeting containing an invalid date does not comply with the requirements of Minn. Stat. § 13D.04, Subd. 2, which requires notice of the date of the meeting. See Advisory Op. No. 04-052 (Aug. 31, 2004). If the public body's principal bulletin board, used for posting notices of special meetings, is one where notices can either be removed or blown away, the public body is not able to meet the special meeting posting requirements. Id. A government entity is limited to acting only on those matters specifically included in the notice of special meeting. See Advisory Op. No. 10-013 (April 29, 2010). **When the board changed the place and time of the regularly scheduled meeting on the day of the meeting, it became a special meeting subject to three days's notice. See Advisory Op. No. 13-015 (December 23, 2013).**

9. Emergency Meetings: The Department of Administration has recognized that there are no cases that describe the circumstances as to what constitutes an emergency justifying a government entity to hold an emergency meeting. See Advisory Op. No. 06-027 (Sept. 28, 2006). The Commissioner did opine, however, that examples of emergency situations permitting the holding of an emergency meeting would include a meeting to respond to a natural disaster or health epidemic caused by an event such as an accident or terrorist activity. Id. Based on the facts before the Commissioner, he opined that it was improper for a city council to hold an emergency meeting for purposes of removing the city's building official and hiring a new firm to fill that role as the aggregated complaints did not arise to the level of an emergency nor were the complaints or decision to seek a new building official unexpected. Id. See also Advisory Op. No. 12-004 (March 8, 2012).

10. Place of Meeting. Op. Atty. Gen. 34-b-2, February 13, 1973. Upon facts stated, meetings of town board need not be held within township. In this decision, the attorney general stated:

"Empire Township, located in Dakota County, does not have a town hall. The town board presently meets in a commercial building in the city of Farmington, which is adjacent to but outside of the boundaries of the township, since there is no suitable public place to meet within the township.

In view of these circumstances and in view of the absence of any statutory requirement that meetings of town boards be held within the township, it is our opinion that meetings of the town board of Empire Township are not at this time required to be held within the township. We note, however, that every public body subject to the Open Meeting Law should take care in selecting a meeting place so that the intent of this law is not transgressed by making it difficult for residents to attend meetings."

In contrast, the Commissioner determined that it was not proper to hold a meeting outside the borders of the public body to save attorney expense based on travel to the town hall and because of the attorney's tight time schedule. See Advisory Op. No. 06-012 (April 7, 2006).

11. What Constitutes a Meeting: Minn. Stat. § 13D.01, Subd. 1 provides that "All meetings, including executive sessions, must be open to the public of the governing body of a school district...." school boards

must be open to the public. Since the statute does not define the term ‘meeting,’ it must be given its common and ordinary meaning. Minn. Stat. § 645.08 (1) (1971). ‘Meeting’ is defined as ‘a coming together of persons; ‘an assembly; gathering of people, especially to discuss or decide on matters.’ Webster’s New World Dictionary (College Ed. 1964). Op. Thomas G. Mattson, Asst. Atty. Gen., Aug. 29, 1973. **A “workshop at which a quorum of the board is present constitutes a meeting” for purposes of Chapter 13D. See Advisory Op. No. 14-007 (June 18, 2014).**

12. Informal Meetings of a Quorum or Majority of a Quorum: The provisions of Op. Atty. Gen. 63-a-3, October 28, 1974, were effectively overruled by the Supreme Court in Moberg v. Independent School District No. 281, 336 N.W.2d 510 (Minn. 1983) discussed below where the Court held that the Open Meeting Law only applied to meetings of a quorum or more.

The Attorney General has opined that where a committee of three council members meets pursuant to notice under Minn. Stat. § 471.705 [now 13D.04], a violation does not occur if a fourth or additional council member attends the meeting as long as the council member’s involvement is limited to attendance at the meeting. However, to the extent that the fourth or additional council member participates in discussions or deliberations of the committee upon matters of city business within the council’s purview, a violation would be found. Op. Atty. Gen. 63A-5, August 28, 1996.

The Commissioner of the Department of Administration has opined that it would be a violation of the Open Meeting Law for a quorum to adjourn from a meeting to meet informally with legal counsel. See Advisory Op. No. 07-014 (June 27, 2007).

13. Meeting Between Members of Different Governing Bodies: The Attorney General held that a member of a city council is not precluded from privately discussing council matters with a member of the city housing and redevelopment authority and that these discussions could not be viewed as a “meeting” of either the council or the HRA. He stated:

“In our view, some discussion or deliberation or other joint activity between or among members of the same body must ordinarily occur before any violation of the Open Meeting Law could be found. To hold otherwise would virtually isolate members of governing bodies from both their constituents and from governmental activities which they are expected to understand. We do not believe that the Open Meeting Law is intended to prevent an individual member of a governing body from receiving information about government affairs, necessary for the performance of his duties, from sources other than members of the body itself. Certainly a councilman must be accessible to comments and suggestions from constituents. Also, a councilman must be able to obtain information from other government officials who are not council members, in formulating his own preliminary views on issues confronting the city.

To require that each such communication be held open to the public with advance notice as required under the Open Meeting Law would impose substantial barriers to such communications without substantial corresponding public benefit.”

The following warning was inserted in the opinion:

“We caution, however, that one-member meetings may not be used as a mere device to circumvent the requirements of the law. It is our view, for example, that discussion of council matters or the exchange of views among members of a given body, through a series of meetings between individual members and a non-member could be found to contravene the Open Meeting Law notwithstanding that the discussion was held through an intermediary rather than face-to-face. Each such case would, however, depend upon an analysis of the facts involved.” Op. Atty. Gen. 471-e, May 23, 1978.

NOTE: This opinion was upheld in Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn. 1982). See discussion below.

14. Consultant's Reports and Political Caucuses: Presentation of consultant's reports to a governing body and a political caucus of all members of the body must be noticed meetings. Op. Atty. Gen., 471-e, October 28, 1974.

15. Training Sessions: The Attorney General held that the mayor and entire council of a city may participate in a private 20 hour training session conducted by the League of Municipalities for the purpose of strengthening communications between and among the public and public officials, but that specific municipal matters such as "policy on the granting of liquor licenses" or the approach to take in "making sidewalk assessments" may not be discussed. Op. Atty. Gen., 63a-5, February 5, 1975.

16. Recorded Votes: The vote recording provisions of Minn. Stat. § 471.705 (1974) [now 13D.01, Subd. 4] require that the individual votes of public officials on "any action" be recorded in a journal except for votes on "payment of judgments, claims and amounts fixed by statutes." Op. Atty. Gen., 125a-14, February 28, 1975.

NOTE: M.S. 123B.09, Subd. 10 requires the board to cause its official proceedings to be published once in the official newspaper within 30 days of the meeting; however, M.S. 331A.08, Subd. 3 provides that if the school board conducts regular meetings not more than once every 30 days, the board need not publish the minutes until ten (10) days after the minutes have been approved by the school board. M.S. 331A.01 defines "official proceedings" to mean the substance of all official actions taken by the board at any regular or special meeting and includes, at minimum, the subject matter of a motion, the persons making and seconding a motion, the roll call vote on a motion, the character of resolutions offered, including a brief description of their subject matter, and whether defeated or adopted.

17. Advisory Committees: Op. Atty. Gen., 10B, July 3, 1975 was overruled by the Court of Appeals in The Minnesota Daily v. the University of Minnesota, 432 N.W.2d 189 (Minn. App. 1988), where, as discussed below, the Court of Appeals held that an advisory committee that did not have authority to make final decisions was not subject to the Open Meeting Law. The Department of Administration issued a similar opinion with respect to the applicability of the Open Meeting Law to a working group established by the city of Minneapolis. See Advisory Op. No. 07-025 (Nov. 16, 2007). In this matter, the "Free Speech Working Group" had been established to create a model on the preservation of the right to political speech without disrupting community life during the Republican National Convention. The Group was required to report to the City Council every six months and as needed. While the Group included two City Council members, no quorum of the Council existed. Accordingly, the Department opined that as the Group was not comprised of a quorum and did not have decision-making powers of the government body, it was not subject to the Open Meeting Law.

18. Standing Committees: The Commissioner of Administration issued an opinion holding that a standing committee is subject to the Open Meeting Law. The question related to committees of the Cannon Falls Community Hospital Board. According to Hospital bylaws, standing committees, comprised of Board members, were required to be established by Board resolution. The standing committees were responsible for management liaison, collection of information, and formulation of issues and recommendations for the Board. The Commissioner determined that the committees were not performing a one-time function but tasks relating to the ongoing operation of the Board. The Commissioner further found that the committees made decisions about what should or should not be communicated to the Board and were delegated the responsibility to make recommendations to the Board, which often acted without much deliberation based on these recommendations. Based on these facts, the Commissioner opined that meetings of the standing committees must be open to the public unless there is an express statutory provision that authorizes or requires that the meeting, or portion of a meeting, be closed. See Advisory Op. No. 05-014 (April 18, 2005).

19. Communication Between City Manager and Individual Council Members: The Attorney General held that individual telephone conversations between a City Manager and individual council members concerning an action the Manager was going to take was not per se a violation of the Open Meeting Law. He stated:

“...it is our view that a violation of the Open Meeting Law would not be found absent some form of concerted activity or communication between, or among, more than one member of a body covered by the Act. You do not indicate any discussion or exchange of views among members of the council either directly or through the manager. Your facts indicate only that the city manager contacted some members of the council individually concerning an action he was going to take. Thus, those members were informed of an event which subsequently occurred and apparently later became general knowledge.

To find a violation of the Open Meeting Law upon the facts you describe would, in our view, require establishment of a rule which would preclude a person from giving information to more than one member of a governing body outside a meeting of a body. On such a theory, a communication concerning city business from any source received by more than one member of a city council would automatically result in a violation of the Open Meeting Law. On such a standard, a member of a governing body could find himself in danger of unwittingly violating the Open Meeting Law each time he reads a letter or answers his telephone if it turns out that the information received has also been conveyed to another member or may be conveyed to another member in the future.

To rule otherwise would virtually eliminate the ability of members of public bodies to do ‘homework’ or to receive any information outside the often crowded agenda of a meeting concerning the affairs they are to govern.”

The Attorney General did re-emphasize, however, that any council deliberation or other action based on the facts so communicated must still occur at a public meeting and did not rule out a violation if a subsequent council action was based on important information privately acquired by the members individually and not disclosed in public deliberation. Op. Atty. Gen. 471-e, April 22, 1980.

A different result was reached in a similar issue reviewed by the Department of Administration. See Advisory Op. No. 06-017 (May 25, 2006). In this instance, it was alleged that in the process of hiring a new accountant, the city administrator engaged in a serial solicitation by telephone of the city council’s approval to hire the council’s third choice for the position of accountant when the first two candidates declined the position. As there was a disagreement as to whether a vote was taken or whether there were simply one-on-one discussions that there was a need to fill the position, the Commissioner did not resolve the issue presented. However, the Commissioner stated that if, as alleged, a majority of the members of the council took action with respect to the hiring of the accountant, the Open Meeting Law had been violated. The fact that the city administrator served as the go-between among the members would not change the outcome. Additionally, the Commissioner noted that there is no language in the Open Meeting Law that authorizes members of a public body to vote by telephone.

20. Reimbursement for Legal Expenses: The provisions of M.S. 13D.06, Subd. 4(c) now provide that a public body may pay any costs, disbursements, or attorney fees incurred by or awarded against any of its members in an action under the Open Meeting Law.

21. Summary of Information to Be Disclosed after Closed Meeting Is Held: The Department of Administration issued an opinion relating to the duty of a school district to accurately summarize the School Board’s conclusions regarding the personnel evaluation it discussed during a closed meeting. The Commissioner held that the School Board had a duty to provide more detail regarding its conclusions than the statement, “As a result of that review, strengths were noted and areas of improvement were defined. The board developed goals regarding communication and leadership.” The Commissioner stated that the board had a duty to carefully review the specific points it established in reaching a conclusion and summarize each salient point of the evaluation so that the public is given the opportunity to get the best possible sense of the performance. See Advisory Op. No. 02-021 (May 15, 2002).

See also Advisory Op. No. 02-035 (Oct. 7, 2002) (School Board statement in meeting minutes that “areas of growth were identified and [Superintendent’s] evaluation is an ongoing process” did not constitute proper “summary” of conclusions for purposes of Minn. Stat. § 13D.05, Subd. 3(a)).

In addition, the Department of Administration has clarified the requirement to provide a summary of the evaluation at its next regular meeting of the board. In this regard, a school board held a special closed meeting to evaluate the superintendent which was immediately followed by a regular meeting of the school board. The Commissioner opined that the school board did not comply with the Open Meeting Law when it failed to provide a summary of the evaluation at its next regular meeting which immediately followed the closed session. See Advisory Op. No. 12-008 (May 2, 2012).

22. Discussing Not Public Data at Open Meeting. The Department of Administration issued an opinion relating to a school district’s ability to discuss not public data at an open meeting. Two parents who opted to convert an oral sexual harassment complaint involving their daughter to writing complained that the school district inappropriately released their names at a public meeting. The Commissioner noted that parent names are private data on individuals. While noting that a school district had the ability to discuss private data on individuals in an open meeting “if the disclosure relates to a matter within the scope of the public body’s authority and is reasonably necessary to conduct the business or agenda item before the public body,” Minn. Stat. § 13D.05, Subd. 1(b), the Commissioner concluded that, in this case, the school district could reasonably have discussed the substance and merit of the complaint without publicly identifying the complainants. See Advisory Op. No. 02-033 (Sept. 11, 2002).

The Commissioner also issued an opinion as to whether or not private data about an employee may be discussed at an open meeting. In this instance, an employee, subject to the Department of Transportation’s Drug and Alcohol Testing Regulations, underwent reasonable suspicion drug testing with a positive result. Following an investigation, the employee was terminated. The employee requested a post-termination hearing (“Loudermill hearing”) to be held before the city council. The question arose as to whether data pertaining to the drug test result could be disclosed during the hearing. The Commissioner determined that such data would be considered public data under state law as it constitutes the specific reasons for final disposition of disciplinary action. However, such data is classified as not public data pursuant to federal regulations. As federal regulations preempt state law, the Commissioner determined the data would be classified as nonpublic. Nonetheless, as federal law permits an employer to disclose test results in conjunction with lawsuits, grievances, administrative proceedings arising from the testing or in criminal or civil actions, the City may release data pertaining to the drug testing during the post-termination hearing. The Commissioner noted, however, that because data discussed in the hearing are not public pursuant to federal law, any of the related printed materials are not available for public inspection or distribution as is normally required under Minn. Stat. § 13D.01, Subd. 6(b). See Advisory Op. No. 04-037 (June 3, 2004).

23. Performance Evaluations. The Department of Administration issued an opinion relating to a school district’s improper closure of a school board meeting to discuss a “performance evaluation.” At the request of the superintendent and the superintendent’s attorney, the school board closed a meeting for the purpose of “clearing [the superintendent’s] name and professional reputation.” The Commissioner found that this discussion did not amount to a performance evaluation or the preliminary consideration of allegations or charges against the superintendent, and thus that the school board did not have the authority to close the meeting. See Advisory Opinion 03-007 (Mar. 12, 2003). The Commissioner also noted a school district’s duty to accurately state the reasons for closing a meeting to the public. In this case, the school board meeting agenda stated that the meeting was to be closed for a “meet and confer” session (which would not be a legitimate reason for closing the meeting except pursuant to labor negotiations), but the board chair then stated at the meeting that it was being closed for “a personnel review and performance evaluation,” which also was not true.

The Department of Administration also issued an opinion as to the definition of an “individual” relating to the evaluation or performance of an individual who is subject to a public body’s authority. In this opinion, the question raised was whether a public entity could close an open meeting to discuss its contract with an

independent contractor. The Commissioner opined that a public entity may close an open meeting to discuss its contract with an independent contractor when that contractor is an "individual human being." However, if the contractor is a business organization, such as a corporation, then the meeting may not be closed. See Advisory Op. No. 05-013 (March 28, 2005).

24. Identity of Individual Subject to Allegations or Charges. The name of an individual against whom a school board is preliminarily considering allegations or charges in closed session, as well as the status of the complaints or charges, are public data and must be disclosed upon request. See Advisory Op. No. 03-020 (July 10, 2003).

25. Individual Subject to Boards's Authority. An applicant who has been extended a conditional offer of employment was not an individual subject to the board's authority and the board did not have the authority to close a meeting to discuss the individual. See Advisory Op. No. 14-004 (May 12, 2014).

26. Request for Advisory Opinion and No Penalty for Compliance. Minnesota Statutes Chapter 13 has now been amended to provide that, for a \$200.00 fee, an entity such as a school district subject to Chapter 13D (or a person who disagrees with a school district's actions under Chapter 13D) may request a written opinion from the Commissioner of Administration on any question relating to compliance with Chapter 13D. See Minn. Stat. § 13.072, Subd. 1(b) (2003). Advisory opinions regarding compliance with Chapter 13D are to be given deference by a court in a proceeding brought under Chapter 13D. See Minn. Stat. § 13D.06, Subd. 4(e). A school district acting in conformance with the Commissioner's advisory opinion is not subject to fines, or awards of attorney fees, or any other penalty under Chapter 13D (a similar provision applies to compliance with Chapter 13). In contrast, if a school district is the subject of an advisory opinion that is directly related to a cause of action being litigated and did not act in conformity with the opinion and is found to have violated the Open Meeting Law, a court shall award reasonable attorney fees to a prevailing plaintiff. In addition, the statute now provides that a school board member is not subject to forfeiture of office if he or she was acting in reliance on an advisory opinion. See id.

27. Board Actions at Special Meeting Limited to Items for Which Notice Was given. The Department of Administration issued an opinion relating to actions that may be taken by a board at a special meeting. The Commissioner opined that the Board's actions are limited to those topics included in the notice of the special meeting and that actions on other matters would be in violation of the Open Meeting Law. See Advisory Opinion 04-004 (February 3, 2004). In posting notice of a special meeting, the phrase "other legal issues may be discussed" does not give sufficient notice to comply with the Open Meeting Law. See Advisory Op. No. 07-014 (June 27, 2007).

28. Post-Termination Hearings are Subject to the Open Meeting Law. A question was raised to the Department of Administration as to whether a post-discharge hearing ("a Loudermill hearing") of an employee, held before the city council, is required to be part of an open meeting. The Commissioner opined that pursuant to Minn. Stat. § 13D.05, Subd. 2, there is no authority to close a post-discharge hearing. See Advisory Op. No. 04-037 (June 3, 2004).

29. Access to Journal. The Commissioner opined that members of the township board of supervisors did not comply with Minn. Stat. § 13D.01, Subd. 5, which requires that the public body's journal must be open to the public during all normal business hours, when they limited access to the journal in which votes are kept to once a month during the regular meeting of the township board. See Advisory Op. No. 07-014 (June 27, 2007).

30. Interview of Candidates. There is no provision in the Open Meeting Law that requires or permits a meeting to be closed to interview candidates for the appointment of a position. See Advisory Op. No. 06-031 (Nov. 14, 2006).

31. Real Property Data. Tapes of a meeting closed to consider offers and counteroffers for the purchase of an interest in real property by a public entity may not be disclosed to the public unless one of the

conditions set forth in Minn. Stat. § 13D.05, Subd. 3(c)(3) have been met (i.e.: the property has been purchased or sold or the governing body has abandoned the purchase or sale) or eight years have passed, assuming that the data are otherwise public. See Advisory Op. No. 08-001 (March 5, 2008).

32. Printed Materials. Electronic communications, other than those classified as nonpublic, that are prepared or distributed by or at the direction of a governing body or its employees must be made available to the public pursuant to Minn. Stat. § 13D.01, Subd. 6. See Advisory Op. No. 08-015 (July 9, 2008). **A public body must make at least one copy of members' materials available to the public at the meeting. See Advisory Op. No. 14-010 (August 5, 2014).**

33. Email Communications. Where a quorum of a public body receives and comments upon information received via email that is related to a matter of official business of the public body, the conduct of the public body constitutes a meeting which is required to be open to the public. In contrast, it is permissible and not a violation of the open meeting law to send meeting materials to all members of a public body via email as long as no discussion or decision making ensues. See Advisory Op. No. 09-020 (Sept. 8, 2009).

34. Closed Meeting Procedure. City Council did not comply with Minn. Stat. § 13D.01, Subd. 3, when it closed a meeting without identifying the statutory authority for closing the meeting, did not describe the subject of the meeting and failed to take a vote before moving into closed meeting. City Council also did not comply with section 13D.03 when it discussed topics unrelated to the stated subject of the closed meeting. See Advisory Op. No. 13-012 (August 9, 2013). **The statement made on the record to close the meeting must be made by the board. See Advisory Op. No. 14-005 (June 2, 2014).**

35. Meetings Conducted by Interactive Television. City Council meeting where a member attended via Skype from a remote location complied with the Open Meeting Law where all four requirements contained in M.S. § 13D.02 were met. See Advisory Op. No. 13-009 (March 19, 2013).

V. MINNESOTA COURT CASES: A number of Minnesota court cases have evolved over the years.

1. Meeting Place: Lindahl v. Independent School District No. 306, (1965) 270 Minn. 164, 133 N.W.2d 23, Judge Rogosheske speaking for the Supreme Court said:

“Appellant’s specific objection to the March 25 board meeting is that it was not ‘open to the public’ as required by Minn. St. 471.705 [now 13D.01] because the board moved from the gymnasium to the superintendent’s office without inviting the public. The purpose of this statute is to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning board decisions or to detect improper influences. But, while the statute orders that the public be given an opportunity to observe it does not compel a board to conduct business in a place most advantageously suited for public viewing. Matters of school government should be decided in the relative calm of the school board meeting room, not under the glare of gymnasium lights amid the distractions of departing electors. The record makes it clear that the board moved to its meeting room to seek quiet rather than to furtively conceal its deliberations from the public. While the failure to invite the public might be an important consideration in another instance, it is relatively unimportant here since the electors had already had ample opportunity to express their views. Since there is insufficient evidence to establish any attempt to prohibit spectators, to conceal deliberations, or to make the meeting room inaccessible to the electorate, this meeting was open to the public within the meaning of Sec. 471.705 [now 13D.01].”

2. Meeting Outside a School District: Quast v. Knutson (1967) 276 Minn. 340, 150 N.W.2d 199, the court held:

(a) “A meeting of the members of the school board of a common school district held in a private office 20 miles distant from its territorial boundaries was not ‘open to the public’ within the meaning of Minn. St. 471.705 [now 13D.01], requiring that all meetings of the governing body of any school district shall be open to the public.”

(b) “An attempted consolidation involving a part of a common school district is held to have been fatally defective where the initiating resolution of the school board which specified the part of the common school district to be consolidated with an adjoining district was adopted at a meeting which was not open to the public.”

(NOTE: M.S. 123A.32, Subd. 6 authorizes the school boards of districts with an interdistrict cooperation agreement to hold valid joint meetings at any location that would be permissible for one of the school boards participating in the meeting.) It also allows a school board that has an interdistrict cooperation agreement to hold a meeting in any district that is a party to the agreement if it complies with the notice provisions of the Open Meeting Law and other applicable law.

3. Teacher Hearing: In Head v. Special School District No. 1, (1973) 296 Minn. 267, 208 N.W.2d 294, Judge Otis said:

“The status of the teachers who had been accorded hearings was determined without making the grounds therefor a matter of public record. Intervenors cite section 471.705 [now 13D.01] as requiring that the meetings of the board should have been public, while the trial court found the board’s procedure invalid because the court construed section 125.17, Subd. 8, [now 122A.41, Subd. 10] to require that the board render decisions in writing, state the grounds therefor, and announce the decisions publicly. However, we are of the opinion and hold that it was quite clearly the intention of the legislature that the hearings before the school board were to be private if the teachers so elected and that the board’s deliberations in reaching their decisions were to remain confidential.”

4. Negotiation Strategy Meetings. Negotiation strategy meetings may be closed under the 1981 amendments. M.S. 13D.03. The Minnesota Court of Appeals established a two-part test to be used in determining whether a board member has violated the labor negotiation strategy exception to the Open Meeting Law. Claude v. Collins, 507 N.W.2d 452 (Minn. App. 1993) reversed on other grounds, Claude v. Collins 518 N.W.2d 836, (Minn. 1994), superseded by statute on other grounds as stated in Brown v. Cannon Falls Township, 723 N.W.2d 31 (Minn. App. 2006). According to the Court of Appeals, in order to constitute a violation of the labor negotiation strategy exception, a plaintiff must prove intent by first showing that: (a) the member was present at a gathering of a quorum or more of the governing body; (b) the gathering was closed for the purpose of discussing labor negotiations; and (c) the member purposefully discussed, decided, or received information on public issues other than labor negotiations. The second part of the test that a plaintiff must establish to prove a violation of the law is that: (a) a quorum or more of the governing body was present; (b) the meeting was closed for the purpose of discussing labor negotiations; and (c) the information the member discussed, decided, or received pertained to public issues other than labor negotiations. Id. at 456-57.

5. Notice of Meetings: The Minnesota Supreme Court in Sullivan v. Credit River Township, (1974) 299 Minn. 170, 217 N.W.2d 502, in an opinion written by Justice MacLaughlin, held:

“The critical question is what constitutes a meeting open to the public, as required by the statute. It is the judgment of this court that a meeting of which the public is unaware is not such a meeting. To constitute a public meeting, there must be adequate, timely notice to the public of the time and place of the meeting. The statute itself does not expressly require such advance notice to the public. However, the general rule of statutory construction is that every statute is understood to contain by implication, if not by its express terms, all provisions necessary to effectuate its object and purpose. 17B Dunnell, Dig. (3 ed.) section 8949; 82 C.J.S., Statutes, section 327. The language of the statute directing that meetings be open to the public is meaningless if the public has no knowledge that the meeting is to take place. Therefore, we believe that the statute, by implication, requires adequate notice of the time and place of the meeting. The mere fact that the meeting-room door is unlocked is not sufficient compliance with the directive of the statute.

In reaching this decision, we do not hold that such notice must be given for regularly scheduled meetings of public bodies if the times, dates, and locations of such regular meetings are available to the public upon reasonable inquiry. Nor would we require additional notice for any meeting which is adjourned to a specific time and place. We do hold that public notice is required to be given for all special meetings, including the type involved in this case, except, as noted below, those called for emergency purposes where the giving of such notice is impractical or impossible.

The timeliness and mode of giving public notice may be left to the reasonable discretion of the governing body.

Notice in a newspaper is not essential; it may consist of a posted notice at certain predesignated locations, such as the public hall or other locations determined by the governing body, so long as the public has a reasonable opportunity to be aware of the places in which such notices will regularly be posted.

In all cases, a notice of the meeting may be dispensed within a situation, which requires immediate emergency action. In determining what constitutes such an emergency, the governing body should be guided by considerations of whether the situation calls for immediate action involving the protection of the public peace, health, or safety. See 56 Am. Jur. 2d, Municipal Corporations, sections 353-354.”

In Merz v. Leitch, 342 N.W.2d 141 (Minn. 1984), the Minnesota Supreme Court held that conducting a meeting where the time and place have not been given prior thereto, or conducting a meeting before the scheduled time when the public was led to believe the meeting was to commence, is a violation of the Open Meeting Law. In that case, a county board took action to terminate an employee at 12:50 when the meeting was not scheduled to begin until 1:00.

In Rupp v. Mayasich, 533 N.W.2d 893 (Minn. App. 1995), the Court of Appeals held that in order for a posting of a notice of a meeting on the principle bulletin board of a public body to satisfy the Open Meeting Law, the bulletin board must be located in a place that is reasonably accessible to the public.

NOTE: Specific provisions relating to meeting notice were incorporated into the Open Meeting Law in 1987. See M.S. 13D.04.

In Brown v. Cannon Falls Township, 723 N.W.2d 31 (Minn. App. 2006), the Court of Appeals addressed the issue of when notice of a special meeting must be given based upon the content of a request for such notice. In Brown, a request was made for notice of a special meeting that addressed the following topics: (1) feedlot permits and setbacks from residential properties; and (2) feedlot permits issued within the township’s urban expansion district or within two miles of the township limits. The township argued that it was not required to provide notice of a meeting wherein a discussion was held as to the township’s attorney’s dual representation of the township board and a board member individually related to litigation pertaining to revocation of a building permit due to the existence of the board member’s feedlot. The township argued that the board’s discussion was only “tangentially related” to the request for notice. The court, however, held that a request for notice should be construed liberally and, based upon the request for notice, the township failed to properly provide notice of the special meeting.

6. Exception for Litigation Strategy Meetings with Attorneys: In Minneapolis Star and Tribune Company, et al v. The Housing and Redevelopment Authority in and for the City of Minneapolis, et al, 246 N.W.2d 448, (1976), order on petition for rehearing 251 N.W.2d 620, the Minnesota Supreme Court in an opinion by Justice Scott held that meetings of public bodies with legal counsel to discuss litigation strategy need not be open to the public.

The facts of that case were that prior to a regularly scheduled public meeting of the HRA, the HRA members met with their attorneys in a closed meeting to discuss strategy in connection with litigation challenging the HRA environmental impact statement of a controversial HRA housing project. A reporter, present to cover

the public meeting, sought admission to the closed meeting but was denied admission on the recommendation of the HRA attorney. The HRA attorney by affidavit indicated that the closed meeting related solely to Cedar-Riverside environmental litigation strategy.

The attorney further testified by affidavit that because of doubt over the Open Meeting Law he recommended that a proposed settlement of the litigation be dropped from a subsequent agenda rather than discuss it in front of the opposition at a public meeting, or challenge the Open Meeting Law further.

The opinion for the court cited two statutes which acknowledge the attorney-client privilege and thus “generally indicate a legislative intent to preserve attorney-client confidences.”

The opinion then went on to cite state constitutional and statutory authority and court cases, which establish the principle of separation of powers in government among the judicial, legislative and executive branches, and which provide that the judiciary has the inherent power to regulate the practice of law. Pursuant to this authority, the court has adopted a code of professional responsibility, which includes Canon 4:

“A lawyer should preserve the confidences and secrets of a client.”

The opinion of the court recognized the two conflicting public policies involved and after balancing the interest of each, sided with the view of a majority of jurisdictions that have considered the question, namely, strategy conferences with legal counsel in the face of threatened or pending litigation need not be open to the public.

The opinion of the court concluded with the following cautionary words:

“In this area requiring a delicate balancing of public interests, our conclusion was reached only after a thorough consideration of the record, which discloses that the members of HRA were involved in active and immediate litigation in their capacity as members of a public agency and also, in one case, as an individual. The advisory meetings with the attorney were necessary to perhaps attain a settlement ultimately beneficial to the agency, the individual, and the general public.

The attorney-client exception is therefore operable in this matter to fully implement the confidentiality of the relationship. A basic understanding of the adversary system indicates that certain phases of litigation strategy may be impaired if every discussion is available for the benefit of opposing parties who may have as a purpose a private gain in contravention to the public need as construed by the agency.

The record discloses that tort cases against the HRA are handled by lawyers retained by insurance companies. Certainly, in this respect, if the board were required to meet with the insurance company’s lawyer on a specific case, that consultation should not be subject to public scrutiny as an ‘open meeting’ contemplated by the statute. The attorney-client exception discussed herein would almost never extend to the mere request for general legal advice or opinion by a public body in its capacity as a public agency. We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated, for this court has consistently emphasized that respect for and adherence to the First Amendment is absolutely essential to the continuation of our democratic form of government. It will be upheld, however, if the balancing of these conflicting public policies dictates the need for absolute confidentiality. The exception is therefore available to satisfy the concerns expressed herein but is to be employed or invoked cautiously and seldom in situations other than in relation to threatened or pending litigation.” (emphasis added)

In Northwest Publications, Inc. v. City of Saint Paul, 435 N.W.2d 64 (Minn. App. 1989), the St. Paul City Council scheduled a closed meeting to discuss threatened litigation over proposed nude dancing ordinances. The trial court held that the advice to be given was general legal advice that was not subject to the attorney-

client privilege. The Court of Appeals held that the attorney-client privilege would almost never extend to the mere request for general legal advice. It held that the attorney-client exception properly applies when a governing body seeks legal advice concerning litigation strategy; however, the privilege is not available when a governing body seeks instead to discuss the strengths and weaknesses of the underlying proposed enactment which may give rise to future litigation. The Court also held that the mere existence of litigation was not sufficient to uphold the privilege and the public body must demonstrate that a legitimate need for confidentiality requires closure and that the need for confidentiality outweighs the public's right of access.

NOTE: The 1990 amendments to the Open Meeting Law provide that meetings may be closed if permitted by the attorney-client privilege. M.S. 13D.05, Subd. 3(b).

The Minnesota Court of Appeals again discussed the litigation strategy exception in, Star Tribune v. Board of Education, Special School District No. 1, 507 N.W.2d 869 (Minn. App. 1993). In Star Tribune, the Minneapolis School Board held two closed meetings regarding questions of financial mismanagement by three high-ranking administrators. At the second of these meetings the School Board, after returning to open session, scheduled a third closed meeting to discuss the investigation of the superintendent and to receive advice from counsel regarding possible rescission of two previously approved settlement agreements. The newspaper immediately petitioned the district court for a writ of mandamus to compel the School Board to conduct all future meetings in public, including the already scheduled closed meeting. The district court granted a writ of mandamus which provided that, if litigation was actually commenced between the School Board and the administrators in question, the Board could meet in closed session to seek legal advice on litigation strategy pursuant to M.S. 471.705, Subd. 1d(e) [now M.S. 13D.05, Subd. 3(b)]. The Court of Appeals reversed the district court, holding that “[w]hen a public body can show that litigation is imminent or threatened, or when a public body needs advice above the level of general legal advice, i.e., regarding specific acts and their legal consequences, then the attorney-client exception applies.” Id. at 872.

See also Demming v. Housing and Redevelopment Authority of Duluth, Minn., 847 F. Supp. 130 (1994), where the federal district court cited the Star Tribune case, *supra*, favorably in a situation in which litigation had not yet been commenced but was threatened. The discussions between the HRA and its legal counsel were not generalized and unfocused, but were directed at specific legal acts and their potential legal consequences. In this case the director had given warning that she was disgruntled and was unhesitant about employing legal action to address the agency's “harassment.” The court held the attorney-client exception to the Open Meeting Law applied.

In Prior Lake American v. Mader, 642 N.W.2d 729 (Minn. 2002) the Minnesota Supreme Court further narrowed the attorney-client exception by limiting the circumstances when a public body could properly close an open meeting to consult with counsel when legal action had not yet been commenced. In Prior Lake, a contracting company applied for a conditional use permit. The application sparked concern in the community. In response, the contracting company sent the city council a letter stating that it may seek legal action to ensure the proper handling of the matter and to recoup lost revenues if the permit were denied. The city council thereafter held an open meeting to discuss the permit application. Following a public discussion of the application, the city council met in a closed session with legal counsel based upon the letter sent by the contracting company on the grounds of threatened litigation. Prior Lake American then commenced litigation seeking a declaration that the Open Meeting Law was violated when the city council closed its meeting. On appeal, the Minnesota Court of Appeals reversed the district court's order for summary judgment in favor of the city council, finding that the city council violated the Open Meeting Law. The Court held that the city council failed to identify the type of information of which public disclosure would damage the city's position in future litigation with the applicant. As a result, the Court found that the council did not need absolute confidentiality regarding possible litigation in determining whether or not there were grounds to grant or deny the requested permit. In the decision, the Court noted with favor its analysis in Minneapolis Star & Tribune Co. v. Hous. & Redev. Auth., 310 Minn. 313, 251 N.W.2d 620 (Minn. 1976). The Court also reiterated the necessity of balancing the policies behind the attorney-client privilege and the Open Meeting law, noting “that the mere threat that litigation might be a consequence of deciding the matter one way or another does not, by itself, justify closing the meeting.” Prior Lake v. Mader, at 740. Instead, the Court concludes that, “the

attorney-client privilege exception to the Open Meeting Law applies when a public body seeks legal advice concerning litigation strategy.” Id. at 740.

In Brainerd Daily Dispatch v. Dehen, 693 N.W.2d 435 (Minn. App. 2005), the Minnesota Court of Appeals, while adopting the balancing test set forth in Prior Lake, distinguished the facts of the Brainerd case from the Prior Lake case to find that even where legal action is only threatened, the attorney-client privilege may apply to allow for the closing of a meeting. In Brainerd, the city council denied the plaintiff’s request for a permit to march in the parade. The plaintiffs sent the city several letters claiming their rights were violated and that if the decision were not reversed, they would consider legal action. The city’s insurer retained an attorney to represent the city in the dispute. The city council then met with the attorney in a closed session to discuss the development of a defense strategy or reconciliation to address the threatened lawsuit that appeared imminent. The Court distinguished the facts in Prior Lake, where no evidence of imminent and threatened litigation was produced. In Brainerd, the Court found that there was evidence of the need for absolute confidentiality to discuss a defense strategy and that it would be detrimental to the public interest to discuss these matters at an open meeting. The Court found that it was significant that, in contrast to the facts in Prior Lake, the city’s decision already had been made and that public involvement by virtue of an open meeting would not change the result. The Court also acknowledged that the presence of counsel retained by the city’s insurance company suggests that the circumstances prompting counsel’s presence involve more than a routine request for general legal advice. In balancing these factors, the Court concluded that while no legal action was pending, the attorney-client exception to the Open Meeting Law was properly invoked based on the need for absolute confidentiality.

The Minnesota Court of Appeals has further interpreted the language allowing meetings to be closed under the attorney-client privilege. The Court ruled that the requirement in the Open Meeting Law that a public body describe the “subject to be discussed” before closing a meeting did not merely require a statement asserting an attorney-client privilege to discuss pending litigation, but rather required that the public body specifically describe the matter to be discussed at the closed meeting, subject only to relevant privacy and confidentiality protections under state and federal law. The Free Press v. County of Blue Earth, 677 N.W.2d 471 (Minn. App. 2004). See also Brainerd Daily Dispatch v. Dehen, supra.

7. Advisory Committees: In The Minnesota Daily v. the University of Minnesota, 432 N.W.2d 189 (Minn. App. 1988), the Daily sued the University to open the meetings of the Presidential Search Advisory Committee. The Court held that while the Advisory Committee had the opportunity to influence the governing body that was not dispositive. There was heavy emphasis on the fact that the advisory committee could not make the final decision. It also stressed that the governing body could not abdicate its responsibilities to an outside panel and should grant members of the public the opportunity to comment prior to making its final decision.

The Court of Appeals addressed the issue of committees again in Sovereign v. Dunn, 498 N.W.2d 62 (Minn. App. 1993), rev. denied, (Minn. 1993). In Sovereign, a “delegation” from the Lake Elmo City Council attended a number of meetings with the Oakdale City Council in an attempt to resolve a border question. This delegation, which was not a formally appointed committee and which had no final decision-making authority, consisted of the mayor of Lake Elmo and one Lake Elmo City Council member. The Court of Appeals, in determining that the meetings in question did not violate the Open Meeting Law, held that “a gathering of public officials is not a ‘committee, subcommittee, board, department or commission’ subject to the Open Meeting Law unless the group is capable of exercising decision-making powers of the governing body.” Id. at 67. In regard to whether a particular group has the capacity to act on behalf of the governing body, the Court stated that such capacity “is presumed where members of the group comprise a quorum of the body” or “where there has been a delegation of power from the governing body.” Id.

In Zahavy v. University of Minnesota, 544 N.W.2d 32 (Minn. App. 1996), (impliedly overturned on other grounds by Shaw v. Bd. of Regents, 594 N.W.2d 187 (Minn. App. 1999)) the Court of Appeals favorably cited Sovereign v. Dunn, supra, to the effect that since the Senate Judicial Commission panel issued recommendations rather than decisions, its proceedings were not subject to the Open Meeting Law.

8. Tape Recording of Public Meetings: In Farrar v. City of Wells, Faribault County, 3/2/79, the district court held that a city council could not prohibit the unobtrusive use of a tape recorder by a member of the public at any public meeting required to be open to the public under the Open Meeting Law. The court stated:

“Once it is recognized that the open meeting is for the benefit of the public and not for the convenience of public officials, it is clear that the public should be able to conduct in any reasonable manner to aid understanding of public matters so long as such conduct does not impair the purpose and function of the open meeting.”

9. Communication Between Superintendent and Individual Board Member: In Minnesota Education Association v. Bennett, 321 N.W.2d 395 (Minn. 1982), the Minnesota Supreme Court held that a superintendent is not a member of the school board for purposes of the Open Meeting Law and that meetings or conversations between the superintendent and a board member are thus not subject to restrictions of the Open Meeting Law. The Court reiterated this ruling in St. Cloud Newspapers, Inc. v. District 742 Community Schools, 332 N.W.2d 1 (Minn. 1983).

10. Administrative Seminars Constitute Meetings: In St. Cloud Newspapers, Inc. v. District 742 Community Schools, 332 N.W.2d 1 (Minn. 1983), the Minnesota Supreme Court reviewed the practice of the St. Cloud school district of holding yearly administrative seminars. The general theme of the seminars was long-range planning for the District and they were designed to provide board members with factual information concerning issues currently facing the educational system in general and the district in particular. The discussions did not relate to matters pending before the board, there were no attempts to resolve specific problems of the district, and no decisions or pre-decisions were made. No public notice was given of the meetings.

The Court held that gatherings of all members of a school board and district administrators for the purpose of providing the board members with background information concerning issues currently facing the educational system and the school district in particular, where the school board members take no official action to resolve specific problems of the school district, constitute “meetings” under the Minnesota Open Meeting Law.

In Moberg v. Independent School District No. 281, 336 N.W.2d 510 (Minn. 1983), the Court reviewed its holding in the St. Cloud case as follows:

“Thus any ‘scheduled’ gathering of all members of a governing body must be noticed and open, whether or not action is taken or contemplated. This includes meetings at which information is received which may influence later decisions of such bodies, but excludes chance or social gatherings.”

11. Exception for Negotiations, Mediation Sessions and Hearings Closed by Director of BMS. In Minnesota Education Association v. Kenneth Bennett, 321 N.W.2d 395 (Minn. 1982), the Minnesota Supreme Court held that once the Bureau of Mediation Services takes jurisdiction of the bargaining process, pursuant to PELRA, the mediator may authorize a board to meet privately. The court held in pertinent part as follows:

“The statute [M.S. 179.69, Subd. 2] (now M.S. 179A.14) authorizes the mediator (director) to permit nonpublic negotiations, mediation sessions and hearings between the parties. To hold that the word ‘between’ means that both sides must be together in a nonpublic meeting is too narrow an interpretation.

Once the Bureau of Mediation Services takes jurisdiction of the bargaining process, it is only reasonable to conclude that to aid effectively in resolving the issues between the parties, the mediator may meet with both parties together, or with each party separately and may direct, or permit, a party to meet without the mediator being present, nonpublicly at any place within or without the district, the mediator, or permitted party, deems suitable.

If the Bemidji meeting is to be held to violate the Open Meeting Law, it should be only on the ground that the mediator did not authorize it to be nonpublic. The trial court in a memorandum made a part of its findings of fact, conclusion of law and order for judgment correctly stated: "At no time did the mediator ever authorize the board to meet in private.' While express authorization certainly is preferable, implied authorization is as valid. Since a mediator had directed the meeting to take place and since negotiations could not be successful unless the board produced increased offer authority and since a public meeting for that purpose would disclose not only to the board, but to the public, including the employees of the district, whatever increase was determined as a new limitation, it was not unreasonable for the board to conclude that it had been impliedly authorized to meet privately."

12. Meetings Between Members of Different Governing Bodies. In Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn. 1982), the Minnesota Supreme Court approved the Opinion of the Attorney General which stated that conversations between two individual members of two separate governing bodies do not constitute a meeting for purposes of the Open Meeting Law. Op. Atty Gen. 471-e, May 23, 1978, cited in IV.13 above.

13. Decisions not Invalidated. In Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn. 1982), two members of a city council discussed over lunch an application for a special use permit that was pending before the council. The applicant sought to invalidate the later action of the council denying a special use permit based in part on this luncheon meeting. The court held that the Open Meeting Law only provided statutory penalties in the form of fines or removal from office for a violation of the Open Meeting Law and cited the Sullivan v. Credit River case for the proposition that the statute did not specify that action taken at a meeting which is not public should be invalidated. The court held that this particular case did not concern a meeting where action was taken, only one where discussion occurred, and noted that "deliberation cannot be nullified." It thus ruled that the luncheon meeting was not a violation of the Open Meeting Law, which would invalidate the council's actions.

In Petition of D & A Truck Line, Inc., 524 N.W.2d 1 (Minn. App. 1994), the Court of Appeals held that the Open Meeting Law provided statutory penalties for its violation and that invalidation of actions that were the result of a closed meeting was not a correct remedy for a violation. See also Rupp v. Mayasiach, 561, N.W.2d 555 (Minn. App. 1997); In Re Order Goodland Township, Co. No. A07-0694, 2008 WL 224009 (Minn. App. 2008) (unpublished); Columbus Concerned Citizens, Inc. v. Minnesota Racing Commission, Co. No. A05-1743, 2006 WL 1529494 (Minn. App. 2006) (unpublished).

14. Constitutionality Upheld. In St. Cloud Newspapers, Inc. v. District 742 Community Schools, 332 N.W.2d 1 (Minn. 1983), the Minnesota Supreme Court held that the Minnesota Open Meeting Law was not unconstitutionally vague or overbroad and did not unconstitutionally interfere with school board members' rights of free speech or freedom of association.

15. Definition of Meeting; Requirement for a Quorum. In Moberg v. Independent School District No. 281, 336 N.W.2d 510 (Minn. 1983), the Minnesota Supreme Court held:

"...meetings subject to the requirements of the Open Meeting Law are those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body." (Emphasis supplied.)

In formulating this definition, the Court held that the public's right to be informed must be balanced against the public's right to the effective and efficient administration of public bodies. In this regard, the Court stated that "it is the duty of public officials to persuade each other in an attempt to resolve issues, and it makes little sense to suggest that they may listen to a group of non-members on important matters, but not to their colleagues, who may be more expert on the subject than any other persons."

See also Winona Post and John Edstrom v. Board of Education of Independent School District No. 861 (Winona) and Individual School Board Numbers, No. C6-93-1255, Third Judicial District, May 4, 1994.

16. Social Gatherings. In St. Cloud Newspapers, Inc. v. District 742 Community Schools, *supra*, the Court held that the Open Meeting Law did not apply to “chance or social gatherings”. In Moberg v. Independent School District No. 281, *supra*, the Court reiterated that chance or social gatherings are exempt from the Open Meeting Law, but also held that a quorum may not, as a group, discuss or receive information on official business in any setting under the guise of a private social gathering.

17. Letters; Telephone Conversations. In Moberg v. Independent School District No. 281, *supra*, the Minnesota Supreme Court held that the Open Meeting Law did not apply to letters, the distribution of written questions and answers, or to telephone conversations between fewer than a quorum. Note: Letters and written materials may not come under the general Open Meeting Law but may be covered by the provisions of M.S. 13D.01, Subd. 6, requiring certain printed materials relating to agenda items to be available at the meeting. See M.S. 13.601, Subd. 2 (correspondence between individuals and elected officials is private data on individuals, but may be made public by either the sender or the recipient).

In O’Keefe v. Carter, No. A12-0811, 2012 WL 6734463 (Minn. App. 2012), the Court of Appeals relied upon Moberg’s distinction between oral and written communications and found that emails between two school board members did not constitute a meeting where the written communication was not related to an “important” and “controversial” subject.

18. Serial Meetings or Conversations. In Moberg v. Independent School District No. 281, *supra*, the appellants raised the point that because the Court ruled that the Open Meeting Law only applied to meetings of a quorum or more, the Open Meeting Law could be circumvented by serial face-to-face or telephone conversations between board members to marshal their votes on an issue before it is initially raised at a public hearing. The Court held that the rule could be circumvented anyway by persons who are determined to do so but that it was important that the rule of law not be so restrictive as to lose the public benefit of personal discussion between public officials while gaining little assurance of openness. The Court, however, went on to state as follows:

“Of course, serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning an agreement may also be found to be a violation of the statute depending upon the facts of the individual case.”

The Minnesota Court of Appeals has reviewed circumstances as to whether serial meetings by less than a quorum constitute a violation of the Open Meeting Law in two separate instances. In In re City of Buffalo, Co. No. A05-1410, 2006 WL 1229596 (Minn. App. 2006) (unpublished), public utility commissioners met with staff members prior to public hearings for the stated purpose of determining how various parties came up with compensation figures for and accounting for differences between the parties’ calculations in relationship to compensation awards. The city sued alleging, in part, that the commissioners violated the Open Meeting Law by meeting privately before the public hearing. The Court of Appeals held that there was no evidence in the record that the commission met privately before the public meeting to conduct business on the case. The Court found that the commissioners’ consultation with staff merely reflected a study of the evidence and preparation for the public meeting. Such meetings did not amount to evidence that a quorum of the members of the commission met to discuss the case and receive information about it. Thus, the Court held the commission did not violate the Open Meeting Law.

Similarly, in Columbus Concerned Citizens, Inc. v. Minnesota Racing Commission, Co. No. A05-1743, 2006 WL 1529494 (Minn. App. 2006) (unpublished), appellants alleged that the Minnesota Racing Commissioners violated the Open Meeting Law by engaging in ex parte communications with each other and with representatives of the North Metro Harness Initiative (“NMHI”) regarding the Commission’s decision to reconsider the denial of NMHI’s application for a Class A racetrack license. At the outset, the Court of Appeals held that any ex parte contacts between individual commissioners and representatives of NMHI or

other third parties are not subject to the Open Meeting Law. As to the alleged serial meetings, the Court noted that several commissioners discussed the Commission's denial of the application and possibly discussed how they might go about persuading their fellow commissioners to reconsider that denial. However, the Court found there was no evidence to suggest these commissioners were able to "forge a majority in advance of the public hearing" on the issue. The Court also found no evidence that the commissioners engaged in off-the-record discussions to avoid public discussion of the issue. To the contrary, the Court found that the commission held several public hearings on the issue of reconsideration, reopened the record and allowed consideration of additional evidence prior to voting.

The United States District Court of Minnesota also has reviewed the issue of serial meetings. In Franzwa v. City of Hackensack, 567 F.Supp.2d 1097 (D. Minn. 2008), the plaintiff, a former city council member, alleged that another city council member approached the mayor to mention a concern as to the plaintiff's residency and eligibility on the city council. The mayor then mentioned these concerns to another city council member, the city clerk, another individual who was not a city council member and the city attorney. The plaintiff alleged that these discussions constituted a serial meeting in violation of the Open Meeting Law. The court found that despite these conversations, there was no evidence presented that a "group consensus" was formed during those conversations or that anything was discussed, other than the necessity to raise the question of the plaintiff's residency at the next scheduled city council meeting. Thus, the claim was dismissed.

19. Good Faith Not a Defense. In Merz. v. Leitch, *supra*, the Supreme Court held that neither good faith actions by members of public boards nor the fact that no one was harmed by the action illegally taken is a defense to the imposition of civil penalties for violations of the Open Meeting Law upon members who participated in an illegal meeting. The correct standard is whether the violation was intentional, not whether it was willful or deliberate. Willison v. Pine Point Experimental School, 464 N.W.2d 742 (Minn. App. 1991). However, the Minnesota Supreme Court subsequently held that, while a member's good faith is not a complete defense, it may be considered when a court determines the amount of a civil penalty for a violation of the Minnesota Open Meeting Law. Claude v. Collins, 518 N.W.2d 836 (Minn. 1994). In Brown v. Cannon Falls Township, 723 N.W.2d 31 (Minn. App. 2006), the Court of Appeals held that while the good faith reliance on competent legal advice regarding compliance with the Open Meeting Law may negate a finding of an intentional violation of the law, the reliance must be reasonable. Based upon the specific facts found in this case, namely a potential conflict of interest of legal counsel, the Court held that the board members' reliance upon the advice of the township attorney was unreasonable and did not negate a finding of an intentional violation of the Open Meeting Law.

20. Employee Evaluations. In Itasca County Board of Commissioners v. Olson, 372 N.W.2d 804 (Minn. App. 1985), the Court of Appeals held that the Minnesota Government Data Practices Act does not create an exception to the Open Meeting Law. This decision was overturned by the 1990 and 1994 Amendments, M.S. 13D.05. The public body may discuss the data at a public meeting if necessary. The data itself, however, retains its original classification. Also, public bodies were granted the power to close meetings to evaluate the performance of individuals subject to their authority. M.S. 13D.05, Subd. 3.

21. Discussions of Private Data. In Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (1989), rehearing denied, the Minnesota Supreme Court held that when it was necessary to discuss data classified as not public by the Minnesota Government Data Practices Act at a meeting otherwise required to be open under the Open Meeting Law, that portion of the meeting in which the not public data is discussed must be closed. The remainder of the meeting must be open. This decision was overturned in part by statutory amendments. M.S. 13D.04 and 13D.05. The statutes now specify the circumstances under which meetings may be open or closed.

The Minnesota Court of Appeals reached a result which appears to be at odds with the 1990 amendments to the Open Meeting Law in Unke v. Independent School District No. 147, 510 N.W.2d 271 (Minn. App. 1994). The Court's decision in Unke was specifically overturned by the 1994 amendments to the Minnesota Government Data Practices Act and the Open Meeting Law.

22. Court-Ordered Settlement Conferences. In State of Minnesota by Archabal v. County of Hennepin, 505 N.W.2d 294 (Minn. 1993), the Minnesota Supreme Court held that “[w]here a court, in the exercise of its inherent judicial power, orders a litigating public body into a closed settlement conference as a practical necessity in deciding the case and carefully and narrowly limits the scope of the conference to the issues involved in the litigation, application of the Open Meeting Law would violate the separation of powers under...the Minnesota Constitution.” Id. at 298. The Court also set forth certain factors to be considered in determining whether a court appropriately exercises its inherent judicial power, such as: (a) whether all parties to the litigation are included in the settlement conference; (b) whether the proposed closed conference was for the purpose of avoiding trial of the lawsuit, although the Court indicated that “[t]his is not to say that in all instances the court cannot exercise its inherent power to order a closed settlement conference after trial;” and (c) whether the scope of the proposed settlement conference was narrowly drawn to focus on the specific issues raised by the underlying lawsuit. Id. at 299.

23. Statute of Limitations. Because the Open Meeting Law provides for a penalty of forfeiture by punishing an offense against the public rather than redress a private wrong, it is subject to the two-year statute of limitations contained in M.S. § 541.07(2). See, O’Keefe v. Carter, No. A12-0811, 2012 WL 6734463 (Minn. App. 2012).

24. Intentional Violation. In Elseth v. Hille, No. A12-1496, 2013 WL 1943036 (Minn. App. 2013), the Court of Appeals found that the following facts “barely” cleared the hurdle of showing intent to violate the Open Meeting Law to withstand summary judgement: presumption that experienced public-body board members have constructive knowledge of the Open Meeting Law and the precedential appellate cases that have interpreted it, including that board members likely know they cannot act beyond the scope of the notice of a special meeting, and board member statements indicating their belief that they were acting beyond the scope of the special meeting notice.

25. Attorneys Fees. In two actions, district courts have awarded attorneys fees to plaintiffs prevailing in Open Meeting Law litigation. See Claude v. Collins, Case File No. C5-92-300400 (Sixth Jud. Dist., Nov. 25, 1992); Waste Systems Corp. v. Hugoson, et al, Case File No. C2-91-527 (Fifth Jud. Dist., Jan. 8, 1993). Both district courts awarded attorneys fees to be taxed severally (i.e. liability for that portion of the total damage caused by the defendant in question).

In addition to other remedies, the court may award reasonable costs, disbursements, and reasonable attorney fees of up to \$13,000 to any party in an action under the Open Meeting Law. The court may award costs and fees to a defendant (usually a school board member) only if the court finds that the action was frivolous and without merit. The law provides that no monetary penalties or attorney fees may be awarded against a member of a public body unless the court finds that there was an intent to violate the Open Meeting Law. Reasonable attorney fees also are to be awarded to a prevailing plaintiff if the public body was also the subject of a prior written opinion issued under section 13.072, and the court finds that the opinion is directly related to the cause of action being litigated and that the public body did not act in conformity with the opinion.

The Minnesota Supreme Court has not yet articulated standards by which a court should exercise its discretion to grant or deny an award of attorney fees under the Open Meeting Law. The Court has determined, however, that not all cases require an award of attorney fees and found that the facts in Star Tribune Company v. University of Minnesota Board of Regents, Co. No. A03-124, A03-155, 2004 WL 3198625 (Minn. 2004) (unpublished), did not support such an award. In Star Tribune, the Court stated that because such awards are discretionary rather than mandatory, there will be instances when a defendant who loses an enforcement action nevertheless would not be liable for the plaintiff's attorney fees. Facts which supported the denial of an award in this case included: (1) the government entity's defense against the application of the Open Meeting Law was based on a constitutional principal; (2) the context of the dispute involved an important governance decision for the government entity; and (3) although the government entity did not prevail, the entity's position had a reasonable basis in law. (NOTE: Based on the 2008 amendments to the law, a court is required to award attorney fees if a public body violates the Open Meeting Law and did

not act in conformity with a prior written opinion issued under section 13.072).

Even though a person must act intentionally to violate the Open Meeting Law and the court must find that there was an intent on the part of a member of a public body to violate this law to allow the award of a civil penalty or attorney fees against that member, the 1994 amendments specifically provide that a public body may pay any costs, disbursements, or attorney fees incurred by or awarded against any of its members in an action brought under the Open Meeting Law.

As to the amount of attorney fees, as set forth above, the courts may award up to \$13,000 to a party in an action under the Open Meeting Law. The Court of Appeals has interpreted this provision as not limiting the attorney fees award to a one-time cap of \$13,000 in an action regardless of how many parties are involved in the lawsuit. Brown v. Cannon Falls Township, supra. Rather, each party in an action is permitted to recover the statutory maximum. However, in Brown, the Court did not permit the parties to recover \$13,000 per complaint filed as the complaints had been consolidated into one “in court proceeding.” The court also did not permit the recovery of attorney fees on appeal, finding that the parties had received the maximum allowed by statute at the district court level.

26. Removal From Office. In Claude v. Collins, 518 N.W.2d 836 (Minn. 1994), the Minnesota Supreme Court ruled that once a member violated the Open Meeting Law three times, the person forfeited any further right to serve on that governing body in any capacity for a period of time equal to the term of office that person was then serving. However, while this provision of the Open Meeting Law is mandatory, the court held that Article 8, Section 5 of the Minnesota Constitution only allowed for removal from office of inferior officers for malfeasance or nonfeasance in the performance of their duties. Malfeasance has reference to civil conduct or an illegal deed, the doing of that which one ought not to do, or the performance of an act by an officer in his official capacity that is wholly illegal and wrongful. Nonfeasance is the neglect or refusal, without sufficient excuse, to do that which it is the officer's legal duty to do. The court found the conduct in this case was not malfeasance but was nonfeasance, so removal was mandatory.

In discussing nonfeasance, the Court ruled that while good faith was not a defense to a violation of the Open Meeting Law, it was relevant to the Constitutional issue of whether a violation constituted nonfeasance. While ignorance alone does not amount to good faith or a sufficient excuse, ignorance due to inexperience may constitute good faith and a sufficient excuse until the elected official has had a reasonable period to learn his or her duties.

NOTE: Claude v. Collins was decided under the old law which provided that upon a third violation of the Open Meeting Law by the same person connected with the same governing body, that person shall forfeit any further right to serve on that governing body. The court ruled that one adjudication of three separate, unrelated and intentional violations was sufficient for removal under the statute. The 1994 amendments, however, now require that the person forfeits the right to serve “if the person has been found to have intentionally violated this section in three or more actions brought under this section.” The Legislature thus intended that there be three or more separate adjudications required prior to removal. See also Brown v. Cannon Falls Township, supra, (holding there must be three separate proceedings before removal of public official).

In Hedstrom v. Cook County Board of Commissioners, Co. No. C5-00-208, 2000 WL 1281138, (Minn. App. September 12, 2000) (unpublished) the Court of Appeals upheld removal of members from the board due to their roles and participation in two closed meetings. The court recognized that removal of a member requires three intentional separate violations before removal is appropriate under the Open Meeting Law. However, the members’ violations of the EDA policies and procedures as well as the Open Meeting Law, justified removal based on nonfeasance (neglect of duty), within the meaning of Minn. Stat. § 469.095.

27. Damages. In Thelen v. City of Elba, Co. No. 08-1150, 2009 WL 2208161 (D. Minn. July 22, 2009), the plaintiffs sought damages from the city for violation of the Open Meeting Law. The court held that the chief remedy under the Open Meeting Law is a civil penalty that is not payable to the plaintiff. As a result,

the court held that the Open Meeting Law does not provide an action for damages and dismissed the claim for failure to state a claim.

28. Straw Vote. In Mankato Free Press Co. v. City of North Mankato, 563 N.W.2d 291 (Minn. App. 1997), the Court of Appeals found that the city council violated the Open Meeting Law when it took a straw vote to narrow the list of finalists for the city administrator position during a meeting and not making results public until after the meeting. The results must be made public during the meeting.

29. Attorney Involvement in a Closed Meeting. In Honan v. City of Cottonwood, Co. No. A04-1636, 2005 WL 2077277 (Minn. App. 2005) (unpublished), the plaintiff alleged that the city's attorney participated in closed meetings during which the council discussed possible disciplinary action against him. The plaintiff claimed that the meetings were without a statement on the record of the purpose of the closed meeting and that the city's attorney is liable under the Open Meeting Law for his complicity in the council's alleged violations. The Court held that as legal counsel for the city, the city's attorney had the authority to make recommendations and give advice but did not have any power to decide issues or otherwise call meetings. Therefore, the Court concluded that despite the city's attorney's involvement in the meeting, he could not be held liable for violation of the Open Meeting Law.

30. Closed Session Related to Real or Personal Property. In Vik v. Wild Rice Watershed District, Co. No. A09-1841, 2010 WL 3119424 (Minn. Ct. App. 2010) (unpublished), the board closed its meeting to discuss possible real estate transactions. During the closed session, the board discussed property acquisitions but did not discuss specific terms of purchase agreements. A claim was brought against the Watershed District alleging that the meeting was improperly closed in violation of Minn. Stat. § 13D.05 as there was no discussion of prices or the actual terms of the acquisitions contemplated by the board which warranted a closed session. The court held that the statute provides that meetings may be closed to "develop or consider offers or counteroffers for the purchase or sale of real or personal property." The statute does not require the board to discuss specific terms of advanced negotiations. Thus, the court determined that the Watershed District permissibly closed the meeting.

VI. PERMISSIBLE EXCEPTIONS TO THE OPEN MEETING LAW: These are limited in number as follows:

1. County welfare board meetings which pertain to grants or services to specific individuals. Op. Atty. Gen. 125-2-64, 12/4/72.
2. Teacher termination if a private hearing is requested by the teacher. M.S. 122A.40 and 122A.41.
3. The nonrenewal hearing of a licensed or nonlicensed head varsity coach if requested by the coach or if the school board discusses private data. M.S. 122A.33, Subd. 3.
4. Student expulsion or exclusion hearings shall be closed unless requested to be open by the student. M.S. 121A.47, Subd. 5.
5. All negotiations, mediation sessions and hearings between public employers and public employees or their representatives must be public meetings except when otherwise provided by the Commissioner of the Bureau of Mediation Services. M.S. 179A.14, Subd. 3. See also Minn. Rule 5510.2810, Subp. 5 and 5a.
6. Meetings of the Commissioner of Corrections are exempt. M.S. 13D.01, Subd. 2(1).
7. The quasi judicial functions involving disciplinary proceedings of a state agency, board or commission. M.S. 13D.01, Subd. 2(2).
8. Strategy meetings with attorneys involving threatened or pending litigation. However, the mere threat that litigation might be a consequence of deciding a particular matter one way or another does not, by itself, justify closing a meeting. Court decisions cited above; M.S. 13D.05, Subd. 3(b).
9. Meetings to consider strategy for labor negotiations, including negotiation strategies or developments or discussion and review of labor negotiation proposals. M.S. 13D.03.
10. A gathering of less than a quorum of the members of a governing body, or of less than a quorum of a committee, subcommittee, board, department, or commission. For purposes of this exception, a gathering of members of a governing body is not a "committee, subcommittee, board, department or commission" unless the group is capable of exercising decision-making powers of the governing body. CAVEAT: Serial meetings are to be avoided.

11. The statute does not apply to letters, the distribution of written questions and answers or to telephone conversations between fewer than a quorum; however, certain letters and printed material relating to agenda items must be available to the public while the board considers the agenda items.

12. Meetings and conversations between the superintendent and a board member.

13. Portions of a meeting must be closed if expressly required by another law. M.S. 13D.05, Subd. 2 (a).

14. Portions of a meeting must be closed if the following types of information are discussed: (a) information that would identify the identity of alleged victims or reporters of criminal sexual conduct, domestic abuse or maltreatment of children or vulnerable adults; (b) active investigative data or internal affairs data; (c) educational data, health data, medical data, welfare data or mental health data; or (d) an individual's medical records that are not public data under M. S. Chapter 13, M. S. 13D.05, Subd. 2 (a).

15. A public body must close a meeting for preliminary consideration of allegations or charges against an employee or individual subject to its authority. M.S. 13D.05, Subd. 2(b).

16. A public body may close a meeting to evaluate the performance of an employee or individual who is subject to its authority. M.S. 13D.05, Subd. 3.

17. A meeting may be closed if the closure is expressly permitted by statute. M.S. 13D.05, Subd. 3(b).

18. Certain court-ordered settlement conferences.

19. A meeting may be closed to determine the asking price for real or personal property to be sold by the government entity, to review confidential or nonpublic appraisal data or to develop or consider offers or counteroffers for the purchase or sale of real or personal property. M.S. 13D.05, Subd. 3(c).

20. A meeting may be closed to receive security briefings and reports, to discuss emergency response procedures and to discuss security deficiencies in or recommendations regarding public services, infrastructure and facilities, if disclosure of the information would pose a danger to public safety or compromise security procedures or responses. M.S. 13D.05, Subd. 3(d).

VII. PENALTIES:

1. The law provides personal liability in the form of a civil penalty not to exceed \$300 per occurrence for a person who intentionally violates the law. (M.S. 13D.06) The public body may not pay the civil penalty. Any person may bring a legal action in a court where the public body's administrative offices are located. Note the penalty is a civil penalty rather than a penalty paid to the person bringing the suit. See Grossman v. School Board of I.S.D. No. 640, 389 N.W.2d 532 (Minn. App. 1986). However, school board members are not liable for fines, attorney fees, or other remedies imposed by Chapter 13D, if they are acting in conformity with an advisory opinion issued by the Commissioner of Administration.

2. If a member has been found to have intentionally violated the Open Meeting Law in three or more separate legal actions, the member forfeits his or her right to serve on the public body. However, a member may be removed from office only if the member is guilty of malfeasance or nonfeasance. See Claude v. Collins, 518 N.W.2d 836 (Minn. 1994).

3. In addition to the penalties provided in 13D.06, the court may make a party take certain action or refrain from certain action. The Minnesota Court of Appeals has held that the appropriate mechanism to enforce compliance with the Open Meeting law was not a declaratory judgment action but, rather, a lawsuit pursuant to statutory enforcement provisions. See Rupp v. Mayasich, 561 N.W.2d 555 (Minn. App. 1997).

4. M.S. 645.241 makes it a crime, a misdemeanor, to perform any act prohibited by statute. The law provides for no criminal penalty, but requires a civil penalty of \$300. Whether this provision provides for the criminal penalty stated in M.S. 645.241 will depend on future decisions of the courts.

5. In addition to other remedies, the court may award reasonable costs, disbursements, and reasonable attorney fees up to \$13,000 to any party in a legal action under the Open Meeting Law. The court may award costs and attorney fees to a defendant only if the court finds that the action had no legal basis and was without merit.

6. No monetary penalties or attorney fees may be awarded against a member of a public body unless the court finds that the member acted with the intent to violate the Open Meeting Law.

7. The court shall award reasonable attorney fees to a prevailing plaintiff where the public body did not act in conformity with the opinion of the Department of Administration.

8. A school board may pay any costs, disbursements, or attorney fees incurred by or awarded against any of its members in a legal action under the Open Meeting Law.

9. Neither good faith nor the fact that no one was harmed by the illegal action taken is a defense to the court awarding civil penalties for violation of the act. However, good faith on the part of a board member may be considered by a court in determining the amount of a civil penalty or in determining if the member failed to perform a required duty that would allow removal from office.

VIII. CONCLUSION: Minnesota has a strong Open Meeting Law with penalties. Public officials should be aware of what it says. Any person, including the news media, has standing to bring appropriate legal action. In order to avoid complications, school officials are urged to be knowledgeable about the Open Meeting Law.

If in doubt about the law, take actions that are based on “openness”. The MSBA office and its legal counsel stand ready to assist on a case-by-case basis as new situations develop.

(Bolded Items - 2015 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

SCHOOL DISTRICT REFERENDUM REVENUE AUTHORIZATION PROCEDURE
AND CAPITAL PROJECT LEVY PROCEDURE
Revised June 2015

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SCHOOL DISTRICT REFERENDUM REVENUE AUTHORITY

A. Introduction. In 1971 the Minnesota Legislature in a special session imposed comprehensive school district levy limitations as a part of a substantial school finance reform bill. One intention of the levy limitations was to strictly control the amount of revenue that could be raised solely in the school board's discretion. The 1971 legislation did provide for the levy limitations to be exceeded if approved by the electorate at a referendum. The 2001 Legislature excluded agricultural and seasonal recreational residential property from the tax base upon which the levy is spread, increased the level of equalization, and rolled up to \$415 of a district's existing authority into the general education formula.

This particular referendum procedure may only be used to increase the general education revenue of the district. It may not be used to increase any other levy allowed by law.

The Legislature has provided for equalization of a portion of referendum levy revenues.

B. Citation. The referendum statute, as recodified, may be cited as Minnesota Statutes, Section 126C.17, and provides as follows:

126C.17 REFERENDUM REVENUE.

Subdivision 1. Referendum allowance. (a) A district's initial referendum allowance equals the result of the following calculations:

(1) multiply the referendum allowance the district would have received for fiscal year 2015 under Minnesota Statutes 2012, section 126C.17, subdivision 1, based on elections held before July 1, 2013, by the resident marginal cost pupil units the district would have counted for fiscal year 2015 under Minnesota Statutes 2012, section 126C.05;

(2) add to the result of clause (1) the adjustment the district would have received under Minnesota Statutes 2012, section 127A.47, subdivision 7, paragraphs (a), (b), and (c), based on elections held before July 1, 2013;

(3) divide the result of clause (2) by the district's adjusted pupil units for fiscal year 2015;

(4) add to the result of clause (3) any additional referendum allowance per adjusted pupil unit authorized by elections held between July 1, 2013, and December 31, 2013;

(5) add to the result in clause (4) any additional referendum allowance resulting from inflation adjustments approved by the voters prior to January 1, 2014;

(6) subtract from the result of clause (5), the sum of a district's actual local optional levy and local optional aid under Section 126C.10, subdivision 2e, divided by the pupil units of the district for that school year; and

(7) if the result of clause (6) is less than zero, set the allowance to zero.

(b) A district's referendum allowance equals the sum of the district's initial referendum allowance, **plus any new referendum allowance authorized between July 1, 2013, and December 31, 2013, under subdivision 9a**, plus any additional referendum allowance per adjusted pupil unit authorized after December 31, 2013, minus any allowances expiring in fiscal year 2016 or later, provided that the allowance may not be less than zero. For a district with more than one referendum allowance for fiscal year 2015 under Minnesota Statutes 2012, section 126C.17, the allowance calculated under paragraph (a), clause (3), must be divided into components such that the same percentage of the district's allowance expires at the same time as the old allowances would have expired under Minnesota Statutes 2012, section 126C.17. For a district with more than one allowance for fiscal year 2015 that expires in the same year, the reduction under paragraph (a), clause (6), to offset local optional revenue shall be made first from any allowances that do not have an inflation adjustment approved by the voters.

Subd. 2. Referendum allowance limit. (a) Notwithstanding subdivision 1, for fiscal year 2015 and later, a district's referendum allowance must not exceed the annual inflationary increase as calculated under paragraph (b) times the greatest of:

(1) \$1,845;

(2) the sum of the referendum revenue the district would have received for fiscal year 2015 under Minnesota Statutes 2012, section 126C.17, subdivision 4, based on elections held before July 1, 2013, and the adjustment the district would have received under Minnesota Statutes 2012, section 127A.47, subdivision 7, paragraphs (a), (b), and (c), based on elections held before July 1, 2013, divided by the district's adjusted pupil units for fiscal year 2015; or

(3) the product of the referendum allowance limit the district would have received for fiscal year 2015 under Minnesota Statutes 2012, section 126C.17, subdivision 2, and the resident marginal cost pupil units the district would have received for fiscal year 2015 under Minnesota Statutes 2012, section 126C.05, subdivision 6, plus the adjustment the district would have received under Minnesota Statutes 2012, section 127A.47, subdivision, paragraphs (a), (b), and (c), based on elections held before July 1, 2013, divided by the district's adjusted pupil units for fiscal year 2015; minus \$424; or

(4) for a newly reorganized district created after July 1, 2013, the referendum revenue authority for each reorganizing district in the year preceding reorganization divided by its adjusted pupil units for the year preceding reorganization.

(b) For purposes of this subdivision, for fiscal year 2016 and later, "inflationary increase" means one plus the percentage change in the Consumer Price Index for urban consumers, as prepared by the United States Bureau of Labor Standards, for the current fiscal year to fiscal year 2015. For fiscal year 2016 and later, for purposes of paragraph (a), clause (3), the inflationary increase equals one-fourth of the percentage increase in the formula allowance for that year compared with the formula allowance for fiscal year 2015.

Subd. 3. Sparsity exception. A district that qualifies for sparsity revenue under section 126C.10 is not subject to a referendum allowance limit.

Subd. 4. Total referendum revenue. The total referendum revenue for each district equals the district's referendum allowance times the adjusted pupil units for the school year.

Subd. 5. Referendum equalization revenue. (a) A district's referendum equalization revenue equals the sum of the first tier referendum equalization revenue and the second tier referendum equalization revenue, and the third tier referendum equalization revenue.

(b) A district's first tier referendum equalization revenue equals the district's first tier referendum equalization allowance times the district's adjusted pupil units for that year.

(c) A district's first tier referendum allowance equals the lesser of the district's referendum allowance under subdivision 1 or \$300.

(d) A district's second tier referendum equalization revenue equals the district's second tier referendum equalization allowance times the district's adjusted pupil units for that year.

(e) A district's second tier referendum equalization allowance equals the lesser of the district's referendum allowance under subdivision 1 or \$760, minus the district's first tier referendum equalization allowance.

(f) A district's third tier referendum equalization revenue equals the district's third tier referendum equalization allowance times the district's adjusted pupil units for that year.

(g) A district's third tier referendum equalization allowance equals the lesser of the district's referendum allowance under subdivision 1 or 25 percent of the formula allowance, minus the sum of the district's first tier referendum equalization allowance and second tier referendum equalization allowance.

(h) Notwithstanding paragraph (g), the third tier referendum allowance for a district qualifying for secondary sparsity revenue under section 126C.10, subdivision 7, or elementary sparsity revenue under section 126C.10, subdivision 8, equals the district's referendum allowance under subdivision 1 minus the sum of the district's first tier referendum equalization allowance and second tier referendum equalization allowance.

Subd. 6. Referendum equalization levy. (a) A district's referendum equalization levy equals the sum of the first tier referendum equalization levy, the second tier referendum equalization levy, and the third tier referendum equalization levy.

(b) A district's first tier referendum equalization levy equals the district's first tier referendum equalization revenue times the lesser of one or the ratio of the district's referendum market value per resident pupil unit to \$880,000.

(c) A district's second tier referendum equalization levy equals the district's second tier referendum equalization revenue times the lesser of one or the ratio of the district's referendum market value per resident pupil unit to \$510,000.

(d) A district's third tier referendum equalization levy equals the district's third tier referendum equalization revenue times the lesser of one or the ratio of the district's referendum market value per resident pupil unit to \$290,000.

Subd. 7. Referendum equalization aid. (a) A district's referendum equalization aid equals the difference between its referendum equalization revenue and levy.

(b) If a district's actual levy for first, second, or third tier referendum equalization revenue is less than its maximum levy limit for that tier, aid shall be proportionately reduced.

(c) Notwithstanding paragraph (a), the referendum equalization aid for a district, where the referendum equalization aid under paragraph (a) exceeds 90 percent of the referendum revenue, must not exceed 25 percent of the formula allowance times the district's adjusted pupil units. A district's referendum levy is increased by the amount of any reduction in referendum aid under this paragraph.

Subd. 7a. Referendum tax base replacement aid.] For each school district that had a referendum allowance for fiscal year 2002 exceeding \$415, for each separately authorized referendum levy, the

Commissioner of Revenue, in consultation with the Commissioner of Education, shall certify the amount of the referendum levy in taxes payable year 2001 attributable to the portion of the referendum allowance exceeding \$415 levied against property classified as class 2, noncommercial 4c(1), or 4c(4), under section 273.13, excluding the portion of the tax paid by the portion of class 2a property consisting of the house, garage, and surrounding one acre of land. The resulting amount must be used to reduce the district's referendum levy amount otherwise determined, and must be paid to the district each year that the referendum authority remains in effect, is renewed or a new referendum authority is approved. The aid payable under this subdivision must be subtracted from the district's referendum equalization aid under subdivision 7. The referendum equalization aid after the subtraction must not be less than zero.

Subd. 7b. Referendum aid guarantee. (a) Notwithstanding subdivision 7, the sum of a district's referendum equalization aid and location equity aid under section 126C.10, subdivision 2e, for fiscal year 2015 must not be less than the sum of the referendum equalization aid the district would have received for fiscal year 2015 under Minnesota Statutes 2012, section 126C.17, subdivision 7, and the adjustment the district would have received under Minnesota Statutes 2012, section 127A.47, subdivision 7, paragraphs (a), (b), and (c).

(b) Notwithstanding subdivision 7, the sum of referendum equalization aid and location equity aid under section 126C.10, subdivision 2e, for fiscal year 2016 and later, for a district qualifying for additional aid under paragraph (a) for fiscal year 2015, must not be less than the product of (1) the district's referendum equalization aid for fiscal year 2015, times (2) the lesser of one or the ratio of the district's referendum revenue for that school year to the district's referendum revenue for fiscal year 2015, times (3) the lesser of one or the ratio of the district's referendum market value used for fiscal year 2015 referendum equalization calculations to the district's referendum market value used for that year's referendum equalization calculations.

Subd. 8. Unequalized referendum levy. Each year, a district may levy an amount equal to the difference between its total referendum revenue according to subdivision 4 and its referendum equalization revenue according to subdivision 5.

Subd. 9. Referendum revenue. (a) The revenue authorized by section 126C.10, subdivision 1, may be increased in the amount approved by the voters of the district at a referendum called for the purpose. The referendum may be called by the board. The referendum must be conducted one or two calendar years before the increased levy authority, if approved, first becomes payable. Only one election to approve an increase may be held in a calendar year. Unless the referendum is conducted by mail under subdivision 11, paragraph (a), the referendum must be held on the first Tuesday after the first Monday in November. The ballot must state the maximum amount of the increased revenue per adjusted pupil unit. The ballot may state a schedule, determined by the board, of increased revenue per adjusted pupil unit that differs from year to year over the number of years for which the increased revenue is authorized or may state that the amount shall increase annually by the rate of inflation. For this purpose, the rate of inflation shall be the annual inflationary increase calculated under subdivision 2, paragraph (b). The ballot may state that existing referendum levy authority is expiring. In this case, the ballot may also compare the proposed levy authority to the existing expiring levy authority, and express the proposed increase as the amount, if any, over the expiring referendum levy authority. The ballot must designate a specific number of years, not to exceed ten, for which the referendum authorization applies. The ballot, including a ballot on the question to revoke or reduce the increased revenue amount under paragraph (c), must abbreviate the term "per adjusted pupil unit" as "per pupil." The notice required under section 275.60 may be modified to read, in cases of renewing existing levies at the same amount per pupil as in the previous year:

"BY VOTING 'YES' ON THIS BALLOT QUESTION, YOU ARE VOTING TO EXTEND AN EXISTING PROPERTY TAX REFERENDUM THAT IS SCHEDULED TO EXPIRE."

The ballot may contain a textual portion with the information required in this subdivision and a question stating substantially the following:

"Shall the increase in the revenue proposed by (petition to) the board of _____, School District No. _____, be approved?"

If approved, an amount equal to the approved revenue per adjusted pupil unit times the adjusted pupil units for the school year beginning in the year after the levy is certified shall be authorized for certification for the number of years approved, if applicable, or until revoked or reduced by the voters of the district at a subsequent referendum.

(b) The board must prepare and deliver by first class mail at least 15 days but no more than 30 days before to the day of the referendum to each taxpayer a notice of the referendum and the proposed revenue increase. The board need not mail more than one notice to any taxpayer. For the purpose of giving mailed notice under this subdivision, owners must be those shown to be owners on the records of the county auditor or, in any county where tax statements are mailed by the county treasurer, on the records of the county treasurer. Every property owner whose name does not appear on the records of the county auditor or the county treasurer is deemed to have waived this mailed notice unless the owner has requested in writing that the county auditor or county treasurer, as the case may be, include the name on the records for this purpose. The notice must project the anticipated amount of tax increase in annual dollars for typical residential homesteads, agricultural homesteads, apartments, and commercial-industrial property within the school district.

The notice for a referendum may state that an existing referendum levy is expiring and project the anticipated amount of increase over the existing referendum levy in the first year, if any, in annual dollars for typical residential homesteads, agricultural homesteads, apartments, and commercial-industrial property within the district.

The notice must include the following statement: "Passage of this referendum will result in an increase in your property taxes." However, in cases of renewing existing levies, the notice may include the following statement: "Passage of this referendum extends an existing operating referendum at the same amount per pupil as in the prior year."

(c) A referendum on the question of revoking or reducing the increased revenue amount authorized pursuant to paragraph (a) may be called by the board. A referendum to revoke or reduce the revenue amount must state the amount per adjusted pupil unit by which the authority is to be reduced. Revenue authority approved by the voters of the district pursuant to paragraph (a) must be available to the school district at least once before it is subject to a referendum on its revocation or reduction for subsequent years. Only one such revocation or reduction referendum may be held to revoke or reduce referendum revenue for any specific year and for years thereafter.

(d) The approval of fifty percent plus one of those voting on the question is required to pass a referendum authorized by this subdivision.

(e) At least 15 days before the day of the referendum, the district must submit a copy of the notice required under paragraph (b) to the Commissioner and to the county auditor of each county in which the district is located. Within 15 days after the results of the referendum have been certified by the board, or in the case of a recount, the certification of the results of the recount by the canvassing board, the district must notify the Commissioner of the results of the referendum.

Subd. 9a. Board-approved referendum allowance. Notwithstanding subdivision a school district may convert up to \$300 per adjusted pupil unit of referendum authority from voter approved to board approved by

a board vote. A district with less than \$300 per adjusted pupil unit of referendum authority after the local optional revenue subtraction may authorize new referendum authority up to the difference between \$300 per adjusted pupil unit and the district's referendum authority. The board may authorize this levy for up to five years and may subsequently reauthorize that authority in increments of up to five years.

Subd. 10. School referendum levy; market value. A school referendum levy must be levied against the referendum market value of all taxable property as defined in section 126C.01, subdivision 3. Any referendum levy amount subject to the requirements of this subdivision must be certified separately to the county auditor under section 275.07.

Subd. 11. Referendum date. (a) Except for a referendum held under paragraph (b), any referendum under this section held on a day other than the first Tuesday after the first Monday in November must be conducted by mail in accordance with section 204B.46. Notwithstanding subdivision 9, paragraph (b), to the contrary, in the case of a referendum conducted by mail under this paragraph, the notice required by subdivision 9, paragraph (b), must be prepared and delivered by first-class mail at least 20 days before the referendum.

(b) In addition to the referenda allowed in subdivision 9, clause (a), the Commissioner may grant authority to a district to hold a referendum on a different day if the district is in statutory operating debt and has an approved plan or has received an extension from the department to file a plan to eliminate the statutory operating debt.

(c) The Commissioner must approve, deny, or modify each district's request for a referendum levy on a different day within 60 days of receiving the request from a district.

Subd. 12. Repealed.

Subd. 13. Referendum conversion allowance. A school district that received supplemental or transition revenue in fiscal year 2002 may convert its supplemental revenue conversion allowance and transition revenue conversion allowance to additional referendum allowance under subdivision 1 for fiscal year 2003 and thereafter. A majority of the school board must approve the conversion at a public meeting before November 1, 2001. For a district with other referendum authority, the referendum conversion allowance approved by the board continues until the portion of the district's other referendum authority with the earliest expiration date after June 30, 2006, expires. For a district with no other referendum authority, the referendum conversion allowance approved by the board continues until June 30, 2012.

C. Elements of Referendum Statute. The referendum statute contains the following elements:

1. The referendum, if approved, affects general education revenue, not any special purpose levy.
2. The revenue increase may be "in the amount approved." The voters grant an authorization to the board to receive the approved amount of revenue. The board determines on an annual basis whether to certify a levy and to access the referendum revenue.
3. The referendum "may" be called by the school board. It may not be initiated by petition.
4. The general rule is that the date of the referendum is the first Tuesday after the first Monday in November. However, see Paragraph 32 below relating to mail ballot elections and approved elections by certain districts in statutory operating debt.

In 1999, actual pupil unit or resident pupil unit was changed to resident marginal cost pupil unit. In 2013, the term "resident marginal cost pupil unit" was changed to "adjusted pupil unit."

The statute requires inclusion on the ballot of the amount of the increased revenue per adjusted pupil unit (which is abbreviated as an amount per pupil). The authority granted by the voters is authority to receive revenue equal to the approved revenue per adjusted pupil unit times the adjusted pupil units for the school year beginning in the year after the levy is certified. Thus, it is the amount per adjusted pupil unit that determines the authorization, and the authorization will increase or decrease depending on the adjusted pupil unit count.

The ballot may state a schedule, determined by the board, of increased revenue per adjusted pupil unit that differs from year to year over the number of years for which the increased revenue is authorized.

The ballot may state that the proposed amount shall increase annually by the rate of inflation (see Attachment C for form of ballot that increased proposed amount by the rate of inflation.)

The ballot may state that existing referendum levy authority is expiring. In this case, the ballot may also compare the proposed levy authority in the first year it will be levied to the existing expiring levy authority, and express the proposed increase as the amount, if any, over the expiring referendum levy authority.

Minnesota Statutes, Section 275.60 requires that the following notice must also be included on the ballot in bold-face type:

"BY VOTING 'YES' ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A PROPERTY TAX INCREASE."

This notice requirement applies if the election is to approve either a property tax levy or a tax rate increase. However, if the election is on a continuation of an existing authority, the notice may state:

"BY VOTING 'YES' ON THIS BALLOT QUESTION, YOU ARE VOTING TO EXTEND AN EXISTING PROPERTY TAX REFERENDUM THAT IS SCHEDULED TO EXPIRE."

5. A referendum approved in 1994 or thereafter may not exceed ten years in duration.
6. The authorization may be revoked or reduced by the electorate only, not by the school board. However, the decision as to whether to certify the levy and access the revenue in any year is made by the board.
7. The school board may call for a referendum on revocation or reduction. It may not be initiated by petition.
8. The amount approved by the voters must be available to the school district at least once before it is subject to a referendum on its revocation or reduction for subsequent years. Only one revocation or reduction election may be held to revoke or reduce referendum revenue for any specific year and for years thereafter.
9. The approval of 50 percent plus one of those voting on the question is required to pass a referendum.
10. The approval to receive increased revenue is an authorization. The board is not required to levy to access revenue to the limits authorized. It may also in its discretion levy a lower amount in a succeeding year, after having levied the maximum in an earlier year.
11. The board must mail by first class mail to each taxpayer in the district a notice of the referendum and the proposed revenue increase. No more than one notice must be mailed to any taxpayer. The notice must be mailed at least 15 but no more than 30 days prior to the day of the election. The notice must

contain the required statement specified in the statute and must project the anticipated amount of tax increase in annual dollars for typical residential homesteads, agricultural homesteads, apartments, and commercial-industrial property within the school district. If the election is for a continuation of an existing authority, the notice may state that an existing referendum levy is expiring and project the anticipated amount of increase over the existing referendum levy in the first year, if any, in annual dollars and annual percentage for typical residential homesteads, agricultural homesteads, apartments, and commercial-industrial property within the school district. If the referendum is to renew an existing authority, the notice may include a required statement that passage of this referendum extends an existing operating referendum at the same amount per pupil as in the previous year. See Section D below for instructions on preparing the notice and ATTACHMENT B1 for a form of notice and ATTACHMENT B2 for a form of Certificate of Mailing for the district's records.

12. At least 74 days prior to the election, the school district clerk shall provide a written notice to the Commissioner of Education. The notice must include the date of the election and the title and language for each ballot question to be voted on at the election (M.S. 205A.07, Subd. 3a).
13. At least 15 days prior to the day of the referendum, the district must submit to the Commissioner of Education and to the county auditor of each county in which the school district is located a copy of the notice that is to be mailed to the taxpayers.
14. Within 15 days after the results of the election have been certified by the school board, or in the case of a recount, the special canvassing board, the district must notify the Commissioner of the results. The certified vote totals for each ballot question must be certified to the Commissioner.
15. Certain taconite districts where voters have approved referendum revenue authorizations are eligible to receive additional revenue from the taconite production tax. See Minn. Stat. 298.28, Subd. 1(c).
16. A recount of a referendum revenue election requires the use of a special canvassing board. See Section 15.9.2 of the Public School District Election Manual in Chapter 14 of this handbook.
17. Since July 1, 1994 (fiscal year 1995), there has been equalization of new and existing referendum revenue. From fiscal year 2003 to fiscal year 2014, there were two tiers of equalization revenue. Effective for fiscal year 2015 and thereafter, there are three tiers of equalization revenue.
18. A district's referendum revenue allowance is defined in Minn. Stat. 126C.17, Subd. 1, cited above.
19. There is a cap on a district's referendum allowance.
20. For fiscal year 2015 and later, a district's referendum allowance must not exceed the annual inflation increase as calculated below, times the greatest of:
 - (1) \$1845;
 - (2) the sum of the referendum revenue the district would have received for fiscal year 2015 under M.S. 126C.17, Subd. 4, based on elections held before July 1, 2013, and the adjustment the district would have received under M.S. 127A.47, Subd. 7, paragraphs (a), (b), and (c) based on elections held before July 1, 2013, divided by the district's adjusted pupil units for fiscal year 2015; or
 - (3) the product of the referendum allowance the district would have received under M.S. 126C.17, Subd. 2, and the resident marginal cost pupil units the district would have received for fiscal year 2015 under M.S. 126C.05, Subd. 6, plus the district would have received under M.S. 127A.47, Subd. 7, paragraphs (a), (b), and (c) based on elections held before July 1, 2013, divided by the district's adjusted pupil units for fiscal year 2015; minus the \$424.

For purposes of this referendum cap calculation, for fiscal year 2016 and later, "inflationary

increase” means one plus the percentage change in the Consumer Price Index for urban consumers, as prepared by the United States Bureau of Labor Standards, for the current fiscal year to fiscal year 2015. For fiscal year 2016 and later, the inflationary increase equals one-fourth of the percentage increase in the formula allowance for that year compared with the formula allowance for fiscal year 2015.

This limit does not apply to a district that qualifies for sparsity revenue.

21. There are three tiers of referendum equalization.

(a) A district's first tier referendum equalization allowance equals the lesser of the district's referendum allowance under subdivision 1 or \$300. The district's first tier referendum equalization revenue equals that first tier referendum equalization allowance times the district's adjusted pupil units for that year.

(b) A district's second tier referendum equalization allowance equals the lesser of the district's referendum allowance under subdivision 1 or \$760, minus the district's first tier referendum equalization allowance. The district's second tier referendum equalization revenue equals the district's second tier referendum equalization allowance times the district's adjusted pupil units for that year.

(c) A district's third tier referendum equalization allowance equals the lesser of the district's referendum allowance under subdivision 1 or 25 percent of the formula allowance, minus the sum of the district's first tier referendum equalization allowance and second tier referendum equalization allowance. This third tier referendum allowance varies slightly for sparsity districts.

22. (a) A district's first tier referendum equalization levy equals the district's first tier referendum equalization revenue times the lesser of one or the ratio of the district's referendum market value per resident pupil unit to \$880,000.

(b) A district's second tier referendum equalization levy equals the district's second tier referendum equalization revenue times the lesser of one or the ratio of the district's referendum market value per resident pupil unit to \$510,000.

(c) A district's third tier referendum equalization levy equals the district's third tier equalization revenue times the lesser of one or the ratio of the district's referendum market value per resident pupil unit to \$290.00.

23. A district's referendum equalization aid equals the difference between its referendum equalization revenue and its referendum equalization levy.

If a district levies less for its first, second or third tier than the maximum referendum equalization levy amount for that tier, its referendum equalization aid is proportionately reduced.

24. Each year, a district may levy an amount equal to the difference between its total referendum revenue and its total referendum equalization revenue.

25. The 1995 Legislature provided that a referendum shall be conducted during the one or two calendar years before the increased levy authority, if approved, first becomes payable. The law still provides that only one election to approve an increase may be held in a calendar year except as specified in paragraph 29 below.

26. Referendum levies are levied against referendum market value rather than net tax capacity. The levy is certified separately to the county auditor from all other school district levies that are levied against net tax capacity.
27. The 2001 Legislature amended the definition of referendum market value to exclude agricultural property and seasonal recreational residential properties for taxes payable in 2002 and thereafter. The house, garage and surrounding one acre of an agricultural homestead remains included in referendum market value.
28. The 2001 Legislature established a referendum tax base replacement aid to replace amount of the district's fiscal year 2002 referendum allowance exceeding \$415 that was levied against the excluded agricultural and seasonal recreational residential property. The aid will be paid each year that the referendum authority remains in effect, is renewed or a new referendum authority is approved. The 2013 Legislature established a referendum aid guarantee for fiscal year 2015 and a guarantee for fiscal years 2016 and thereafter.
29. As discussed in paragraph 4 above, the general rule is that the date of the referendum revenue authorization election is the first Tuesday after the first Monday in November. However, there are two exceptions:
 - (a) Pursuant to Minnesota Statutes, Section 126C.17, Subdivision 11(a), a referendum revenue authorization election may be held on a day other than the first Tuesday after the first Monday in November if it is conducted by mail in accordance with Minnesota Statutes, Section 204B.46. If it is conducted by mail, the required notice must be prepared and delivered by first class mail at least 20 days rather than 15 days before the date of the election. The district may still hold only one election in a calendar year and it must be held on a date on which the district would otherwise be authorized to hold an election.
 - (b) Pursuant to Minnesota Statutes, Section 126C.17, Subdivision 11(b), a district may apply to the Commissioner of Education for authority to hold a referendum revenue authorization election on a different day than the first Tuesday after the first Monday in November if the district is in statutory operating debt and has an approved plan or has received an extension from the department to file a plan to eliminate the statutory operating debt. The Commissioner is given authority to grant authority to a district to hold a referendum on a different day and must approve, deny or modify each district's request to hold an election on a different day within 60 days of receiving the request. This authority is in addition to the general authority so that districts may hold more than one election in a calendar year if so approved by the Commissioner.
30. In the case of a consolidation or a dissolution and attachment, Minnesota Statutes, Section 123A.73 specifies procedures for determination of referendum revenue authority in the enlarged or newly created district.
31. The 2013 Legislature adopted a location equity revenue program which was renamed in 2014 as local optional revenue. The local optional revenue for a district equals \$424 times the adjusted pupil units of the district for that school year. The revenue has an aid and an equalized levy portion. A district's local optional levy equals its local optional revenue times the lesser of one or the ratio of its referendum market value per resident pupil unit to \$510,000. The local optional revenue levy must be spread on referendum market value. A district may levy less than the permitted amount. A district's local optional aid equals its local optional revenue less its local optional levy, times the ratio of the actual amount levied to the permitted levy. The district's \$424 of local optional revenue is subtracted from the districts' existing referendum revenue authority and that amount becomes part of the district's ongoing general education revenue. That amount would not have to be renewed by the voters.

33. The 2013 Legislature also provided that a district could convert up to \$300 per adjusted pupil unit of referendum authority from voter approved to board approved by a vote of its school board. If the district had less than \$300 of referendum authority after the local optional revenue subtraction, it could convert the authority it had from voter approved to board approved and could establish an additional board approved authority up to the difference between \$300 per adjusted pupil unit and the district's existing referendum authority. The board could approve this initial levy authority for up to five years and could subsequently reauthorize that authority in increments of up to five years. Voter approval is not required to renew this board approved authority.
34. If a district has no current authority and wishes to approve an authority up to \$300 per adjusted pupil unit, see attachment D hereto. If a district has under \$300 in current authority and wishes to convert that authority to a board approved authority and create a new authority up to \$300 per adjusted pupil unit, see attachment E hereto. If a district has over \$300 in current authority and wishes to convert that authority to a board approved authority, see attachment F hereto. If a district converted its authority in 2013 and wishes to create an additional board approved authority, it may be necessary to rescind its 2013 action and repass one on the resolutions above, see attachment G hereto. We would advise a district to renew these actions with its fiscal consultant or with MSBA staff. These decisions are always more complicated than they seem on their faces.

D. Instructions for Preparation of Mailed Notice. The 1989 Legislature required school boards to prepare and deliver by first class mail to each taxpayer a notice regarding a referendum revenue election. The district is also required to provide a copy of the notice to the Commissioner of Education and to the county auditor of each county in which the school district is located.

A proposed notice is set forth in ATTACHMENT B1. Instructions for preparing a notice are included below. A DISTRICT WOULD BE WELL ADVISED TO REVIEW ITS CALCULATIONS WITH ITS FISCAL CONSULTANT PRIOR TO MAILING.

The statute requires that the notice must project the anticipated amount of tax increase in annual dollars for the typical residential homesteads, agricultural homesteads, apartments and commercial industrial property within the school district. In that the tax is levied against referendum market value, the amounts are the same for each class of property other than certain disabled homestead property.

For disabled homestead property, the first \$59,000 is valued at 45% of its value. Any amount in excess of that amount is valued the same as residential or agricultural homestead property.

For agricultural property (both homestead and non-homestead), the taxes for the proposed referendum will be based on the value of the house, garage and surrounding one acre of land only. There will be no referendum taxes paid on the value of other agricultural land and buildings.

For seasonal recreational residential property (i.e, cabins), there will be no taxes paid for the proposed referendum.

The Minnesota Department of Education has prepared referendum aid and levy worksheets. Questions regarding referendum revenue and referendum aid and levy computations may be directed to Bob Porter, Program Finance Division, Minnesota Department of Education, at 651-582-8851.

E. Ballot Question. A referendum resolution for an election held in conjunction with the state general election, including a recommended form of ballot question, is included here for your convenience as ATTACHMENT A1. A resolution for an election held in the odd year is included as ATTACHMENT A2.

(1) The statute authorizes a ballot to contain a textual portion and a specified question. The material

in the textual portion is limited to the following:

"The ballot must state the maximum amount of the increased revenue per adjusted pupil unit. The ballot may state a schedule, determined by the board, of increased revenue per adjusted pupil unit that differs from year to year over the number of years for which the increased revenue is authorized or may state that the amount shall increase annually by the rate of inflation. For this purpose, the rate of inflation shall be the annual inflationary increase calculated under subdivision 2, paragraph (b). The ballot may state that existing revenue authority is expiring. In this case, the ballot may also compare the proposed levy authority to the existing expiring levy authority, and express the proposed increase as the amount, if any, over the expiring referendum levy authority. The ballot must designate a specific number of years, not to exceed ten, for which the referendum authorization applies." The ballot, including a ballot on the question to revoke or reduce the increased revenue amount under paragraph (c), must abbreviate the term "per adjusted pupil unit" as "per pupil."

(2) The Ballot must also contain the following language in bold-face type:

"BY VOTING 'YES' ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A PROPERTY TAX INCREASE."

However, if the ballot is for a question to renew an existing levy, the notice may state:

"BY VOTING 'YES' ON THIS BALLOT QUESTION, YOU ARE VOTING TO EXTEND AN EXISTING PROPERTY TAX REFERENDUM THAT IS SCHEDULED TO EXPIRE."

F. Conduct of Election. Except for the notice mailing requirement, the conduct of the election is otherwise as provided by Minnesota Statutes for school district special elections. For additional information consult your revised Public School District Election Manual which is included as Chapter 14 of this Handbook. See Attachment A3 for resolution calling election conducted by mail.

Dates of importance for **November 3, 2015** referendum elections are as follows:

August 21, 2015	Last day to adopt resolution calling the referendum election. (74 days before the election).
August 21, 2015	Last day to notify county auditors and the Commissioner of the date of the election and the questions to be voted on. Last day to cancel referendum election. (74 days before the election).
September 18, 2015	First day absentee ballots must be available for November election. (46 days prior to election).
October 5, 2015	First day district may mail required notice (no more than 30 days prior to election).
October 13, 2015	Last day to preregister for November election (at least 21 days prior to date of election).
October 19, 2015	Last day to mail required notice and to provide a copy of required notice to Commissioner of Education and county auditors (at least 15 days prior to date of election).
October 20, 2015	Last day to publish first notice of November election.
October 24, 2015	Last day to post notice of November election (at least 10 days prior to date of election). Because this date falls on a Saturday, districts should post notice by Friday, October 23 . Campaign finance reports are due if more than \$750 spent.
October 27, 2015	Last day to publish second notice of November election.
October 30, 2015	Last day to post sample ballot for November election (at least 4 days prior to date of election).
November 2, 2015	Last day to apply for absentee ballot for November election (day prior to date of election).
November 3, 2015	Election Day.
November, 6-13, 2015	November election canvassing period.
15 days after canvass	Last day to notify Commissioner of results of election.

ELECTION CONDUCTED IN CONJUNCTION WITH
STATE GENERAL ELECTION

ATTACHMENT A1

Extract of Minutes of Meeting of
School Board of Independent School

District No. _____

(Name of District)

State of Minnesota

Pursuant to due call and notice thereof, a _____ meeting of the School Board
of Independent School District No. _____, State of Minnesota, was held in said school district on
_____, 20____, at _____ o'clock ____m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its
adoption:

RESOLUTION RELATING TO INCREASING
THE GENERAL EDUCATION REVENUE OF THE SCHOOL DISTRICT
AND CALLING AN ELECTION THEREON

BE IT RESOLVED by the School Board of Independent School District No. _____, State of Minnesota,
as follows:

1. The Board hereby determines and declares that it is necessary and expedient for the school district to increase its general education revenue by \$ _____ per adjusted pupil unit.** As provided by law, the ballot question must abbreviate the term "per adjusted pupil unit" as "per pupil." The additional revenue will be used to finance school operations and the property tax portion thereof will require an estimated referendum tax rate of approximately _____% of the referendum market value of the school district for taxes payable in _____, the first year it is to be levied. The proposed referendum revenue authorization would be applicable for _____ years unless otherwise revoked or reduced as provided by law. The question on the approval of this referendum revenue authorization shall be School District Question ____ on the school district ballot at the special election held to approve said authorization.

2. The question of increasing the general education revenue of the school district shall be submitted to the qualified electors of the district at a special election, which is hereby called and directed to be held in conjunction with the state general election on Tuesday, the _____ day of November, 20 ____.

** *NOTE: This language may be revised in the case of an election to renew an existing authority.*

3. Pursuant to Minnesota Statutes, Section 205A.11, the precincts and polling places for this special election are those precincts or parts of precincts located within the boundaries of the school district which have been established by the cities or towns located in whole or in part within the school district. The voting hours at those polling places shall be the same as those for the state general election.

4. The clerk is hereby authorized and directed to cause written notice of said special election to be provided to the county auditor of each county in which the school district is located, in whole or in part, and to the Commissioner of Education at least seventy-four (74) days before the date of said election. The notice shall specify the date of said special election and the title and language for each ballot question to be voted on at said special election. Any notice given prior to the date of the adoption of this resolution is ratified and confirmed in all respects.

The clerk is hereby authorized and directed to cause notice of said special election to be posted at the administrative offices of the school district at least ten (10) days before the date of said special election.

The clerk is hereby authorized and directed to cause a sample ballot to be posted at the administrative offices of the school district at least four (4) days before the date of said special election and to cause two (2) sample ballots to be posted in each polling place on election day. The sample ballot shall not be printed on the same color paper as the official ballot.

The clerk is hereby authorized and directed to cause notice of said special election to be published in the official newspaper of the district, for two (2) consecutive weeks with the last publication being at least one (1) week before the date of the election.

The notice of election so posted and published shall state the question to be submitted to the voters as set forth in the form of ballot below, and shall include information concerning each established precinct and polling place.

The clerk is hereby authorized and directed to cause a notice of the election to be mailed by first class mail to each taxpayer in the district at least fifteen (15) but no more than thirty (30) days prior to the date of the special election. The notice shall contain the required projections and the required statement specified in Minnesota Statutes, Section 126C.17, Subdivision 9, paragraph (b). The clerk is also directed to cause a copy of this notice to be submitted to the Commissioner of Education and to the county auditor of each county in which the school district is located in whole or in part at least fifteen (15) days prior to the day of the election.

The clerk is authorized and directed to acquire and distribute such election materials and to take such other actions as may be necessary for the proper conduct of this special election and generally to cooperate with election authorities conducting the state general and other elections on that date. The clerk and members of the administration are authorized and directed to take such actions as may be necessary to coordinate this election with those other elections, including entering into agreements with appropriate municipal and county officials regarding preparation and distribution of ballots, election administration, and cost sharing.

5. The clerk is further authorized and directed to cooperate with the proper election officials to cause ballots to be prepared for use at said election in substantially the following form, with such changes in form and instructions as may be necessary to accommodate the use of an optical scan voting system:

SPECIAL ELECTION BALLOT

INDEPENDENT SCHOOL DISTRICT NO. _____
(NAME OF DISTRICT)

NOVEMBER __, 20__

INSTRUCTIONS TO VOTERS:

To vote, completely fill in the oval(s) next to your choice(s), like this:



To vote for a question, fill in the oval next to the word "Yes" on that question.
To vote against a question, fill in the oval next to the word "No" on that question.

SCHOOL DISTRICT QUESTION _____ *

APPROVAL OF SCHOOL DISTRICT

REFERENDUM REVENUE AUTHORIZATION **

The board of Independent School District No. _____ (Name of District) has proposed to increase its general education revenue by \$ _____ per pupil. The proposed referendum revenue authorization would be applicable for _____ years unless otherwise revoked or reduced as provided by law. **

☐ **Yes** Shall the increase in the revenue proposed by the board of Independent School District No. _____ be approved?

☐ **No**

BY VOTING "YES" ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A
PROPERTY TAX INCREASE. **

* A number must be included if there is more than one ballot question on the ballot.

** *NOTE: This language may be revised in the case of an election to renew an existing authority.*

In precincts using an optical scan voting system, the ballots must be printed in black ink on white colored material, except that marks to be read by the automatic tabulating equipment may be printed on another color ink. The name of the precinct and machine-readable identification must be printed on each ballot. Voting instructions must be printed at the top of the ballot on each side that includes ballot information. The instructions must include an illustration of the proper mark to be used to indicate a vote. Lines for initials of at least two election judges must be printed on one side of the ballot so that the judges' initials are visible when the ballots are enclosed in a secrecy sleeve.

6. If the school district will be contracting to print the ballots for this special election, the clerk is hereby authorized and directed to prepare instructions to the printer for layout of the ballot. Before a contract exceeding \$1,000 is awarded for printing ballots, the printer shall, if requested by the election official, furnish, in accordance with Minnesota Statutes, Section 204D.04, a sufficient bond, letter of credit, or certified check acceptable to the clerk in an amount not less than \$1,000 conditioned on printing the ballots in conformity with the Minnesota election law and the instructions delivered. The clerk shall set the amount of the bond, letter of credit, or certified check in an amount equal to the value of the purchase.

7. The individuals designated as judges for the state general election shall act as election judges for this special election at the various polling places and shall conduct said election in the manner described by law. The election judges shall act as clerks of election, count the ballots cast and submit the results to the school board for canvass in the manner provided for other school district elections. The election must be canvassed between the third and tenth day following the election.

8. The School District clerk shall make all Campaign Financial Reports required to be filed with the school district under Minnesota Statutes, Section 211A.02, and received on or after May 17, 2014, available on the school district's website. The clerk must post the report on the school district's website as soon as possible, but no later than thirty (30) days after the date of the receipt of the report. The school district must make a report available on the school district's website for four years from the date the report was posted to the website. The clerk must also provide the Campaign Finance and Public Disclosure Board with a link to the section of the website where reports are made available.

The motion for the adoption of the foregoing resolution was duly seconded by _____
and upon vote being taken thereon the following voted in favor thereof: _____
and the following voted against the same: _____
whereupon said resolution was declared duly passed and adopted.

STATE OF MINNESOTA)
)SS
COUNTY OF _____)

I, the undersigned, being the duly qualified and acting Clerk of Independent School District No. _____
(_____), Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a meeting of the school board of said school district duly called and held on the date therein indicated, so far as such minutes relate to the calling of a special election of said school district, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND officially as such clerk this _____ day of _____, 20__.

Clerk

ELECTION NOT CONDUCTED IN CONJUNCTION WITH
STATE GENERAL ELECTION

ATTACHMENT A2

Extract of Minutes of Meeting of
School Board of Independent School

District No. _____
(Name of District)
State of Minnesota

Pursuant to due call and notice thereof, a _____ meeting of the School Board of Independent School District No. _____, State of Minnesota, was held in said school district on _____, 20____, at _____ o'clock ____m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its adoption:

RESOLUTION RELATING TO INCREASING
THE GENERAL EDUCATION REVENUE OF THE SCHOOL DISTRICT
AND CALLING AN ELECTION THEREON

BE IT RESOLVED by the School Board of Independent School District No. _____, State of Minnesota, as follows:

1. The Board hereby determines and declares that it is necessary and expedient for the school district to increase its general education revenue by \$_____ per adjusted pupil unit.** As provided by law, the ballot question must abbreviate the term "per adjusted pupil unit" as "per pupil." The additional revenue will be used to finance school operations and the property tax portion thereof will require an estimated referendum tax rate of approximately _____% of the referendum market value of the school district for taxes payable in _____, the first year it is to be levied. The proposed referendum revenue authorization would be applicable for _____ years unless otherwise revoked or reduced as provided by law. The question on the approval of this referendum revenue authorization shall be School District Question ____ on the school district ballot at the special election held to approve said authorization.

2. The question of increasing the general education revenue of the school district shall be submitted to the qualified electors of the district at a special election, which is hereby called and directed to be held on Tuesday, the _____ day of November, 20____, between the hours of _____m. and 8:00 p.m.

*** NOTE: This language may be revised in the case of an election to renew our existing authority.*

3. Pursuant to Minnesota Statutes, Section 205A.11, the school district combined polling places and the precincts served by those polling places, as previously established and designated by school board resolution for school district elections not held on the day of a statewide election, are hereby designated for this special election.

4. The clerk is hereby authorized and directed to cause written notice of said special election to be provided to the county auditor of each county in which the school district is located, in whole or in part, and to the Commissioner of Education at least seventy-four (74) days before the date of said election. The notice shall specify the date of said special election and the title and language of each ballot question to be voted on at said special election. Any notice given prior to the date of the adoption of this resolution is ratified and confirmed in all respects.

The clerk is hereby authorized and directed to cause notice of said special election to be posted at the administrative offices of the school district at least ten (10) days before the date of said special election.

The clerk is hereby authorized and directed to cause a sample ballot to be posted at the administrative offices of the school district at least four (4) days before the date of said special election and to cause two (2) sample ballots to be posted in each polling place or combined polling place on election day. The sample ballot shall not be printed on the same color paper as the official ballot.

The clerk is hereby authorized and directed to cause notice of said special election to be published in the official newspaper of the district, for two (2) consecutive weeks with the last publication being at least one (1) week before the date of the election.

The notice of election so posted and published shall state the question to be submitted to the voters as set forth in the form of ballot below, and shall include information concerning each established precinct and polling place.

The clerk is hereby authorized and directed to cause the rules and instructions for use of the optical scan voting system to be posted in each combined polling place on election day.

The clerk is hereby authorized and directed to cause a notice of the election to be mailed by first class mail to each taxpayer in the district at least fifteen (15) but no more than thirty (30) days prior to the date of the special election. The notice shall contain the required projections and the required statement specified in Minnesota Statutes, Section 126C.17, Subdivision 9, paragraph (b). The clerk is also directed to cause a copy of this notice to be submitted to the Commissioner of Education and to the county auditor of each county in which the school district is located in whole or in part at least fifteen (15) days prior to the day of the election.

The clerk is authorized and directed to acquire and distribute such election materials and to take such other actions as may be necessary for the proper conduct of this special election and generally to cooperate with election authorities conducting other elections on that date.

5. The clerk is further authorized and directed to cooperate with the proper election officials to cause ballots to be prepared for use at said election in substantially the following form, with such changes in form and instructions as may be necessary to accommodate the use of an optical scan voting system:

SPECIAL ELECTION BALLOT

INDEPENDENT SCHOOL DISTRICT NO. _____
(NAME OF DISTRICT)

NOVEMBER __, 20 __

INSTRUCTIONS TO VOTERS:

To vote, completely fill in the oval(s) next to your choice(s), like this: 

To vote for a question, fill in the oval next to the word "Yes" on that question.
To vote against a question, fill in the oval next to the word "No" on that question.

SCHOOL DISTRICT QUESTION _____ *

APPROVAL OF SCHOOL DISTRICT
REFERENDUM REVENUE AUTHORIZATION. **

The board of Independent School District No. _____ (Name of District) has proposed to increase its general education revenue by \$ _____ per pupil. The proposed referendum revenue authorization would be applicable for _____ years unless otherwise revoked or reduced as provided by law. **

- ☐ **Yes** Shall the increase in the revenue proposed by the board of Independent School District No. _____ be approved?
- ☐ **No**

BY VOTING "YES" ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A
PROPERTY TAX INCREASE. **

* A number must be included if there is more than one ballot question on the ballot.

** *NOTE: This language may be revised in the case of an election to renew an existing authority.*

In precincts using an optical scan voting system, the ballots must be printed in black ink on white colored material, except that marks to be read by the automatic tabulating equipment may be printed on another color ink. The name of the precinct and machine-readable identification must be printed on each ballot. Voting instructions must be printed at the top of the ballot on each side that includes ballot information. The instructions must include an illustration of the proper mark to be used to indicate a vote. Lines for initials of at least two election judges must be printed on one side of the ballot so that the judges' initials are visible when the ballots are enclosed in a secrecy sleeve.

6. If the school district will be contracting to print the ballots for this special election, the clerk is hereby authorized and directed to prepare instructions to the printer for layout of the ballot. Before a contract exceeding \$1,000 is awarded for printing ballots, the printer shall, if requested by the election official, furnish, in accordance with Minnesota Statutes, Section 204D.04, a sufficient bond, letter of credit, or certified check acceptable to the clerk in an amount not less than \$1,000 conditioned on printing the ballots in conformity with the Minnesota election law and the instructions delivered. The clerk shall set the amount of the bond, letter of credit, or certified check in an amount equal to the value of the purchase.

7. The clerk is hereby authorized and directed to provide for testing of the optical scan voting system within fourteen (14) days prior to the election date. The clerk shall cause notice of the time and place of the test to be given at least two (2) days in advance of publication once in the official newspaper, by posting a notice, and by notifying the county or legislative district chair of each major political party.

8. The clerk is hereby authorized and directed to cause notice of the location of the counting center or the place where the ballots will be counted to be published in the official newspaper at least once during the week preceding the week of the election and in the newspaper of widest circulation once on the day preceding the election, or once the week preceding the election if the newspaper is a weekly.

9. As required by Minnesota Statutes, Section 203B.121, the Board hereby establishes a ballot board to process, accept and reject absentee ballots at school district elections not held in conjunction with the state primary or state general election or that are conducted by a municipality on behalf of the school district and generally to carry out the duties of a ballot board as provided by Minnesota Statutes, Section 203B.127 and other applicable laws. The ballot board must consist of a sufficient number of election judges trained in the handling of absentee ballots. The ballot board may include deputy county auditors or deputy city clerks who have received training in the processing and counting of absentee ballots. The clerk or the clerk's designee is hereby authorized and directed to appoint the members of the ballot board. The clerk or the clerk's designee shall establish, maintain and update a roster of members appointed to and currently serving on the ballot board and shall report to the Board from time to time as to its status. Each member of the ballot board shall be paid reasonable compensation for services rendered during an election at the same rate as other election judges; provided, however, if a staff member is already being compensated for regular duties, additional compensation shall not be paid for ballot board duties performed during that staff member's duty day.

10. The following individuals, each of whom is qualified to serve as an election judge, are hereby appointed as judges of election, to act as such at the respective polling places or combined polling places listed below:

<u>Polling Place</u>	<u>Election Judges</u>
_____	Head Election Judge - _____
_____	_____
_____	Head Election Judge - _____
_____	_____
_____	Head Election Judge - _____

The election judges shall act as clerks of election, count the ballots cast and submit the results to the school board for canvass in the manner provided for other school district elections. The election must be canvassed between the third and tenth day following the election.

STATE OF MINNESOTA)
)SS
COUNTY OF)

WITNESS MY HAND officially as such clerk this _____ day of _____, 20____.

(D-22)

MAIL BALLOT ELECTION

ATTACHMENT A3

Extract of Minutes of Meeting of
 School Board of Independent School
 District No. _____
 (_____)
 State of Minnesota

Pursuant to due call and notice thereof, a _____ meeting of the School
 Board of Independent School District No. _____ (_____), State of Minnesota, was held
 in said school district on _____, 20 ____, at _____ o'clock __.m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its
 adoption:

RESOLUTION RELATING TO INCREASING
 THE GENERAL EDUCATION REVENUE OF THE SCHOOL DISTRICT
 AND CALLING AN ELECTION THEREON TO BE
 CONDUCTED BY MAIL

BE IT RESOLVED by the School Board of Independent School District No. _____, State of Minnesota,
 as follows:

1. The Board hereby determines and declares that it is necessary and expedient for the school district to increase its general education revenue by \$ _____ per adjusted pupil unit.** As provided by law, the ballot question must abbreviate the term "per adjusted pupil unit" as "per pupil." The additional revenue will be used to finance school operations and the property tax portion thereof will require an estimated referendum tax rate of approximately _____% of the referendum market value of the school district for taxes payable in 20 ____, the first year it is to be levied. The proposed referendum revenue authorization would be applicable for _____ (____) years unless otherwise revoked or reduced as provided by law. The question on the approval of this referendum revenue authorization shall be School District Question ____ on the school district ballot at the special election held to approve said authorization.

2. The question of increasing the general education revenue of the district shall be submitted to the qualified voters of the school district at a special election, which is hereby called and directed to be held on _____, the _____ day of _____, 20 _____. The election shall be conducted on this date pursuant to Minnesota Statutes, Section 126C.17, subdivision 9, paragraph (a), subdivision 11, paragraph (a), and Section 204B.46.

** NOTE: This language may be revised in the case of an election to renew an existing authority.

This election shall be conducted by mail pursuant to Minnesota Statutes, Section 204B.46, with no polling place other than the administrative offices of the district. The polls at that polling place shall be open from _____ o'clock ____ .m. to 8:00 o'clock p.m.

3. The clerk shall notify the County Auditors of each county in which the school district is located, in whole or in part, and the Commissioner of Education of said election at least seventy-four (74) days before the date of the election. The notice shall specify the date of the election and the title and language for each ballot question to be voted on at said special election.

4. The clerk shall give the County Auditors of each county in which the school district is located, in whole or in part, notice of the district's intention to conduct this special election by mail. Said notice shall be given within two (2) weeks after the date of the adoption of this resolution and may be given by providing a copy of this resolution to each auditor.

5. The clerk shall prepare a Notice of Mail Ballot Procedures in compliance with Minnesota Rule 8210.3000, subpart 3. The clerk shall post said Notice at the administrative offices of the school district at least six (6) weeks before the date of the election. The clerk is further authorized and directed to cause said Notice of Mail Ballot Procedures to be published in the official newspaper of the district prior to the date of the election. This notice may be combined with the Notice of Special Election.

6. The clerk is hereby authorized and directed to cause notice of said special election to be posted at the administrative offices of the school district at least ten (10) days before the date of said special election.

The clerk is hereby authorized and directed to cause a sample ballot to be posted at the administrative offices of the school district at least four (4) days before the date of said special election and to cause two (2) sample ballots to be posted in the polling place on election day. The sample ballot shall not be printed on the same color paper as the official ballot.

The clerk is hereby authorized and directed to cause notice of said special election to be published in the official newspaper of the school district, for two (2) consecutive weeks with the last publication being at least one (1) week before the date of the election.

The notice of election so posted and published shall state the question to be submitted to the voters as set forth in the form of ballot below and shall include information concerning the conduct of the election by mail.

The clerk is hereby authorized and directed to cause the rules and instructions for use of the optical scan voting system to be posted in the polling place on election day.

The clerk is hereby authorized and directed to cause a notice of the election to be mailed by first class mail to each taxpayer in the district at least twenty (20) but no more than thirty (30) days prior to the date of the special election as provided in Minnesota Statutes, Section 126C.17, Subdivision 11. The notice shall contain the required projections and the required statement specified in Minnesota Statutes, Section 126C.17, Subdivision 9, paragraph (b). The clerk is also directed to cause a copy of this notice to be submitted to the Commissioner of Education and to the county auditor of each county in which the school district is located in whole or in part at least fifteen (15) days prior to the day of the election. This notice may be combined with the Notice of Special Election.

The clerk is authorized and directed to acquire and distribute such election materials and to take such other actions as may be necessary for the proper conduct of this special election.

7. The clerk is further authorized and directed to cause ballots to be prepared for use at said election in substantially the following form:

SPECIAL ELECTION BALLOT

INDEPENDENT SCHOOL DISTRICT NO. _____
(_____)

_____, 20 ____

INSTRUCTIONS TO VOTERS:

To vote, completely fill in the oval(s) next to your choice(s), like this:



To vote for a question, fill in the oval next to the word "Yes" on that question.
To vote against a question, fill in the oval next to the word "No" on that question.

SCHOOL DISTRICT QUESTION _____ *
APPROVAL OF SCHOOL DISTRICT
REFERENDUM REVENUE AUTHORIZATION

The board of Independent School District No. _____ (_____) has proposed to increase its general education revenue by \$ _____ per pupil. The proposed referendum revenue authorization would be applicable for _____ years unless revoked or reduced as provided by law. **



Yes

Shall the increase in the revenue proposed by the board of Independent School District No. _____ be approved?



No

BY VOTING "YES" ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A
PROPERTY TAX INCREASE. **

* A number must be included if there is more than one ballot question on the ballot.

** *NOTE: This language may be revised in the case of an election to renew an existing authority.*

Optical scan ballots must be printed in black ink on white material, except that marks to be read by the automatic tabulating equipment may be printed in another color ink. The name of the precinct and machine-readable identification must be printed on each ballot. Voting instructions must be printed at the top of the ballot on each side that includes ballot information. The instructions must include an illustration of the proper mark to be used to indicate a vote. Lines for initials of at least two election judges must be printed on one side of the ballot so that the judges' initials are visible when the ballots are enclosed in a secrecy sleeve.

8. If the school district will be contracting to print the ballots for this special election, the clerk is hereby authorized and directed to prepare instructions to the printer for layout of the ballot. Before a contract exceeding \$1,000 is awarded for printing ballots, the printer shall, if requested by the election official, furnish, in accordance with Minnesota Statutes, Section 204D.04, a sufficient bond, letter of credit, or

certified check acceptable to the clerk in an amount not less than \$1,000 conditioned on printing the ballots in conformity with the Minnesota election law and the instructions delivered. The clerk shall set the amount of the bond, letter of credit, or certified check in an amount equal to the value of the purchase.

9. The clerk is hereby authorized and directed to provide for testing of the optical scan voting system within fourteen (14) days prior to the election date. The clerk shall cause notice of the time and place of the test to be given at least two (2) days in advance of publication once in the official newspaper, by posting a notice, and by notifying the county or legislative district chair of each major political party.

10. The clerk is hereby authorized and directed to cause notice of the location of the counting center or the place where the ballots will be counted to be published in the official newspaper at least once during the week preceding the week of the election and in the newspaper of widest circulation once on the day preceding the election, or once the week preceding the election if the newspaper is a weekly.

11. As required by Minnesota Statutes, Section 203B.121, the Board hereby establishes a ballot board to process, accept and reject mail and absentee ballots at school district elections not held in conjunction with the state primary or state general election or that are conducted by a municipality on behalf of the school district and generally to carry out the duties of a ballot board as provided by Minnesota Statutes, Section 203B.127 and other applicable laws. The ballot board must consist of a sufficient number of election judges trained in the handling of absentee and mail ballots. The judges shall comply with the special procedures of Minnesota Rules, Part 8210.3000. The ballot board may include deputy county auditors, deputy municipal clerks, or deputy school district clerks who have received training in the processing and counting of mail ballots, and who need not be affiliated with a major political party. The clerk or the clerk's designee is hereby authorized and directed to appoint the members of the ballot board. The clerk or the clerk's designee shall establish, maintain and update a roster of members appointed to and currently serving on the ballot board and shall report to the Board from time to time as to its status. Each member of the ballot board shall be paid reasonable compensation for services rendered during an election at the same rate as other election judges; provided, however, if a staff member is already being compensated for regular duties, additional compensation shall not be paid for ballot board duties performed during that staff member's duty day.

12. The clerk is hereby authorized and directed to begin assembling names of trained election judges to serve at the polling place during the _____, 20 ____ special election. The election judges shall act as clerks of election, count the ballots cast and submit the results to the school board for canvass in the manner provided for other school district elections. The judges shall also comply with the special procedures of Minnesota Rules, Part 8210.3000.

13. No earlier than forty-six (46) days or later than fourteen (14) days prior to the date of the special election, the clerk shall mail ballots by nonforwardable mail to all registered voters in the school district. No later than fourteen (14) days before the election, the clerk shall make a subsequent mailing of ballots to those voters who register to vote after the initial mailing but before the 20th day before the election. Ballots for eligible voters who reside in health care facilities must be delivered as provided in Minnesota Statutes, Section 203B.11. Ballots must be sent by nonforwardable first class mail. A ballot must be mailed to each voter whose name is included in the registration file on the 21st day before the election. No ballot may be mailed to a challenged voter. A challenged voter may apply for an absentee ballot. The ballot mailing must be addressed to the voter at the voter's residence as shown on the registration file unless the voter requests, in writing, that the ballot be mailed to the voter at a different address. All materials mailed in conjunction with mail voting must bear the official United States Postal Services mail Insignia. All envelopes used in connection with mail voting shall also bear a legend indicating the ballot category enclosed (mail).

A return envelope, a ballot secrecy envelope, and instructions for marking and returning mail ballots as provided in Minnesota Rules, Part 8210.3000, Subpart 4, must be included with the ballots. The instructions must include a telephone number or electronic mail address which voters can call or write for help in mail voting. At the request of the Secretary of State, a survey card that the voter can return to the Secretary of

State must also be included. The ballot return envelope must be printed with a mail voter's certificate in the form specified in Minnesota Rules, Part 8210.3000, Subpart 4. The ballot return envelope must be addressed for return to the school district clerk. First class postage must be affixed to the return envelope.

An eligible voter who was not registered on the 21st day prior to the election may apply to the clerk for and receive an absentee ballot. The time for applying for, receiving and returning absentee ballots is extended until 8:00 o'clock p.m. on the day of the election. The mail balloting process for voters whose registrations are incomplete must be administered as if the voter were not registered to vote.

Mail ballots may be returned to the clerk by mail, in person or by designated agent. Ballots returned in person will be accepted until 8:00 o'clock p.m. on the day of the election. The judges shall arrange to receive from the clerk any additional ballots received in the mail or returned by a voter prior to 8:00 o'clock p.m. on election day.

14. The polling place for this election shall be at the _____ of the school district. The ballots shall be counted at the _____, _____ (address) _____, _____, Minnesota.

15. The School District clerk shall make all Campaign Financial Reports required to be filed with the school district under Minnesota statutes, Section 211A.02, and received on or after May 17, 2014, available on the school district's website. The clerk must post the report on the school district's website as soon as possible, but no later than thirty (30) days after the date of the receipt of the report. The school district must make a report available on the school district's website for four years from the date the report was posted to the website. The clerk must also provide the Campaign Finance and Public Disclosure Board with a link to the section of the website where reports are made available.

The motion for the adoption of the foregoing resolution was duly seconded by _____ and upon vote being taken thereon the following voted in favor thereof:

and the following voted against the same:

whereupon said resolution was declared duly passed and adopted.

STATE OF MINNESOTA)
)SS
COUNTY OF _____)

I, the undersigned, being the duly qualified and acting clerk of Independent School District No. _____ (_____), State of Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a meeting of the school board of said school district duly called and held on the date therein indicated, so far as such minutes relate to the calling of a special election of said school district, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND officially as such clerk this _____ day of _____, 20____.

Clerk

ATTACHMENT B1

See pages D-8 to D-13 above for instructions regarding this Notice.

NOTICE OF SPECIAL ELECTION
INDEPENDENT SCHOOL DISTRICT NO. _____
(NAME OF DISTRICT)
STATE OF MINNESOTA

NOTICE IS HEREBY GIVEN, that a special election has been called and will be held [in conjunction with the state general election]* in and for Independent School District No. _____ (Name of District), State of Minnesota, on Tuesday, the _____ day of November, 20 _____, for the purpose of voting on the following question:

SCHOOL DISTRICT QUESTION _____
APPROVAL OF SCHOOL DISTRICT
REFERENDUM REVENUE AUTHORIZATION **

The board of Independent School District No. _____ (Name of District) has proposed to increase its general education revenue by \$_____ per pupil. The proposed referendum revenue authorization would be applicable for _____ years unless otherwise revoked or reduced provided by law. ***

☐ **Yes** Shall the increase in the revenue proposed by the board of Independent School District No. _____ be approved?

☐ **No**

BY VOTING "YES" ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A
PROPERTY TAX INCREASE. **

* To be inserted if election is held in conjunction with the state general election.

** If levy extension, this language will be revised.

*** This language may be revised in the case of an election to renew an existing authority.

* Passage of this referendum will result in an increase in your property taxes.

The annual dollar increases for typical residential homesteads, apartments, commercial-industrial properties, and most other classes of property within the school district are as shown in the table below: **

For agricultural property (both homestead and non-homestead), the taxes for the proposed referendum will be based on the value of the house, garage and surrounding one acre of land only. There will be no referendum taxes paid on the value of other agricultural lands and buildings. For seasonal residential recreational property (i.e. cabins), there will be no taxes paid for the proposed referendum.

<u>Market Value</u>	<u>Dollar Increase</u>
\$40,000	\$ _____
\$50,000	\$ _____
\$60,000	\$ _____
\$75,000	\$ _____
\$100,000	\$ _____
\$125,000	\$ _____
\$150,000	\$ _____
\$200,000	\$ _____
\$250,000	\$ _____
\$500,000	\$ _____
\$1,000,000	\$ _____

The polling places for this election and the precincts served by those polling places will be as follows:

(SPECIFY PRECINCTS AND POLLING PLACES)

Any eligible voter residing in the school district may vote at said election at the polling place designated above for the precinct in which he or she resides. The polls for said election will be opened at _____ o'clock a.m. and will close at 8:00 o'clock p.m. on the date of said election.

A voter must be registered to vote to be eligible to vote in this election. An unregistered individual may register to vote at the polling place on election day.

Dated this _____ day of _____, 20 ____.

BY ORDER OF THE SCHOOL BOARD

/S/ _____

School District Clerk
Independent School District No. _____
(Name of District)
State of Minnesota

* *NOTE: This provision may be revised in the case of an election to renew an existing authority.*

ATTACHMENT B2

STATE OF MINNESOTA)
) SS
 COUNTY OF _____)

CERTIFICATE OF MAILING OF NOTICE

I, _____, hereby certify that I am the duly appointed _____ of Independent School District No. _____ (_____) and acting in behalf of said school district, I deposited in the United States mails at _____, Minnesota, on _____, 20 ____, copies of the attached Notice with postage thereon fully prepaid, addressed to each property owner within the school district as revealed by the records of each county in which the school district is located in whole or in part. The addresses to which the Notices were mailed are on file in the office of the Clerk of the school district.

IN WITNESS WHEREOF, I hereunto set my hand this _____ day of _____, 20 ____.

(Attach copy of Notice)

Subscribed and sworn to before me

this _____ day of _____, 20 ____

 (Notary Public)

ATTACHMENT C

Form of Ballot for Authorization that Increases by the Rate of Inflation

SCHOOL DISTRICT QUESTION 1
APPROVAL OF SCHOOL DISTRICT
REFERENDUM REVENUE AUTHORIZATION

The board of Independent School District No. _____ (Name of District) has proposed to increase its general education revenue by \$_____ per pupil. The proposed referendum revenue authorization would increase each year by the rate of inflation and be applicable for _____ years unless otherwise revoked or reduced as provided by law.

☐

Yes

Shall the increase in the revenue proposed by the board of Independent School District No. _____ be approved?

☐

No

BY VOTING "YES" ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A
PROPERTY TAX INCREASE. **

ATTACHMENT D

[Under \$300 all new Authority]

EXTRACT OF MINUTES OF MEETING
OF SCHOOL BOARD
OF INDEPENDENT SCHOOL DISTRICT NO. ____
(_____)
STATE OF MINNESOTA

HELD: _____, 20__

Pursuant to due call and notice thereof, a _____ meeting of the School Board of Independent School District No. ____ (_____), State of Minnesota, was held in said school district on _____, 20__, at _____ o'clock ____m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its adoption:

**RESOLUTION AUTHORIZING A NEW
BOARD APPROVED REFERENDUM AUTHORITY**

BE IT RESOLVED by the School Board of Independent School District No. ____, State of Minnesota, as follows:

1. Current Authority. The District has no current voter approved referendum authority.

2. Approval of New Authority. Pursuant to Minnesota Statutes, Section 126C.17, subdivision 9a, the Board hereby determines to authorize a new Board approved referendum authority in the amount of \$300 per adjusted pupil unit. This new Board approved referendum authority shall be further adjusted based on final pupil unit data. It is the intention of the Board to create the maximum authority for which it is eligible, not to exceed \$300 per adjusted pupil unit. This new Board approved referendum authority, as adjusted, shall be applicable for five years, beginning with taxes payable in 20__. The Board may subsequently reauthorize the Board approved referendum authority in increments of up to five years.

3. The clerk is authorized and directed to submit a copy of the adopted resolution to

the Minnesota Department of Education as soon as reasonably practicable after its adoption, but in no event later than September 30, 20__.

The motion for the adoption of the foregoing resolution was duly seconded by _____. On a roll call vote, the following voted in favor:

and the following voted against:

whereupon said resolution was declared duly passed and adopted.

[Under \$300 all new Authority]

STATE OF MINNESOTA)
)SS
COUNTY OF _____)

I, the undersigned, being the duly qualified and acting Clerk of Independent School District No. ____ (_____), State of Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a meeting of the school board of said school district duly called and held on the date therein indicated, so far as such minutes relate to adopting a resolution authorizing a new Board approved referendum authority, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND officially as such clerk this ____ day of _____ 20__.

Clerk

ATTACHMENT E

[Under \$300 in Current Authority]

EXTRACT OF MINUTES OF MEETING
OF SCHOOL BOARD
OF INDEPENDENT SCHOOL DISTRICT NO. ____
(_____)
STATE OF MINNESOTA

HELD: _____, 20__

Pursuant to due call and notice thereof, a _____ meeting of the School Board of Independent School District No. ____ (_____), State of Minnesota, was held in said school district on _____, 20__, at _____ o'clock __.m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its adoption:

**RESOLUTION CONVERTING VOTER APPROVED REFERENDUM AUTHORITY
TO A BOARD APPROVED REFERENDUM AUTHORITY AND
AUTHORIZING A NEW BOARD APPROVED REFERENDUM AUTHORITY**

BE IT RESOLVED by the School Board of Independent School District No. ____, State of Minnesota, as follows:

1. Current Authority. The District has either no current voter approved referendum authority or a current voter approved referendum authority of less than \$300 per adjusted pupil unit after the local optional revenue subtraction for fiscal year 20__, and after preliminary adjustment by the Minnesota Department of Education in compliance with Minnesota Statutes, Section 126C.17, as amended.
2. Conversion and Approval of New Authority. Pursuant to Minnesota Statutes, Section 126C.17, subdivision 9a, the Board hereby determines to convert its voter approved referendum authority to a Board approved referendum authority of approximately \$_____ per adjusted pupil unit. The Board also determines to authorize an additional new Board approved referendum authority in the amount of approximately \$_____ per adjusted pupil unit, which authority equals the difference between \$300 per adjusted pupil unit and the

District's estimated current referendum authority per adjusted pupil unit after the local option revenue subtraction. This total new Board approved referendum authority shall be \$300 per adjusted pupil unit. This total new Board approved referendum authority, as adjusted, shall be applicable for ____* years, beginning with taxes payable in 20___. The Board may subsequently reauthorize the Board approved referendum authority in increments of up to five years.

*not to exceed five years

3. The clerk is authorized and directed to submit a copy of the adopted resolution to the Minnesota Department of Education as soon as reasonably practicable after its adoption, but in no event later than September 30, 20__.

The motion for the adoption of the foregoing resolution was duly seconded by _____. On a roll call vote, the following voted in favor:

and the following voted against:

whereupon said resolution was declared duly passed and adopted.

[Under \$300 in Current Authority]

STATE OF MINNESOTA)
)SS
COUNTY OF _____)

I, the undersigned, being the duly qualified and acting Clerk of Independent School District No. ____ (_____), State of Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a meeting of the school board of said school district duly called and held on the date therein indicated, so far as such minutes relate to adopting a resolution converting voter approved referendum authority to a Board approved referendum authority, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND officially as such clerk this ____ day of _____ 20__.

Clerk

ATTACHMENT F

[Over \$300 in Current Authority]

EXTRACT OF MINUTES OF MEETING
OF SCHOOL BOARD
OF INDEPENDENT SCHOOL DISTRICT NO. ____
(_____)
STATE OF MINNESOTA

HELD: _____, 20__

Pursuant to due call and notice thereof, a _____ meeting of the School Board of Independent School District No. ____ (_____), State of Minnesota, was held in said school district on _____, 20__, at _____ o'clock ____m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its adoption:

**RESOLUTION CONVERTING VOTER APPROVED REFERENDUM AUTHORITY
TO A BOARD APPROVED REFERENDUM AUTHORITY**

BE IT RESOLVED by the School Board of Independent School District No. ____, State of Minnesota, as follows:

1. Current Authority. The District has a current voter approved referendum authority that is estimated to be \$_____ per adjusted pupil unit for fiscal year 20__, after the local option revenue subtraction and after preliminary adjustment by the Minnesota Department of Education in compliance with Minnesota Statutes, Section 126C.17, as amended.

2. Conversion of Referendum Authority. Pursuant to Minnesota Statutes, Section 126C.17, subdivision 9a, the Board hereby determines to convert \$_____ per adjusted pupil unit of its voter approved referendum authority which expires after taxes payable in 20__ [and \$_____ per adjusted pupil unit of its voter approved referendum authority which expires after taxes payable in 20__] * to a Board approved referendum authority of approximately \$_____ per adjusted pupil unit. This authority shall be further adjusted based on final pupil unit data and it is the intention of the Board to convert the maximum authority for which it is eligible, not to exceed \$300 per adjusted pupil unit. This Board approved referendum authority, as adjusted, shall be applicable for ** years, beginning

with taxes payable in 20___. The Board may subsequently reauthorize the Board approved referendum authority in increments of up to five years.

* not to exceed a total of \$300 per adjusted pupil unit.

** not to exceed five years.

3. The clerk is authorized and directed to submit a copy of the adopted resolution to the Minnesota Department of Education as soon as reasonably practicable after its adoption, but in no event later than September 30, 20___.

The motion for the adoption of the foregoing resolution was duly seconded by _____. On a roll call vote, the following voted in favor:

and the following voted against:

whereupon said resolution was declared duly passed and adopted.

STATE OF MINNESOTA)
)SS
COUNTY OF _____)

I, the undersigned, being the duly qualified and acting Clerk of Independent School District No. ____ (_____), State of Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a meeting of the school board of said school district duly called and held on the date therein indicated, so far as such minutes relate to adopting a resolution converting voter approved referendum authority to a Board approved referendum authority, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND officially as such clerk this ____ day of _____ 20___.

Clerk

ATTACHMENT G

[Rescinding 2013 Action]

EXTRACT OF MINUTES OF MEETING
OF SCHOOL BOARD
OF INDEPENDENT SCHOOL DISTRICT NO. ____
(_____)
STATE OF MINNESOTA

HELD: _____, 20__

Pursuant to due call and notice thereof, a _____ meeting of the School Board of Independent School District No. ____ (_____), State of Minnesota, was held in said school district on _____, 20__, at _____ o'clock __.m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its adoption:

**RESOLUTION RESCINDING PRIOR RESOLUTION THAT
CONVERTED VOTER APPROVED REFERENDUM AUTHORITY
TO A BOARD APPROVED REFERENDUM AUTHORITY
[AND AUTHORIZED A NEW BOARD APPROVED REFERENDUM AUTHORITY]**

BE IT RESOLVED by the School Board of Independent School District No. ____, State of Minnesota, as follows:

1. On _____, 2013 the Board adopted a resolution to convert (a portion/all) of its voter approved referendum authority to a Board approved referendum authority.
 - 1a. [If Applicable] In that 2013 resolution, the Board also determined to authorize an additional Board approved referendum authority which equaled the difference between \$300 per adjusted pupil unit and the District's then current referendum authority per adjusted pupil unit after the Location Equity Revenue subtraction.
2. The 2013 resolution referenced above is hereby rescinded, effective for taxes payable in 2015 and thereafter.

3. The clerk is authorized and directed to submit a copy of this adopted resolution to the Minnesota Department of Education as soon as reasonably practicable after its adoption.

The motion for the adoption of the foregoing resolution was duly seconded by _____. On a roll call vote, the following voted in favor:

and the following voted against:

whereupon said resolution was declared duly passed and adopted.

STATE OF MINNESOTA)
)SS
COUNTY OF _____)

I, the undersigned, being the duly qualified and acting Clerk of Independent School District No. ____ (_____), State of Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a meeting of the school board of said school district duly called and held on the date therein indicated, so far as such minutes relate to adopting a resolution rescinding a prior resolution that converted a voter approved referendum authority to a Board approved referendum authority and if applicable, approved an additional Board approved referendum authority, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND officially as such clerk this ____ day of _____ 20__.

Clerk

(No changes from 2014 Session)

School Law Bulletin
for

School Board Members and Administrators

WORKERS' COMPENSATION COVERAGE
FOR SCHOOL BOARD MEMBERS

Revised September 2014

Prepared by:

KNUTSON, FLYNN & DEANS-COUNSEL
MINNESOTA SCHOOL BOARDS ASSOCIATION

I. STATUTORY AUTHORITY:

Minnesota Statutes, Section 176.011, Subdivision 9 (6) includes "elected or appointed officials," "of a . . . school district" "who perform services for another for hire, "within the definition of "employee" for purposes of workers' compensation coverage.

In order, however, for members of the school board to be covered by workers' compensation, it is necessary that the school board take affirmative action. Clause (6) continues:

"An officer of a political subdivision elected or appointed for a regular term of office, or to complete the unexpired portion of a regular term, shall be included [in the definition of employee] only after the governing body of the political subdivision has adopted an ordinance or resolution to that effect;" (emphasis added)

Some school boards may not have adopted such a resolution or may no longer have a record of adoption of such a resolution that can be forwarded to the workers compensation insurer for the school district to ensure coverage. The value of having such a resolution in place and available may be illustrated by the following true example of a school district that was denied coverage even though it paid a higher premium expecting such coverage:

A school board member acting as the clerk of the district, was injured in the course of his duties as clerk. Because the board apparently had not adopted a resolution approving inclusion of board members as employees, the insurer refused to pay workers' compensation benefits even though the board salaries had been included as a part of the salary base upon which the insurer's premium was based.

If your district desires such coverage for board or officer coverage, the attached model resolution should be adopted. You should also determine whether salaries paid to board members are included for purposes of premium computation. If your district is not sure if a resolution exists or if coverage is extended, you should check with your carrier and/or consider adopting the attached model resolution (again).

II. MODEL RESOLUTION COMMENTS:

1. "[E]mployee" is generally limited to "any person who performs services for another for hire." Thus, probably only board members who received some salary may be compensated by workers' compensation.

2. The superintendent is mentioned because he or she is an ex officio board member, in the unlikely event he or she is not otherwise covered by the district's policy as a regular employee.

3. The resolution is explicitly given continuing effect, so that it is clearly understood that each subsequent board need not ratify it.

4. Board members may be already included in the premium cost, even though the board has not adopted a resolution. If so, no adjustment in premiums would be necessary. You are advised to check your policy and confer with your agent.

5. The workers' compensation schedule varies commensurately with the amount of compensation received for services performed for the school district. Since the chair, clerk, and treasurer often perform more services and receive more compensation, the effect of this resolution may be most significant for them.

6. The school district's workers' compensation coverage can only extend to injuries arising out of and in the course of employment with the district and would not cover injury to a board member while engaged by another employer.

7. Recovery by a school board under the workers' compensation schedule may be lessened, in any event, by the following provision which was enacted at the same time as the provision permitting board members to be covered by resolution. Laws, 1967, c. 701:

M.S. 176.021, "Subd. 7. Public Officer. If an employee who is a public officer of the state or governmental subdivision continues to receive the compensation of office during a period when receiving benefits under the workers' compensation law for temporary total or temporary partial disability or permanent total disability and the compensation of office exceeds \$100 a year, the amount of that compensation attributable to the period for which benefits under the workers' compensation law are paid shall be deducted from such benefits."

III. MODEL RESOLUTION FOR BOARD ACTION:

Extract of Minutes of Meeting
School Board
Independent School District No. _____ (_____)
_____, 20____

Pursuant to due call and notice thereof, a meeting of the school board of Independent School District No. _____, (_____) State of Minnesota, was held on the _____ day of _____, 20____, at _____ o'clock p.m.

The following members were present:

and the following were absent:

Member _____ introduced the following resolution and moved its adoption:

RESOLUTION PROVIDING WORKERS' COMPENSATION COVERAGE FOR BOARD MEMBERS

BE IT RESOLVED, by the School Board of Independent School District No. ____, State of Minnesota, as follows:

1. All officers of the school district who perform services for the district for hire or compensation, including all directors of the school board, whether elected or appointed for a regular term of office or to complete the unexpired portion of any such regular term, or to fill a vacancy, and also including the Superintendent of Schools as an ex officio member of the school board if the Superintendent is not otherwise covered, shall be included in the definition of employee pursuant to Minnesota Statutes, Section 176.011, Subdivision 9 (6), for purposes of workers' compensation coverage, to the fullest extent permitted by the laws of the State of Minnesota,

2. This resolution shall be of continuing effect, until revoked or altered by subsequent action of the school board, regardless of any changes in its membership,

3. This resolution is hereby given retroactive effect to the point in time, without limit at which the compensation of directors was first included in the base for determining the premium for the district's workers' compensation policy, and

4. A copy of this resolution shall be kept as part of the school board records, and a copy shall be sent by certified mail to the agent of the workers' compensation insurer for the school district so that the insurer may be on notice of the action of this board, and so that the insurer may adjust the terms and conditions, and premiums of the district's workers' compensation policy as necessary and as mutually agreed, to effectuate the board's action as indicated by this resolution.

The motion for the adoption of the foregoing resolution was duly seconded by Member _____ and upon a roll-call vote being taken, the following voted in favor thereof:

and the following voted against the same:

Whereupon said resolution was declared duly passed and adopted.

STATE OF MINNESOTA)
) SS
COUNTY OF)

I, the undersigned, being the duly qualified and acting clerk of the school board of Independent School District No. ____, (_____) State of, Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a regular meeting of the school board of said school district duly called and held on the date therein indicated, so far as such minutes relate to the providing of workers' compensation coverage for board members, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND this _____ day of _____, 20__.

Clerk

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

SCHOOL DISTRICT CONTRACT AND BIDDING PROCEDURES
Revised April 2015

Prepared by:

KNUTSON, FLYNN & DEANS - COUNSEL FOR
MINNESOTA SCHOOL BOARDS ASSOCIATION

I. INTRODUCTION: School districts, like most other public bodies or entities, may be required to submit contracts for the purchase or sale of goods or services to a competitive bidding or quotation process. Submitting contracts to this process is considered beneficial to the school district and the public in that it protects the public and makes certain as far as possible that the taxpayers are assured of the best bargain for the least money.¹ It is the purpose of this bulletin to inform school board members and administrators of the general requirements for contracting using competitive bidding, quotations and proposals.

II. CONTRACTING REQUIREMENTS:

A. General Rule:² The procedural requirements for entering into contracts to purchase or sell/dispose of goods or services depends on the estimated dollar amount involved in the transaction. In general:

1. If the contract is estimated to exceed \$100,000, by either:
 - a. Sealed bids, solicited by public notice consisting of advertising in the official newspaper for two weeks; or
 - b. By best value contracting (for construction, alteration, repair, or maintenance work);
2. If the contract is estimated to be between \$25,000 and \$100,000, by either:
 - a. Sealed bids;
 - b. By direct negotiation (by obtaining two or more quotations for the purchase or sale when possible and without advertising for bids or otherwise complying with the requirements of competitive bidding); or
 - c. By best value contracting (for construction, alteration, repair, or maintenance work);
3. If the contract is estimated to be \$25,000 or less, the contract may be made, in the discretion of the school board, either:
 - a. Upon quotation (based on at least two quotations so far as practicable),
 - b. In the open market, or
 - c. By best value contracting (for construction, alteration, repair, or maintenance work).

The following factors distinguish competitive bidding from a call for quotations:

- Public Notice: While bids must generally be sought by public notice, quotations may ordinarily be solicited without public notice.³ (However, certain contracts, including contracts for transportation of school children, the purchase of group insurance coverage, and

the purchase of petroleum heating fuel or fuel for vehicles, provide for purchase by quotation but require published notice.⁴⁾

- Formality: Unlike competitive bidding where the terms are fixed, unnegotiable, and must be submitted in sealed written form, the quotation procedure is less formal and may allow certain terms to remain open for negotiation. (However, where quotations are required for the purchase of certain items, such as perishable foods other than milk, transportation services, group insurance coverage, or the purchase of petroleum heating fuel or fuel for vehicles, quotations must be in writing.⁵⁾
- Offer and acceptance: From a legal standpoint, a bid is an offer that creates a binding contract when the offer is accepted. A quotation may not constitute a binding offer, but is rather informational in nature, and may require additional negotiation, offer, and acceptance, before a binding contract is created.

When calculating the value of the contract to determine whether bidding or quotations are required, the value estimate must be made in good faith. An attempt to understate the value to avoid competitive bidding may void the transaction. Bids may be invited if there is doubt as to the estimated value. Likewise, if it is apparent that contracts have been split up for purposes of avoiding competitive bidding, the resulting contract may be deemed illegal. However, if there is a logical reason to split up the contract, and school board members are acting in good faith rather than attempting to avoid competitive bidding, splitting the contract may be acceptable even though the aggregate value of the contracts would require competitive bidding. It is suggested that a school district contact the MSBA or legal counsel if questions arise regarding the splitting of contracts.

Once the school district has determined that competitive bidding is required for a contract and adopted this method, the school district may be obligated to complete the contract using this method, unless the school district has “seasonably abandoned” use of this method.⁶ Seasonable or timely abandonment of the bidding procedure must occur before the award and must not be unreasonable, arbitrary or capricious. There is some authority to support the proposition that a school district that has adopted the competitive bidding process, while retaining the right to reject all bids, may subsequently adopt a different contracting method, assuming the bids received were properly rejected.⁷ However, it is clear that with competitive bidding, no material change may be made to the contract after the contract has been awarded to the lowest responsible bidder.⁸

B. Types of Contracts to Which the Above “General Rule” Applies:⁹ The following is a non-exclusive list of the type of contracts to which the “general rule” set forth in Section A above applies:

1. Contracts for the sale, purchase, or rental of new or used supplies, materials, equipment, furniture, or fixtures.
2. Contracts for the construction, alteration, repair, or maintenance of real or personal property.

C. Exceptions to General Rule: Not all types of contracts are subject to the “general rule” set forth in Section A. above. Rather, the subject matter of the contract may dictate that a different procedure be followed, including the following:

1. Contracts requiring competitive bidding in most or all circumstances:
 - a. Standard requirement price contracts (except for perishable food items other than milk): In general, standard requirement price contracts must be submitted to competitive bidding. An exception to this general rule is perishable food items other than milk. A standard requirement price contract is a contract which requires the seller to meet all of the buyer’s need for a particular item, which may be an unknown quantity, at a fixed price, such as all the

paper requirements of the district for a given period of time for a given price per ream without regard to amount. The contract may provide for a negotiated price increase or decrease based upon a demonstrable industry-wide or regional increase in the vendor's cost. The term of such contracts must not exceed two years with an option to renew for an additional two years.¹⁰

- b. Contracts for work or labor: Contracts for work or labor are subject to competitive bidding depending upon the amount of the contract.
2. Contracts allowed upon direct negotiations after obtaining two or more written quotations: The following types of contracts do not necessarily require competitive bidding, but may be entered into by direct negotiation after obtaining two or more written quotations and complying with various other statutory requirements:
- a. Transportation contracts:¹¹ A school board may enter into contracts for the transportation of school children by direct negotiation after obtaining two or more written quotations for the service when possible, by obtaining two or more written quotations, or upon sealed bids. However, the quotations must be requested by published notice at least 30 days before awarding the contract.
 - b. Petroleum products:¹² A contract for the purchase of petroleum heating fuel or fuel for vehicles may be made in the same manner as described above for transportation contracts.
 - c. Perishable food items (except milk):¹³ Contracts for the purchase of perishable food items, except milk for school lunches, in any amount may be made by direct negotiation by obtaining two or more written quotations for the purchase or sale, when possible, without advertising for bids or otherwise complying with the requirements of the public contracting statutes.
3. Contracts requiring neither bids nor quotations: The following types of contracts require neither bids nor quotations:
- a. Employment contracts: Contracts for personal services of employees.
 - b. Contracts for professional services of consultants or independent contractors: Including attorneys, bond consultants, architects, or other services requiring technical or scientific training.¹⁴
 - c. Purchase of copyrighted books: Copyrighted books are specifically exempted from the bidding requirements.¹⁵
 - d. Contracts for the lease, rental, purchase, sale, or exchange of school rooms, school buildings, or school real estate: In cases where a school districts desires to obtain a particular property, because of its uniqueness such property is not the subject of competitive bidding.¹⁶ Such property may also be obtained by condemnation rather than competitive bidding. A school district need not advertise for bids prior to the disposal of a tract of land or a school building.¹⁷
 - e. Sale of building constructed by school class:¹⁸ The school district may, in lieu of advertising for bids, sell at public auction to the highest responsible bidder a building constructed by a student or class as a school assignment. A school board shall publish notice of such a sale in

the official newspaper of the district at least 2 weeks before the sale and may, at its discretion, publish additional notice. A building may be withdrawn from sale prior to the completion of the sale unless the auction has been announced to be without reserve. If the sale is made at public auction, a duly licensed auctioneer must be retained to conduct the sale. The auctioneer shall be paid from the proceeds of the sale or from any other non-restricted funds available.

- f. Contracts with other governmental units:¹⁹ A school district may enter into any contract with the United States of America or with any agency thereof, any state agency, or with any other political subdivision of the state for the purchase, lease, sale, or other acquisition or disposition of equipment, supplies, materials, or other property, including real property, without regard to statutory provisions. This has been construed to mean that the competitive bidding/quotation process is not required for contracts with such governmental units.²⁰
- g. Contracts for the disposal of surplus school computers: A school district may dispose of surplus school computers and related equipment if the school district disposes of the surplus property by conveying the property and title to: (1) another school district; (2) the State Department of Corrections; (3) the Board of Trustees of the Minnesota State Colleges and Universities; or (4) the family of a student residing in the district whose total family income meets the federal definition of poverty. A school district need not comply with the requirements for competitive bidding in disposing of such property in this manner.²¹
- h. Group insurance contracts: The contracting procedure required for group insurance contracts depends upon the number of employees to be covered by the insurance. If the group consists of fewer than 25 employees, the school district may contract for such insurance on the open market without requesting quotations or bids. If the contract is for 25 or more employees, the school district shall request proposals from and enter into contracts with carriers that, in the judgment of the school district, are best qualified to provide coverage. **In requesting proposals for group health insurance, school districts must request proposals from a minimum of three potential sources of coverage.²² One of these requests must go to the administrator of the public employee insurance program, who must respond to the request within 60 days.²³ School districts must make requests for proposals at least 150 days prior to the expiration of the existing contract but not more frequently than one every 24 months.²⁴** The request for proposals shall be in writing at a minimum and shall include: coverage to be provided, criteria for evaluation of carrier proposals, and the aggregate claims record for the appropriate period. **The request for proposals must also include the most recently available 24 months of nonidentifiable aggregate claims data.²⁵ Any entity providing group health insurance coverage to a school district must provide the school district with school district-specific nonidentifiable aggregate claims records for the most recent 24 months within 30 days of the request by the school district.²⁶** A school district may exclude from considerations proposals requiring self insurance. Public notice of the request for proposals must be provided in a newspaper or trade journal at least 21 days before the final date for submitting proposals.²⁷ **In addition, the request for proposals must be publicly released prior to its release to potential sources of coverage.²⁸**

All initial proposals must be sealed upon receipt until they are opened no less than 90 days prior to the plan's renewal date in the presence of up to three representatives selected by the exclusive representative of the largest group of employees. The classification of data in the proposals is governed by M.S. 13.591, Subd. 3(b), and the representatives of the exclusive representative must maintain the data according to such classification.²⁹

The school district shall make benefit and cost comparisons and evaluate the proposals using the written criteria. **A school district, in consultation of the representatives selected by the exclusive representative of the largest group of employees, may continue to negotiate with any entity that submitted an initial proposal in order to reduce costs or improve services under the proposal.³⁰ Following the negotiations, any entity that submitted an initial proposal may submit a final proposal incorporating the negotiations, which is due no less than 75 days prior to the plan's renewal date.³¹ All final proposals submitted must be opened at the same time in the presence of up to three representatives selected by the exclusive representative of the largest group of employees.³² Notwithstanding the provisions of M.S. 13.591, Subd. 3(b), following the opening of the final proposals, all the proposals, including initial proposals, and other data submitted in connection with the proposals are public data.³³ Carriers applying must provide the school district with aggregate claims records for the appropriate period. The school district may choose from any of the initial or final proposals without further negotiations, provided the aggregate value of benefits provided by a group insurance contract covered by a collective bargaining agreement is not reduced, unless the school district and the exclusive representative of the appropriate bargaining unit agree to a reduction in benefits.³⁴ The school district must provide a written rationale for its decision before entering into a contract with a carrier. School district contracts for group health insurance must not be longer than two years unless the exclusive representative of the largest employment group and the school district agree otherwise.³⁵ Employees may be added to an existing group pursuant to a joint powers agreement, and nothing in the statute shall restrict the authority granted to school district boards of education under the Joint Powers Act, except that school districts will not be considered self-insured for purposes of the statute solely through participation in a joint powers agreement.³⁶**

A school district contracting for and providing group insurance shall file with the clerk or other comparable officer of the school district a copy of the group insurance contract and make the copy available for public inspection.³⁷

School districts which have more than 100 employees are authorized to self-insure for employee health benefits, including long term disability, but not for life benefits. Cities, counties, or school districts are allowed to join together to reach the 100 employee limit and jointly self-insure. If the self-insurance plan covers fewer than 1,000 employees, it is required to include excess or stop loss coverage, except for long term disability. The law further provides that a school district may not adopt a self-insured health benefit plan for employees represented by an exclusive representative certified pursuant to PELRA without prior notification and consultation on 10 days' written notice to the exclusive representatives of covered employees and agreement by the exclusive representative that represents the largest number of employees in the plan. The law grandfathers in school districts which had a self-insurance health benefit plan on August 1, 1980, even though they do not meet the minimum employee group size requirement (100 employees).³⁸ Self-insurance plans must be filed and certified by the Minnesota Department of Commerce before they are issued or delivered to any person.

School districts that are self-insured must follow all of the requirements that apply to group health insurance coverage as set out above, except that: (1) the request for proposals may be for third-party administrator services, where applicable; (2) the requests for proposals must be from a minimum of three different sources, which may include both entities referenced in M.S. 471.6161, Subd. 1 and providers of third-party administrator services; (3) for purposes of fulfilling the requirement to request a

proposal for group health insurance from an administrator of the public employee insurance program, self-insured districts are not required to include in the request for proposal the coverage to be provided; (4) a school district that is self-insured on or before May 16, 2014, or that is self-insured with more than 1,000 insured lives, or a school district in which the school board adopted a motion on or before May 14, 2014 to approve a self-insured health care plan to be effective July 1, 2014, may, but need not, request a proposal from an administrator of the public employee insurance program; (5) requests for proposals must be sent to providers no less than 90 days prior to expiration of the existing contract; and (6) proposals must be submitted at least 60 days prior to the plan's renewal date, and all proposals must be opened at the same time and in the presence of the exclusive representative, where applicable.³⁹

A statutory or home rule charter city, county, school district or instrumentality of any of these entities with a self-insurance health benefit plan may, upon request of the exclusive representative of its employees, allow the employees of the exclusive representative to enroll, at their own expense, in the health insurance benefit plan.

An entity providing group health insurance to a school district under a multiyear contract must give notice of any rate or plan design changes applicable under the contract at least 90 days before the effective date of any change to the school district and to the exclusive representatives of employees.⁴⁰

- i. Contracts for certain purchases made from student activities funds: If the fund is not under the supervision and control of the school board, the contracting statute has no application to such a purchase.⁴¹ If the fund is under the supervision and control of the school board, the school district contracting law applies.⁴²
 - j. Contracts for property and liability insurance other than group insurance:⁴³
 - k. Qualified guaranteed energy savings contracts:⁴⁴
4. Emergency contracts: Minnesota law provides for a limited exception to the bidding requirements where, in the case of the destruction of buildings or injury thereto, where public interest would suffer by delay, contracts for repairs may be made without advertising for bids.⁴⁵

The emergency exception has been interpreted on various occasions by the Attorney General. He has opined that the rebuilding of a school in its entirety after destruction by a tornado is not "repair" so the rebidding cannot take place without advertising for bids.⁴⁶ Whether extensive repairs to a school damaged by a tornado, coupled with the addition of four new classrooms is "repair" such that no advertising for bids is required is a question of fact to be determined by the board in light of the distinction between repair and rebuilding. If the work substantially changes the building or enlarges it or greatly enhances its value, it is said to be a rebuilding. If a building is so changed in general appearance that it might according to common understanding be called a new building, it is not repair.⁴⁷

The emergency exception has also been extended to certain nonschool building repair situations by the Attorney General. He has opined that after a school board had advertised three times for bids and no bids had been received, the board could do the work by day labor and purchase materials where they could best be obtained.⁴⁸ He has also opined that where a real emergency existed and the school board was honestly trying to meet that emergency, it could dispense with the requirements of the statute requiring two weeks published notice of bids.⁴⁹

In all these cases, any declaration of “emergency” will be strictly and narrowly construed by any reviewing court.

5. Other miscellaneous contracts:

- a. Cost plus contracts: Local units of government may not enter into cost plus contracts (a cost plus contract is one in which the parties agree to reimburse the contractor/seller for whatever cost is incurred plus some additional amount).⁵⁰
- b. Joint Powers contracts: Whether a contract entered into under the Joint Powers act must follow the procedures of competitive bidding is determined by the total amount of the contract, rather than the amount contributed by each individual party to the Joint Powers contract.⁵¹
- c. Cooperative purchasing: By utilizing contracts that are available through the state’s cooperative purchasing venture authorized by M.S. 16C.11.⁵² For a contract estimated to exceed \$25,000, a school district must consider the availability, price and quality of supplies, materials, or equipment available through the state’s cooperative purchasing venture before purchasing through another sources.⁵³ If a school district does not utilize the state’s cooperative purchasing venture. A school district may contract for the purchase of supplies, materials, or equipment without regard to competitive bidding requirements if the purchase is through a national municipal association’s purchasing alliance or cooperative created by a Joint Powers agreement that purchases items from more than one source on the basis of competitive bids or competitive quotations.⁵⁴ The district may also purchase from a state contract upon compliance with applicable rules and payment of required fees.
- d. Reverse auctions: Notwithstanding the other procedural requirements of the Uniform Municipal Contracting Act, a school district may contract to purchase supplies, materials, and equipment using an electronic purchasing process in which vendors compete to provide the supplies, materials, or equipment at the lowest selling price in an open and interactive environment. A school district may use this process to contract for professional or technical services or to contract for nonprofessional or technical services under a service contract.⁵⁵
- e. Electronic sale of surplus supplies, materials, and equipment: Notwithstanding any other procedural requirements of the Uniform Municipal Contracting Act, a school district may contract to sell supplies, materials, and equipment which is surplus, obsolete, or unused using an electronic selling process in which purchasers compete to purchase the supplies, materials, or equipment at the highest purchase price in an open and interactive environment.⁵⁶
- f. Electronic bidding: Notwithstanding any other procedural requirements of the Uniform Municipal Contracting Act, vendors may submit bids, quotations, and proposals electronically in a form and manner required by the school district.⁵⁷
- g. Electronic furnishing of bonds: A school district may allow bid, performance, or payment bonds, or other security, to be furnished electronically.⁵⁸

6. Other contract situations requiring special attention:

- a. Sales tax: School district purchases are generally exempt from the sales tax.⁵⁹ However, there is no sales tax exemption for building, construction or reconstruction materials purchased by a school district’s contractor or subcontractor as a part of a lump-sum contract, or similar type

of contract with a guaranteed maximum price covering both labor and materials for use in the construction, alteration or repair of a building or facility.⁶⁰

- b. Performance and payment bonds: (i) Contractors. A contract in an amount greater than \$75,000 for the doing of public work is not valid unless the contractor gives a performance bond and a payment bond.⁶¹ The penalty of each bond shall not be less than the contract price. The bonds are necessary for the contract to be valid. The purpose of the performance bond for the use and benefit of the public is to complete the contract according to its terms and to save the district harmless from all costs and charges that may accrue to complete the work. The purpose of the payment bond is for the use and benefit of all persons furnishing labor and materials to insure payment of just claims as they become due. Note that M.S. 574.38 provides that when the statute requires a performance bond from a contractor doing a public work project of under \$50,000, the contractor may be permitted to provide, in lieu of the bond, an irrevocable bank letter of credit in the same amount required for the bond and subject to the same conditions as the bond. There are exceptions for performance bonds for transportation contracts and for contracts for the purchase of finished tangible products.
 - (ii) Contracts for the purchase of finished tangible products. Notwithstanding the provisions of M.S. 574.26 or any other law to the contrary, on a contract limited to a finished tangible product, a school board may in its discretion, but is not required to, require a performance bond of a contractor in accordance with M.S. 123B.52, Subd. 1.
 - (iii) Transportation contracts. Pursuant to M.S. 123B.52, Subd. 1, a performance bond shall be required of a contractor on a contract for the transportation of school children only when and in the amount deemed necessary by and at the discretion of the school board.
- c. Sale of bonds or obligations. The notice requirements for the sale of bonds or other obligations are specified in M.S. 475.60, Subd. 3. That section also provides that the governing body may reject any and all offers. In that case or if no offers are received, the board may award to any person who within 30 days thereafter presents an offer complying with the terms of sale and deemed more favorable than any received previously. The board may also, upon compliance with the normal notice requirements, invite other offers or bids upon the same or different terms and conditions.

III. BIDDING PROCEDURE:

- A. Authority to Contract: The general rule is that no contract may be made or authorized, except by the school board at a regular or special meeting at which all members are present or have had notice.⁶² Minnesota law provides that a school board may authorize its superintendent or business manager to enter into contracts within the budget as approved by the school board. However, any transaction in an amount exceeding the minimum amount for which bids are required must first be specifically authorized by the board and must fulfill all other applicable requirements of competitive bidding⁶³ (unless the school district opts to use best value contracting.)⁶⁴ Minnesota law also allows a school board to establish an imprest or “petty” cash fund from which a custodian appointed by the board may make distributions. A claim itemizing these distributions is to be presented to the school board for action, and the custodian is personally responsible for any portion of the claim not approved by the school board.⁶⁵ However, see the provisions above relating to electronic reverse auctions and electronic sales.
- B. Bid Specifications:

1. Generally: It is important that bid invitations contain specifications that are definite and precise. The use of definite and precise specifications should reduce the potential for disputes and litigation regarding the bidding process. One potential objection to a bid is that the bid varies from the specifications or is non-responsive. In reviewing imprecise or ambiguous plans and specifications, courts consider whether the bid letting is contrary to the best interests of the school district and whether it is prejudicial to individual bidders. Imprecise or ambiguous specifications will be upheld by a court only if it is demonstrated that the nature of the procurement requires a somewhat vague and imprecise bid invitation and only if such plans and specifications do not result in prejudice to a bidder's opportunity to submit a proposal.⁶⁶ Sources for assistance in providing precise specifications include neighboring units of government and various departments of state government. The American Society for Testing Materials and National Institute of Governmental Purchasing, may also be a useful source for obtaining standardized specifications for many items. Public bodies must demonstrate a clear need for restrictive specifications.⁶⁷ Restricting bids to a specific brand or manufacturer has been upheld as valid where the restriction provided a benefit to students of a school district.⁶⁸ An approved method of including restrictive specifications has been to include a phrase or reference to "or product of equal or better quality," when specifying a particular brand or trade name in a request for bids.⁶⁹
2. Terms of delivery and other conditions: Terms of delivery and "other conditions imposed in the call for bids" may also be taken into consideration in awarding the bid.⁷⁰ As a result, all contractual obligations of either party should be specified in the terms and conditions portion of the specifications to avoid ambiguity and misunderstandings due to omissions. To reduce publication costs, it is reasonable to adopt, by reference in the published notice, the terms and conditions contained in the specifications by including in the published notice language such as "subject to the terms and conditions contained in the specifications."

The following terms and conditions are required by statute:

- a. Conformity with the specifications;
- b. Terms of delivery;
- c. Executed contract in writing;
- d. Sufficient bond for performance of the contract;
- e. That bids be sealed;
- f. That bids containing alterations or erasures will be rejected unless crossed out and corrected by printing in ink or by pen written adjacent thereto, with the initials of the person signing the bid;
- g. That the board in its discretion may utilize negotiated procurement methods with tied low bidders, so long as the price paid does not exceed the low tied bid price;
- h. That the board in its discretion may negotiate a mutually agreeable contract with the only bidder so long as the price does not exceed the original bid;
- i. That if no satisfactory bid is received, the board may readvertise;
- j. For standard requirement price contracts:
 - The contract may contain escalation clauses;
 - The contract may provide for a negotiated price increase or decrease based upon a demonstrable industry-wide regional increase or decrease in the vendor's costs;
 - Either party to the contract may request that the other party demonstrate such increase or decrease;
 - That the term of such contract must not exceed two years with an option on the part of the school district to renew for an additional two years.
- k. That every contract that does not comply with state law is void.

Other terms and conditions that may be included:

- The school board's right to reject any and all bids;
- The most important award factors;
- Time and place of delivery;
- Liability and insurance in transit;
- Patent protection, if any;
- Liquidated damages provisions;
- Maintenance and service provisions;
- Specifics of acceptance and payment;
- Whether purchase is on a unit or lot basis;
- Reasons for restricted specifications;
- Period of time vendor's bid shall be firm;
- Uniform reference for escalator clauses;
- Period of time for board to make award;
- Need for bid bond or bid security;
- Special conditions related to a particular purchase;
- That a performance bond be specifically conditioned to pay laborers and suppliers.

Bid specifications may also require that a successful construction bidder enter into a pre-hire collective bargaining agreement with labor unions prior to the commencement of construction.⁷¹ (Note that if a school board intends to authorize such a project labor agreement, it must adopt a resolution to that effect at a public meeting held upon 30 days notice published in the official newspaper of the school district.)⁷² Also, if a construction project costing the statutory maximum or more will be paid in whole or in part with state funds, the bid specifications must provide that the contractor will pay the prevailing wage on the project, the applicable wage determination for the contract, and language provided by the commissioner of labor and industry to notify the contractor and all subcontractors of the applicability of the prevailing wage law.⁷³ This includes projects paid for with state loans or state grants or that are paid from school district general revenues (including operating capital funds or health and safety revenue).

C. Publishing Requirements:

1. Generally: For contracts which the school board must bid, the board must advertise for bids or proposals by two weeks published notice in the official newspaper (once a week for two weeks with the last publication at least one week before the time of bid opening).⁷⁴ This notice must state the time and place of receiving bids and contain a brief description of the subject matter. Additional publication in the official newspaper or elsewhere may be made as the board deems appropriate. A legal notice may be published on a Sunday. The notice must be published in consecutive weeks, and the skipping of a week voids the legality of the publication, even if the publication is for the requisite number of weeks.⁷⁵ The following types of contracts may have different publication requirements:
 - a. Transportation contracts and contracts for the purchase of petroleum heating fuel or vehicle fuel, which requires the district to, at least 30 days before awarding a directly negotiated contract request quotations by published notice for services to be provided;
 - b. Requests for proposals for group insurance coverage, which require that public notice of the request for proposal must be provided in a newspaper or trade journal at least 21 days before the final date of submitting proposals.
2. Contents of the notice:

- a. Required provisions:
 - The time and place of receiving bids;
 - A brief description of the subject matter; and
 - A statement requiring “conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids.”
 - b. Advisable provisions:
 - The time and place of opening bids;
 - Information as to the availability of specifications, if applicable;
 - A statement reserving the right of the school board to reject all bids (this is informational as boards may reject all bids even if reservation is not specified);
 - A statement adopting the terms and conditions of the specifications by reference.
3. Alternative Dissemination: In addition to or as an alternative to the statutory requirements for newspaper publication, a school district may disseminate solicitations of bids, requests for information and requests for proposals by use of its web site or a recognized trade journal, if the school district simultaneously publishes, either as part of the minutes of a regular meeting of the school board or as a separate notice published in the official newspaper, a description of all solicitations or requests so disseminated, along with the means by which the dissemination occurred.

If the school district uses its web site or recognized trade journals as an alternative method of dissemination, the dissemination must be in substantially the same format and for the same period of time as a newspaper publication.

For the first six months after a school district designates an alternative means of dissemination, it must continue to publish solicitation of bids, requests for information and requests for proposals in the official newspaper in addition to the alternative method. The publication in the official newspaper must indicate where to find the designated alternative method. After the expiration of the six-month period, an alternative means satisfies the publication requirements of law for solicitation of bids, requests for information, and requests for proposals.⁷⁶

D. Acceptance of Bids:

1. Sales by school districts: The school district is required to accept the bid of the highest bidder for the sale of items by a school district.
2. Lowest responsible bidder: Minnesota law provides that a purchase contract for which a call for bids has been issued must be awarded to the “lowest responsible bidder,” after taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids.⁷⁷ The specifications should be clear so that a bid constitutes an offer which can be accepted without further negotiation and the only function of the school board with respect to the bids should be to determine who is the lowest responsible bidder. The board’s determination of the “lowest responsible bidder” is a discretionary administrative act which must be presumed valid until clearly invalid, and which may not be overturned by a court in the absence of a finding of an abuse of discretion or an unreasonable exercise of power.⁷⁸ In choosing the “lowest responsible bidder,” the board is not bound to award the contract to the bidder submitting the lowest money bid.

(In the event the contract is awarded to someone other than the lowest bidder, the reasons for rejecting the lowest bid should be thoroughly noted and documented in the school board records, in anticipation of a future challenge and/or litigation regarding the rejection of the low bid.)

3. Conformance with specifications: A bid submitted must substantially conform with the advertised plans and specifications, and where there is a substantial variance between the bid and the specifications, the bid must be rejected.⁷⁹ The test of whether the variance is substantial or material and should therefore be rejected is whether the variance gives the bidder a substantial advantage or benefit not enjoyed by other bidders. The school district must determine whether there is a variance based upon the written bid submission and subsequent verbal clarification or modification of the written submission is impermissible.⁸⁰ A substantial or material variance between the bid and the advertised plans and specifications is a defect that may not be waived by the board.

4. Alteration of bid:

- a. Prior to submission of bid: A bid which contains an alteration or erasure of any price contained in the bid which is used in determining the lowest responsible bid must be rejected unless the alteration was corrected by crossing out the erroneous number and printing, in ink or typewritten print adjacent thereto, the correct number, which correction is initialed in ink by the person signing the bid.⁸¹ Failure to follow this procedure is a defect that the board may not waive.⁸²
- b. Alteration after submission of bid: After a bid has been received and opened, no material change may be made to a bid.⁸³ Changing a bid includes filling in missing information or materials required by the call for bids.⁸⁴ A clause in the bid specifications allowing the public entity to waive irregularities does not allow a bidder to add to or alter a bid once a bid has been opened.⁸⁵

Somewhat less clear is the question of whether a submitted bid may be withdrawn based upon an alleged mistake by the bidder. The Minnesota Attorney General has held that a bidder may be allowed to withdraw a bid prior to acceptance of the bid.⁸⁶ There is authority approving the abandonment of a contract arising from the acceptance of a bid, by mutual consent, after the discovery of an error giving rise to the contract.⁸⁷ There is also authority for allowing the withdrawal of a bid, after acceptance, which contain a mistake, where the mistake appeared to be an honest mistake and where the bidder promptly notified the other party of the mistake.⁸⁸ Based upon this authority, if a bidder notifies a school district of its intent to withdraw from a contract due to a mistake in the bid, the school board may have the authority to permit the bidder to withdraw if it finds the mistake was an honest mistake and that notice of the error was promptly provided by the bidder.

5. Number of bids received: If two or more complying bids are received, the school board must award the contract to the lowest responsible bidder, unless the right to reject any and all bids was reserved. If identical bids are received from two or more bidders, the board may, at its discretion, utilize negotiated procurement methods with the tied low bidders, so long as the price paid does not exceed the low tied bid price. If only one complying bid was received, the school board may, at its discretion, negotiate a mutually agreeable contract with the bidder so long as the price paid does not exceed the original bid. If no bids are received, the school board may readvertise.⁸⁹

- E. Delegation of Authority: The school board may authorize the clerk to receive, open, and tabulate bids.⁹⁰

- F. Record Keeping: A record must be kept of all bids, with names of bidders and amount of bids, and with the successful bid indication thereon.⁹¹ All quotations must be kept on file for a period of at least one year after receipt.⁹²
- G. Contract Formalities: All bids accepted must substantially comply with all statutory requirements and be in such form that, upon acceptance, a valid obligation will be placed on the bidder to enter into a formal contract regarding the matter for which the bid was submitted. It is desirable, but not necessary, that contracts involving school districts be dated, that the signatures of both parties to a contract be acknowledged before a notary public or another person authorized to take acknowledgments or that the signature of both parties be made in the presence of witnesses.⁹³

IV. BEST VALUE CONTRACTING:

- A. Best value alternative: As an alternative to accepting a bid from the “lowest responsible bidder,” a contract for construction, building, alteration, improvement, or repair work may be awarded to the vendor or contractor offering the best value.⁹⁴
- B. Criteria: Best value considers price and performance criteria, including but not limited to⁹⁵:
 1. the quality of the vendor’s or contractor’s performance on previous projects;
 2. the timeliness of the vendor’s or contractor’s performance on previous projects;
 3. the level of customer satisfaction with the vendor’s or contractor’s performance on previous projects;
 4. the vendor’s or contractor’s record of performing previous projects on budget and ability to minimize cost overruns;
 5. the vendor’s or contractor’s ability to minimize change orders;
 6. the vendor’s or contractor’s ability to prepare appropriate project plans;
 7. the vendor’s or contractor’s technical capacities;
 8. the individual qualifications of the contractor’s key personnel; or
 9. the vendor’s or contractor’s ability to assess and minimize risks.
- C. Solicitation Document: The solicitation document must indicate the criteria utilized and must state the relative weight of price and other criteria, used by the school district.⁹⁶ If an interview of the vendor’s or contractor’s personnel is one of the selection criteria, the relative weight of the interview must be included in the solicitation document and applied accordingly.⁹⁷
- D. Eligibility: **All** school districts are eligible to utilize best value contracting.

V. EFFECT OF FAILURE TO COMPLY WITH STATUTORY CONTRACTING AND BIDDING REQUIREMENTS:

- A. Violation by School District:
 1. Violation of pre-acceptance procedures: Failure to follow competitive bidding requirements renders the resulting contract void, and may subject the school district to a claim for damages by an unsuccessful bidder.⁹⁸
 2. Violation of acceptance procedures: Failure to award a contract to the lowest responsible bidder may subject the school district to a claim for damages by a bidder claiming to be the lowest responsible bidder. Likewise, awarding a contract to a low bidder whose bid is at variance with

the bid specifications may subject the school district to a claim for damages by the bidder having the next lowest bid.⁹⁹ These damages ordinarily include the unsuccessful bidder's costs in preparing its bid, but not attorney's fees.¹⁰⁰

3. Personal liability of school board members: It has been recognized that a school board who votes to make a contract in violation of the competitive bidding statute may be personally liable for damages arising from the violation.¹⁰¹

- B. Violation by Bidder: A bidder's breach of a contract arising from an accepted competitive bid may subject the bidder to a claim for damages by the school district. In such a case, the school district's damages will likely be the difference between the breaching bidder's bid and that of the next lowest responsible bidder.¹⁰²

VI. PROMPT PAYMENT ACT:¹⁰³ A. Obligation. The statute requires a school district that has regularly scheduled meetings at least once a month to pay its vendors according to the terms of the purchase contract or, if no contract terms apply, within a standard payment period defined as 35 days of the date of receipt. For school districts without regular meeting schedules and for joint powers organizations, the time period is 45 days. The time period begins to run from the date of receipt which is defined as the completed delivery of the goods or services or the satisfactory installation, assembly or specified portion thereof, or the receipt of the invoice for the delivery of the goods or services, whichever is later. The statute allows the school district to dispute the obligation in good faith. The school district must notify the vendor within 10 days of receipt of an incorrect, defective or otherwise improper invoice. The standard payment period then begins to run only upon receipt for a corrected invoice.

- B. Interest. If the school district has not paid its obligation according to the terms of the contract or, if no contract terms apply, within the standard payment period discussed above, the school district must calculate and pay interest to a vendor. The rate of interest is 1-1/2 percent per month or part of a month. The minimum interest penalty for any one overdue bill of \$100 or more is \$10. For unpaid balances of less than \$100, the school district shall calculate and pay the actual interest due the vendor.

- C. Subcontractors. Each contract of a school district with a prime contractor must require the prime contractor to pay any subcontractor within 10 days of the prime contractor's receipt of payment from the school district for undisputed services provided by the subcontractor. The prime contractor must pay interest at the rate of 1-1/2 percent per month or part of a month on any unpaid balance.

- D. Application. The Prompt Payment Act applies to all goods, leases and rents, and contracts for services, construction, repair and remodeling. Thus it applies to purchase invoices, contractor's bills, lease payments, invoices for attorney's fees, and the multitude of other bills received by school districts. It does not apply to purchases from or contracts with a public utility or a telephone company that has on file with the Public Utilities Commission an approved practice regarding late fees.

VII. CONFLICTS OF INTEREST:

- A. Sale of School District Property to Employees: Real or personal property or materials owned by a school district and not needed for public purposes may be sold to an employee of the school district after reasonable public notice at public auction or by sealed response if the employee is not directly involved in the auction or process pertaining to the administration and collection of sealed responses. A person violating this provision is guilty of a misdemeanor.¹⁰⁴ Under this provision, it is illegal for a school district to purchase personal property, such as computer equipment, and to resell it to its employees without going through the public auction or sealed response process.

B. Purchase from School District Employee: No public school teacher, district school officer, superintendent of schools, member of any school board, nor any person connected with the public school system in any capacity, may be interested directly or indirectly in the sale, proceeds, or profits of any book, apparatus, or furniture used or to be used, in any school with which the person is connected in any official capacity. Any person violating this provision shall forfeit not less than \$50.00, nor more than \$200.00, for each such offense. This prohibition does not apply to a person who may have an interest in the sale of any book of which that person is the author. Also, this prohibition shall not prohibit the spouse of a prohibited person from engaging in such activities, as long as the prohibited employee's position does not involve approving contracts for supplies and the school board unanimously approves the transaction.¹⁰⁵

VIII. MODEL SPECIFICATION AND BID FORMS: Attached hereto are copies of model invitation, specification, and contract forms for school transportation and milk contracts.

INDEPENDENT SCHOOL DISTRICT NO. _____

_____, Minnesota _____

INVITATION FOR BIDS
FOR BUS TRANSPORTATION
PURSUANT TO M.S. 123B.52, SUBD. 1

1. Notice is hereby given, that Independent School District No. _____, _____, will receive sealed bids for transportation of its school children including special education and handicapped students, according to the specifications and conditions which may be obtained from the office of the Superintendent of Schools, _____, Independent School District No. _____, _____ Street, _____, Minnesota. Bids shall be submitted in form and manner contained in the specifications and the conditions.

2. Sealed bids must be received in the office of the Superintendent no later than _____, 20____, at _____ o'clock p.m. at which time the bids will be opened by representatives of the board, for tabulation and distribution to the school board and interested parties. No change can be made in any bid except in the manner provided by law, and no bid may be withdrawn for 30 days without consent of the school board.

3. Prior to the submission of bids, the school district will hold an informational meeting on _____ at _____ o'clock p.m. in the office of the Superintendent for purposes of explanation of the needs and services desired by the school district. Questions will be answered.

4. The successful bidder may be required to furnish a performance bond in the full amount of its bid, which bond shall comply with the provisions of Minnesota Statutes, Section 574.26. The amount is discretionary with the school board. M.S. 123B.52, Subd. 3.

5. On _____ at _____ o'clock p.m., the school board will meet to evaluate the bids and act thereon. The school district reserves the right to accept, reject, or waive any informality of any bid and to make an award for transportation services which is deemed most favorable and advantageous to the school district. If further information is desired, interested persons should contact the district business office, phone _____.

Dated this _____ day of _____, 20____.

INDEPENDENT SCHOOL DISTRICT NO. _____
_____, Minnesota _____

Clerk

INDEPENDENT SCHOOL DISTRICT NO. _____

_____, Minnesota _____

INVITATION FOR QUOTATIONS
FOR BUS TRANSPORTATION
PURSUANT TO M.S. 123B.52, SUBD. 3

1. Notice is hereby given, that Independent School District No. _____, _____, will receive written quotations for transportation of its school children, including special education and handicapped students, according to the specification and conditions which may be obtained from the office of the Superintendent of Schools, _____, Independent School District No. _____, _____ Street, _____, Minnesota. Quotations shall be submitted in form and manner contained in the specifications and the conditions.

2. Quotations must be received in the office of the Superintendent no later than _____, 20____, at _____ o'clock p.m. at which time the quotations will be opened and tabulated and distributed to interested parties. No change can be made in the written quotation without consent of the school district. Negotiations will be conducted at such time and place as designated by the school district utilizing such procedures as the school district deems appropriate.

3. Prior to the submission of quotations, the school district will hold an informational meeting on _____, 20____, at _____ o'clock p.m. in the office of the Superintendent for purposes of explanation of the needs and services desired by the school district. Questions will be answered.

4. On _____, 20____, at _____ o'clock p.m., the school board will meet to evaluate the quotations and act thereon. The school district reserves the right to accept, reject or negotiate any quotation and to make an award for transportation services which is deemed most favorable and advantageous to the school district. If further information is desired, interested persons should contact the district business office, phone _____.

5. Any person whose quotation is accepted may be required to furnish a performance bond in the full amount of its quotation, which bond shall comply with the provisions of Minnesota Statutes, Section 574.26. The amount is discretionary with the school board. M.S. 123B.52, Subd. 3.

Dated this _____ day of _____, 20____.

INDEPENDENT SCHOOL DISTRICT NO. _____
_____, Minnesota _____

Clerk

INDEPENDENT SCHOOL DISTRICT NO. _____

_____, Minnesota _____

BUS TRANSPORTATION SPECIFICATIONS AND CONDITIONSSECTION I. GENERAL CONDITIONS

A. Duration: The service shall be for the 20____ - ____ school year [or a period of ____ years] [and the school district has the option to extend the period not to exceed ____ additional school years on the same term and conditions]. Any award must establish the consideration for the entire contract including any options to extend. A future ascertainable adjustment may be utilized such as the Consumer Price Index.

B. Service Within the School District: Supplier shall furnish equipment and personnel sufficient to provide daily transportation of students within the school district for the 20____ - ____ school year(s) to the various schools of the school district according to a time schedule and on routes determined by the school district. There shall be no change in any bus route or time schedule without consent of the school district. Generally the transportation will include pickup from home to school in the morning and pickup from school to home or residence in the afternoon.

C. Service Outside of School District: Supplier shall furnish equipment and personnel as required by the school district to provide daily transportation of handicapped students outside the school district for the 20____ - ____ school year to such schools in other school districts as designated by the school district according to the district's needs.

D. Contract and Performance Bond: The supplier shall enter into a formal contract based on the conditions and specifications as set forth herein. The supplier may be required to supply a performance bond equal to 100% of the anticipated contract award, before commencing service, and shall also provide liability and property damage insurance as herein described. The performance bond shall comply with the provisions of Minnesota Statutes, Section 574.26. The amount is discretionary with the school board. M.S. 123B.52, Subd. 3.

E. School District Agent: For purposes of communication with the school district regarding the transportation contemplated by the contract, supplier shall communicate with the _____.

F. Award: (To be used when the specifications call for bids.) The school district reserves the right to waive any informalities, to accept or reject in whole all proposals, to request new proposals, or to award a contract which in its judgment is in the best interest of the school district. In the event of identical proposals the school board may utilize negotiated methods so long as the low tied price is not exceeded. In the event of only a single proposal, the school board may negotiate a lower price with the supplier. (To be used when the specifications call for quotations.) The school district reserves the right to waive any informalities, to accept or reject in whole all proposals, to request new proposals, to enter into direct negotiations utilizing such procedures as determined by the school district and to award a contract which in its judgment is in the best interest of the school district.

SECTION II. SPECIFIC CONDITIONS

A. Instructions for Submitting Proposal:

1. Any written proposal containing an alteration or erasure of any price contained in the quotation shall be rejected unless the alteration or erasure is corrected as follows: An alteration or erasure may be crossed out and the correction printed in ink or typewritten adjacent thereto, and initialed in ink by the person signing the proposal.

2. Proposals for transportation to schools outside the school district shall be made on the basis of cost per student per day of enrollment.

3. Proposals for transportation to schools within the school district shall be made on the basis of total cost for all vehicles required.

4. As a part of its preparation for submitting a proposal, a supplier shall fully inform itself of school district needs by personal visitation and conferences prior to submission of a written proposal, and may examine maps, schedules, current routes, and other necessary information available at the office of the _____.

5. Supplier shall furnish with its proposal a written biography and statement indicating the type and extent of transportation experience, references, a list of names of school districts (public, private or parochial schools) previously or presently served, including dates of service. A financial statement with bank references may be required, and shall be submitted to the school board if requested.

B. Vehicles:

1. School buses shall comply with all federal and state laws and regulations at all times under this contract and shall be approved by the school district. Sufficient vehicles shall be available.

2. Included in the proposal shall be a list of equipment that the supplier proposed to utilize in providing services. If the supplier proposes to furnish new equipment, the supplier shall include with its proposal evidence that it has such equipment in its immediate possession, or a certification from a manufacturer or a manufacturer's authorized representative that such new equipment will be provided for service on or before commencing performance and that satisfactory arrangements for the payment of said new equipment have been made.

The supplier shall submit the following information with its proposal:

A. Equipment List, indicating by Bus No.

1. Chassis manufacturer - style - year
2. Body manufacturer - number of elementary students that can be seated.
3. Mileage on bus
4. Use of bus - either route number or spare.

B. Names, addresses, and school bus drivers license number for all drivers and substitutes.

3. If the supplier proposes to furnish used equipment, the supplier shall include with its proposal evidence of ownership. No vehicle that is older than _____ years shall be used for any part of the service except standby buses shall not exceed _____ years of age. All vehicles must be maintained in safe operating condition, exterior and interior cleanliness must be maintained. Sufficient heat shall be maintained in all vehicles at the time students are being transported.

4. Additional Equipment: Additional equipment such as hoists which may have to be added throughout the year shall be provided as an amendment to the contract upon mutually agreeable terms. Equipment which is necessary to meet the needs of an individual student shall be identified by the school district.

5. Radios: Some vehicles used for specialized transportation may be equipped with 2-way radios. Supplier's proposal shall clearly indicate the cost with or without radios.

6. Regulations: All vehicles used shall comply with all road and safety regulations as set forth by any Federal, State and Municipal policy, law, statute or ordinance as it may relate directly or indirectly to the safe operation of a vehicle used in public transportation of students.

7. Inspection: All vehicles used in transportation service shall be made available for inspection from time to time as deemed necessary by a school district agent or any state authority.

C. Insurance:

1. Successful supplier shall maintain during the life of the contract public liability and property damage and excess liability insurance with minimum limits as follows:

a. Bodily injury and property damage	\$500,000 claimant,	\$1,500,000 per single occurrence
b. Medical coverage	\$ _____ per claimant	
c. Excess liability, bodily injury	\$ _____ each claimant	

and in addition will be required to maintain any additional coverage which may be required of school districts during the term of this agreement.

2. Certificates of insurance coverage shall be filed with the school district when the contract is executed, and shall carry the following endorsement:

"It is agreed that such insurance as is afforded by the policy applies subject to the following provisions: Under the Bodily Injury Liability and Property Damage Liability Coverage.

The company agrees that it will not use, either in the adjustment of claims or in the defense of suits against the insured from tort liability, any legal immunity the insured may possess solely by reason of its sovereign status unless requested in writing by the insured to interpose such defense."

3. Successful supplier shall furnish and maintain during the life of the contract Worker's Compensation coverage for the protection of its employees in amounts required by law.

4. No liability resulting from a vehicular accident, or any driver or operational negligence will be assumed by the school district, or its officers, employees or authorized representatives.

5. All certificates of insurance coverage furnished to the school district shall show the school district as an additional insured under the policy, and such certificates shall be in force at all times under the contract.

D. Service Conditions:

1. It is anticipated that daily transportation to each of the school locations will be substantially as follows:

- a. _____ number of regular students
- b. _____ number of handicapped students

Any new or additional students who can be transported without additional cost to the supplier shall be transported by supplier on request by school district at no additional compensation. Should such new or additional students require significant changes in routes or number of kinds of buses or vehicles which in the opinion of the school district will require additional cost to the supplier, the school district may pay to the supplier such additional sum as mutually agreed by the school district and the supplier or any other supplier. Extracurricular and special trips as requested by the school district shall be provided by the supplier at the rates provided in supplier's proposal. Supplier will quote costs for providing bussing service for extracurricular activities and special trips on both hourly rate and mileage rate.

2. The number of students transported shall not exceed the rated manufacturer's capacity of the transporting vehicle. If passenger vehicles are used, i.e., private cars, the number of passengers shall not exceed five (5) or the rated capacity of the vehicle, exclusive of the driver. Scheduling of the students for arrival at the various school locations shall conform to regular school schedules, or to the schedule established by the school district.

3. Handicapped students shall be picked up immediately in front or as near as possible to their homes. A student shall load or unload at home or school only from the right side of the vehicle, except on a one-way street, where the non-traffic side of the vehicle may be used. Type III vehicles shall load and unload in the student's driveway, if one is available.

4. No unauthorized person shall be allowed in any vehicle while engaged in the transportation of students for the school district. The school district reserves the right to assign attendants to any vehicle in the best interest of any student.

5. The successful supplier shall be highly selective in the employment of its drivers. The supplier will be required to utilize only those drivers holding a valid Class A or Class B license with a school bus endorsement who have been thoroughly checked for ability, character, integrity and fitness, and who are acceptable to the school district. The school district reserves the right to comment on the performance of any employee of the supplier and supplier shall take appropriate steps to improve services. The successful supplier must agree annually to provide 4 hours of in-service time for all bus drivers utilized in the performance of the contract including substitute drivers or additional drivers for routes which may be added during the year. Such in-service training sessions shall be scheduled between the hours of 9:30 a.m. and 2:00 p.m. All drivers shall meet the competency testing specified in the Minnesota Department of Public Safety Model School Bus Driver Training Manual and must be assessed periodically for the following competencies: 1) Safely operate the type of school bus the driver will be driving; 2) Understand student behavior, including issues relating to students with disabilities; 3) Ensure orderly conduct of students on the bus and handling incidents of misconduct appropriately; 4) Know and understand relevant laws, rules of the road, and local school bus safety policies; 5) Handle emergency situations; and 6) Safely load and unload students.

The evaluation must include completion of an individual "school bus driver evaluation form" (road test evaluation) as contained in the Model School Bus Driver Training Manual. The supplier must provide annually an individual school bus driver "evaluation certification" form for each school district driver.

Each driver must have completed a criminal history background check to the satisfaction of the school district.

Supplier shall provide satisfactory evidence of the good health of each driver prior to each school year (or during the school year for new drivers) based on a yearly physical examination. Such examination shall indicate that the driver complies with the minimum health standards required by the rules and regulations of the State Board of Education or any other state agency for school bus drivers. The expense of the physical examination for all drivers shall be paid by the supplier.

The supplier must comply with all state and federal laws governing the mandatory drug and alcohol testing of school bus drivers.

The supplier and each driver must comply with the requirements of Minn. Stat. § 171.02.

6. Smoking on vehicles shall be prohibited at all times. The driver shall not carry on unnecessary conversation while the vehicle is in motion. The driver shall at all times operate the vehicle in a safe, prudent and careful manner with due regard for traffic conditions, speed limits and road conditions. Drivers will not be allowed to make personal stops. Drivers shall not operate a school bus while communicating over, or otherwise operating a cellular phone for personal reasons when the bus is in motion.

7. Successful supplier shall be responsible for handling complaint calls.

SECTION III. BILLING

The supplier shall agree to bill the school district within ten days after the end of each month for services rendered for that month on vouchers provided by the school district and in compliance with state laws. If such billings are proper, the school district shall make payment within fifteen days thereafter.

SECTION IV. INCLUSION BY REFERENCE AND APPLICABILITY OF LAWS AND MISCELLANEOUS PROVISIONS

A. Anything herein notwithstanding, successful supplier shall comply with applicable provisions of State and Federal Laws including the Motor Vehicle Code, Department of Education or any other state agency rules and regulations relating to student transportation, the construction, design, operation of equipment, and safety accessories for equipment, vehicle codes and other applicable laws, rules and regulations prescribed by the State or any political subdivision thereof relating to the transportation of regular and handicapped students.

B. The school district shall require strict adherence to the terms of the specifications of the contract to be awarded in order to safeguard the comfort and safety of the students and to provide for the orderly operation of its program.

C. The attached proposal form shall be completed by each supplier desiring to make a proposal to the school district.

D. Acceptance of a proposal by the school district for the transportation contemplated by these specifications shall be reduced to written contract and the successful supplier agrees to execute such contract which will refer to and include by reference these specifications. It is understood that a contract for transportation will be effective upon award by the school district, or execution following negotiation if not bid.

The successful supplier shall comply with the school district's adopted transportation regulations which are a part of its administrative code so far as they are applicable to the performance of transportation of students. A copy will be made available to any supplier desiring to submit a proposal.

E. The Supplier shall provide the school district with a cashier's check or bid bond in the amount of _____ Dollars (\$ _____) from a reputable bonding company satisfactory to the school district, guaranteeing as bid surety that the supplier will enter into a contract and comply with the terms, conditions and covenants of the Agreement and these specifications.

F. In the event a contract is awarded and there is any dispute whether or not the proposed type of equipment, character of the service, ability and qualifications of the drivers, or any other fact question shall arise, the school board shall be the sole judge, arbitrator and determiner thereof.

G. If additional buses are required to handle any additional students within the school district, and if the supplier is unable or unwilling to provide the kind and caliber of additional buses specified by the school district at a price equivalent to that provided under this contract, the school district may provide such transportation at a price agreed upon between the school district and the supplier or any other supplier in accordance with applicable bidding statutes.

H. The supplier agrees to provide any necessary information to the school district, which will permit the school district to apply for a refund of the federal excise tax per gallon of gasoline and will assist the school district in processing any application for a refund. Supplier shall also supply all information necessary for the school district to make claim for state aids for transportation to the Department of Education and any other forms or data required by the Department of Education to be filed by the school district with the Department of Education as relate to the transportation of students under this contract.

I. The entire operation contemplated by the Agreement shall comply with applicable rules and regulations adopted by the Commissioner of Education, the Minnesota Department of Transportation, any other state agency and the school board, presently in effect or now or hereafter adopted and required and the supplier will be bound by all rules and regulations, local ordinances, or State and Federal laws relative to road conditions and road restrictions, as well as with ordinances of other subdivisions of government.

J. It is also agreed that the supplier will provide a competent dispatcher, who will dispatch all buses and equipment proposed for service and under said Agreement, and shall assign bus drivers to school district routes who shall be approved by the School Board and shall, at the request and in the discretion of the school district, remove a bus driver found unsatisfactory by the school district.

SECTION V. BUS DRIVERS' RULES OF CONDUCT

1. All drivers shall submit to the school district before the date on which school opens or before the date on which such driver shall operate on the routes, a physician's statement as to the driver's physical condition and health to show compliance with applicable regulations.
2. All drivers shall be required to travel over the routes and make the stops according to the timetables designated by the appropriate school district official.
3. All drivers shall exercise all proper care in protecting children from injury and exposure.
4. All drivers shall stop the vehicle and cause the same to be flagged over all railroad tracks by the bus patrol when such a patrol is available. When the bus patrol is not available, the driver shall, after stopping the vehicle, personally ascertain that the tracks are clear before crossing.
5. The drivers shall supervise all students when they cross the highway before entering and on leaving the school bus.
6. All drivers shall observe and obey all traffic rules and regulations imposed by the State of Minnesota and the various municipalities on all public roads.

7. All drivers shall observe all operating rules adopted promulgated by the Commissioner of Education, the Commissioner of Transportation, any other state agency and the local school board for the operation of the vehicle on the roads.
8. Drivers shall maintain order among the children at all times when they are being transported to and from school, shall allow them to enter and leave the bus only at such places as shall be designated by the appropriate school district official, shall keep the aisle and emergency exit of the bus unobstructed at all times when children are being transported and shall report all cases of disobedience, improper conduct and speech, and cases of tardiness to the principal of the school to which the student is transported or which the student attends.
9. No driver shall use profane or indecent language within the hearing of any student and shall tolerate no such language on the part of the students.
10. No driver shall be under the influence of an alcoholic beverage or controlled substance as defined by the Minnesota Highway Traffic Regulation Act (M.S. 169) at any time while transporting students. The school district may refuse to accept as a driver any person who habitually uses alcoholic beverages or controlled substances to excess as determined by the school district, and the school district shall not be required to accept any driver whose driver's or chauffeur's license is under suspension or revocation.
11. Each driver will make such daily and weekly reports as may be required by school district officials regarding the schedules and passengers and incidents en route. The reports shall be delivered to the supplier, who shall deliver them to the appropriate school officials.
12. All drivers shall report immediately to the appropriate school district officials all accidents involving the vehicles operated by the driver during the transportation of students.
13. All drivers shall attend the meetings of the school bus drivers that may be called by the appropriate school district officials.
14. All drivers shall attend regional bus drivers' schools of instruction as the same may be scheduled, and shall bring the vehicles used by the drivers for student transportation for inspection when such inspection is ordered by the State Board of Education.
15. No drivers shall allow students to use tobacco, alcoholic beverages or controlled substances while in the bus.
16. All drivers shall notify the Minnesota Division of Driver and Vehicle services and/or the supplier of a conviction for a motor vehicle traffic violation, license suspension, or other conviction as specified in Minn. Stat. § 171.02.

SECTION VI. CONCLUSION

Independent School District No. _____ will require strict adherence to the terms of the specifications and of the contract to be awarded, including but not limited to specifications related to schedules, adequacy of equipment, maintenance of equipment, employment of qualified personnel, constant attendance of qualified supervisory personnel, enforcement of rules as to conduct of children while being transported, safety of operation under all conditions and strict and faithful compliance with all rules, regulations, directives and orders of the School Board, Superintendent of Schools, other appropriate school district officials, the officials

and peace officers of any and all municipalities and of any and all other persons or bodies having jurisdiction or control of any subject matter of the contract.

SECTION VII. PROPOSED TRANSPORTATION AGREEMENT ATTACHED

Suppliers are instructed to read the attached agreement and be expected to comply with it in the event of award.

TRANSPORTATION CONTRACT
INDEPENDENT SCHOOL DISTRICT NO. _____
_____, Minnesota

This agreement is made effective _____ by and between Independent School District No. _____, _____, Minnesota, hereinafter described as "School District" and _____ hereinafter described as "bus operator" as follows:

I.

1. It is contracted and agreed by and between the said parties that the bus operator shall transport students required to be transported by the school district from any points on the designated routes to and from designated schools according to the routes and schedules as are furnished from time to time by the superintendent of the school district, or other appropriate school district officials, for the period of this contract.

2. The bus operator agrees:

- a. To furnish chassis and passenger school bus bodies both conforming to all the State and Federal laws and regulations relating to school buses.
- b. To keep said school buses properly stored so that they will insure proper warmth and comfort for the students transported therein, each bus to be equipped with good and sufficient heaters.
- c. To have said buses maintained by qualified mechanics so that they will be at all times in good mechanical condition and kept clean and will from time to time add such equipment and safety devices as may be required by any new laws or rules of the State of Minnesota relating to school buses.
- d. To furnish drivers over 18 years of age in good health and in possession of a valid, effective bus driver's license issued by the Motor Vehicle Department of the State of Minnesota, and who have completed a criminal history background check to the satisfaction of the school district for said buses in adequate numbers and of proper qualifications to fulfill the requirements of the contract.
- e. To establish and enforce regulations for the rules relating to the conduct of such drivers.
- f. To comply fully with all state and federal laws governing the mandatory drug and alcohol testing of individuals required to hold a commercial driver's license (all school bus drivers).
- g. To discharge or replace any drivers violating rules of conduct or not meeting qualifications or such requirements or qualifications as may be established herein in addition thereto.
- h. To have on hand serviceable standby buses in sufficient numbers to make all trips necessary under this contract so that all normal buses are operating at all times.

3. The entire operation contemplated in this agreement shall comply with applicable rules and regulations adopted by the Commissioner of Education, the Minnesota Department of Transportation, any other state agency and the school district presently in effect or now or hereafter adopted and required. The

bus operator will be bound by all rules and regulations, local ordinances, or state laws relating to road conditions and road restrictions of any other subdivisions of government and any other regulations relating to the operation contemplated herein.

II.

1. The school district agrees to pay the bus operator in consideration and compensation of operator's obligation for performance under this contract an amount of \$_____ per school year [or per pupil] for not more than _____ school days. In the event the school year consists of fewer days the cost per bus will be reduced accordingly. Average seating capacity of buses will be _____.

The school calendar, including vacations, holidays and recess periods, shall be provided to the operator prior to the beginning of the school year. In the event that the actual number of days school is in session each school year and during which pupils must be transported shall exceed _____ days, the school district and operator shall determine the additional cost to operator of transporting the pupils during the additional days and the compensation to be paid to operator shall be mutually agreed upon between the parties in writing.

The minimum number of pupils to be transported under this contract during any school year shall be _____. Extra-curricular and special trips shall be in addition to the above amount and paid according to operator's proposal or as otherwise provided by an attachment to this agreement.

2. If the price of gasoline to the bus operator should exceed _____ cents per gallon, excluding federal tax, during the contract period, the school district agrees to assume the excess cost beyond _____ cents per gallon, excluding federal tax, upon documentation as to price and gallonage used in fulfilling contracted obligations.

III.

1. The bus operator agrees to keep in effect liability insurance for each bus to insure against liabilities up to \$500,000 for each claimant and \$1,500,000 for each single occurrence in addition to any other coverage required by the specifications. The school district shall approve the company and policy submitted to fulfill this requirement and be included in an appropriate endorsement. Any additional coverage obtained by the bus operator will apply to this contract at the time secured.

2. Operator shall not be held or deemed in any way to be the agent or employee of the school district. It is the intention of the parties that the operator is and shall be considered as an independent contractor. No officer, employee or agent of operator shall be deemed to be an officer, employee or agent of the school district, unless he is also an officer or employee of the school district. Operator agrees to hold harmless and indemnify the school district from any and all claims, demands, causes of action, and suits against the school district caused by the negligence or intentional acts of the officers, employees and agents of the bus operator, and the school district shall pay or settle no claims or judgments arising out of such negligence or intentional acts of the officers, employees, or agents of the operator, except as otherwise required by law, without approval of the operator or its insurer, in writing, and shall immediately give notice of all claims or suits to operator.

IV.

1. It is agreed by the parties that in the event the bus operator is unable to provide transportation services as herein specified because of acts of God, fire, riot, war, picketing, civil commotion, strikes, labor disputes or any other similar condition, the school district may excuse it from performance hereunder and terminate the contract or shall have the right to take over the operation of such buses that the bus operator is prevented from

running, utilizing such school employees or other persons as the school district may deem appropriate, until the bus operator is able to resume operation. The school district shall pay to the bus operator for such buses the same amount specified in the heretofore mentioned rate schedule, less all expenses and costs incurred by the school district in the operation and maintenance of the vehicles.

V.

1. This agreement shall be in full force and effect for a period commencing _____, 20____, and ending on _____, 20____. [This agreement may be renewed for an additional _____-year period at the option of the school district on the same terms by a written notice mailed to second party on or before _____, 20____.]

The minimum service to be provided under this agreement shall be to transport one round trip each day school is in session all pupils required to be transported under this agreement to and from the school and the residing place of the pupil for a period of not more than _____ days during each school year of this agreement, if required by the school district. This statement shall not in any way excuse Operator from performing all other obligations or duties required under this contract, or the specifications or proposal attached hereto, during the period of this contract for the consideration recited.

This contract may be amended or terminated by mutual agreement of the parties in writing approved by the school board upon 30 days' written notice of one party to the other, or as otherwise permitted by this contract or the specifications or proposals attached hereto. Failure or refusal of either party to substantially perform the conditions of this contract during the term of the contract will permit the other party to terminate the contract upon 30 days' written notice in writing to the breaching party, unless within such 30-day period the breaching party shall correct the performance to the satisfaction of the other party, but both parties shall be entitled to all remedies provided by law in case of such breach, failure or refusal, but neither party shall be required to accept less than full performance of this contract unless otherwise agreed in writing by the parties. All notices under this contract required to be given to the school district shall be directed to the clerk of the school district at the school district's administrative offices. All notices required to be given to the operator shall be directed to it at its principal office last on record with the school district.

VI.

1. The specifications and general conditions relating hereto are included herein and made a part of this contract by reference along with any proposal submitted by operator, except as otherwise provided in this contract.

2. The school board shall approve any and all school bus routes, bus stops, drivers and alternative drivers. The school district reserves the right to change or alter the schedules and routes of travel by giving at least two weeks' written notice to operator, but any additional costs shall be verified in writing by the operator and additional compensation shall be mutually agreed upon by the parties in writing.

VII.

Operator cannot assign or transfer any part or all of his interest in this contract without the written approval of the school board of the school district as authorized at a regular or special meeting of the school board.

VIII.

Operator and school district has complied with the provisions of M.S. 123B.52, Subd. 3. Any adjustments or refunds under this contract shall be determined by mutual consent of the parties.

IN WITNESS WHEREOF, the parties have executed this agreement below.

_____	Independent School District No. _____
(Insert name of bus operator)	_____, Minnesota
By : _____	By: _____
(Insert Title)	(Chair)
Dated this _____ day of _____, 20____.	_____
	(Clerk)
	Dated this _____ day of _____, 20____.

INDEPENDENT SCHOOL DISTRICT NO. _____

_____, Minnesota

INVITATION FOR BIDS FOR SCHOOL MILK AND RELATED PRODUCTS
 REQUIREMENTS AND NECESSARY EQUIPMENT PURSUANT TO M.S. 123B.52, SUBD. 1

1. Notice is hereby given, that Independent School District No. _____, _____, will receive sealed bids for milk and related products requirements and for necessary equipment of the district for the period from July 1, _____ to June 30, _____, according to the specifications and conditions which may be obtained from the office of the Superintendent of Schools, _____, Independent School District No. _____, _____ Street, _____, Minnesota _____. Bids shall be submitted in form and manner contained in the specifications and the conditions, which are adopted by reference, in this invitation for bids.

2. Sealed bids must be received in the office of _____, _____ (Address) _____, no later than _____, 20____, at _____ o'clock _____.m. at which time the bids will be opened by representatives of the board, for tabulation and distribution to the school board and interested parties. No change can be made in any bid except in the manner provided by law, and no bid may be withdrawn for 30 days without consent of the school board.

3. [Optional] Bid security in the form of a certified or cashier's check and in the amount of \$_____ shall accompany each bid.

4. On _____ at _____ o'clock _____.m., the school board will meet to evaluate the bids and act thereon. The school district reserves the right to accept, reject, or waive any informality of any bid and to make an award for milk and related products which is deemed most favorable and advantageous to the school district. If further information is desired, interested persons should contact _____ at phone: _____.

Footnote: 1. A district is not required to invite bids on perishable dairy items other than milk, but may rather contract through direct negotiations after obtaining two written quotations without advertising.

Dated this _____ day of _____, 20_____.

INDEPENDENT SCHOOL DISTRICT NO. _____
 _____, Minnesota

 Clerk

[To be published once a week for two consecutive weeks in the official newspaper; last publication to be at least one full week in advance of bid reception deadline.]

INDEPENDENT SCHOOL DISTRICT NO. _____
_____, Minnesota

SPECIFICATIONS AND CONDITIONS FOR SCHOOL MILK AND RELATED PRODUCTS
REQUIREMENTS AND NECESSARY EQUIPMENT FOR THE PERIOD _____ TO _____

SECTION I. GENERAL CONDITIONS

A. Invitation: The invitation to bid which is attached hereto, and everything contained therein is adopted by reference and made a part of these specifications and conditions.

B. Subject; Duration; Option: The bid is requested for the milk and related products requirements and necessary equipment of the district for the period from _____ to _____.

[Optional] The district has the option to extend the agreement so that the total life of the agreement may extend for any period up to four full years without recourse to further bidding or a change in the specifications, terms, and conditions applicable to the contract. The option and succeeding options may be exercised, at any time the agreement is in effect by notification in writing to the successful bidder at his address last known to the district.

C. General Criteria for Award: After taking into consideration conformity with the specifications, terms of delivery and other conditions imposed in the call for bids, an award shall be made to the lowest responsible bidder.

D. Writing: Within ten days of the award, a formal contract covering the subject matter of the bid shall be duly executed by persons having authority to contract for the parties.

E. Form of Bids: The bid must be submitted on the form prescribed by the district, a sample of which is contained in these specifications, and copies of which are available from the school district from the following office:

F. Presentation of Bids: A bid to be considered must be signed and be presented on the prescribed form in a special envelope on or before the time and at the place mentioned in the invitation for bids. The outside of the envelope shall contain the name of the bidder, the date of the presentation, the subject of the bid, and an indication that the bid is enclosed.

G. Bid Security: If the invitation for bids indicates a requirement for bid security, the bid security shall be in the form of a cashier's or certified check drawn on a state or national bank licensed for banking in this state. The district specifically reserves the right to reject bid security in the form of cash. The bid security must not be enclosed in the envelope containing the bid, but must be submitted separately in a sealed envelope, identified as bid security with the name of the bidder and the subject of the bid. It shall be presented at the time the bid is presented. Bid security will be returned to all bidders as soon as possible after execution and delivery of a performance bond by the successful bidder.

H. Bidder's Qualifications: The district reserves the right to refuse to consider the bid of a bidder who is not known to be reliable, skilled, and regularly engaged in providing the service and goods for which bids were invited.

In addition, the district may require of any bidder evidence satisfactory to the district of the bidder's financial responsibility, and ability to efficiently, economically and satisfactorily perform the services and deliver the goods required by the district.

The district may consider the foregoing factors in determining the lowest responsible bidder.

I. Rejection of Bids: In addition to grounds for rejection stated elsewhere in law, or in these specifications and conditions, the district may reject a bid if:

- (1) The bidder fails to provide reasonable evidence reasonably requested pursuant to H above,
- (2) The bidder misstates or conceals any material fact in the bid, or
- (3) The bid is conditional. A bid properly made subject to an escalator clause shall not be deemed conditional.

J. Forfeiture: If a bidder to whom a contract is awarded refuses or neglects to execute it within ten days of the award, or refuses to execute and deliver the required performance bond within ten days of award, the amount of his bid security or as much thereof as may be applicable to the amount of the award made him shall be forfeited and shall be retained by the district as liquidated damages. The bidder shall also be liable for and agrees to pay the district on demand the difference between the price bid by him and the price for which the contract shall subsequently be awarded, including the cost of reletting if any, and a reasonable attorney's fee incurred in enforcing the agreement, less the amount of his deposit.

If a bidder to whom a contract is awarded refuses to perform the contract as required, the district may, at its option, accept the next lowest bid or readvertise. If the district chooses to readvertise, it may, at its discretion, refuse to accept any bid from the bidder which failed to execute the original bid.

No plea of mistake in the accepted bid shall be available to the bidder for the recovery of his deposit or as a defense to any action based upon the accepted bid.

K. Alterations and Erasures: A bid containing an alteration or erasure of any price contained in the bid which is used in determining the lowest responsible bid shall be rejected unless the alteration or erasure is corrected as herein provided. An alteration or erasure may be crossed out and the correction thereof printed in ink or typewritten adjacent thereto and initialed in ink by the person signing the bid.

L. Identical Low Bids: In the case of identical low bids from two or more bidders, the board may at its discretion utilize negotiated procurement methods with the tied low bidders for that particular transaction, so long as the price paid does not exceed the low tied bid price.

M. Single Bid: In the case where only a single bid is received, the board may, at its discretion, negotiate a mutually agreeable contract with the bidder so long as the price paid does not exceed the original bid.

N. Readvertisement: If no satisfactory bid is received the district may readvertise.

O. Withdrawal and Award Deadlines: No bidder may withdraw his bid within 30 days after the date of opening bids. The district may elect to take up to 30 days to decide which bidder is to receive the award.

P. Bid and Award Options: Any bidder may bid for either the milk alone, or other related products alone, or for both. The district may make a separate award for the milk alone, and for the related products alone, or may make a single award for the milk and related products.

If an escalator clause is permitted in any part of the bid, a bidder may submit either a firm price bid or a bid subject to the escalator clause, or both, and the district may make the award to either a firm price bidder or a bidder whose bid is subject to the escalator clause.

Q. Collusion between bidders is cause for rejection of all bids of bidders thus involved.

R. Guarantee: The successful bidder shall agree to unconditionally guarantee all goods supplied against inferiority as to specifications and conditions. All products delivered to the district shall be packaged under applicable federal, state and local requirements and shall be delivered before the freshness coding dates inscribed on the individual packages. Any items which are rejected by the district because of damage or defect, including items delivered beyond their freshness coding dates, and leaky cartons, shall be removed and replaced without cost to the district.

S. Delivery: Costs of delivery shall be included in the bid price.

T. Non-Waiver of Specifications and Conditions: Failure or neglect of the district to require compliance with any term, condition, or specification of the bidding shall not be deemed a waiver of the same.

U. Contract Performance Bond: The successful bidder shall enter into a formal written contract based on the conditions and specifications as set forth herein. He shall also supply the district within ten days of notification of award with a performance bond equal to 100% of the anticipated contract price. The award is subject to and conditioned upon delivery and execution of the performance bond.

V. Special Equipment Specifications: (Specify special equipment requirements, if any.)

SECTION II. ESTIMATED REQUIREMENTS AND DELIVERY SCHEDULE, BY SCHOOL.

NAME OF SCHOOL _____ ADDRESS _____
(Complete one schedule for each school requiring delivery)

<u>PRODUCT</u>	<u>NUMBER UNITS/WK</u>	<u>DLVRY DATES/TIMES</u>
Homo, ½ pints	_____	_____
2%, ½ pints	_____	_____
Skim, ½ pints	_____	_____
Choc/Skim, ½ pints	_____	_____
Orange Drink, ½ pints	_____	_____
Orange Drink, 6 oz.	_____	_____
Homo, Dispenser Bags-_____ gals.	_____	_____
2%, Dispenser Bags-_____ gals.	_____	_____
Skim, Dispenser Bags-_____ gals.	_____	_____
Cottage Cheese, _____ lbs.	_____	_____
Buttermilk, qts./½ gals.	_____	_____

<u>PRODUCT</u>	<u>NUMBER UNITS/WK</u>	<u>DLVRY DATES/TIMES</u>
Sour Cream, 5 lbs.	_____	_____
Butter, lb.	_____	_____

Eggs, doz.	_____	_____
Choc. Shake Mix, ____gals.	_____	_____
Van. Shake Mix, ____gals.	_____	_____
Ice Cream Slices, ____ oz; ____ doz.	_____	_____
Dixie Cups, ____ oz; ____ doz.	_____	_____
Straws	_____	_____
Other Products	_____	_____
_____	_____	_____
_____	_____	_____

This estimate is based upon last year's actual experience and no representation as to quantity shall be construed therefrom. No guarantee of minimum or maximum quantity is either made or implied. The school district shall neither be compelled to order any quantity of any item nor be limited in the total quantity ordered on any item.

SECTION III. BID FORM.

School Board
 Independent School District No. _____
 _____ Avenue
 _____, Minnesota _____

School Board Members:

The undersigned bidder hereby proposes, and if this proposal is accepted, agrees to enter into contract with the Independent School District No. _____, _____, Minnesota, to furnish milk and related products requirements, and equipment as required, for the period _____ to _____ at the prices and delivery schedules indicated on the attached sheets marked "Bid Prices", "Equipment", and "Estimated Requirements and Delivery Schedule".

 Bidder Company Name

 Bidder Address

 Bidder Telephone

 Signature

 Name and Title of Signator

SECTION IV. BID PRICES.

<u>PRODUCT</u>	<u>NUMBER UNITS /YR</u>	<u>FIRM BID PRICE</u>	<u>ESCALATED /DE-ESCALATED PRICE/ADJUSTMENT</u>
Homo, ½ pints	_____	_____	_____
2%, ½ pints	_____	_____	_____
Skim, ½ pints	_____	_____	_____
Choc/Skim, ½ pints	_____	_____	_____
Orange Drink, ½ pints	_____	_____	_____
Orange Drink, 6 oz.	_____	_____	_____
Homo, Dispenser Bags-_____ gals.	_____	_____	_____
2%, Dispenser Bags-_____ gals.	_____	_____	_____
Skim, Dispenser Bags-_____ gals.	_____	_____	_____
Cottage Cheese, _____ lbs.	_____	_____	_____
Buttermilk, qts./½ gals.	_____	_____	_____
Sour Cream, 5 lbs.	_____	_____	_____
Butter, lb.	_____	_____	_____
Eggs, doz.	_____	_____	_____
Choc. Shake Mix, _____ gals.	_____	_____	_____
Van. Shake Mix, _____ gals.	_____	_____	_____
Ice Cream Slices, _____ oz.; _____ doz.	_____	_____	_____
Dixie Cups _____ oz.; _____ doz.	_____	_____	_____
Other Products	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

It is understood that if the bidder provides a bid for a firm price only, that price shall apply without regard to any fluctuations in the market or in premium handling charges.

If an escalated/de-escalated price bid is used, enter under "Escalated/De-escalated Price Adjustment" the bid price first, then the amount of price adjustment which will be made each time the price of raw milk increases _____ cents per hundred weight, based on the applicable Federal Market Order, and/or on premium handling charges [sometimes called service charges].

Current Federal Market Order Price Per Hundredweight _____

Current Premium Handling Charges _____

SECTION V. EQUIPMENT.

Equipment incident to the storage and handling of products covered by this contract may be a) owned by the school (or leased from a separate entity not a party to this contract) and maintained by the school (or by a separate entity not a party to this contract); b) owned by the school (or leased from a separate entity not a party to this contract) but maintained by the successful bidder on this contract; c) owned and maintained by the successful bidder on this contract; d) leased from the successful bidder on this contract to the school and maintained by successful bidder; e) leased from the successful bidder on this contract to the school and maintained by the school.

Equipment provided or leased by the dairy to the school shall be clean and in good working order. Schools may be charged for damage or misuse.

Indicate the nature of the equipment relationship between the school and the dairy as described above:

- a) _____ School owns and maintains (Do not complete remainder of form)
- b) _____ School owns, dairy maintains
- c) _____ Dairy owns, dairy maintains
- d) _____ School leases from dairy, dairy maintains
- e) _____ School leases from dairy, school maintains

List below the equipment to be covered under b, c, d, or e above.

EQUIPMENTLOCATION

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

For the above referenced equipment, in the relationship indicated, the bidder will charge the following annual price:

\$ _____ Lease cost

\$ _____ TOTAL COST

\$ _____ Maintenance cost

INDEPENDENT SCHOOL DISTRICT NO. _____
 _____, Minnesota

CONTRACT FOR MILK AND OTHER RELATED PRODUCTS
 REQUIREMENTS AND EQUIPMENT OF THE DISTRICT
 FOR THE PERIOD _____ TO _____

This agreement is entered into between Independent School District No. _____,
 _____, hereafter the district, and _____, hereafter the provider.

The provider agrees to provide all the school district milk and related products requirements and necessary equipment, as agreed upon for the period _____ to _____, for the prices indicated in the bid award to the provider made by the district at a board meeting _____, 20____, an extract of the pertinent minutes of which are attached to the agreement as Exhibit A and incorporated herein.

In return, the district agrees to pay the provider the (bid) price in accordance with the bid award referred to above, payment to be billed by the provider (check one) _____ weekly, _____ twice monthly, _____ monthly, and payment to be made within 10 days.

Payment is subject to compliance by provider with all terms, conditions and specifications of the bid which are attached hereto as Exhibit B, and incorporated by reference into this contract.

Date _____

 Provider

by _____
 Signature

 Title

 Address - Phone

Date _____

Independent School District No. _____

by _____
 Chair

Date _____

 Clerk

¹ See: Nielsen v. City of St. Paul, 88 N.W.2d 853 (Minn. 1958). See also: Village of Excelsior v. F.W. Pearce Corp., 226 N.W.2d 316 (Minn. 1975).

² See: Minn. Stat. §§ 471.345, Subd. 3 and 123B.52, Subd. 1

³ See: Minn. Stat. § 471.345, Subd. 4

⁴ See: Minn. Stat. §§ 123B.52, Subd. 3 and 471.6161, Subd. 2

⁵ See: Minn. Stat. §§ 123B.52, Subd. 3 and 471.6161, Subd. 2

⁶ See: Griswold v. Ramsey County, 65 N.W.2d 647 (1954).

⁷ See: Op. Atty. Gen., 622j-3, June 3, 1975.

⁸ See: Byrd v. ISD No. 194, 495 N.W.2d 226, 231-32 (Minn. App. 1993).

⁹ See: Minn. Stat. §§ 471.345, Subd. 2 and 123B.52, Subd. 1; Op. Atty. Gen., 707-A-15, February 19, 1971; Op. Atty. Gen., 707-A-15, January 29, 1962

¹⁰ See: Minn. Stat. § 123B.52, Subd. 1

¹¹ See: Minn. Stat. § 123B.52, Subd. 3

¹² See: Minn. Stat. § 123B.52, Subd. 3

¹³ See: Minn. Stat. § 123B.52, Subd. 1

¹⁴ See: Krohnberg v. Pass, 244 N.W. 329 (Minn. 1932); Barnard v. Kandiyohi County, 5 N.W. 2d 317 (1942)

¹⁵ See: Minn. Stat. § 123B.52, Subd. 1

¹⁶ See: Ambrosich v. City of Eveleth, 274 N.W. 635 (Minn. 1937)

¹⁷ See: Op. Atty. Gen., 622-j-3, September 20, 1961

¹⁸ See: Minn. Stat. § 123B.29

¹⁹ See: Minn. Stat. § 471.64

²⁰ See: Op. Atty. Gen., 59-A-15, March 30, 1965; and Op. Atty. Gen., 159-B-1, December 27, 1955

²¹ See: Minn. Stat. § 123B.52, Subd. 6

²² See: Minn. Stat. § 471.6161, Subd. 8(b)

²³ See: Minn. Stat. § 471.6161, Subd. 8(b); Minn. Stat. § 43A.316

²⁴ See: Minn. Stat. § 471.6161, Subd. 8(b)

²⁵ See: Minn. Stat. § 471.6161, Subd. 8(b)

²⁶ See: Minn. Stat. § 471.6161, Subd. 8(a)

²⁷ See: Minn. Stat. § 471.6161

²⁸ See: Minn. Stat. § 471.6161, Subd. 8(b)

²⁹ See: Minn. Stat. § 471.6161, Subd. 8(d); Minn. Stat. § 13.591, Subd. 3(b)

³⁰ See: Minn. Stat. § 471.6161, Subd. 8(e)

³¹ See: Minn. Stat. § 471.6161, Subd. 8(e)

³² See: Minn. Stat. § 471.6161, Subd. 8(e)

³³ See: Minn. Stat. § 471.6161, Subd. 8(e)

³⁴ See: Minn. Stat. § 471.6161, Subd. 8(e); Minn. Stat. § 471.6161, Subd. 5

³⁵ See: Minn. Stat. § 471.6161, Subd. 8(c)

³⁶ See: Minn. Stat. § 471.6161, Subds. 4 and 8(g)

³⁷ See: Minn. Stat. § 471.6161

³⁸ See: Minn. Stat. § 471.617

³⁹ See: Minn. Stat. § 471.6161, Subd. 8(f)

⁴⁰ See: Minn. Stat. § 471.6161, Subd. 8(h)

⁴¹ See: Op. Atty. Gen., 159A-16, May 5, 1937

⁴² See: Minn. Stat. § 123B.52

⁴³ See: Op. Atty. Gen., 707-A-12, February 9, 1953; December 17, 1929; No. 217, 1930; 159-B-4, August 28, 1962; and unpublished September 17, 1965

⁴⁴ See: Minn. Stat. § 123B.65 and 471.345, Subd. 13

⁴⁵ See: Minn. Stat. § 123B.52, Subd. 1

⁴⁶ See: Op. Atty. Gen., 161-b-1, May 28, 1965

⁴⁷ See: Op. Atty. Gen., 707-A-12, October 12, 1945

⁴⁸ See: Op. Atty. Gen., 707-A-12, October 12, 1945

⁴⁹ See: Op. Atty. Gen., 707-A-12, October 12, 1945

- ⁵⁰ See: Op. Atty. Gen., 1001-A, November 8, 1948
- ⁵¹ See: Op. Atty. Gen., 1007, March 22, 1971
- ⁵² See: Minn. Stat. § 471.345, Subd. 15
- ⁵³ See: Minn. Stat. § 471.345, Subd. 15
- ⁵⁴ See: Minn. Stat. § 471.345, Subd. 15
- ⁵⁵ See: Minn. Stat. § 471.345, Subd. 16
- ⁵⁶ See: Minn. Stat. § 471.345, Subd. 17
- ⁵⁷ See: Minn. Stat. § 471.345, Subd. 18
- ⁵⁸ See: Minn. Stat. § 471.345, Subd. 18
- ⁵⁹ See: Minn. Stat. § 297A.67; 297A.68; 297A.69; and 297A.70
- ⁶⁰ See: Minn. Stat. § 574.26
- ⁶¹ See: Minn. Stat. § 574.26, Subd. 2
- ⁶² See: Minn. Stat. § 123B.09, Subd. 6
- ⁶³ See: Minn. Stat. § 123B.52, Subd. 2
- ⁶⁴ See: Minn. Stat. § 123B.52, Subd. 2a
- ⁶⁵ See: Minn. Stat. § 123B.11
- ⁶⁶ See: Otter Tail Power Co. v. MacKichan, 133 N.W.2d 511 (1965)
- ⁶⁷ See: Otter Tail Power Co. v. MacKichan, 133 N.W.2d 511 (1965)
- ⁶⁸ See: Op. Atty. Gen., 102A-12, May 23, 1962
- ⁶⁹ See: Shore Gas & Oil Co. v. Borough of Spring Lake, 98 A.2d 689 (N.J. Super Ct. App. Div. 1953)
- ⁷⁰ See: Minn. Stat. § 123B.52, Subd. 1
- ⁷¹ See: Queen City Construction, Inc. v. City of Rochester, 604 N.W.2d 368 (Minn. App. 1999)
- ⁷² See: Minn. Stat. § 123B.52, Subd. 1a
- ⁷³ See: Minn. Stat. § 177.43, Subd. 3
- ⁷⁴ See: Op. Atty. Gen., 125-A-17, May 7, 1937
- ⁷⁵ See: Op. Atty. Gen., 277-A-11, April 5, 1948
- ⁷⁶ See: Minn. Stat. § 331A.03, Subd. 3
- ⁷⁷ See: Minn. Stat. § 123B.52, Subd. 1
- ⁷⁸ See: Nielsen v. City of St. Paul, 88 N.W.2d 853 (Minn. 1958)
- ⁷⁹ See: Coller v. City of St. Paul, 26 N.W.2d 835 (Minn. 1947); and C. Bolander & Sons v. City of Minneapolis, 451 N.W.2d 204 (Minn. 1990)
- ⁸⁰ See: C. Bolander & Sons v. City of Minneapolis, 451 N.W.2d 204 (Minn. 1990)
- ⁸¹ See: Minn. Stat. § 123B.52, Subd. 1
- ⁸² See: J.L. Manta, Inc. v. Braun, 393 N.W.2d 490 (Minn. 1986)
- ⁸³ See: Coller v. City of St. Paul, 26 N.W.2d 835 (Minn. 1947)
- ⁸⁴ See: Telephone Associates, Inc. v. St. Louis County Board, 364 N.W.2d 378 (Minn. 1985)
- ⁸⁵ See: Lovering-Johnson, Inc. v. City of Prior Lake, 558 N.W.2d 499 (Minn. App. 1997)
- ⁸⁶ See: Op. Atty. Gen., 707-A-12, April 15, 1957 and Op. Atty. Gen., 707-A-12, February 24, 1959
- ⁸⁷ See: Tunny v. City of Hastings, 121 Minn. 212, 141 N.W. 168 (1913); and also ISD No. 102 v. Farmers' & Merchants' State Bank, 153 Minn. 353, 190 N.W. 539 (1922)
- ⁸⁸ See: St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N.W. 500 (1916)
- ⁸⁹ See: Minn. Stat. § 123B.52, Subd. 1
- ⁹⁰ See: Op. Atty. Gen., 707-A-12, January 24, 1956
- ⁹¹ See: Minn. Stat. § 123B.52, Subd. 1
- ⁹² See: Minn. Stat. §§ 123B.52, Subd. 1 and 471.345
- ⁹³ See: Op. Atty. Gen., 161-A-8, December 14, 1953
- ⁹⁴ See: Minn. Stat. § 123B.52, Subd. 1b
- ⁹⁵ See: Minn. Stat. § 16C.28, Subd. 1b
- ⁹⁶ See: Minn. Stat. § 16C.28, Subd. 1(c)
- ⁹⁷ See: Minn. Stat. § 16C.28, Subd. 1(c)
- ⁹⁸ See: Telephone Associates, Inc. v. St. Louis County Board, 350 N.W.2d 398 (Minn. App. 1984)

⁹⁹ See: C. Bolander & Sons v. City of Minneapolis, 451 N.W.2d 204 (Minn. 1990); and Lovering-Johnson, Inc. v. City of Prior Lake, 558 N.W.2d 499 (Minn. App. 1997)

¹⁰⁰ See: Minn. Stat. § 471.345, Subd. 14

¹⁰¹ See: Tritchler v. Bergeson, 241 N.W. 578 (Minn. 1932)

¹⁰² See: ISD No. 24 v. Weinmann, 68 N.W.2d 248 (Minn. 1955)

¹⁰³ See: Minn. Stat. § 471.425

¹⁰⁴ See: Minn. Stat. § 15.054

¹⁰⁵ See: Minn. Stat. § 123B.20

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

**SCHOOL DISTRICT ORDERS ISSUED WITHOUT
SUFFICIENT FUNDS FOR PAYMENT THEREOF**
Revised September 2014

Prepared by:

KNUTSON, FLYNN & DEANS-COUNSEL
MINNESOTA SCHOOL BOARDS ASSOCIATION

I. **INTRODUCTION**: The Minnesota Bankers Association has urged banks and school boards to change and formalize their procedures for accepting and issuing orders, commonly known as warrants, when the treasurer does not have sufficient funds on hand for their payment. The Minnesota Bankers Association recommends, and it is our opinion, that state law requires that school districts enter into agreements whenever these orders are issued. The purpose of this bulletin is to review the applicable law and to recommend procedures which the school district should consider adopting.

II. **APPLICABLE LAW**: M.S. 123B.14, Subd. 5, sets forth the procedure for issuing the above described orders and reads as follows:

Subd. 5. **Insufficient funds**. In the event that valid orders are presented to the treasurer for payment, and there are insufficient funds on hand to pay them, the treasurer shall receive, endorse and process them in accordance with section 123B.12."

School districts are bound to strictly follow the statutory requirements set forth in M.S. 123B.12:

"123B.12 **Insufficient funds to pay orders**. (a) In the event that a district or a cooperative unit as defined by section 123A.24, subdivision 2, has insufficient funds to pay its usual lawful current obligations, subject to section 471.69, the board may enter into agreements with banks or any person to take its orders. Any order drawn after having been presented to the treasurer for payment and not paid for want of funds shall be endorsed by the treasurer by putting on the back thereof the words 'not paid for want of funds,' giving the date of endorsement and signed by the treasurer. A record of such presentment, nonpayment and endorsement shall be made by the treasurer. The treasurer shall serve a written notice upon the payee or the payee's assignee, personally, or by mail, when the treasurer is prepared to pay such orders. The notice may be directed to the payee or the payee's assignee at the address given in writing by such payee or assignee to such treasurer, at any time prior to the service of such notice. No order shall draw any interest if such address is not given when the same is unknown to the treasurer, and no order shall draw any interest after the service of such notice."

(b) A district may enter, subject to section 471.69, into a line of credit agreement with a financial institution. The amount of credit available must not exceed 95 percent of average expenditure per month of operating expenditures in the previous fiscal year. Any amount advanced must be repaid no later than 45 days after the day of advancement.

III. RECOMMENDED PROCEDURE: It would be advisable for boards anticipating issuance of orders to enact a policy establishing the procedure for such issuance.

Furthermore, since M.S. 123B.12 authorizes the entry into agreements with banks or any person to take the district's orders, it would seem incumbent for the board to enact a resolution incorporating the terms of such an agreement. At the least, the resolution should approve the agreement and its execution after its provisions have been reviewed in detail.

The resolution should state the period of time covered by resolution, i.e., a specific date or until terminated or amended. The resolution should specify that the orders are callable prior to the specified redemption date in order to reduce interest costs.

The resolution should set forth the rate of interest that will be paid as well as the date or time from which interest shall begin to accrue.

The resolution could provide the manner in which the orders will be paid, i.e., in the order of presentment or by the size of the order. Since M.S. 123B.12 sets forth no standard to be followed, this matter would be subject to agreement between the district and the bank.

The resolution should also provide whether the orders will be payable out of the first tax receipts or aids available for that purpose, or on a specific due date. If on a specific due date, it might be advisable to provide that orders may be paid prior to the set date.

The resolution should also provide for the total dollar volume that will be accepted by the bank or issued by the board.

If the interest on the orders is to be tax exempt, the District must file Treasury Form 8038-G or 8038-GC with the Internal Revenue Service. Under most circumstances, the orders are issued as taxable obligations.

A sample proposed resolution is attached hereto.

M.S. 123B.12 sets forth certain procedures to be followed by the district, and therefore, we are calling the attention of the districts proposing issuance of orders to these provisions:

- 1) The district should prepare a written resolution based upon the above discussion.
- 2) Any order then issued for which there would not be sufficient funds must be presented to the treasurer for payment, and when not paid for want of funds, shall be endorsed by the treasurer by putting on the back thereof the words "not paid for want of funds", giving the date of endorsement and signed by the treasurer.
- 3) The treasurer must then keep a record of such presentment, nonpayment and endorsement.
- 4) As soon as the treasurer is prepared to pay the orders, the treasurer is required to serve a written notice upon the payee or the payee's assignee, personally or by mail. The notice may be directed to the payee or the payee's assignee at the address given in writing by such payee or assignee to such treasurer at any time prior to the service of such notice.
- 5) No order shall draw any interest if such address is not given or when the same is unknown to the treasurer, and no order shall draw any interest after the service of such notice. Obviously, the

address provision of this statute can and should be incorporated into the original resolution or agreement.

IV. LIMITATIONS ON THE AMOUNT OF ORDERS TO BE ISSUED WITHOUT SUFFICIENT FUNDS FOR PAYMENT THEREOF: When considering the issuance of orders for which there are insufficient funds for payment, the school district should keep in mind the limits imposed upon it by the state law.

Subject to the statutory tax levy limitations as set forth in M.S. Chapter 126C and other law, there are by law limitations as to the indebtedness that a school district may incur. Your attention is called to M.S. 471.69:

"471.69 Limitation of tax levies; statement. No school district, county, statutory city, or town shall contract any debt or issue any warrant or order in any calendar year in anticipation of the collection of taxes levied or to be levied for that year in excess of the average amount actually received in tax collections on the levy for the three previous calendar years plus ten percent thereof, and an average of other income excluding gifts received by the school district for the past three years. This section shall not apply to any school district, county, statutory city or town, wherein the mineral net tax capacity exceeds 25 percent of the net tax capacity of real property in such taxing district. This section shall not apply to any school district in a city of the first class which constitutes one single school district.

As soon as practicable after the beginning of each calendar year, the clerk or other recording officer of any municipality described in this section shall present to the governing body of the municipality a statement of tax collections and other income excluding gifts credited to each fund of the municipality during each of the three previous fiscal years and the yearly average thereof. The auditor of the county shall be required to furnish information as appears in the office records to the clerk upon request."

Disregard of this statute may void contracts and cause personal liability to be incurred by school board members, as set forth in M.S. 275.27:

"275.27 Contracts in excess void; liability of officers. It shall be unlawful for the authorities of any county, town, city or school district, unless expressly authorized by law, to contract any debt or incur any pecuniary liability for the payment of either the principal or the interest of which, during the current or any subsequent year, it shall be necessary to levy a rate of taxes higher than the maximum prescribed by law. Every such contract shall be null and void in regard to any obligation thereby sought to be imposed upon such corporation; but every officer, agent, or member thereof who participates in or authorizes the making of such contract shall be individually liable for its performance. Every such officer or agent who is present when such contract is made or authorized shall be deemed to participate in or authorize the making thereof, as the case may be, unless the officer or agent enter or cause to be entered a dissent therefrom in the records of such corporation."

A limitation on the net debt of a school district is imposed by M.S. 475.53, Subd. 4:

"Subd. 4. School Districts. Except as otherwise provided by law, no school district shall be subject to a net debt in excess of 15 percent of the estimated market value of all taxable property situated within its corporate limits, as computed in accordance with this subdivision. The county auditor of each county containing taxable real or personal property situated within any school district shall certify to the district upon request the estimated market value of all such property. Whenever the commissioner of revenue, in accordance with section 127A.48, subdivisions 1 to 6, has determined that the adjusted

market value of taxable property in the district exceeds the estimated market value of property within the district, the commissioner of revenue shall certify to the district upon request the ratio most recently ascertained to exist between the estimated market value and the adjusted market value of property within the district, and the debt limit under this subdivision will be based on the estimated market value divided by the ratio certified by the commissioner of revenue.

The school board should recognize, however, that orders issued pursuant to M.S. 123B.12 are not necessarily included in the definition of "net debt" for the purpose of computing a school district's net debt limit. Whether such orders are included in establishing the net debt limit will depend upon whether a fixed maturity date for redemption of an order has been set. M.S. 475.51, Subd. 4, provides:

Subd. 4. 'Net debt' means the amount remaining after deducting from its gross debt the amount of current revenues which are applicable within the current fiscal year to the payment of any debt and the aggregate of the principal of the following:

- (1) Obligations issued for improvements which are payable wholly or partly from the proceeds of special assessments levied upon property specially benefitted thereby, including those which are general obligations of the municipality issuing them, if the municipality is entitled to reimbursement in whole or in part from the proceeds of the special assessments.
- (2) Warrants or orders having no definite or fixed maturity.
- (3) Obligations payable wholly from the income from revenue-producing conveniences.
- (4) Obligations issued to create or maintain a permanent improvement revolving fund.
- (5) Obligations issued for the acquisition, and betterment of public waterworks systems, and public lighting, heating or power systems, and of any combination thereof or for any other public convenience from which a revenue is or may be derived.
- (6) Debt service loans and capital loans made to a school district under the provisions of sections 126C.68 and 126C.69.
- (7) Amount of all money and the face value of all securities held as a debt service fund for the extinguishment of obligations other than those deductible under this subdivision.
- (8) Obligations to repay loans made under section 216C.37.
- (9) Obligations to repay loans made from money received from litigation or settlement of alleged violations of federal petroleum pricing regulations.
- (10) Obligations issued to pay pension fund or other postemployment benefit liabilities under section 475.62, subdivision 6, or any charter authority.
- (11) Obligations issued to pay judgments against the municipality under section 475.52, subdivision 6, or any charter authority.
- (12) All other obligations which under the provisions of law authorizing their issuance are not to be included in computing the net debt of the municipality." (Emphasis added)

In interpreting a prior statute, Mason Minn. Statutes 1927, Section 1938-3, Subd. D, containing language similar to M.S. 475.51, Subd. 4 (2), the Attorney General ruled that orders having no definite or fixed date of maturity are not to be considered part of the net debt. Op. Atty. Gen. 476a-4, April 5, 1938.

V. REPORTING REQUIREMENTS: A further requirement is the reporting of outstanding obligations to the County Auditor as set forth in M.S. 471.70. M.S. 471.70 provides:

"471.70 Annual Report of Outstanding Obligations. For the purposes of this section 'municipality' means a city, however organized; a school district, however organized; a town; or any other body corporate and politic created under Minnesota Law.

An 'obligation' as used in this section means an obligation as defined in chapter 475.

On or before February first each year, it shall be the duty of the principal accounting officer of each municipality to report to the auditor of each county in which such municipality is situate, the total amount of outstanding obligations, and the purpose for which issued as of December 31 of the preceding year. Such report shall be kept by the auditor of each county in a suitable record. On March first each year, it shall be the duty of the auditor of each county to make report to the state auditor of such obligations as reported to the county auditor by the principal accounting officer of the municipality, together with the amount and character of all outstanding obligations issued by the county." (Emphasis supplied)

However, it should be noted that orders issued pursuant to M.S. 123B.12 are not necessarily included under the reporting requirements of M.S. 471.70. Section 471.70 requires the reporting of "obligations". M.S. 475.51, Subd. 3, defines that term as follows:

"Obligation" means any promise to pay a stated amount of money at a fixed future date or upon demand of the obligee, regardless of the source of funds to be used for its payment, made for the purpose of incurring debt, including the purchase of property through an installment purchase contract or any other deferred payment agreement, for which funds are not appropriated in the current year's budget.

The Attorney General has ruled that, absent specific facts to the contrary, orders or warrants issued for want of funds do not qualify as obligations within the definition set out in section 475.51, Subd. 3. Op. Atty. Gen. 159-C-9, Sept. 14, 1959. Note that orders issued under section 123B.12 need not provide for a fixed future date of payment.

VI. UNIFORM FINANCIAL ACCOUNTING AND REPORTING SYSTEM (UFARS): We would also call to your attention in this respect to the Uniform Financial Accounting and Reporting System statutes of the State of Minnesota. Specifically, we call your attention to M.S. 123B.77, Subd. 4, 123B.79, and 123B.83.

"M.S. 123B.77 Accounting, budgeting and reporting requirement. Subd. 4. Budget approval. Prior to July 1 of each year, the board of each district must approve and adopt its revenue and expenditure budgets for the next school year. The budget document so adopted must be considered an expenditure-authorizing or appropriations document. No funds shall be expended by any board or district for any purpose in any school year prior to the adoption of the budget document which authorizes that expenditure, or prior to an amendment to the budget document by the board to authorize the expenditure. Expenditures of funds in violation of this subdivision shall be considered unlawful expenditures." Prior to the appropriation of revenue for the next school year in the initial budget, the board shall inform the principal or other responsible administrative authority of each site

of the total amount of general education and referendum revenue that the Department of Education estimates will be generated by the pupils in attendance at each site. For purposes of this subdivision, a district may adjust the department's estimates for school building openings, school building closings, changes in attendance area boundaries, or other changes in programs or student demographics not reflected in the department's calculations. A district must report to the department any adjustments it makes according to this subdivision in the department's estimates of compensatory revenue generated by the pupils in attendance at each site, and the department must use the adjusted compensatory revenue estimates in preparing the report required under section 123B.76 subdivision 3, paragraph (c).

"123B.79 Permanent fund transfers. Subd. 1. Limitations. Except as provided in this subdivision, sections 123B.51, 123B.80, 475.61 and 475.65, a district may not permanently transfer money from (1) an operating fund to a nonoperating fund; (2) a nonoperating fund to another nonoperating fund; or (3) a nonoperating fund to an operating fund. Permanent transfers may be made from any fund to any other fund to correct for prior fiscal years' errors discovered after the books have been closed for that year. Permanent transfers may be made from the general fund to any other operating funds according to section 121A.19, or if the resources of the other fund are not adequate to finance approved expenditures from that other fund. Permanent transfers may also be made from the general fund to eliminate deficits in another fund when that other fund is being discontinued. When a district discontinues operation of a district-owned bus fleet or a substantial portion of a fleet, the balance shall cancel to the district's general fund.

* * * *

"Subd. 5. Deficits; exception. For the purposes of this section, a permanent transfer includes creating a deficit in a nonoperating fund for a period past the end of the current fiscal year which is covered by moneys in an operating fund. However, a deficit in the capital expenditure fund pursuant to section 123B.78, subdivision 5, does not constitute a permanent transfer."

"123B.83 Expenditure limitations. Subd. 2. Net unreserved general fund balances. A general district must limit its expenditures so that its net unreserved general fund balances do not constitute statutory operating debt as defined in section 126C.42.

Subd. 3. Failure to limit expenditures. If a district does not limit its expenditures in accordance with this section, the commissioner may so notify the appropriate committees of the legislature by no later than February 15 of the year following the end of that fiscal year.

Subd. 4. Special operating plan. (a) If the net negative unreserved general fund balance, calculated in accordance with the uniform financial accounting and reporting standards for Minnesota school districts, as of June 30 each year, is more than 2 ½ percent of the year's expenditure amount, the district must, prior to January 31 of the next fiscal year, submit a special operating plan to reduce the district's deficit expenditures to the commissioner for approval. The commissioner may also require the district to provide evidence that the district meets and will continue to meet all high school graduation requirements.

Notwithstanding any other law to the contrary, a district submitting a special operating plan to the commissioner under this clause which is disapproved by the commissioner must not receive any aid pursuant to Chapters 120B, 122A, 123A, 123B, 124D, 125A, 126C, and 127A until a special operating plan of the district is so approved.

(b) A district must receive aids pending the approval of its special operating plan under paragraph

(a). A district which complies with its approved operating plan must receive aids as long as the district continues to comply with the approved operating plan."

Rules have been adopted by the State to implement these statutes (UFARS).

VII. PUBLICATION OF SCHOOL DISTRICT FINANCIAL INFORMATION, M.S. 123B.10: Your attention is also called to M.S. 123B.10.

"123B.10 Publication of financial information. Subdivision 1. Budgets; form of notification. (a) Every board must, publish revenue and expenditure budgets for the current year and the actual revenues, expenditures, fund balances for the prior year and projected fund balances for the current year in a form prescribed by the commissioner within one week of the acceptance of the final audit by the board, or November 30, whichever is earlier. The forms prescribed must be designed so that year to year comparisons of revenue, expenditures and fund balances can be made.

(b) A school board annually must notify the public of its revenue, expenditures, fund balances, and other relevant budget information. The board must post the materials in a conspicuous place on the district's official Web site, including a link to the district's school report card on the Department of Education's Web site, and publish the information in a qualified newspaper of general circulation in the district.

Subd. 2. Debt summary. The board must also publish at the same time a summary of bonds outstanding, paid, and sold; a summary of orders not paid for want of funds; certificates of indebtedness for the year ending June 30; the statutory operating debt of the district as defined and certified pursuant to section 123B.81; and the balance amount of the reserved fund balance reserve account for purposes of statutory operating debt reduction established pursuant to sections 126C.40 to 126C.45, 126C.48, and 124D.22. (Emphasis added)

Subd. 3. Budget inspection. A statement shall be included in the publication that the complete budget in detail may be inspected by any resident of the district upon request to the chief school administrator.

Subd. 4. Cost per pupil. It shall also publish at the same time the average cost per pupil in average daily membership educated in that district in the preceding year. This computation shall be made exclusive of debt service or capital outlay costs."

VIII. OTHER ALTERNATIVES: Several remedies are available when a school district is faced with the above cited statutory debt limitations.

For availability of debt service loans, see M.S. 126C.68.

For issuing of bonds to fund or refund indebtedness, when the outstanding gross debt exceeds 1.62 percent of estimated market value, see M.S. 475.58, subd. 2.

Authorization, together with limitations thereon, for sale of certificates of indebtedness is found in M.S. 471.75 and tax and state aid anticipation borrowing is authorized by M.S. 126C.50-126C.56.

Authorization for line of credit agreements is found in M.S. 123B.12 (b).

SAMPLE RESOLUTION

EXTRACT OF MINUTES OF A MEETING
OF THE SCHOOL BOARD OF
INDEPENDENT SCHOOL DISTRICT NO. ____
(NAME OF DISTRICT)
STATE OF MINNESOTA

Pursuant to due call and notice thereof, a _____ meeting of the school board of Independent School District No. _____, State of Minnesota, was duly held on the _____ day of _____, 20____, at _____ o'clock _____.m.

Member _____ introduced the following resolution and moved its adoption:

RESOLUTION AUTHORIZING THE ISSUANCE
OF ORDERS NOT PAID FOR WANT OF FUNDS

WHEREAS, upon review of financial projections, the Board has determined that Independent School District No. ____ (the "District") may face cash flow problems in 20____;

WHEREAS, District staff has entered into negotiations and has reached a tentative agreement, subject to Board approval and Bank acceptance, with (name of bank) _____, _____, Minnesota (the "Bank"), providing that the Bank will accept and cash properly drawn and endorsed District orders not paid for want of funds which are presented to it as provided herein; and

WHEREAS, the Board desires to enter into such an agreement with the Bank to take its orders, as authorized by Minnesota Statutes, Sections 123B.12, 123B.14, 123B.143, and 123B.147;

NOW THEREFORE, BE IT RESOLVED by the School Board of Independent School District No. _____, State of Minnesota, as follows:

1. Upon the effective date of this resolution, the District hereby enters into an agreement with the Bank providing that the bank shall take its orders not paid for want of funds upon the terms and conditions specified herein.
2. If the District has insufficient funds on hand to pay its bills or obligations when due, the Treasurer is authorized to draw and endorse orders not paid for want of funds. The Bank shall be obligated to honor and pay the orders so issued within the limitations of this resolution.
3. The Treasurer may utilize existing checks of the District to draw such orders. The Treasurer's signature shall be crossed out or omitted on the front of said order. The Treasurer shall endorse the order by placing the words "NOT PAID FOR WANT OF FUNDS" on the back and by dating and signing it on the back. The Bank shall not be obligated to cash any such order unless it is a demand negotiable item properly drawn and endorsed and shall have no responsibility or duty to examine the validity of the underlying claim.
4. The Treasurer shall maintain a register of all orders so issued, which shall include the order number, the amount, the payee, the date of presentment and the amount and date of payment. The Treasurer shall not issue, and the Bank shall not be obligated to pay, any order or combination of orders which exceeds \$_____ in total principal amount outstanding at any one time as an obligation owed to the Bank. In no event shall the Treasurer issue orders in a total amount which exceeds any applicable statutory limits. The Bank may reject payment of any order if, for any reason, payment thereof would be contrary to the laws of Minnesota or any federal laws or regulations or would be contrary to a directive issued by any state or federal bank regulatory agency.

5. The Treasurer shall present the orders so drawn to the Bank for payment. The date of presentment shall be evidenced by the imprint of any mechanical posting machine or other posting device used by the Bank in its general banking operation. Every such order honored and paid shall bear [taxable] interest on the outstanding principal amount at the rate of _____ percent (____%) per annum from the date of its presentment to and honoring by the Bank until the date that it is redeemed and repaid by the District. The Bank shall maintain a register or record of the orders honored in the order of their presentment.

6. The School District shall, from time to time as funds become available, tender funds to the Bank for the payment of outstanding orders. The orders shall be repaid in the order of their original presentment to the Bank. The Treasurer shall serve written notice upon the Bank at or prior to the date of repayment specifying the date on which the orders will be repaid. No orders shall bear interest after the date District funds are tendered for their repayment.

7. The business manager or that officer's designee is directed to prepare such reporting materials relating to outstanding orders as may be necessary to comply with Minnesota Statutes, Sections 123B.10, 471.70 or any similar reporting requirement.

[Sections 8 and 9 are included only if the orders are tax-exempt. This issue should be reviewed with Board Counsel]

8. The Board hereby determines and declares that the District does not reasonably anticipate the issuance in calendar year 20__ of tax-exempt obligations in an aggregate principal amount greater than \$10,000,000 (exclusive of Private Activity Bonds). The Board hereby specifically designates the orders "qualified tax-exempt obligations" for calendar year 20__ within the meaning of Section 265 of the Internal Revenue Code of 1986, as amended, ("the Code") relating to the deduction permitted financial institutions for interest expenses allocable to the orders.

9. For purposes of compliance with the provisions of Section 149(e) of the Code, the District shall submit to the Secretary of the Treasury, not later than the 15th day of the second calendar month after the close of the calendar quarter in which the order is issued, a statement concerning the order which meets the requirements of Section 149(e)(2).

10. This resolution shall remain in effect until rescinded or amended by proper resolution duly adopted by the Board at any regular meeting or any special meeting called for that purpose; however, as to any orders outstanding and unpaid at the time of such rescission or amendment, the terms of this resolution shall remain in full force and effect.

11. This resolution shall be effective upon receipt by the Treasurer of written acceptance of its terms by an authorized official of the Bank, and thereafter it shall constitute the terms of the agreement required by Minnesota Statutes, Section 123B.12. However, if notice of acceptance by the Bank is not received within 10 days from the mailing or delivery of a copy of this resolution to the Bank, this resolution shall stand rescinded without further action of the Board.

The motion for the adoption of the foregoing resolution was duly seconded by Member _____, and upon vote being taken thereon, the following voted in favor thereof:

and the following voted against the same:

Whereupon said resolution was declared duly passed and adopted.

ACCEPTANCE STATEMENT

The Bank has received and agrees to be bound by the terms and conditions of the resolution of the School Board of Independent School District No.____ authorizing the issuance of orders not paid for want of funds. The Bank agrees to accept, honor and cash at face value such properly drawn and endorsed orders not paid for want of funds as issued by Independent School District No.____, in the manner and according to the terms provided in the enabling resolution. The officer executing this acceptance is authorized to sign on behalf of the Bank.

Date: _____

Name of Bank

Signature of Bank Official

Title of Bank Official

[illegible]

I, the undersigned, being the duly qualified and acting Clerk of Independent School District No. _____, Minnesota, hereby certify that the attached and foregoing is a full, true and correct transcript of the minutes of a meeting of the school board of said district duly called and held on the date therein indicated so far as such minutes relate to Issuance of Orders not Paid for Want of Funds pursuant to Minnesota Statutes, Section 123B.12, and that the resolution included therein is a full, true and correct copy of the original thereof.

WITNESS MY HAND officially as such recording officer and the official seal of the school district this
day of _____, 20____.

School District Clerk

(No changes from 2014 Session)

School Law Bulletin
for
School Board Members and Administrators

SETTING THE SCHOOL YEAR

Revised September 2014

Prepared by:

KNUTSON, FLYNN & DEANS - COUNSEL FOR
MINNESOTA SCHOOL BOARDS ASSOCIATION

I. INTRODUCTION: Various state statutes impose requirements or restrictions upon the setting of a school year calendar. This bulletin is intended to inform school board members and administrators of such requirements and restrictions.

II. REQUIREMENTS AND RESTRICTIONS:

A. Date of Commencement of School Year. M.S. 120A.40 provides that an elementary or secondary school year must not commence before Labor Day, except for the following reasons:

1. The program is a summer learning program;
2. The program is a flexible learning year program authorized under Minn. Stat. § 124D.12 to § 124D.127;
3. The program is a learning year program under Minn. Stat. § 124D.128; or
4. Commencement of the school year prior to Labor Day is necessary to accommodate a construction or remodeling project of \$400,000.00 or more affecting a district school facility.

Days devoted to teachers' workshops may be held before Labor Day. Further, districts that enter into cooperative arrangements are encouraged to adopt similar school calendars. (Minn. Stat. § 120A.40). A school district that has an agreement under Minn. Stat. § 123A.30, 123A.32 or 123A.35 with a district that qualifies to start early under the construction exception may also start early under that exception. (Minn. Stat. § 120A.40(b)(2)). A school district that agrees to the same schedule with a school district in an adjoining state may also begin the fiscal year before Labor Day. (Minn. Stat. § 120A.40 (b)(3)).

B. Duration of School Year. A school board's annual school calendar must include at least 425 hours of instruction for a kindergarten student without a disability, 935 hours of instruction for a student in grades 1 through 6, and 1020 hours of instruction for a student in grades 7 through 12, not including summer school. The school calendar for all-day kindergarten must include at least 850 hours of instruction for the school year. A school board's annual calendar must include at least 165 days of instruction for a student in grades 1 through 11 unless a four-day week schedule has been approved by the commissioner under section 124D.126. (Minn. Stat. § 120A.41). A school board that offers licensed kindergarten through grade 12 teachers the opportunity for more staff development training and additional salary under Minn. Stat. § 122A.40, Subd. 7 and 7a, or § 122A.41, Subd. 4 and 4a, must adopt as its school calendar a total of 240 days of student instruction and staff development, of which the total number of staff development days equals the difference between the total number of

days of student instruction and 240 days. A school board may schedule additional staff development days throughout the calendar year. (Minn. Stat. § 120A.415).

- C. Interplay of School Calendar and Legal Holidays. With limited inapplicable exceptions, Minnesota law provides that no public business shall be transacted on any holiday. (Minn. Stat. § 645.44). Because holding school can be considered transacting public business, holding school on holidays is generally prohibited. Minnesota law defines “holiday” to include:

New Year’s Day (January 1st)
 Martin Luther King’s Birthday (3rd Monday in January)
 Washington’s and Lincoln’s Birthday (3rd Monday in February)
 Memorial Day (last Monday in May)
 Independence Day (July 4th)
 Labor Day (1st Monday in September)
 Columbus Day (2nd Monday in October)
 Veterans’ Day (November 11th)
 Thanksgiving Day (4th Thursday in November)
 Christmas Day (December 25th)

(If New Year’s Day, Independence Day, Veterans’ Day, or Christmas Day falls on a Sunday, the following day shall be a holiday; if New Year’s Day, Independence Day, Veterans’ Day, or Christmas Day falls on a Saturday, the preceding day shall be a holiday.) Also, political subdivisions (which include school districts) have the option of determining whether Columbus Day and the Friday after Thanksgiving shall be holidays. (Minn. Stat § 645.44). Thus, a school board could declare that one, both, or neither of these days was to be considered a holiday. (Op. Atty. Gen. 276, September 29, 1980).

However, pursuant to Minn. Stat. § 120A.42, the governing body of any school district may contract with any of the teachers of the district for the conduct of schools, and may conduct schools, on either, or any, of the following holidays, provided that a clause to this effect is inserted in the teacher’s contract:

Martin Luther King’s Birthday
 Washington’s and Lincoln’s Birthday
 Columbus Day
 Veterans’ Day.

It is our opinion that this can be done with reference to the school calendar as adopted by the school board if the district has a contract with a reference provision similar to that in the MSBA model contract form.

On Martin Luther King’s Birthday, Washington’s and Lincoln’s Birthday, and Veterans’ Day at least one hour of the school program must be devoted to a patriotic observance of the day. (Minn. Stat § 120A.42). Federal law also requires educational institutions receiving federal funds to conduct an educational program on the US Constitution on September 17 of each year. When September 17 falls on a Saturday or Sunday, Constitution Day must be held the preceding or following week.

- D. Flexible Learning Year Programs. Minnesota law does authorize school districts to evaluate,

plan, and employ the use of flexible learning year programs. (Minn. Stat. § 124D.12). It is believed that the open selection of the type of flexible learning year operation from a variety of alternatives will allow each school district seeking to utilize this concept to suitably fulfill the educational needs of its pupils. These alternatives must include, but not be limited to, various 45-15 plans, four-quarter plans, quinmester plans, extended learning year plans, flexible all-year plans, and four-day week plans. A “flexible learning year program” is defined as any district plan approved by the commissioner that utilizes buildings and facilities during the entire year or that provides forms of optional scheduling of pupils and personnel during the learning year in elementary and secondary schools or residential facilities for children with a disability. (Minn. Stat. § 124D.121). Before implementing a flexible learning year program in any facility of the school district, the school board must negotiate with the teachers, principals, assistant principals, supervisory personnel and employees to the extent required by the Public Employment Labor Relations Act, and must consult with the parents of pupils who would be affected by the change, and with the community at large. These procedures must include at least three informational meetings for which the school board has given published notice to the teachers and employees and to the parents of pupils affected. (Minn. Stat. § 124D.124).

- E. Learning Year Programs. A learning year program provides instruction throughout the year. A learning year program may begin after the close of the regular school year in June. The program may be for students in one or more grade levels from kindergarten through grade 12. Students may participate in the program if they reside in:

1. A district that has been designated a learning year site by the commissioner;
2. A district that is a member of the same education district as a site; or
3. A district that participates in the same area learning center program as a site.

A state-approved alternative program designated by the state must be a site. To be designated, a state-approved alternative program must demonstrate to the commissioner that it will:

1. Provide a program of instruction that permits pupils to receive instruction throughout the entire year; and
2. Develop and maintain a separate record system that permits identification of membership attributable to pupils participating in the program. The record system and identification must ensure that a program will not have the effect of increasing the total average daily membership attributable to an individual pupil as a result of a learning year program. (Minn. Stat § 124D.128). The record system must include the date the pupil originally enrolled in a learning year program, the pupil’s grade level, the date of each grade promotion, the average daily membership generated in each grade level, the number of credits or standards earned, and the number needed to graduate.

- F. Negotiation. The school board may, and must if requested by the exclusive representative of the teachers, meet and confer with the exclusive representative concerning the setting of the school calendar. However, it is the right and duty of the school board to establish the school calendar and the calendar is not negotiable as long as the parties do not agree to make it so. Thus, while a school board may discuss the school calendar with the teachers or their exclusive representative, the board should at all times insist that it is a non-negotiable matter of inherent managerial policy and that the final decision will be made by the board.

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

SCHOOL RECORDS - PRIVACY - ACCESS TO DATA
A Review of Recent State and Federal Legislation
Revised October 2014

Prepared by:

KNUTSON, FLYNN & DEANS - COUNSEL FOR
MINNESOTA SCHOOL BOARDS ASSOCIATION

I. INTRODUCTION: There have been an increasing number of demands by parents, attorneys, researchers, investigators, law enforcement officials, and others upon school district officials for the furnishing of or examination of school records, including those relating to individual pupils. As a result, there are now numerous state and federal statutes that direct who may have access to school data and under what circumstances.

Chapter 13 of the Minnesota Statutes, more commonly referred to as the Minnesota Government Data Practices Act, applies to the state and its political subdivisions, including school districts, and governs the classification, the methods of collecting, storing, providing security for and disseminating all data maintained by that entity.

The federal government has also initiated laws and regulations that deal with parental and student access to their education records. Section 1232g of the Family Educational Rights and Privacy Act of 1974 governs the handling of all education records maintained by an educational agency or institution. The term “educational agency or institution,” means any public or private agency or institution that is the recipient of (federal) funds under any applicable program. The Act denies federal funds to a school district that has a policy of denying the parents of students who are or have been in attendance at the school the right to inspect and review the education records of their children. The violation of this federal statute may have ramifications on the school district’s receipt of federal funds as well as possible legal action on behalf of the student/parent.

This section of the manual seeks to integrate both the applicable state and federal laws regarding access to education records. In some cases, the regulations appear to be in conflict with the plain language of the statute. Such conflicts will be noted where applicable.

Access to education records, whether by the student’s parent(s), the student, or a third party, is very complex. If an issue regarding data practices arises, it is advisable for the school to contact legal counsel to address what may or may not be disclosable under the federal and state data practice laws. For example, a request for data may not be allowed under one area of state law but there may be an exception elsewhere in the state or federal statutes that governs such disclosures. Failure to abide by data practice laws can result in loss of federal funding and litigation.

II. CITATIONS:

- A. State Statutes. Chapter 13 of the Minnesota Statutes [hereinafter referred to as the Data Practices Act] (Available on request basis.)
- B. State Rules. Parts 1205.0100 to 1205.2000 (Available on request basis.)

- C. Federal Statutes. 20 U.S.C. § 1232g also referred to as the Family Educational Rights and Privacy Act of 1974. (Available on request basis.)
- D. Federal Regulations. 34 C.F.R. § 99.1-99.67.

III. THE MINNESOTA GOVERNMENT DATA PRACTICES ACT – AN OVERVIEW:

- A. Application of Minnesota Statutes. The Minnesota Government Data Practices Act applies to the state and its political subdivisions, including school districts. It governs the methods used to collect, store, provide security for, and disseminate all data maintained by a governmental entity.
- B. Important Definitions under Minnesota Law. Minn. Stat. § 13.02.
 1. Government Data. Means all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use. Government data can be maintained in any form including paper records and files, microfilm, computer medium or other processes. Even notes on post-it notes are covered under the Minnesota Data Practices Act. The duration of the existence of the data, including whether it is temporary or permanent, is not relevant.
 2. Data on Individuals. Means all government data in which any individual is or can be identified as the subject of that data, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual. Data is data on individuals if it can in any way identify any particular individual or if it can be used in connection with other data elements to uniquely identify an individual. Those data elements include street addresses, job titles, etc., where the particular data could only identify one individual.
 3. Data Not on Individuals. All government data that are not data on individuals.
 4. Public Data on Individuals. Data which are accessible to the public in accordance with the provisions of Minn. Stat. § 13.03.
 5. Public Data Not on Individuals. Data which are accessible to the public pursuant to Minn. Stat. § 13.03.
 6. Private Data on Individuals. Data which are made not public by statute or federal laws applicable to the data but which are accessible to the subject of the data. See also Minn. R. 1205.0200, Subp. 9. If data on individuals are classified as both private and confidential by the Data Practices Act, any other statute, or by federal law, they are private. Minn. Stat. § 13.03, Subd. 4.
 7. Nonpublic Data. Data not on individuals made not public by statute or federal law applicable to the data but which are accessible to the subject, if any, of the data.
 8. Confidential Data on Individuals. Data which are made not public by statute or federal law applicable to the data and which are inaccessible to the individual subject of those data. See also Minn. R. 1205.0200, Subp. 3.
 9. Protected Nonpublic Data. Data not on individuals made not public by statute or federal law applicable to the data and are not inaccessible to the subject of the data.
 10. Not Public Data. Any government data that are classified by statute, federal law or temporary

classification as confidential, private, nonpublic or protected nonpublic.

11. Summary Data. Statistical records and reports derived from data on individuals but in which individuals are not identified and from which neither their identities nor any other characteristic that could uniquely identify an individual is ascertainable. Minn. Stat. § 13.02, Subd. 19.
12. Computer Data.
 - a. Electronic Access Data. Data that are created, collected, or maintained about a person's access to a government entity's computer for the purpose of: (1) gaining access to data or information; (2) transferring data or information; or (3) using government services. Electronic access data are private data on individuals or nonpublic data. Minn. Stat. § 13.05.
 - b. Cookie. Cookie means any data that a government-operated computer electronically places on the computer of a person who has gained access to a government computer.
13. Individual. Means a natural person. In the case of a minor (person under the age of 18) or an incapacitated person as defined in section 524.5-102, Subd. 6, the term "individual" includes the parents or guardians or an individual acting as a parent or guardian in the absence of a parent or guardian, except that the responsible authority shall withhold data from parents or guardians or individuals acting as parents or guardians in the absence of parents or guardians, upon request of the minor if the responsible authority determines that withholding the data would be in the best interest of the minor.
14. Person. Means any individual, partnership, corporation, association, business trust, or a legal representative of an organization.
15. Political Subdivision. Means any county, statutory or home rule charter city, school district, special district and any board, commission, district or authority created pursuant to law, local ordinance or charter provision. It also includes certain nonprofit corporations.
16. Responsible Authority. In any political subdivision, the responsible authority is the person designated by the governing board of that political subdivision as responsible for the collection, use, and dissemination of any set of data on individuals, government data or summary data, unless otherwise provided by state law. Until an individual is designated by the governing body the responsible authority for school districts is the superintendent. The responsible authority must be a specific individual and not a particular position, i.e. Director of Human Resources. Advisory Op. No. 05-008 (January 28, 2005).
17. Designee. Means any person designated by a responsible authority to be in charge of individual files or systems containing government data and to receive and comply with requests for government data.
18. Federal Law. Means United States Code, rules and regulations of federal agencies as published in the Code of Federal Regulations, and federal case law, including decisions of any court in the federal judicial system. Minn. R. 1205.0200, Subp. 7.

IV. THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974, 20 U.S.C. § 1232g - AN OVERVIEW: Section 1232g governs the handling of all education records maintained by an educational agency or institution. The Act denies federal funds to a school district that has a policy of denying the parents of students who are or have been in attendance at the school the right to inspect and review the education records of their children. The Act does not create a private cause of action, Gonzaga Univ. v. Doe, 122 S. Ct.

2268 (2002), but rather requires that the Secretary of Education take appropriate actions to enforce its provisions. A violation of this federal statute may have ramifications on the school district's receipt of federal funds as well as possible legal action on behalf of the student/parent.

A. Important Definitions.

1. Record. Includes any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. 34 C.F.R. § 99.3.
2. Biometric Record. Means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual; e.g. fingerprints, retina and iris patterns, voice prints, DNA sequence, facial characteristics and handwriting.
3. Educational Agency or Institution. Means any public or private agency or institution that is the recipient of (federal) funds under any applicable program. 20 U.S.C. § 1232g(a)(3).
4. Education Records. Means those records, files, documents, and other materials that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). The following are not considered educational records:
 - a. Records kept in the maker's possession are used only as a personal memory aid, and are not accessible or revealed to anyone other than a temporary substitute for the maker of the record.
 - b. Records and documents created by a law enforcement unit for a law enforcement purpose, which are kept apart from the education records of the district, are maintained only for law enforcement purposes. This exclusion from the definition of "education records" is only applicable if a law enforcement unit does not have access to education records pursuant to 20 U.S.C. § 1232g(b)(1).
 - c. Records relating to any employee who is not also a student.
 - d. Records relating to a student who is either 18 years old or older or attending an institution of postsecondary education which are made or maintained by a recognized professional or paraprofessional (such as a physician, psychiatrist, or psychologist) acting in that capacity and which are made, maintained or used only in connection with treatment of the student, and disclosed only to individuals providing the treatment except such records can be personally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution.
 - e. Records that only contain information about an individual after he or she is no longer a student at that agency or institution and that are not directly related to the individual's attendance as a student.
 - f. Grades on peer-graded papers before they are collected and recorded by a teacher. 34 C.F.R. § 99.3.
 (1) But, posting of a student's name and test score on the classroom blackboard violated FERPA and Minn. Stat. § 13.32. See Advisory Op. No. 09-013 (June 23, 2009).
5. Student. Includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not

been in attendance at such agency or institution. 20 U.S.C. § 1232g(a)(6).

6. Eligible Student. Means a student who has reached 18 years of age or is attending an institution of postsecondary education. 34 C.F.R. § 99.3.
7. Personally Identifiable Information. Includes, but is not limited to, the student's name; the name of the student's parent or other family member; the address of the student or student's family; a personal identifier, such as the student's social security number, student number or biometric record; other indirect identifiers (i.e., student's date of birth, place of birth and mother's maiden name); other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution believes knows the identity of the student to whom the education record relates. 34 C.F.R. § 99.3.
8. Parent. Means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. 34 C.F.R. § 99.3.

B. Individuals to Whom the Federal Rights are Provided.

1. Section 1232g vests most rights to the parents of the particular student involved.
2. Once a student has attained 18 years of age, or is attending a postsecondary educational institution, the permission or consent required of and the rights accorded to the parents are thereafter *only* required of and accorded to *the student*. 20 U.S.C. § 1232g(d).
 - a. Grades. Once a student has reached the age of 18, only the student may have access to his or her own grades with certain exceptions. Once the student reaches the age of majority, the individual inherits the rights formerly possessed by parents. This position comports with both the state data privacy law and the federal statute on the same topic.
 - b. Access By Parents of "Dependent Students." The Commissioner of Administration addressed the issue of whether the parents of an eligible student (18 years of age or older) were entitled to gain access to the education records, including grades, of their child. Advisory Op. No. 96009 (Feb. 16, 1996). According to the Commissioner, if a student who is 18 years of age or older qualifies as a "dependent student" under the IRS code definition, then the student's parents are entitled to gain access to the student's education records pursuant to 20 U.S.C. § 1232g(b)(1)(H). The relevant section of the IRS code defines a "dependent student" as an individual who during each of five calendar months during the calendar year in which the taxable year of the parent begins:
 - (1) Is a full-time student at an educational institution; or
 - (2) Is pursuing a full-time course of instructional on-farm training under the supervision of an accredited agent of an educational institution or of a state or political subdivision of the state.
 26 U.S.C. § 152. See MSBA/MASA Policy Reference Manual - Model Policy No. 515.
 - c. Access by Parents in Health and Safety Emergency. Notwithstanding whether the eligible student is a dependent student, nothing prevents an educational agency or institution from disclosing education records to a parent without the consent of the eligible student in connection with a health and safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. 34 C.F. R. § 99.5(a)(2), 99.31(a)(10) and 99.36.
 - d. Access by Parents to Violations of Law Regarding Use or Possession of Alcohol or Controlled

Substances. Notwithstanding whether the eligible student is a dependent student, nothing prevents an educational agency or institution from disclosing education records to a parent without the consent of the eligible student where the disclosure is to the parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution governing the use or possession of alcohol or a controlled substance if the institution determines that the student has committed a disciplinary violation with respect to that use or possession and the student is under the age of 21 at the time of disclosure to the parent. 34 C.F.R. § 99.5(a)(2) and 99.31(a)(15).

- e. Access by Parents to Other Information. Notwithstanding whether the eligible student is a dependent student, nothing prevents an educational agency or institution from disclosing education records to a parent without consent of the eligible student where the disclosure meets the conditions of any provision in 34 C.F.R. § 99.31(a).

V. OPINIONS ISSUED BY THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF ADMINISTRATION:

- A. General Authority. The Commissioner of Administration may issue opinions on questions related to the Data Practices Act. Minn. Stat. § 13.072.
- B. Effect of Opinion. Opinions issued by the Commissioner are not binding on the government entity whose data is the subject of the opinion, although it must be given deference by a court or other tribunal in a proceeding involving the data. Minn. Stat. § 13.072, Subd. 2. Written numbered and published opinions issued by the Attorney General take precedence over an opinion issued by the Commissioner. Minn. Stat. § 13.072, Subd. 1(c). Finally, a government entity or person that acts in conformity with a written opinion issued by the Commissioner is not liable for compensatory or exemplary damages or awards of attorneys' fees in actions for violations arising under Minn. Stat. § 13.08, or 13.085, or for a penalty under Minn. Stat. § 13.09. Minn. Stat. § 13.072, Subd. 2. However, a court can award attorneys fees to a prevailing plaintiff who has brought an action to compel compliance with the Data Practices Act under Minn. Stat. § 13.08, if the court finds that the government entity that is the defendant in the action did not act in conformity with an opinion by the Commissioner that (a) involved that entity and (b) is directly related to the cause of action being litigated. Minn. Stat. § 13.08, Subd. 4(c).
- C. Who May Request an Opinion. Upon request of a government entity, the Commissioner may give a written opinion on any question relating to public access to government data, rights of subjects of data or classification of data under the Data Practices Act, or any other Minnesota statute governing data practices. Additionally, the Commissioner may give a written opinion upon request from any person who disagrees with a determination regarding data practices made by a government entity regarding the person's rights as a subject of government data or right to have access to government data. In such a situation, however, the government entity must be provided a reasonable opportunity to explain the reasons for its decision regarding the data. Minn. Stat. § 13.072., Subd. 1.
- D. Commissioner's Responsibilities Upon Receipt of a Request for an Opinion. Upon receipt of a request, if the Commissioner determines that no opinion will be issued, the Commissioner must give the requesting party notice of the decision not to issue the opinion within five business days of receipt of the request. If notice is not given within this five-day period, the Commissioner must issue a written opinion within twenty days of receipt of the request, unless the deadline is extended by the Commissioner for an additional thirty-day period for good cause and upon notice to the requesting party. The notice of extension must state the reason for extending the deadline.
- E. Questions Involving the Exercise of Discretionary Power. The statute authorizing the Commissioner

of Administration to give written opinions does not apply to questions involving the exercise of a discretionary power specifically granted by statute to a responsible authority to withhold or grant access to government data in a manner different than the data's general statutory classification. Minn. Stat. § 13.072, Subd. 1(b). See Minn. Stat. § 13.3805, Subd. 1(b) and Minn. Stat. § 144.6581.

- F. Request for Commissioner to Determine Classification of Data. In a letter to the Texas Office of Attorney General regarding the disclosure of education records by a school district, the Family Policy Compliance Office stated that "FERPA does not permit the District to disclose personally identifiable information from students' education records to the Office of the Attorney General, without prior written parental consent, for the purpose of determining whether the District is in compliance with the Public Information Act." *Letter to Texas Office of Attorney General regarding Disclosure of Education Records by School District*, July 25, 2006. Therefore, documents submitted to the Commissioner for review should be in redacted form unless informed consent of the data subject is obtained.

VI. RULES SURROUNDING GOVERNMENT DATA: Minn. Stat. § 13.03.

- A. General Rule. All data collected, created, received, maintained or disseminated by a school district shall be public, unless it is classified as nonpublic or protected nonpublic with respect to data not on individuals or as private or confidential with respect to data on individuals by statute, temporary classification, or federal law. See Minn. Stat. § 13.03, Subd. 1.
1. Effect of Changes in Classification of Data. Unless otherwise expressly provided by a particular statute, the classification of data is determined by the law applicable to the data at the time a request for access to the data is made, regardless of the data's classification at the time it was collected, created, or received. Minn. Stat. § 13.03, Subd. 9.
 2. Nonpublic Data: Change in Classification. Except for security information, nonpublic and protected nonpublic data shall become public either 10 years after the creation of the data by a government entity or 10 years after the data was received and collected by any government entity, unless the responsible authority for the originating or custodial entity determines that, if the data were made available to the public or the data subject, the harm to the public or the data subject would outweigh the benefit to the public or the data subject. If access is denied to the data, the individual seeking access may seek judicial review of the determination. Minn. Stat. § 13.03, Subd. 8.

This provision requires a responsible authority to keep records relating to the date of creation or receipt of data to determine its privacy classification upon the passage of time.

3. Treatment of Not Public Data at Public Meetings. Data classified as not public data may be discussed at a meeting open to the public to the extent provided in Minn. Stat. § 13D.05. Minn. Stat. § 13.03, Subd. 11. In an August 18, 1994, opinion of the Commissioner of Administration, the Commissioner opined that a discussion of allegations or charges against an employee of the City of Centerville should, consistent with the private data classification of such data, take place only at a closed meeting of the city council unless the employee requests that the meeting be opened to the public. See Minn. Stat. § 13D.05, Subd. 2 (b).
- B. Data Practices Compliance Official. Each responsible authority or other appropriate authority must designate an employee to act as the entity's data practices compliance official. The responsible authority may be the data practices compliance official. The data practices compliance official is the designated employee to whom persons may direct questions or concerns regarding problems in obtaining access to data or other data practices problems. See Minn. Stat. § 13.05, Subd. 13. The

responsible authority must establish procedures to insure that requests for government data are received and complied with in an appropriate and prompt manner. These procedures must be updated no later than August 1 of each year.

Under federal law, the school district must establish procedures so that parents or eligible students have access to inspect and review any and all educational records, files, and data directly related to their children. 20 U.S.C. § 1232g(a)(1)(A). See infra.

C. Responsible Authority - Duties in Regard to Government Data. **(2014 Session Change)**

1. Keep records in such arrangement and condition as to make them easily accessible for convenient use.
2. Establish procedures to insure that all requests for government data are received and complied with in an appropriate and prompt manner. Such public access procedures must be prepared in written form and be updated no later than August 1 of each year as necessary to reflect any changes in personnel or circumstances that might affect public access to government data. Copies of the written public access procedures must be made easily available to the public by distributing free copies of the procedures to the public or by posting a copy of the procedures in a conspicuous place within the school district that is easily accessible to the public. The Commissioner of Administration has repeatedly opined that in responding to a request for data under Minn. Stat. § 13.03, Subd. 3, if the data requested does not exist at the time of the request, the governmental entity should so inform the requestor of the data. See e.g. Advisory Op. No. 97-001 (Jan. 2, 1997); Advisory Op. No. 97-020 (May 7, 1997); and Advisory Op. No. 97-025 (May 30, 1997).
3. Unless specifically authorized by law, the district may not require persons to identify themselves, state a reason for, or justify a request to gain access to public government data. A person may only be asked to provide certain identifying or clarifying information in order to facilitate access to the data. See Minn. Stat. § 13.05, Subd. 12. **Data about a member of the public requesting access to public data are presumptively public. Advisory Op. No. 14-006 (June 5, 2014).**
4. Allow inspection and copying of public government data at reasonable times and places. “Inspection” for purposes of the law, includes, but is not limited to, the visual inspection of paper and similar types of government data. “Inspection” does not include printing copies by a school district, unless printing a copy is the only method to provide for inspection of the data. In the case of data stored in electronic form and made available in electronic form on a remote access basis to the public by a school district, “inspection” includes remote access to the data by the public and the ability to print copies of or download the data on the public’s own computer equipment. With respect to electronic access to data, a government entity may not deny an individual access to data or information, the ability to transfer data or information, or the use of government services through the government entity’s computer, simply because the individual refuses to accept a “cookie” on the individual’s computer. Minn. Stat. § 13.15.
5. Explain, if requested, the data’s meaning.
6. Provide copies or electronic transmittal of public government data upon request, at the requester’s expense, at the time of the request or as soon as reasonably possible. In the event that public government data is maintained in a computer storage medium, the responsible authority must provide to the requesting person a copy of any public data contained in that medium, in electronic form, if the government entity can reasonably make the copy or have a copy made. The district does not have to provide the data in an electronic format or program that is different

from the one in which the data is stored.

7. Inform the requesting person of a denial of access to government records orally at the time of request and in writing as soon as possible afterwards and cite the specific statutory section, temporary classification, or specific provision of federal law on which the denial is based. According to the Commissioner, the government entity must provide a requestor with the specific statutory citation upon which a denial to access is based. See Advisory Op. No. 97-019 (May 7, 1997). However, there is no requirement that a requestor be provided with the particular subdivision of a statute under which a denial of access was made. See Advisory Op. No. 98-006 (Feb. 9, 1998).

See Form 22 for Compliance Checklist.

- D. Fees. School districts may charge reasonable fees for providing copies of governmental data or education records. If a person requests copies, the responsible authority may require the requestor to pay the actual costs of making, certifying, and electronically transmitting the copies. Minn. Stat. § 13.03, Subd. 4(c). In addition, a school district may charge a fee for remote access to data where either the data or the access is enhanced at the request of the person seeking access. Minn. Stat. § 13.03, Subd. 3(b). The Commissioner of Administration has distinguished between the costs allowable for providing copies of data when the requestor is the subject of the data from the costs allowable for providing copies of data when the requestor is not the subject of the data. See Advisory Op. No. 03-023 (July 29, 2003); Advisory Op. No. 95-051 (Dec. 6, 1995). The difference is that if the data requestor is not the subject of the data, the government entity may include in its charge -- in addition to the universal charge for the “actual costs of making, certifying, and compiling the copies” -- the “actual costs of searching for and retrieving” the data. (Note: Government entities no longer may charge for compiling data). A search and retrieval charge may not be included in a fee to a requestor when he or she is the subject of the data. Consequently, when the requestor is the data subject, only the actual costs of making and certifying the data maybe charged. Minn. Stat. § 13.05, Subd. 4. Guidelines for government entities for establishing the appropriate charge are found in Minn. Stat. § 13.03 (when requestor is not the subject of the data) and in Minn. Stat. § 13.04 (when requestor is the subject of the data).

Fees may not be charged to a requesting person who is only seeking to inspect the documents. This includes the costs of employee time to retrieve and compile the documents for inspection. See Demers v. City of Minneapolis, 468 N.W.2d 71 (Minn. 1991); 34 CFR § 99.11. The district also may not charge for separating public from not public data. See Advisory Op. No. 02-029 (Aug. 7, 2002); Advisory Op. No. 02-028 (Aug. 7, 2002); Advisory Op. No. 97-005 (Jan. 31, 1997). However, the Minnesota Court of Appeals held that entire documents may be withheld under the Data Practices Act when public and nonpublic data are so inextricably intertwined that segregation of the material would impose a significant financial burden and leave the remaining part of the document with little informational value. See Northwest Publications, Inc. v. City of Bloomington, 499 N.W.2d 509 (Minn. Ct. App. 1993). See also Advisory Op. No. 96-002 (Jan. 16, 1996); Advisory Op. No. 03-001 (Jan. 16, 2003); Advisory Op. No. 03-010 (Apr. 23, 2003) (same for videotapes); Advisory Op. No. 04-014 (Mar. 11, 2004).

A school district may not charge a fee to search for or retrieve education records of a student, including such records of a child with a disability. Minn. Stat. § 13.04, Subd. 5; 34 C.F.R. § 99.11(b). In addition, a school district may only charge a fee for copies of records of a student with a disability if doing so would not impair or effectively prevent the parent or eligible student from exercising their right to inspect and review those records. Minn. Stat. § 13.04, Subd. 5; 34 C.F.R. § 99.11(a).

In determining the amount of a fee, Minn. R. 1205.0300 recommends that the responsible authority consider:

1. The cost of materials, including paper, used to provide the copies;
2. The cost of the labor required to prepare the copies;
3. Any schedule of standard copying charges established by the district in its normal course of operations;
4. Any special costs necessary to produce copies from machine based record keeping systems such as computers or microfilm systems; and
5. Mailing costs.

Based upon a 1994 decision by the Commissioner of Administration, the costs for supplying copies of documents may not include the costs of copying machines or maintenance unless those costs are directly attributable to the costs of providing the copies. Similarly, the Commissioner has opined that a flat charge per copy may be charged only if the flat fee represents the actual costs of providing the data. See Advisory Op. No. 99-042 (Nov. 18, 1999).

During the 2005 legislative session, a maximum fee was established in certain cases. More specifically, if 100 or fewer pages of black and white, legal or letter size paper copies are requested, actual costs shall not be used, and instead, the responsible authority may charge no more than 25 cents for each page copied. Minn. Stat. § 13.03, Subd. 3(c). See also, Advisory Op. No. 10-024 (Nov. 16, 2010).

- a. If two requests for public data from the same individual resulted in the copying of less than 100 pages for each request, the government entity may not charge more than \$.25 per page. If one request was for more than 100 pages, the government entity may charge its actual, reasonable cost to provide copies of those data. Advisory Op. No. 07-002 (January 12, 2007), but See Advisory Op. No. 11-005 (\$3900 was not a reasonable charge for approximately 135 pages of data).

Minn. Stat. § 13.03 also provides that when a request for public government data involves the requestor receiving copies of data that have commercial value and are a substantial and discrete portion of or an entire formula, pattern, compilation, program, device, method, technique, process, data base or system developed with a significant expenditure of public funds by the school district, the responsible authority may charge a reasonable fee for the information in addition to the costs of making and certifying the copies. Any fee charged must be clearly demonstrated by the district to relate to the actual development costs of the information. The responsible authority, upon the request of any person, shall provide sufficient documentation to explain and justify the fee being charged.

- E. Discoverability of Data. Minn. Stat. § 13.03, Subd. 6. If a school district opposes discovery of government data or release of data pursuant to court order on the grounds that the data are classified as not public, the party seeking access may bring an action to compel discovery. The presiding officer determines if the data are discoverable under the rules governing the action and then follows a balancing test to determine whether the benefit to the party seeking access outweighs the confidentiality interests of the district or the privacy rights of the data subject. In making this determination, the presiding officer must consider whether notice to the subject of the data is warranted and, if so, what type of notice must be given. The presiding officer may fashion protective orders. In addition, if the data consists of a videotape of a child victim or alleged victim alleging, explaining, denying, or describing an act of physical or sexual abuse, the presiding officer must consider the provisions of Minn. Stat. § 611A.90, Subd. 2(b). Minn. Stat. § 13.08, Subd. 5 provides a district or person releasing not public data under a presiding officer's order is immune from civil and criminal liability.

The Commissioner of Administration has opined that a teacher who sought redacted Individual Education Plans regarding various students for the purpose of resolving a grievance on the part of the teacher may attempt to obtain the data in question through the process set out in Minn. Stat. § 13.03, Subd. 6. Advisory Op. No. 94-016 (April 5, 1994). The Commissioner's opinion was based, in large part, on the conclusion that the IEP data requested would identify or might identify students even after a process of some redacting. The Commissioner of Administration has also opined that a county employee's current legal dispute with the county had no effect on his or her, or his or her legal counsel's, ability and right to request and gain access to government data. See Advisory Op. No. 97-005 (Jan. 31, 1997).

Minn. Stat. § 363A.06, Subd. 2(b) provides that it is not a violation of Chapter 13 for a school district to provide data or information under a subpoena issued by the Commissioner of Human Rights. The same rule is applicable to administrative subpoenas issued by the EEOC. Equal Employment Opportunity Commission v. County of Hennepin, 623 F. Supp. 29 (D. Minn. 1985).

- F. Background Information on Job Applicants. In Pathmanathan v. St. Cloud State University, 461 N.W.2d 726 (Minn. App. 1990), the Court of Appeals held that tape recordings and field notes of an investigator, hired by the university to investigate the background of a job applicant, were "government data" subject to disclosure to the applicant.

VII. RULES SURROUNDING DATA ON INDIVIDUALS:

- A. Standards for Collection and Storage. Collection and storage of all data on individuals and the use and dissemination of private and confidential data on individuals shall be limited to that which is necessary for the administration and management of programs specifically authorized by the legislature or local governing body or mandated by the federal government. Minn. Stat. § 13.05, Subd. 3.
- B. Collection and Use - General Rule. Private or confidential data on an individual shall not be collected, stored, used or disseminated by school districts for any purposes other than those stated to the individual at the time of collection. Because of this provision, the school district must give, at the time of collection, a broad warning as to the uses to which the data may be put and the persons to whom it may be distributed. This warning is often called a Tennesen Warning. This warning must inform the individual of the following:
1. The purpose and intended use of the requested data within the collecting government entity;
 2. Whether the individual may refuse or is legally required to supply the requested data;
 3. Any known consequence arising from supplying or refusing to supply private or confidential data; and
 4. The identity of other persons or entities authorized by state or federal law to receive the data.
- Minn. Stat. § 13.04, Subd. 2.

In the event that an individual, such as an employee or a student, is asked to supply private or confidential data regarding themselves without first being given such a warning, the school district may not use the data supplied. See Advisory Op. No. 96-062 (Dec. 26, 1996); Advisory Op. No. 07-009 (March 9, 2007). This also extends to parents of students who are asked to supply private data, such as their names. Advisory Op. No. 02-033 (Sept. 11, 2002). In addition, the Commissioner of Administration has opined that a Tennesen Warning was required to be given when a county employee was required by the county to undergo an independent evaluation. See Advisory Op. No. 97-043 (Oct. 20, 1997). However, if an individual, such as an employee or a student, is asked to supply private or confidential data regarding some other individual, no such warning need be given.

See Edina Education Association v. Board of Independent School District No. 273, 562 N.W.2d 306 (Minn. Ct. App. 1997). Further, the district is not required to give a Tennesen Warning if the data sought deals with incidents that occur within the course and scope of the employee's job. See, e.g., Kobluk v. University of Minnesota, 613 N.W.2d 425 (Minn. Ct. App. 2000), Washington v. Independent Sch. Dist. No. 625, 590 N.W.2d 655 (Minn. Ct. App. 1999).

Notwithstanding the fact that a Tennesen Warning was not given or that teacher alleged defect in school district's report to the Board of Teaching, school district was required to provide all data requested by the Board of Teaching. Advisory Op. 12-015 (October 8, 2012).

If an entity is collecting the same data from time to time, it is appropriate for the entity to administer one Tennesen Warning notice that might cover all similar collections of data for a stated period. However, when new data is sought or the other elements of the Tennesen Warning are changed, a new Tennesen Warning must be given. See Advisory Op. No. 97-032 (Aug. 1, 1997).

C. Exceptions to Disclosure Rules.

1. Previously Collected Data. Data collected prior to August 1, 1975 that has not been treated as public data may be used and disseminated for the purposes for which the data was originally collected; and for purposes specifically approved of by the Commissioner of Administration as necessary to public health, safety, or welfare. The responsible authority must apply to the Commissioner to receive such authority. Minn. Stat. § 13.05, Subd. 4.
2. Access Authorized by Law. Private or confidential data may be used and disseminated to individuals or agencies as specifically authorized by state, local, or federal law enacted or promulgated after the collection of the data. Minn. Stat. § 13.05, Subd. 4.
3. Necessary to Carry Out Legal Function. Private or confidential data may be used and disseminated to individuals or agencies subsequent to the collection of the data when the responsible authority maintaining the data has requested approval for a new or different use and that request has been specifically approved by the Commissioner as necessary to carry out a function assigned by law. (An application for such authority is necessary.) Minn. Stat. § 13.05, Subd. 4.
4. Informed Consent. Private data may be used by and disseminated to any person or agency if the individual subject or subjects of the data have given their informed consent. See Section VII.D., infra.
5. Records on More than One Student. When the educational records of a student include information on more than one student, the parent of any student included therein shall be entitled to inspect and review, or to be informed of, only the portion which relates to his or her child. Since it may be impossible for the school district to separate out that portion pertaining to one student such that only that portion may be showed to the parents, the option of permitting inspection or informing the parent of that portion pertaining to his or her children must rest with the district. 20 U.S.C. § 1232g(a)(1)(A).
6. Records Not Available for Review and Inspection by Eligible Students. Congress has limited the right of review and inspection of education records by certain eligible students. While other education records remain available to them for review and inspection, students attending an institution of postsecondary education are not entitled to inspect or review:
 - a. Financial records, including any information those records contain, of their parents;

- b. Confidential letters and statements of recommendation placed in the education records prior to January 1, 1975, but only if used for the intended purposes; and
 - c. In addition, if a student has signed a waiver (as more fully discussed in Section XV H 12), he/she is no longer entitled to inspect or review confidential recommendations:
 - (1) respecting admission to an educational agency or institution;
 - (2) respecting an application for employment; or
 - (3) respecting the receipt of an honor or honorary recognition 20 U.S.C. § 1232g (a)(1)(C).
7. Electronic Access Data. Electronic access data may be disseminated: (1) to the Commissioner of Administration for the purpose of evaluating electronic government services; (2) to another government entity to prevent unlawful intrusions into government electronic systems; or (3) as otherwise provided by law. Minn. Stat. § 13.15.

D. Informed Consent Needed for Disclosure of Private Data.

1. General Rules.

- a. Private data or education data may be used by and disseminated to any person or agency if the individual subject or subjects of the data have given their informed consent. Minn. Stat. § 13.05, Subd. 4.
- b. The Commissioner of Administration has adopted general rules relating to informed consent to the release of private data. In addition to the rules promulgated by the Commissioner of Administration, the federal regulations also provide for specific conditions to be met before consent for the release of education records is considered valid. See Minn. R. 1205.1400; 34 C.F.R. § 99.30.
 - (1) “Informed consent” means that the data subject possesses and exercises sufficient mental capacity to make a decision which reflects an appreciation of the consequences of allowing the school district or other entity to initiate a new purpose or use of the data in question. Minn. R. 1205.1400, Subp. 3.
 - (2) In obtaining the informed consent of a data subject, the following applies:
 - (a) The responsible authority shall not take any action to coerce a data subject to give an informed consent;
 - (b) The responsible authority shall explain the necessity for or consequences of the new or different purpose or use; and
 - (c) The informed consent must be in writing and the consent form must explain the consequences of giving the consent. Minn. R. 1205.1400, Subp. 4.

If the responsible authority makes reasonable efforts to obtain the informed consent of a data subject and if those efforts are not acknowledged in any way, the rules provide that the responsible authority shall interpret the silence of the data subject as the giving of an implied consent to the new or different purpose or use of the data. Reasonable efforts to obtain the informed consent include mailing at least two communications requesting the informed consent to the last known address of the data subject and waiting not less than 60 days for a response to the second request. Minn. R. 1205.1400, Subp. 4.
 - (3) Education records may only be disclosed if the consent is in writing and specifies:
 - (a) The records that may be disclosed;
 - (b) The purpose for which the disclosure is made; and
 - (c) The identity of the party or class of parties to whom the disclosure may be made.

If a parent or eligible student so requests, the educational agency shall provide him or her with a copy of the records disclosed. 34 C.F.R. § 99.30 (b) and (c). Written consent may be in electronic format, with certain safeguards to ensure authenticity, as described in 34

C.F.R. § 99.30 (d).

- (4) A data subject may give a partial consent by giving consent to release of less than all the data for which release is requested. In that instance, only the data that the data subject has specifically consented to may be released by the responsible authority.

2. Release of Private Information to an Insurer.

- a. The statute is specific as to informed consent allowing disclosure to an insurer. It provides that, unless otherwise prescribed by the HIPAA Standards for Privacy of Individually Identifiable Health Information, informed consent shall not be deemed to have been given by an individual subject of the data by the signing of any statement authorizing a government entity to disclose information about him or her to an insurer or its authorized representative, unless the statement is:

- (1) In plain language;
- (2) Dated;
- (3) Specific in designating the particular persons or agencies the data subject is authorizing to disclose information about him or her;
- (4) Specific as to the nature of the information he or she is authorizing to be disclosed;
- (5) Specific as to the persons or agencies to whom he or she is authorizing information to be disclosed;
- (6) Specific as to the purpose or purposes for which the information may be used by any of the parties named in clause (5), both at the time of the disclosure and at any time in the future; and
- (7) Specific as to its expiration date, which must be within a reasonable period of time, not to exceed one year. In the case of authorizations given in connection with applications for (i) life insurance or noncancelable or guaranteed renewable health insurance and identified as such, the expiration date must not exceed two years after the date of the policy. An authorization in connection with medical assistance under Minn. Stat. Ch. 256B or MinnesotaCare under Minn. Stat. Ch. 256L, or for individual education plan health-related services provided by a school district that are subject to third party reimbursement, is valid during all terms of eligibility. Minn. Stat. § 13.05, Subd. 4a.

3. Example/Model Informed Consent Form. An example/model informed consent form prepared by the Department of Administration is attached as Form 23.

4. Department of Administration Opinion. The Commissioner of Administration opined that a consent to release form which was not specific in stating exactly what data about the individual would be released, to whom the data would be released, or the consequences of releasing the data did not entirely comply with state statute and federal law. Advisory Op. No. 97-032 (Aug. 1, 1997).

E. Access to Private Data on Individuals and Access to Private Data Concerning Data Subjects Who Are Minors.

1. Minn. R. 1205.0600, Subp. 2 provides that access to private data on individuals is available only to the subject of the data, individuals within the district whose work assignments reasonably require access, entities who are authorized by statute or federal law to have access, and entities or individuals given access by the express written direction of the data subject. The Commissioner of Administration has expressed the opinion that a paraprofessional employed by a school district did not have a legitimate educational interest in behavioral information related to a particular student and the school district failed to show how the paraprofessional's work assignment

reasonably required access to the data. See Advisory Op. No. 96-061 (Dec. 18, 1996). See Advisory Op. No. 02-045 (Nov. 18, 2002) (school district should follow written procedures to determine whether county attorney's work assignment reasonably required access to employee's job application data). See also Advisory Op. No. 05-022 (June 16, 2005) (notwithstanding practice allowing pupil support assistants to have access to information regarding the name, disability and services to be provided to all special needs students for the purpose of requesting assignments for the following school year, school district should make assignments without releasing data about individual students to assistants who will not have interaction with those students as part of the work assignment and, if it cannot, the school district should clearly include the disclosure in its definition of legitimate educational interest.)

- a. The school district must define what constitutes a "school official" and what constitutes a "legitimate educational interest" in its policy and include those definitions in its annual notice. See MSBA/MASA Policy Reference Manual - Model Policy No. 515 and Section XV C, *infra*. See Minn. R. 1205.0400, Subp. 3 (school district must create written procedures that identify persons who may gain access to private data).
2. The responsible authority shall provide for reasonable measures to assure that the person seeking access to the data is the data subject or the authorized representative of the data subject. Reasonable measures include requiring the person seeking access to personally appear, requiring the person to provide identification, or requiring the signature of any data subject who is unable to personally appear.
3. Unless otherwise provided by rule or statute, the responsible authority should presume a parent has authority to have access to data concerning a minor child unless the responsible authority has been provided with evidence that there is a state law or court order governing such matters as divorce, separation, or custody, or a legally binding instrument which provides to the contrary.

An opinion was issued by the Commissioner of Administration regarding the release of data to a parent's attorney regarding an 18-year-old student, a second minor student and the other parent. The Commissioner concluded that the parent who has hired the attorney must first provide to the school district a formal consent allowing the school district to release information to his/her attorney. After consent has been received, the parent's attorney is entitled to receive only that data the parent is actually entitled to receive, which in this case included data about himself/herself, the minor child and public data. The private educational data about the 18-year-old student is not available to the parent, absent consent from that student. Further, private data regarding the spouse is not available absent consent. See Advisory Op. No. 02-019 (May 6, 2002).

4. Minn. Stat. § 13.02, Subd. 8 authorizes a responsible authority to withhold certain data from parents or guardians at the request of the minor data subject if the responsible authority determines that withholding the data would be in the best interests of the minor.
 - a. The responsible authority must notify the minor of his or her right to request that the information be withheld from the parent. The responsible authority may require a written request by the minor that specifies the reasons why the data should be withheld. Minn. R. 1205.0500, Subp. 3.
 - b. Once the request is received, the responsible authority shall determine whether it will honor the request. In making this determination, the responsible authority shall consider at least the following:
 - (1) Whether the minor is of sufficient age and maturity to be able to explain the reasons for

- and to understand the consequences of the request to deny access;
 - (2) Whether the personal situation of the minor is such that denying parental access may protect the minor data subject from physical or emotional harm;
 - (3) Whether there are grounds for believing that the minor data subject's reasons for precluding parental access are reasonably accurate;
 - (4) Whether the data in question is of such a nature that disclosure of it to the parent could lead to physical or emotional harm to the minor data subject; and
 - (5) Whether the data contains medical, dental or other health services provided pursuant to Minn. Stat. §§ 144.341-144.347. Minn. R. 1205.0500, Subp. 3.
- c. The responsible authority may deny parental access to private data on a minor pursuant to Minn. Stat. § 144.345 (relating to consent to health services by minors) or pursuant to any other statute or federal law which allows or requires the responsible authority to do so if the statute or federal law provides standards that limit the responsible authority's discretion. Minn. R. 1205.0500, Subp. 5.
 - d. The responsible authority does not have authority to deny access to an "education record" of a minor data subject as that term is used in the federal Family Educational Rights and Privacy Act of 1974. Minn. R. 1205.0500, Subp. 4. NOTE: This provision may be so broad as to supersede the other nondisclosure provisions of the Minnesota Statutes. See, Letter to School and College Legal Services re: Parental Access to Records of Confidential Medical Services for K-12 Students, Family Policy Compliance Office, March 14, 2005.

F. Access to Confidential Data on Individuals.

- 1. Access to confidential data on individuals is available only to individuals within the district whose work assignments reasonably require access or to entities and agencies authorized by statute or federal law to gain access to that specific data. Minn. R. 1205.0600, Subp. 2.
- 2. The responsible authority shall establish written procedures to assure that access may only be gained by authorized parties. The responsible authority shall not disclose the actual confidential data to the data subjects, but only inform them whether confidential data about them is maintained. The responsible authority should provide for reasonable measures to assure that an individual requesting access to confidential data is in fact the data subject or representative of the subject of the data. Reasonable measures include requiring the person to personally appear, requiring identification or requiring the notarized signature of any data subject who is unable to appear at the offices of the entity.

G. Data on Decedents. Minn. Stat. § 13.10.

- 1. Upon the death of an individual data subject, private or confidential data on individuals is classified as private or confidential data on decedents.
- 2. Private and confidential data on decedents becomes public when ten years have elapsed from the actual or presumed death of the individual and 30 years have elapsed from the creation of the data. An individual is presumed to be dead if either 90 years have elapsed since the creation of the data or 90 years have elapsed since the individual's birth, whichever is earlier, except an individual is not presumed to be dead if readily available data indicate the individual is still living. The rights of the individual to data while living are, upon death, to be exercised by the representative of the decedent. A person seeking access to data on a decedent may apply for court review under Minn. Stat. § 13.10, Subd. 4.

H. Disclosure of Data on Individuals During Public Meetings. Private or confidential data on an

individual may be discussed at a meeting open to the public to the extent provided in Minn. Stat. § 13D.05. Data discussed at an open meeting retain the data's original classification.

VIII. PUBLIC DATA ON INDIVIDUALS: Public data on individuals may be disclosed in the same manner as other government data. The district must provide access to public data to any person without regard to the nature of that person's interest in the data. Minn. R. 1205.0300, Subp. 2.

IX. SUMMARY DATA: Minn. Stat. § 13.05, Subd. 7.

- A. Use. The use of summary data derived from private or confidential data on individuals under the jurisdiction of one or more responsible authorities is permitted.
- B. Classification. Unless otherwise classified pursuant to statute, federal law or temporary classification, summary data is public.
- C. Preparation. The responsible authority shall prepare summary data from private or confidential data upon individuals upon the request of any person, if:
 1. The request is in writing; and
 2. The cost of preparing the summary data is borne by the requesting person.
- D. Method of Preparation. Methods of preparing summary data include, but are not limited to, removing from a set of data, a file, a record-keeping system or a report of an incident all unique personal identifiers. The removing of all unique personal identifiers includes, but is not limited to, blocking out personal identifiers on paper records, tearing off or cutting out the portions of paper records that contain personal identifiers or programming computers in such a way that printed, terminal or other forms of output do not contain personal identifiers. Minn. R. 1205.0700, Subp. 6. The Commissioner has opined that a school district may not release, as public data, multiple sets of summary data regarding students with common student identifiers that would allow for correlation or cross-referencing the data, if the school district believes that such correlation could lead to the identification of individual students. See Advisory Op. No. 98-020 (April 29, 1998). The Commissioner also stated that a school district may not release, as public data, a copy of a teacher's grade book (with student names removed), which includes multiple elements of summary data correlated as to each student, if the school district believes that such correlation could lead to the identification of individual students. See id.
- E. Procedure for Collecting Summary Data. Minn. R. 1205.0700, Subp. 4 provides that within 10 days of the receipt of a written request for the preparation of summary data, the responsible authority must inform the requester of the estimated costs and either:
 1. Provide the summary data requested; or
 2. Provide a written time schedule including reasons for delay; or
 3. Provide access to the requester to the private or confidential data for the purpose of the requestor's preparation of summary data, subject to section G below; or
 4. Provide a written statement of reasons why the responsible authority has determined such access would compromise private or confidential data.
- F. Costs. The costs of preparing the summary data must be borne by the requester. Prior to preparing or supplying the summary data, the requester should be provided an estimate of the costs and the responsible authority should collect any funds necessary to reimburse the district for its expenses. The Commissioner of Administration has opined that the district may request prepayment of any costs associated with preparing summary data. See Advisory Op. No. 97-028 (July 3, 1997). In

determining its costs, the district should consider the cost of materials, including paper, used to provide the copies, the cost of labor required to prepare the copies, any schedule of standard copying charges established by the district in its normal course of operations, any special costs necessary to produce copies from machine-based record-keeping systems such as computers or microfilm systems, and mailing costs if any. If the summary data requires no preparation other than copying, only reasonable copying costs should be charged. The rules also provide that the responsible authority shall take into account the reasonable value to the district of the material prepared and reduce the costs to the requester where appropriate. Minn. R. 1205.0300; Minn. R. 1205.0700, Subp. 7.

G. Delegation of Authority. The responsible authority may delegate the power to prepare summary data:

1. To the administrative officer responsible for any central repository of summary data; or
2. To a person outside of the district (including the requester) if the person sets forth, in writing, his purpose and agrees not to disclose, and the district reasonably determines that the access will not compromise private or confidential data on individuals. The nondisclosure agreement should contain a general description of the private or confidential data which will be used to prepare the summary data, the purpose for which the summary data is being prepared, and a statement that the preparer understands that he or she may be subject to civil or criminal penalties if the private or confidential data is disclosed. Minn. R. 1205.0700, Subp. 5. See Form 10.

H. Determination of Summary Data. In June of 2001, the Commissioner opined that a local newspaper is only entitled to summary data that does not identify specific individuals. The newspaper requested the age, grade level, sex, hometown, race and the act which led to two students' expulsions from school. The Commissioner opined that some of the data requested by the newspaper, although appearing to be summary in nature, would in fact assist a reader in readily identifying the students. Therefore, the Commissioner concluded that a school district must not release summary demographic information which, due to content and the process of elimination, will identify the student subject to the discipline. See Advisory Op. No. 01-053 (June 20, 2001).

The Commissioner gave a similar opinion in 2007. In response to request from newspaper for summary data relating to alleged hazing incident, the Commissioner determined that the nature of the incident in and of itself was not private data. However, the remaining information sought including, identification of the athletic team involved, the number of students disciplined and the discipline imposed could be classified as private educational data because it could result in the disclosure of private data about one or more students. See Advisory Op. No. 07-001 (January 10, 2007).

X. MISCELLANEOUS ACCESS PROVISIONS:

A. Contracts Concerning Data on Individuals. Minn. Stat. § 13.05, Subd. 6.

1. Administration. If a school district enters into a contract with any individual, partnership, corporation, association, business trust, or legal representative of an association and the contract requires that data on individuals be made available to the contracting parties by the district, that data must be administered in accordance with the Data Practices Act.
2. Maintenance. The contracting party must maintain the data according to the statutory provisions applicable to that data.

B. Contracts to Perform School District Functions. Minn. Stat. § 13.05, Subd. 11. **(2014 Session Change)**

1. Contract Terms. If a school district enters into a contract with a private person to perform any of

its functions, all of the data created, collected, received, stored, used, maintained or disseminated by the private person in performing those functions are subject to the requirements of the Data Practices Act and that the private person must comply with those requirements as if it were a school district. **All contracts entered into by a school district must include a notice that these requirements apply to the contract. Failure to include the notice in the contract does not invalidate this requirement.** The civil remedies in Minn. Stat. § 13.08 apply to the private person.

The MGDPA does not impose a direct, affirmative obligation on private businesses that enter contracts with the government and the statute does not make a contract between two private businesses public regardless whether one business is performing a government function. Helmberger v. Johnson Controls, Inc., 839 N.W.2d 527 (Minn. App. 2013).

2. Duty to Provide Access. There is no duty on the part of the private person to provide access to public data to the public if the public data are available from the school district, except as required by the terms of the contract.

XI. INTERGOVERNMENTAL ACCESS TO DATA: Minn. Stat. § 13.05, Subd. 9.

- A. Access. A responsible authority shall allow another responsible authority access to data classified as not public only when the access is authorized or required by statute or federal law. Where there is no such authorization, the sharing of data will not be permitted. To this end, the Commissioner has opined that neither the Data Practices Act nor the state statute governing the establishment of children's mental health collaboratives permits a school district, as part of a grant application for funds related to the collaborative's implementation, to share the MARSS numbers of students receiving services from the collaborative with the Minnesota Department of Human Services without the students' consent. Advisory Op. No. 02-037 (Oct. 7, 2002).
- B. Payment of Costs. A school district may require the requesting entity to pay the actual costs of supplying the data.
- C. Same Classification. Data shall have the same classification in the hands of the entity receiving them as they had in the entity supplying them. The classification of data in the possession of a school district shall change if required to do so to comply with either judicial or administrative rules applicable to the data in the possession of the disseminating or receiving entity. Minn. Stat. § 13.03, Subd. 4(c).

If a school district disseminates data to another government entity, a classification provided for by law in the hands of the entity receiving the data does not affect the classification of the data in the hands of the entity that disseminates the data. Minn. Stat. § 13.03, Subd. 4(d).

- D. Multiple Classifications. If data on individuals are classified as both private and confidential by Chapter 13 or any other statute or federal law, the data are private. Minn. Stat. § 13.03, Subd. 4(b).
- E. Change in Classifications. The classification of data in the possession of a school district shall change if it is required to do so to comply with either judicial or administrative rules pertaining to the conduct of legal actions or with a specific statute applicable to the data in the possession of the disseminating or receiving entity. Minn. Stat. § 13.03, Subd. 4(a). The Commissioner of Administration has opined that if a school district includes data which otherwise would be classified as private in a settlement agreement which is specifically classified as public pursuant to Minn. Stat. § 13.43, Subd. 2(a)(6), the private data becomes public. See Advisory Op. No. 97-017 (May 5, 1997); See also Advisory Op. No. 09-024 (November 30, 2009).

XII. RIGHTS OF SUBJECTS OF DATA: Minn. Stat. § 13.04.

A. Rights Prior to Providing Data. Minn. Stat. § 13.04, Subd. 2.

Except when an individual is asked to supply investigative data to a law enforcement officer, an individual asked to supply private or confidential data concerning himself shall be informed of:

1. The purpose and intended use of the requested data within the collecting government entity;
2. Whether he may refuse or is legally required to supply the requested data;
3. Any known consequence arising from his supplying or refusing to supply private or confidential data; and
4. The identity of other persons or entities authorized by state or federal law to receive the data.

This is the Tennessen Warning discussed above. Minn. Stat. § 13.05, Subd. 4 generally provides, with certain exceptions, that private or confidential data on an individual shall not be collected, stored, used or disseminated by school districts for purposes other than those stated to the individual at the time of collection. (See Forms.) In this respect, the Commissioner of Administration opined that the University of Minnesota was prohibited from using data it collected from an employee during interviews with internal auditors investigating allegations that the employee had falsified overtime claims because the employee had not been given the proper Tennessen Warning. In the Matter of Muffett v. University of Minnesota, (June 15, 1995). See also Advisory Op. No. 95-007; Advisory Op. No. 96-062 (Dec. 26, 1996). However, if the individual, such as an employee or student, is asked to supply private or confidential data regarding another individual, a Tennessen Warning is not required. See Edina Education Association v. Board of Independent School District No. 273, 562 N.W.2d 306 (Minn. App. 1997). See also Advisory Op. No. 96-062 (Dec. 26, 1996). This also includes the situation where information is sought from an employee about incidents that occur within the course and scope of employment. See Washington v. Independent Sch. Dist. No. 625, 590 N.W.2d 655 (Minn. App. 1999) and Kobluk v. University of Minnesota, 613 N.W.2d 425 (Minn. App. 2000).

In another opinion the Commissioner of Administration dealt with the issue of whether a school district was required to give a student and the student's parent a Tennessen Warning when the school district informed the student and the student's parent that the student would not be readmitted to school after a suspension unless the student underwent a psychological assessment. See Advisory Op. No. 94-041 (Oct. 7, 1994). According to the Commissioner, if the school district asked the student or the student's parent to supply private data about the student to the district, a Tennessen Warning was required. The Commissioner went on to state that "If what occurred were discussions about a course of action in which the agents of the [d]istrict did not ask the child or the parents to provide private data to them, the requirement that the [d]istrict provide a Tennessen Warning would not be triggered." Consistent with this opinion, the Commissioner subsequently opined that a Tennessen Warning was required to be given when a county employee was required by the county to undergo an independent evaluation, see Advisory Op. No. 97-043 (Oct. 20, 1997), and when private information about the parent was sought from the parent. Advisory Op. No. 02-033 (Sept. 11, 2002). The Commissioner has also opined that if an entity is collecting the same data from time to time, it is appropriate for the entity to administer one Tennessen Warning notice that might cover all similar collections of data for a stated period. However, when new data are sought or other elements of the Tennessen Warning are changed, a new Tennessen Warning must be given. See Advisory Op. No. 97032 (Aug. 1, 1997), see also, Advisory Op. No. 10-005 (March 11, 2010) (government entity violated chapter 13 when it used data it maintained for purposes beyond Tennessen Warning and outside of express uses of the data provided by law).

The Tennessen Warning was also addressed regarding two separate interviews of the same person by

the same entity. In one interview conducted by the principal, the employee was not given a Tennesen Warning and in the second interview conducted by an investigator, the employee was given a Tennesen Warning. Other persons were also present during the interviews. The Commissioner opined that any data the employee gave about him/herself to the principal could not be disclosed without his/her informed consent or pursuant to a court order. However, any data about the employee that the employee did not provide could be disclosed to the county attorney if it was of the type described in Minn. Stat. § 13.43, Subd. 15. If the other persons in the meeting, including the principal, were employees, then data about them of the type described in Minn. Stat. § 13.43, Subd. 15 can be disclosed. If they are not employees any data about them are public pursuant to the general presumption in Minn. Stat. § 13.03, Subd. 1.

Similarly, data obtained from the employee's child, who was also a student in the school district, about him/herself by the principal without a Tennesen Warning could not be disclosed to the county attorney. Information in the notes that did not come from the student may be released to the county attorney only if there is statutory authority for doing so under Minn. Stat. § 13.32 or FERPA.

Generally, data provided by the employee about him/herself to the investigator after receiving a Tennesen Warning could be provided to the county attorney if it was the type described in Minn. Stat. § 13.43, Subd. 15. The Tennesen Warning given to the employee, however, did not advise the employee that data may be disclosed to law enforcement. Therefore, the Commissioner opined that the data could not be disclosed to the county attorney without the informed consent of the employee or a court order. Nevertheless, data not provided by the employee could be disclosed to the county attorney in accordance with Minn. Stat. § 13.43, Subd. 15.

The Commissioner further found that data provided by other witnesses (teachers, students, administrators) about themselves after receiving the faulty Tennesen Warning could be disclosed only with a court order or the informed consent of the individual. Only public and private data about other individuals provided by the witnesses may be disclosed depending upon their classification. Advisory Op. No. 11-003 (March 10, 2011).

Recently, the Commissioner opined that a Tennesen Warning was not provided where all known consequences of providing or not providing the data were not conveyed and failed to identify persons outside of the school district who were authorized to receive the data. Advisory Op. No. 13-011 (June 14, 2013).

B. Right to be Informed About and Receive Copies of Stored Data. Minn. Stat. § 13.04, Subd. 3.

1. Upon request to a responsible authority or designee, an individual shall be informed of:
 - a. Whether he is the subject of stored data on individuals;
 - b. Whether this data is classified as public, private or confidential.
2. Upon further request, an individual who is the subject of stored private or public data on individuals shall be:
 - a. Shown the data without charge;
 - b. Be informed of the content and meaning of the data upon request;
 - c. Be provided with copies of the public or private data upon request.
3. If the circumstances effectively prevent the parent or eligible student from exercising his or her right to inspect and review the student's educational records, the responsible authority or designee, shall:
 - a. Provide the parent or eligible student with a copy of the records requested; or
 - b. Make other arrangements for the parent or eligible student to inspect and review the

requested records. 34 C.F.R. § 99.10 (d).

4. After an individual has been shown the private data and been informed of its meaning, the data need not be disclosed to him again for six months unless a dispute or action concerning the data is pending or additional data has been collected or created. However, according to Minn. Stat. § 13.32, Subd. 10, nothing contained in the Minnesota Government Data Practices Act shall be construed as limiting the frequency of inspection of the educational records of a child with a disability by the child's parent or guardian or by the child upon the child reaching the age of majority.

Federal and state law appears to be in conflict as it relates to access to education records. Minnesota law provides that after an individual has been shown the requested data and informed of its meaning, the data need not be disclosed again for six months. However, the federal law does not provide for a similar waiting period for education records. Districts are advised to follow federal law on this issue for education records as defined above. It should also be noted that even a statutory right of inspection must be exercised, in this case by the parent or eligible student, in such a manner as will not materially interrupt or interfere with the duties of the official in charge of the records. 76 C.J.S., Records § 35 (1952).

5. The responsible authority or designee, must comply with a request for data immediately if possible or within ten days of the date of the request, excluding Saturdays, Sundays, and legal holidays if immediate compliance is not possible. The Commissioner has applied the ten-day requirement even where the data request is made immediately before a school holiday or other period when school personnel may not be available. See Advisory Op. No. 03-031 (request made before Superintendent's vacation and Fourth of July holiday); Advisory Op. No. 03-030 (request made during extended summer absence of sole employee with relevant information); Advisory Op. No. 03-026 (request made immediately before spring break). The Commissioner has opined that the vagueness of a data request does not negate of government entity's obligation under Minn. Stat. § 13.04 to respond in a timely manner. According to the Commissioner, if the government entity felt that the request was unclear, it could have asked for clarification. See Advisory Op. No. 98-051 (Nov. 19, 1998). The Commissioner of Administration has also opined that the provision of a copy of a psychological report by a school district approximately forty eight days after the request for the report did not comply with the requirements of the Minnesota Government Data Practices Act, in spite of the fact that the administrator who initially responded to the request thought that the report in question had been destroyed. Advisory Op. No. 94-011 (Feb. 16, 1994).

Federal and state law again appears to be in conflict with regard to education records. As indicated above, Minnesota law requires the responsible authority to respond to a request for data immediately or within ten days of the date of the request. However, the federal law governing access to education records provides that the data must be provided to parents or the eligible student within a reasonable period of time, but in no case more than 45 days after the request has been made. Districts are advised to follow the shorter time period provided for in Minnesota law when responding to a request for information, regardless of its classification.

6. The responsible authority may require a person requesting copies of public or private data to pay the actual costs of making and certifying the copies. (See VI D above.)

C. Right to Contest the Accuracy or Completeness of Data. (2014 Session Change)

1. General Rule. Minn. Stat. § 13.04, Subd. 4 provides the following procedure for an individual to contest the accuracy or completeness of data. An individual may contest the accuracy or

completeness of public or private data about himself or herself. The individual must notify the responsible authority in writing describing the nature of the disagreement. Within 30 days, the responsible authority must:

- a. Correct any inaccurate or incomplete data;
- b. Attempt to notify past recipients of inaccurate or incomplete data; or
- c. Notify the individual that the district believes the data to be correct.

Data in dispute may be disclosed only if the individual's statement of disagreement is included with the disclosed data. NOTE: There is no right to a hearing, only an appeal, at the local level under state law. Should the local level appeal be appealed, a hearing may be held.

2. Right to Appeal. Minn. Stat. § 13.04, Subd. 4; Minn. R. 1205.1600:
 - a. The individual may appeal the district's determination on the accuracy and completeness of the information to the Commissioner of Administration.
 - b. Upon receipt of an appeal by an individual, the Commissioner shall, before issuing the order and notice of a contested case, try to resolve the dispute through education, conference, conciliation or persuasion. If the parties consent, the Commissioner may refer the matter to mediation. Following these efforts, the Commissioner shall dismiss the appeal or issue the order and notice of hearing.
 - (1) A government employee's performance evaluation is government data, the accuracy of which may be contested by the employee under the Data Practices Act. See, Schwanke v. Minn. Dept. of Admin., 834 N.W.2d 588 (Minn. App. 2013) **aff'd (Minn. 2014)**.
 - c. The appeal will be conducted by an impartial hearing officer under the contested case provisions of the Administrative Procedure Act.
 - (1) The Minnesota Court of Appeals addressed the responsibility of the Commissioner of Administration to review contested data in Hennepin County Community Services Department v. Hale, 470 N.W.2d 159 (Minn. Ct. App. 1991). According to the Court, the Commissioner of Administration may not adopt the agency's conclusions, but is required to adopt his/her own findings of fact and draw his/her own conclusions from these facts. Thus, the Court held that the Commissioner of Administration may correct and amend the county's facts and conclusions contained in a report prepared by county social workers concerning allegations of child sexual abuse.
 - d. The notice of the appeal must be submitted to the Commissioner within a reasonable time of the determination made by the responsible authority. Minn. R. 1205.1600, Subp. 2 provides that a reasonable time is 180 days from the date of the responsible authority's determination unless the responsible authority provides the individual with a written statement which informs him/her of the right to appeal. In that event, a reasonable time means 60 days.
 - e. The notice of appeal must be in writing and be addressed to the Commissioner of Administration, State of Minnesota, 50 Sherburne Avenue, St. Paul, Minnesota 55155. The notice must contain the following information:
 - (1) The name, address and phone number, if any, of the appealing party;
 - (2) The name of the responsible authority and the school district or entity he or she represents;
 - (3) A description of the nature of the dispute, including a description of the data;
 - (4) A description of the desired result of the appeal; and
 - (5) Whether the individual desires the request to be processed under a pseudonym.
 - f. The school district must reimburse the Department of Administration for the costs of all administrative appeals. This provision may be subject to interpretation and challenge in certain instances. Minn. R. 1205.1600, Subp. 5.
 - g. There may be subsequent appeals to the courts. (See Penalties section.)
 - h. Data on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by the government entity without regard to the records

disposition requirements of Minn. Stat. § 138.17. After completing, correcting or destroying successfully challenged data, a state agency, political subdivision or statewide system may retain a copy of the Commissioner of Administration's order issued under Minn. Stat. Chapter 14 or, if no order was issued, a summary of the dispute between the parties that does not contain any particulars of the successfully challenged data.

3. Rule for Challenging the Accuracy of Information in Education Records - The Right to a Hearing. Under federal law, a parent or eligible student has a right to have a hearing if that person believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy. If an educational agency receives a request to amend a record, the educational agency must decide whether to amend the record as requested within a reasonable time after the agency receives the request. If the agency decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and that person's right to a hearing. 20 U.S.C. § 1232g (a)(2); 34 C.F.R. § 99.20.

The hearing, which must be held within a reasonable time after it is requested, must meet the following minimum requirements:

- a. The educational agency shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.
- b. The hearing may be conducted by any individual, including an official of the educational agency, who does not have a direct interest in the outcome of the hearing.
- c. The educational agency shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the information that is challenged as being inaccurate, misleading, or in violation of the privacy rights of the student. This includes the right of the eligible student or parent to be represented by one or more individuals of his or her choice, at his or her expense, including an attorney.
- d. The educational agency or institution must make its decision in writing within a reasonable period of time. Said decision must be based solely on the evidence presented at the hearing and include a summary of the evidence and the reasons for the decision. 34 C.F.R. § 99.22. See Form 21 - PROPOSED RULES FOR CONDUCT OF HEARING.

If, as a result of the hearing, the educational agency decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall amend the record accordingly and inform the parent or eligible student of the amendment in writing. If the educational agency decides that the information in the educational record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both. If such a statement is presented by the parent or eligible student, said statement must be placed in the education records of the student and the agency shall maintain the statement with the contested part of the record for as long as the record is maintained and disclose the statement whenever it discloses the portion of the record to which the statement relates. 34 C.F.R. § 99.21.

XIII. DUTIES OF THE RESPONSIBLE AUTHORITY - PUBLIC NOTICE:

A. Mandatory Duties. (2014 Session Change)

1. To prepare an inventory containing the authority's name; title; address; a description of each category of record, file, or process relating to private or confidential data on individuals maintained by the school district; forms used to collect the private or confidential data may be included in the inventory. Minn. Stat. § 13.025, Subd. 1.

2. To update annually this public document and to make any changes necessary to keep it accurate. Minn. Stat. § 13.025, Subd. 1.
3. To make this document available to the public according to sections 13.03 and 15.17. Minn. Stat. § 13.025, Subd. 1.
4. To submit copies of the public document to the Commissioner of Administration when required to do so and to provide, upon the Commissioner's request, further information relevant to data collection practices, policies, and procedures. Minn. Stat. § 13.025, Subd. 1.
5. To prepare a written access policy and update it no later than August 1 of each year, and at any other time as necessary to reflect changes in personnel, procedures, or other circumstances that impact the public's ability to access data. Minn. Stat. § 13.025, Subd. 2. The written access policy must be easily available to the public by distributing free copies to the public or by posting the policies in a conspicuous place, within the government entity or by posting it on the government entity's Web site. Minn. Stat. § 13.025, Subd. 4.
 - a. Verbally providing data practices policies and procedures did not fulfill school district's obligation. Advisory Op. No. 13-007 (March 19, 2013).
6. To prepare a public document setting forth in writing the rights of the data subject and the specific procedures in effect for access by the data subject to public or private data on individuals and update it no later than August 1 of each year or at any other time as necessary to reflect changes in personnel, procedures or other circumstances that impact the public's ability to access data. Minn. Stat. § 13.025, Subd. 3. (See also Section XII - RIGHTS OF SUBJECTS OF DATA, for further duties in this regard.)
7. To establish procedures to ensure that all data on individuals is accurate, complete and current. Minn. Stat. § 13.05, Subd. 5.
8. To establish appropriate security safeguards for all records containing data on individuals **including procedures for ensuring that data that are not public are only accessible to persons whose work assignment reasonably requires access to the data, and is only being accessed by those persons for purposes described in the procedure.** Minn. Stat. § 13.05, Subd. 5.
9. **To develop a policy incorporating the procedures, which may include a model policy governing access to the data if sharing of the data with other government entities is authorized by law. Minn. Stat. § 13.05, Subd. 5. (See also Section XXIX Form 27).**
10. To prepare summary data from private or confidential data on individuals at the written request and expense of any person. Minn. Stat. § 13.05, Subd. 7. (See also Section IX - SUMMARY DATA, for further information.)

B. Discretionary Duties.

1. To appoint a designee to be in charge of individual files or systems containing government data and to receive and comply with data requests. Minn. Stat. § 13.02, Subd. 6.
2. To make applications to the Commissioner of Administration for temporary classifications of data. Minn. Stat. § 13.06, Subd. 1. (See discussion of temporary classification below.)

3. To apply to the Commissioner for authority to collect, store, use or disseminate data collected prior to August 1, 1975, because it is necessary to public health, safety or welfare. Minn. Stat. § 13.05, Subd. 4(a).
 4. To apply to the Commissioner for the authority to use and disseminate private or confidential data as necessary to carry out a function assigned by law. Minn. Stat. § 13.05, Subd. 4(c).
 5. To delegate powers to prepare summary data. Minn. Stat. § 13.05, Subd. 7. (See Section IX - SUMMARY DATA, for further information.)
- C. Duties Required by Rule. See Parts 1205.1200; 1205.1300; 1205.1400 and 1205.1500 regarding specific duties of the responsible authority required by the rules.

See Form 22 for Compliance Checklist.

XIV. PERSONNEL DATA: Minn. Stat. § 13.43. **(2014 Session Change)**

- A. Definition. Personnel data means government data on individuals maintained because the individual is or was an employee of or an applicant for employment by a school district; performs services on a voluntary basis for or acts as an independent contractor for a school district; or is a member of an advisory board or commission. Personnel data includes data on individuals who apply for or are enrolled in employment and training programs funded with federal, state or local resources unless the data are welfare data. Minn. Stat. § 13.43, Subd. 1.

The Commissioner of Administration has opined that data which identifies an employee or former employee and are contained in documents that are stored outside a school district's official personnel or building files (i.e. file in superintendent's office), are still personnel data for purposes of Minn. Stat. § 13.43, and accessible by the employee or former employee. Advisory Op. No. 94-034 (Aug. 24, 1994).

The Commissioner has also opined that data in an employee's appointment book are personnel data because they were collected and created because the employee was a public employee. Such data, according to the Commissioner, are classified as private personnel data. Advisory Op. No. 96-056 (Dec. 11, 1996).

Data contained in communications between board member and employee are subject to Chapter 13 when the communication is sent or received in the capacity of board member or public employee regardless whether the communication is transmitted over or by a personal device. Advisory Op. No. 12-019 (December 11, 2012).

- B. Current and Former Employees. The following data on current or former employees, volunteers, independent contractors, and members of advisory boards or commissions are public pursuant to Minn. Stat. § 13.43, Subd. 2(a). See, MSBA/MASA Policy Reference Manual - Model Policy No. 406.

1. Name;
2. Employee identification number which must not be the employee's social security number;
3. Actual gross salary;
4. Salary range;
5. Terms and conditions of employment relationship;
6. Contract fees;

7. Actual gross pension;
8. The value and nature of employee fringe benefits (Note that HIPAA's Privacy Rule will protect the amount of an employee's health care benefits if the school district is a covered entity, as defined in HIPAA, unless a specific request is made under the Minnesota Data Practices Act for such information See Advisory Op. 04-017 (Mar. 26, 2004));
9. The basis for and amount of any added remuneration including expense reimbursement, in addition to salary;
10. Job title and bargaining unit;
11. Job description;
12. Education and training background;
13. Previous work experience;
14. Date of first and last employment;
15. The existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action; (See Section XIV V below.)
16. The final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body; (See Section XIV Q below.)
17. The terms of any agreement settling any dispute arising out of an employment relationship, including a buyout agreement, as defined in Minn. Stat. § 123B.143, Subd. 2(a); except that the agreement must include specific reasons for the agreement if it involves payment of more than \$10,000 of public money. Note that the school district determines the specific reasons put in the agreement.
18. Work location;
19. A work telephone number;
20. Badge number;
21. Work-related continuing education;
22. Honors and awards received; and
23. Data which accounts for the individual's work time and payroll time sheets or other comparable data that are only used to account for employee's work time for payroll purposes, except to the extent that the release would reveal the employee's reasons for the use of sick or medical leave. (See Section XIV W below.)

The Commissioner has opined that seemingly public data, such as an employee's name, may be properly redacted when it is paired with private personnel data regarding the employee. See Advisory Op. No. 07-004 (January 22, 2007). See also Advisory Op. No. 08-005 (April 16, 2008) (names of employees subject to a complaint may not be disclosed until final disposition of disciplinary action where the nature of the complaint is public); and Advisory Op. No. 11-013 (September 8, 2011) (emails revealed identity and work environment complaints such that they were inextricably intertwined and could be withheld).

A settlement agreement whereby an employee resigned in exchange for \$12,000 included the "specific reasons" for the agreement where it provided that the parties wished to settle all matters and to compromise claims, that the School District received a waiver of all claims arising out of the employment relationship and a release, that the employee withdrew all grievances, dismissed an arbitration request, etc. The Commissioner also noted that the parties could agree to include nonpublic information in the settlement agreement, however, with respect to the agreement, that data would become public. See Advisory Op. No. 09-024 (November 30, 2009). See also, Minn. Stat. § 13.43, Subd. 2(f).

The Minnesota Supreme Court has held that "independent contractors" only refers to the company who contracts with the government entity and, consequently, personnel data as defined in Minn. Stat. § 13.43 does not apply to the company's employees. As a result, payroll records of a subcontractor's

employees are public pursuant to Minn. Stat. § 13.03 (unless the data are protected by a separate section, *i.e.*, social security numbers under Minn. Stat. § 13.355). Therefore, the home address data requested was required to be provided. See *Intl. Brotherhood of Elec. Workers, Loc. No. 292 v. City of St. Cloud and Design Electric Inc.* 765 N.W.2d 64 (Minn. 2009); see also Advisory Op. No. 11-002 (January 20, 2011). See Subd. 19 (2012 Amendment) in paragraph O. below.

A superintendent's contract is generally public and any private data therein may be redacted. Providing a summary of the contract is not a compliant response to a request for the contract. Advisory Op. No. 12-009 (May 2, 2012).

In 2013, the Commissioner opined that grades received and grade point average contained on college transcripts were not "education and training background" and thus, were not disclosable. Advisory Op. No. 13-006 (March 5, 2013).

- C. Photograph of Employee. A school district may display a photograph of a current or former employee to a prospective witness as part of the district's investigation of any complaint or charge against the employee. The Commissioner has opined, however, that a public entity must give an employee a Tennesen Warning prior to taking the employee's photograph. See Advisory Op. No. 98-027 (May 20, 1998).
- D. Complainant's Access to Data Regarding an Employee. A complainant has access to a statement provided by the complainant to a school district in connection with a complaint or charge against a district employee. Minn. Stat. § 13.43, Subd. 2(d).
- E. Current and Former Applicants for Employment. The following personnel data on current and former applicants for employment with a school district or appointment to an advisory board or commission are *public*, pursuant to Minn. Stat. § 13.43, Subd. 3:
 1. Veteran status;
 2. Relevant test scores;
 3. Rank on eligible list;
 4. Job history;
 5. Education and training; and
 6. Work availability.

The Commissioner opined that a government entity did not properly respond to a request for copies of public personnel data from an employment application when it sent a separately created list of the public data instead of redacted copies of the actual documents. Advisory Op. No. 13-002 (January 14, 2013).

In addition, the superintendent of a school district or the superintendent's designee, or a person having administrative control of a charter school, must release to a requesting school district or charter school private personnel data on a current or former employee related to acts of violence toward or sexual contact with a student, if an investigation conducted by or on behalf of the school district or law enforcement affirmed the allegations in writing prior to release and the investigation resulted in the resignation of the subject of the data **or the employee resigned while a complaint or charge involving the allegations was pending, the allegations involved acts of sexual contact with the student, and the employer informed the employee in writing before the employee resigned, that if the employee resigns while the complaint or charge is still pending, the employer must release private personnel data about the employee's alleged sexual contact with a student to a school district or charter school requesting the data after the employee applies for employment with that school district or charter school and the data remain classified as provided in chapter 13. Data released must not include data on the student.** See Minn. Stat. §

13.43, Subd. 16.

Names of applicants are private data except when certified as eligible for appointment to a vacancy or when applicants are considered by the appointing agency to be finalists for a position in public employment. “Finalist” means an individual selected to be interviewed by the appointing authority prior to selection. The Commissioner of Administration has opined that certain candidates for the position of St. Louis County Administrator were not “finalists” for purposes of the statute because the candidates in question had been selected to be interviewed on a conditional basis. In this respect, the County Board made it clear that the candidates in question would not be interviewed if they did not survive the background checks and an evaluation process conducted by a consultant retained by the County. Advisory Op. No. 93-002 (Sept. 9, 1993). However, a board cannot give candidates an opportunity to withdraw from consideration before identifying them as “finalists.” The Commissioner of Administration opined that as soon as candidates were selected to be interviewed by the board, they were finalists for the purposes of Chapter 13 and their names became public even though candidates withdrew from consideration prior to the interview. See Advisory Op. No. 10-006 (March 11, 2010).

In 2005, the legislature adopted Minn. Stat. § 13.601, Subd. 3, which provides:

The following data on all applicants for election or appointment to a public body, including those subject to chapter 13D, are public: name, city of residence, education and training, employment history, volunteer work, awards and honors, and prior government service or experience.

Subsequently, the Department of Administration opined that the statute only recognized the general presumption that all government data are public and did not affect the public classification of any data beyond what was listed in the statute. Advisory Op. 05-036 (Nov. 18, 2005).

Clarification was subsequently sought from the Attorney General with respect to applications for election or appointment to a public body whose members are considered employees. The Attorney General opined that when the incumbent will be considered an employee of the government unit he or she serves, the general presumption for personnel data applies rendering all data private unless expressly made public by Minn. Stat. § 13.601, Subd. 3 or 13.43, Subd. 3. Op. Atty. Gen. (July 14, 2006).

In 2008, the legislature amended Minn. Stat. § 13.601, Subd. 3 to provide as follows:

- (a) Data about applicants for appointment to a public body collected by a government entity as a result of the applicant’s application for appointment to the public body are private data on individuals except that the following are public:
 - (1) name;
 - (2) city of residence except when the appointment has a residency requirement that requires the entire address to be public;
 - (3) education and training;
 - (4) employment history;
 - (5) volunteer work;
 - (6) awards and honors;
 - (7) prior government service; and
 - (8) any data required to be provided or that is voluntarily provided in an application for appointment to a multimember agency pursuant to Minn. Stat. § 15.0597.
- (b) Once an individual is appointed to a public body, the following additional items of data are public:
 - (1) residential address; and

- (2) either a telephone number or electronic mail address where the appointee can be reached, or both at the request of the appointee.
- (c) Notwithstanding paragraph (b), any electronic mail address or telephone number provided by a public body for use by an appointee shall be public. An appointee may use an electronic mail address or telephone number provided by the public body as the designated electronic mail address or telephone number at which the appointee can be reached.

In 2012, the legislature added “veteran status” as another category of public data under subdivision (a). Additionally, the following categories were added as additional items which become public once an individual is appointed to a public body as follows:

- (1) first and last dates of service on the public body;
- (2) the existence and status of any complaints or charges against an appointee; and
- (3) upon completion of an investigation of a complaint or charge against an appointee, the final investigative report is public, unless access to the data would jeopardize an active investigation.

Also in 2012, the Commissioner opined that application dates and the dates of testing related to a group of unidentified applicants was not association with any individual and, therefore, was not data on individuals. To comply, the government entity needed only to redact everything from the applications and tests except for the dates. Providing summary data was not appropriate because it cannot be derived from applicant data that is both public and private. Advisory Op. No. 12-003 (January 31, 2012).

Further, the Commissioner opined that where a candidate did not request a private classification of her residential address, both the Affidavit of Candidacy and a copy of her driver's license which she provided as proof of residence would be classified as public under the general presumption in Section 13.03, Subd. 1. Advisory Op. No. 12-007 (April 20, 2012).

In 2014, the Commissioner stated definitively that all data on applicants for appointment to a public body such as a school board are classified under Section 13.601 and not 12.43. In addition, the data enumerated in Section 13.601, Subd. 3(a) are public when the school district received the applications. Advisory Opinion No. 14-008 (July 11, 2014)

- F. Other Provisions. All other personnel data is *private* data on individuals and may not be disclosed without consent except it may be released pursuant to a court order. Minn. Stat. § 13.43, Subd. 4. See, e.g., Advisory Op. No. 03-002 (Jan. 21, 2003) (concluding that, because IRS levy and release notices were not among the categories of public personnel data, the notices were private data under Minn Stat. § 13.43); Advisory Op. No. 02-046 (Nov. 19, 2002) (parking records for individual employees are private data).
- G. Undercover Agents. All personnel data maintained by a school district relating to an individual employed or applying for employment as an undercover law enforcement officer is private. However, when the individual is no longer assigned to an undercover position, the data described in Minn. Stat. § 13.43, Subds. 2 and 3 become public unless the law enforcement agency determines that revealing the data would threaten the personal safety of the officer or jeopardize an active investigation. Minn. Stat. § 13.43, Subd. 5.
- H. Student Employees. Records relating to a student who is employed by a public educational agency or institution are classified as personnel data if they:
 - 1. Are made or maintained in the normal course of business;
 - 2. Relate exclusively to the individual in that individual's capacity as an employee; and

3. Are not available for any other purpose. Minn. Stat. § 13.32, Subd. 1.

- I. Access by Labor Organizations. Personnel data may be disseminated to labor organizations to the extent that the responsible authority determines that the dissemination is necessary to conduct elections, notify employees of fair share fee assessments, and to implement the provisions of PELRA. It may also be disseminated to labor organizations and to the Bureau of Mediation Services to the extent the dissemination is ordered or authorized by the Commissioner of BMS. Minn. Stat. § 13.43, Subd. 6.

The Minnesota Court of Appeals held that dissemination of an employee's social security number to an employee union is not permitted under Minn. Stat. § 13.43, Subd. 6, unless the responsible authority determines that the release is necessary to conduct elections, notify employees of fair share fee assessments, and implement the provisions of PELRA. See Manson v. State of Minnesota, Dept. of Employee Relations, 613 N.W.2d 778 (Minn. Ct. App. 2000).

- J. Independent Contractor Data. The following data maintained as a result of a contractual relationship entered on or after August 1, 2012, between a government entity and a contractor or subcontractor are private: the personal telephone number, home address, and e-mail address of a current or former employee of the contractor or subcontractor. A government entity maintaining data about a contractor or subcontractor's employees must share the data with another government entity to perform a function authorized by law. The data must be disclosed to a government entity or any person for prevailing wage purposes.
- K. Harassment Data. When allegations of sexual or other types of harassment are made against an employee, the employee does not have access to data that would identify the complainant or other witness if the responsible authority determines that the employee's access to the data would:
1. Threaten the personal safety of the complainant or a witness; or
 2. Subject the complainant or witness to harassment.

In the event a disciplinary proceeding is initiated against the employee, data on the complainant or witness must be available to the employee as may be necessary for the employee to prepare for the proceeding. Minn. Stat. § 13.43, Subd. 8. The Commissioner has opined that the determination of whether data requested is "necessary for the employee to prepare" for a disciplinary proceeding is to be made by the responsible authority for the data, subject to resolution of any disagreements through the procedure for discoverability of not public data set forth in Minn. Stat. § 13.03, Subd. 6. Advisory Op. No. 94-018 (April 11, 1994). The Commissioner has also opined that if the complainant whose identity is sought is not a current or former employee of the governmental entity, the data about the complainant is public and should be accessible to a former employee of the governmental entity. Advisory Op. No. 96-002 (Jan. 16, 1996). If, however, the complainant is a student, parent of a student, or an employee of the school district, the data collected and maintained about the complainant is classified as private data and not accessible to the employee. See Advisory Op. No. 97-018 (May 5, 1997).

- L. Prohibition on Agreements Limiting Disclosure or Discussion of Personnel Data. A school district may not enter into an agreement settling a dispute arising out of the employment relationship with the purpose or effect of limiting access to or disclosure of personnel data or limiting the discussion of information or opinions related to personnel data. Any agreement or portion of an agreement imposing such limitations is void and unenforceable. Minn. Stat. § 13.43, Subd. 10(a).

The prohibition on limiting access to, disclosure of, or the discussion of information or opinions related to personnel data applies to the following, but only to the extent that the data or information could otherwise be made accessible to the public:

1. An agreement not to discuss, publicize, or comment on personnel data or information;
2. An agreement that limits the ability of the subject of personnel data to release or consent to the release of data; and
3. Any other provision of an agreement that has the effect of limiting the disclosure or discussion of information that could otherwise be made accessible to the public, except a provision that limits the ability of any employee to release or discuss private data that identifies other employees.

Minn. Stat. § 13.43, Subd. 10(b). The prohibition or limiting access to, disclosure of, or the discussion of information or opinions related to personnel data also applies to a court order. Minn. Stat. § 13.43, Subd. 10(c).

The Commissioner has opined that if a school district and an employee choose to include medical data, or data that would otherwise be classified as private, as part of the terms of a settlement agreement, such data must be made public pursuant to Minn. Stat. § 13.43, Subd. 2(a)(6). See Advisory Op. No. 97-017 (May 5, 1997).

Recently, however, the Commissioner opined that a “settlement agreement” between a municipalities workers’ compensation insurer and an employee is not public pursuant to Minn. Stat. § 13.43, Subd. 2(a)(6). See Advisory Op. No. 09-015 (July 7, 2009).

- M. Disclosure for the Protection of Employee or Others. If the responsible authority or designee of a school district reasonably determines that the release of personnel data is necessary to protect an employee from harm to self or to protect another person who may be harmed by the employee, data that are relevant to the concerns for safety may be released:
1. To the person who may be harmed and to an attorney representing the person when the data are relevant to obtaining a restraining order;
 2. To a pre-petition screening team conducting an investigation of the employee under Minn. Stat. § 253B.07, Subd. 1; or
 3. To a court, law enforcement agency, or prosecuting authority. Minn. Stat. § 13.43, Subd. 11(a) and (b).

Data that are disseminated to another person to protect an employee from harm to self or to protect another person who may be harmed by the employee retain the classification they had in the hands of the district, except to the extent that the data have a more restrictive classification in the possession of the agency or authority that receives the data. Minn. Stat. § 13.43, Subd. 11(c) and Minn. Stat. § 13.03, Subd. 4(c). If the person who may be harmed or person’s attorney receives such data, the data may be used or released further only to the extent necessary to protect the person from harm. Minn. Stat. § 13.43, Subd. 11(c).

- N. Dissemination of Data to Department of Economic Security. Private personnel data must be disclosed to the department of economic security for the purpose of administration of the reemployment insurance program under Minn. Stat. § Ch. 268. Minn. Stat. § 13.43, Subd. 13.
- O. Data Disclosed for Organized Self-Evaluation. Personnel data includes data submitted by an employee to a government entity as part of an organized self-evaluation effort by the government entity to request suggestions from all employees on ways to cut costs, make government more efficient, or improve the operation of government. An employee who is identified in a suggestion shall have access to all data in the suggestion except the identity of the employee making the suggestion.
- P. Letters/Notices of Deficiency. In an early case, a letter of deficiency placed in a teacher’s or other employee’s personnel file was held by a district court to be private data on individuals. Tri-State

Daily News, Inc. v. Independent School District No. 846, Harmes and MEA, Intervenor, Wilkens County Dist. Ct. (Oct. 14, 1980). In 1992, the Hennepin County District Court dealt with the issue of whether a letter of reprimand was classified as public data under Minn. Stat. § 13.43, Subd. 2 in Cowles Media Company v. University of Minnesota, File No. 92-1996, Hennepin County Dist. Ct. In Cowles, the District Court held that a letter of reprimand which, as an authorized form of discipline under the University's policies and procedures, was given to a former employee of the University, constituted final disciplinary action and, therefore, was public. Shortly thereafter, the Commissioner of Administration opined that a notice of deficiency which included a suspension without pay, which was sustained by an arbitrator after being challenged by the employee, was classified as public data. Advisory Op. No. 93-010 (Dec. 9, 1993).

In 1996, the Commissioner opined that two documents (which were memos directed to individual employees) regarding reports of inappropriate behavior and directives to refrain from engaging in the alleged inappropriate behavior did not constitute disciplinary action and, therefore, were private data. Advisory Op. No. 96-001 (Jan. 9, 1996). The Commissioner's opinion was largely based on the absence of certain information in the memos which was required to be in a disciplinary notice pursuant to the employees' collective bargaining agreement.

The Minnesota Court of Appeals has held that a written reprimand which, in part, formed the basis for the termination of an associate dean at Lakewood Community College was public data. Fieno v. Leatherbarrow, 567 N.W.2d 739 (Minn. Ct. App. 1997). The Court of Appeals in Fieno noted, in a footnote, that the written reprimand would be considered public data pursuant to Minn. Stat. § 13.43, Subd. 2(a)(4).

The Commissioner of Administration has also opined that a letter given to a teacher following an investigation containing only directives as to future conduct with no disciplinary response was private data. Advisory Op. No. 99-030 (Sept. 15, 1999). However, where a notice of deficiency provides that failure to comply with the deficiencies and directives "could result in further disciplinary action including the termination of your employment with the school district", the Commissioner opined that the notice constituted disciplinary action. Consequently, if the notice contained data that document the reasons for and basis of disciplinary action that is final for purposes of Minn. Stat. § 13.43, Subd. 2(b), then those data are public. Advisory Op. No. 00-005 (Feb. 29, 2000).

Therefore, if a letter of deficiency, in and of itself, constitutes disciplinary action, it is classified as public data once it has become final. On the other hand, a letter of deficiency which only provides that failure to correct the deficiencies *may* result in disciplinary action is not, in and of itself, disciplinary and, therefore, is classified as private data.

- Q. Evaluations: The Open Meeting Law. In general, evaluations of public employees are classified as private data. See Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (Minn. 1989), reh. denied (1989); Itasca County Board of Comm'rs v. Olson, 372 N.W.2d 804 (Minn. Ct. App. 1984). The Minnesota Court of Appeals has held that a performance evaluation, which in part formed the basis for the termination of an associate dean, was classified as public data. Fieno v. Leatherbarrow, 567 N.W.2d 739 (Minn. App. 1997). The Fieno Court went on to state, in a footnote, that the performance evaluation would also be considered public data under Minn. Stat § 13.43, Subd. 2(a)(4) in that it was personnel data that evidenced complaints or charges against an employee. But see Unke v. Independent School District No. 147, 510 N.W.2d 271 (Minn. Ct. App. 1994). In addition, data detailing how the superintendent's evaluation was being conducted was public data. Advisory Op. No. 10-009 (April 12, 2010).

Under the Minnesota Open Meeting Law, a public body, including a school board, may close a

meeting to evaluate the performance of an individual who is subject to its authority. The public body shall identify the individual to be evaluated prior to closing such a meeting and, at its next open meeting, the public body must summarize its conclusions regarding the evaluation. However, any such meeting must be open at the request of the individual who is being evaluated. Minn. Stat. § 13D.05, Subd. 3. Additionally, the recording of the closed session must be provided in conformance with the superintendent's consent. Advisory Op. No. 10-019 (Sept. 20, 2010).

In a 1999 Advisory opinion, the Commissioner of Administration concluded that merely reporting that the school board "discussed the superintendent's strengths and weaknesses" did not constitute a summary of its conclusions regarding the performance evaluation of the superintendent. Advisory Op. No. 99-018 (June 30, 1999). See also Advisory Op. No. 02-021 (May 15, 2002); MSBA Handbook - Bulletin C - Open Meeting Law.

- R. Allegations or Charges Against an Employee and the Open Meeting Law. Under the Minnesota Open Meeting Law, a public body, including a school board, must close a meeting for preliminary consideration of allegations or charges against an individual subject to its authority. In the event the board members conclude that discipline of any nature may be warranted, further meetings or hearings must be open, and any meeting must be open at the request of the individual who is the subject of the meeting. Minn. Stat. § 13D.05, Subd. 2(b).

In a 1990 district court case, Judge John R. Moonan upheld the school board's handling of allegations leveled against a principal in Schwichtenberg v. Independent School District No. 72, et. al., Fifth Judicial District (June 27, 1990). In Schwichtenberg, a number of parents had voiced concerns regarding the work performance of a principal. A closed meeting was held immediately prior to a regularly scheduled public meeting to discuss the allegations leveled against the principal. After discussing the allegations, the school board met in a public meeting at which time the board stated that it supported the principal and that they felt the allegations were unwarranted. Judge Moonan held that, under the facts, "it is apparent to the court that the Mapleton School Board did follow the criteria set forth in....[Minn. Stat. § 13D.05, Subd. 2(b)]."

Note: In 2008, the legislature amended Minn. Stat. § 13D.05 to require that all closed meetings, except those closed as permitted by the attorney-client privilege, must be electronically recorded at the expense of the public body. Unless otherwise provided by law, the recordings must be preserved for a least three years after the date of the meeting. Thus, if a school board closes a meeting to discuss preliminary allegations against an employee, this portion of the meeting now must be recorded.

Where a school district took the position that school board members are not employees and no state or federal law provided otherwise, the Commissioner opined that data the school district maintained about any school board member, including deliberations about allegations against the school board member, were public data. Advisory Op. No. 99-043 (Nov. 29, 1999). See also Advisory Op. No. 03-011 (May 7, 2003) (same for city council members). Allowing government entities to determine whether board members are employees is consistent with the purpose and public policy of Chapter 13. See, Krout v. City of Greenfield, unpublished (Minn. App. 2012).

- S. Final Disposition of Any Disciplinary Action. For purposes of determining whether there is a "final disposition" of any disciplinary proceeding, a final disposition occurs when the district makes its final decision about the disciplinary action, regardless of the possibility of any later proceedings or court proceedings. In addition, in the case of arbitration proceedings arising under a collective bargaining agreement, a "final disposition" occurs at the conclusion of the arbitration proceeding, or upon the failure of the employee to elect arbitration within the time provided by the collective bargaining agreement. A disciplinary action does not become public data if an arbitrator sustains a

grievance and reverses all aspects of any disciplinary action. **See Advisory Opinion No. 14-002 (April 15, 2014).** A “final disposition” includes a resignation by an individual when the resignation occurs after the final decision of the school board. In the event the resignation occurs prior to the final decision of the school board, no final disposition would result and the data would remain private. Minn. Stat. § 13.43, Subd. 2(b). Provided, however, that “upon completion of an investigation of a complaint or charge against a public official, or if a public official resigns or is terminated from employment while the complaint or charge is pending, all data relating to the complaint or charge are public, unless access to the data would jeopardize an active investigation or reveal confidential sources.” Minn. Stat. § 13.43, Subd. 2(e). A “public official,” for purposes of the statute, means “the head of a state agency and deputy and assistant state agency heads.” Minn. Stat. § 13.43, Subd. 2(e). It does not include school district personnel.

The Minnesota Court of Appeals held that a school board violated Minn. Stat. § 13.43 by releasing information regarding allegations of sexual harassment against an employee at a public board meeting where the board adopted a resolution proposing to terminate the employee in Unke v. Independent School District No. 147, 510 N.W.2d 271 (Minn. Ct. App. 1994). At the meeting in question, the superintendent released the following information: (1) the identity of the alleged perpetrator; (2) that a student had filed a sexual harassment claim against the perpetrator/employee; (3) that the superintendent had interviewed the student, the student’s mother and the perpetrator/employee; (4) that the superintendent talked to two other students who ostensibly corroborated part of the student’s story; (5) that the allegation was the first one made against the perpetrator/employee; (6) that the perpetrator/employee had an opportunity to provide exculpatory evidence but failed to do so; (7) that an arbitrator would make the ultimate decision on the perpetrator’s/employee’s discipline; and (8) that the superintendent concluded that the perpetrator/employee violated the school district’s sexual harassment policy.

The Court of Appeals held that the school district violated the Data Practices Act by elaborating on the nature of the charge against the employee and failing to restrict release of information to the existence of a complaint. The Legislature, primarily in response to Unke, amended the Minnesota Government Data Practices Act to provide that not public data may be discussed at a meeting open to the public to the extent provided in Minn. Stat. § 13D.05. Minn. Stat. § 13.03, Subd. 11 and Minn. Stat. § 13.05, Subd. 4(e). However, the Court of Appeals has also held that while a political subdivision is required to release the status of any complaint, and the specific reasons for the final disposition of any disciplinary action, Minn. Stat. § 13.43 does not compel disclosure of the complaint itself. Demers v. City of Minneapolis, 468 N.W.2d 71 (Minn. Ct. App. 1992). Thus, while a school board may discuss private personnel data at a public school board meeting in accordance with Minn. Stat. § 13D.05, such data maintains its private data classification and may not be released outside the board meeting.

In another case, the Minnesota Court of Appeals held that statements made by the University of Minnesota’s athletic director regarding alleged misconduct by the gymnastics coach, prior to final disposition of the University’s investigation, were not unrecorded mental impressions, but rather were government data covered by Minn. Stat. § 13.43. Deli v. Hasselmo, 542 N.W.2d 649 (Minn. Ct. App. 1996). See, Keezer v. Spickard, 493 N.W.2d 614 (Minn. App. 1992). The information was derived from a letter to the University president from the grievance committee stating its actions and conclusions. Consequently, the athletic director’s statement based on the letter was not unrecorded mental impressions and constituted protected personnel data.

The Commissioner of Administration has addressed the issue of what data can be released upon final disposition of disciplinary action. Upon final disposition of a disciplinary action, the specific reasons for the action and all data documenting the basis of the action are public, including: (1) a notice of deficiency containing a suspension without pay which was the subject of a grievance, once the

suspension was sustained by the arbitrator; (2) the arbitrator's decision sustaining the suspension without pay, with personally identifiable information about other employees and students which are classified as private data redacted; and (3) the transcript of the arbitration hearing with personally identifiable information about other employees and students which are classified as private data redacted. However, the Commissioner of Administration has opined that if, after an investigation into a complaint against the employee, a determination is made that no disciplinary action is warranted, the only data that are public about the handling of the complaint are: (1) the name of the employee that is the subject of the complaint; (2) the fact that a complaint was made; (3) the fact that the complaint was investigated; and (4) the fact that the employing governmental entity determined that no disciplinary action would be taken. Advisory Op. (Nov. 10, 1994); Advisory Op. No. 97-010 (March 3, 1997). See also Advisory Op. No. 02-049 (Dec. 17, 2002) (pornographic computer images forming basis for employee discipline are public once disciplinary action is final). Advisory Op. No. 08-014 (June 26, 2008) (report of alleged student maltreatment that document the basis for disciplinary action and the specific reasons for the disciplinary action against an employee are public with the exception of any data that identify school district students, including the victim, and other school district employees or any data in the report that do not document the basis for the disciplinary action or represent the specific reasons for the disciplinary action).

The Commissioner of Administration also addressed the situation where a school district receives a complaint regarding one of its employees, investigates the complaint and prepares an investigation report. After the preparation of the investigation report, the employee resigned before disciplinary action was taken. The Commissioner opined that under this situation the report was not public because no disciplinary action was taken. Advisory Op. No. 97-027 (July 2, 1997). See also Advisory Op. No. 02-053 (Dec. 26, 2002) (all data documenting basis for disciplinary action against employee were not public, because employee resigned before disciplinary action was final); Advisory Op. No. 05-025 (June 29, 2005) (resignation occurring prior to a final decision about disciplinary action is not final disposition.)

The Commissioner of Administration has opined that a termination of a public works superintendent by a city council did not constitute "final disposition" until after the conclusion of a hearing before the city council as requested by the employee. Advisory Op. No. 96-004 (Jan. 25, 1996). However, the Commissioner also opined that the possibility of a subsequent hearing under the Veterans Preference Act did not alter the fact that a city's termination of an employee constituted "final disposition." Therefore, the Commissioner concluded that the specific reasons documenting the basis for the disciplinary action were public, regardless of the possibility of any later proceedings, including a Veterans Preference hearing. See Advisory Op. No. 96-050 (Nov. 27, 1996). See also Advisory Op. No. 07-027 (Dec. 20, 2007). In addition, "final disposition" occurs when the parties reach a mutual resolution prior to the arbitration hearing. See Advisory Op. No. 2010-002 (February 10, 2010).

The Commissioner opined that memoranda provided to an employee of a disciplinary nature but which did not include certain information required by the collective bargaining agreement to be included in a notice of disciplinary action did not contain data documenting disciplinary action and thus, were private data. Advisory Op. No. 06-008 (March 8, 2006).

- T. Employee Drug and Alcohol Test Results. Test result reports and other information acquired in the drug or alcohol testing process are, with respect to public sector employees and job applicants, private data on individuals pursuant to Minn. Stat. Chapter 13, and may not be disclosed by a school district or laboratory to another employer or to a third party individual, governmental agency or private organization without the written consent of the employee or job applicant tested. Minn. Stat. § 181.954, Subd. 2. However, notwithstanding such classification, evidence of a positive test result on a confirmatory test may be: (1) used in an arbitration proceeding pursuant to a collective

bargaining agreement, an administrative hearing or other applicable state or local law, or a judicial proceeding, provided that information is relevant to the hearing or proceeding; (2) disclosed to any federal agency or other unit of the United States government as required under federal law, regulation, or order, or in accordance with compliance requirements of a federal government contract; and (3) disclosed to a substance abuse treatment facility for the purpose of evaluation or treatment of the employee. Minn. Stat. § 181.954, Subd. 3.

The Commissioner of Administration has addressed the application of federal law to the classification of the results of an employee's drug or alcohol tests. According to the Commissioner, data relating to the results of an employee's drug or alcohol tests are classified as private pursuant to 49 C.F.R. § 382. Advisory Op. No. 97-006 (Feb. 3, 1997) and Advisory Op. No. 98-041 (Aug. 27, 1998).

- U. Health and Medical Data. The Commissioner of Administration opined that health and medical data maintained in the personnel file of a public employee are considered personnel data under Minn. Stat. § 13.43 and not medical data under Minn. Stat. § 13.384. See Advisory Op. No. 97-017 (May 5, 1997). The privacy protections under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") also may apply if the school district is a "covered entity," as the term is defined in HIPAA, and the school district creates or maintains "protected health information," as that term is defined in HIPAA. Employment records that pertain to the health of employees may be protected by HIPAA's privacy rules unless such records are maintained in the school district's capacity as an employer. Because HIPAA is extremely complex, and the HIPAA privacy rules are still being clarified by the federal government, a school district should consult with an attorney with respect to protections for any information that may be covered by HIPAA. The legislature has also determined that genetic information maintained by an entity is classified as private data on individuals. Minn. Stat. § 13.386.
- V. Work-Provided E-mail. The Commissioner of Administration has opined that public employer's work-provided e-mail addresses are part of the employees' "work location" and, therefore, are public data. Advisory Op. No. 97-049 (Dec. 18, 1997).
- W. Opinions Regarding School District Policies. The school district was presented with a petition signed by teachers asking the school board either not to follow or to reevaluate the state's graduation standards. The Commissioner opined that the petition linked the names of teachers with their opinions regarding school district policy and, therefore, the data was private pursuant to Minn. Stat. § 13.43, Subd. 4. See Advisory Op. No. 00-020 (June 16, 2000).
- X. Complaints Regarding Employees. In a case decided by the Minnesota Supreme Court on October 10, 2002, the Court held that Minn. Stat. § 13.43, Subd. 2(a)(4) only authorizes the disclosure of the existence and status of complaints and nothing more. Navarre v. South Washington County Schools, 652 N.W.2d 9, (Minn. 2002). According to the court "[a]ny disclosure by the government entity during the investigation that describes any quality or characteristic of the complaint, whether general or specific, goes beyond the mere existence of the complaint, and therefore violates section 13.43, subdivision 2(a)(4)." Id. at 23. For example, the Navarre Court, while finding that the number of complaints constituted public data, held that a letter sent by a school district to parents which indicated that "the stories from children are...sometimes alarming regarding the characteristics of the instructional program they received," went beyond the disclosure of the existence and status of any complaints. Id. at 24.

The Commissioner recently opined that an employee who filed a written complaint against another employee with the government entity employer and retains a copy of the complaint may only release data in the complaint of which he/she is the subject and not data regarding the employee who is the

subject of the complaint. See Advisory Op. No. 06-023 (August 11, 2006). See also Advisory Op. No. 10-005 (March 3, 2010) (discussing data classifications in an investigation report.)

The Commissioner has also opined that written informal complaints and observations about a former employee communicated through email that did not result in disciplinary action are private data under Minn. Stat. § 13.43. The emails also contained data about other employees that was inextricably intertwined. Consequently, the documents should be withheld in their entirety. Advisory Op. No. 11-013 (Sept. 8, 2011).

- Y. Data Used to Account for Employee's Work Time for Payroll Purposes. The Minnesota Supreme Court held that a school district did not violate the Data Practices Act by advising parents in a letter that a teacher was on a "medical leave" as such information constituted "other comparable data that are only used to account for an employee's work time for payroll purposes" pursuant to Minn. Stat. § 3.43, Subd. 2(a)(8). Navarre v. South Washington County Schools, 652 N.W.2d 9, (Minn. 2002).
- Z. Mental Impressions. The Minnesota Court of Appeals has held that unrecorded mental impressions of government employees do not constitute "government data." Keezer v. Spickard, 493 N.W.2d 614, 617-18 (Minn. Ct. App. 1992). In a recent decision by the Minnesota Supreme Court, the court held that while disclosing mental impressions to the public does not violate the Data Practices Act (citing Keezer) "pending final disposition of any disciplinary action, the disclosure of mental impressions derived directly from personnel data recorded in some physical form or storage media, or derived directly from complaints or charges against the employee, is private data on individuals." Navarre v. South Washington County Schools, 652 N.W.2d 9, (Minn. 2002).
- AA. Board Member Meeting Notes. Notes taken by a watershed district board member during a public meeting are public data if they are maintained by the district, are not personal and are not classified as private data or are not subject to the attorney-client privilege. Advisory Op. No. 07-006 (January 30, 2007).

Similarly, a superintendent's personal recording of a school board meeting is government data where the recording was made by the superintendent's action in his official capacity. See Advisory Op. No. 08-028 (Sept. 29, 2008).
- AB. Fringe Benefit Data. While Minn. Stat. § 13.43, Subd. 2(a) provides that the fringe benefits received by a public employee are public data, the Commissioner of Administration has opined that identifying data about retirees and their dependents is private personnel data. More specifically, the Commissioner found that former employees who currently receive "free" retiree health care from their employment and the total value and nature of health care benefits each person has received is private. The Commissioner determined that the disclosure of such data would reveal private data such as the reason an employee left employment, the fact the employee has dependents and the identity of the dependents. See Advisory Op. No. 08-004 (April 11, 2008).
- AC. Personal Home Contact Information. In 2009, the legislature added a provision to Minn. Stat. § 13.43 related to continuity of operations. This amendment provides that employee personal home contact information may be shared with another government entity to ensure that the employee can be reached in the event of an emergency or other disruption of either government entity. Minn. Stat. § 13.43, Subd. 17.
- AD. Records Relating to Individual Teachers: Access and Expungement. All evaluations and files generated within a school district relating to each individual teacher shall be available to each individual teacher upon his written request. Effective January 1, 1976, all evaluations and files,

wherever generated, relating to each individual teacher shall be available to each individual teacher upon written request. The teacher shall have the right to reproduce any of the contents of the files at the teacher's expense and to submit for inclusion in the file written information in response to any material contained therein.

A school district may destroy the files as provided by law and shall expunge from the teacher's file any material found to be false or inaccurate through the grievance procedure required pursuant to Minn. Stat. § 179A.20, Subd. 4, provided the grievance procedure promulgated by the director of the bureau of mediation services, pursuant to Minn. Stat. § 179A.04, Subd. 3(h), shall apply to those principals and supervisory employees not included in an appropriate unit as defined in Minn. Stat. § 179A.03. Expungement proceedings shall be commenced within the time period provided in the collective bargaining agreement for the commencement of a grievance. If no time period is provided in the bargaining agreement, the expungement proceedings shall commence within 15 days after the teacher has knowledge of the inclusion in his file of the material he seeks to have expunged. Minn. Stat. § 122A.40, Subd. 19; Minn. Stat. § 122A.41, Subd. 15.

- AE. When a report of alleged maltreatment of a student in a school facility, as defined in section 626.556, subdivision 2, paragraph (f), is made to the commissioner of education under section 626.556, data that are relevant to a report of maltreatment and are collected by the school facility about the person alleged to have committed maltreatment must be provided to the commissioner of education upon request for purposes of an assessment or investigation of the maltreatment report. Data received by the commissioner of education pursuant to these assessments or investigations are classified under section 626.556. In addition, personnel data may be released for purposes of providing information to a parent, legal guardian, or custodian of a child under section 626.556, subdivision 7. See Minn. Stat. 13.32, Subd. 14.
- AF. **When a teacher is discharged upon the receipt of notice that the teacher's license has been revoked due to a conviction for child abuse or sex abuse or when the commissioner makes a final determination of child maltreatment involving a teacher, the school principal or other person having administrative control of the school must include in the teacher's employment record the information contained in the record of the disciplinary record of the disciplinary action or final maltreatment decision, consistent with public data definition under section 13.41, subdivision 5, and must provide the Board of Teaching and licensing division at the Department of Education to fulfill their statutory and administrative duties related to issuing, renewing, suspending; or revoking a teacher's license.**

In addition to the background check required by law, a school board or other school hiring authority must contact the Board of Teaching and Department of Education to determine whether the teacher's license has been suspended or revoked, consistent with the discharge and final maltreatment determinations identified in this paragraph. Unless restricted by federal or state data practices law or by the terms of a collective bargaining agreement, the responsible authority for a school district must disseminate to another school district private personnel data on a current or former teacher employee or contractor of the district, including the results of background investigations, if the requesting school district seeks the information because the subject of the data has applied for employment with the requesting school district.

XV. EDUCATION DATA: Minn. Stat. § 13.32 and 20 U.S.C. § 1232g. Educational data means data on individuals maintained by a school district or person acting for a school district which relates to a student. Educational data includes all student records. They are thus subject to both the state statutes and the federal law and regulations.

- A. General Rule. Except for information designated as directory information pursuant to the federal law procedures, all educational data are *private*. These data cannot be disclosed without the prior written consent of the student's parent and eligible student unless one of the specific exceptions discussed below applies.
- B. Directory Information: With the exception of data collected by a public school on certain nonpublic students and parents, directory information related to a student may be released and made public without the written consent of the parents (or an eligible student) if the district gives public notice of the categories of information which it has designated as directory information. Minn. Stat. § 13.32, Subds. 4a & Subd. 5; 20 U.S.C. § 1232g (a)(5)(b); 34 C.F.R. § 99.37. See MSBA/MASA Policy Reference Manual - Model Policy No. 515. Directory information is defined by federal law. The federal law and regulations provide that the following information may be considered directory information:
- (1) the student's name;
 - (2) address;
 - (3) telephone listing;
 - (4) electronic mail address;
 - (5) photograph;
 - (6) date of birth;
 - (7) place of birth;
 - (8) major field of study;
 - (9) participation in officially recognized activities and sports;
 - (10) weight and height of members of athletic teams;
 - (11) dates of attendance (Dates of attendance means the period of time during which the student attends or attended a school or schools in the school district. The term does not include specific daily records of a student's attendance at a school or schools in the school district. In addition, attendance includes attendance in person or by paper correspondence, video conference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom and the period during which a person is working under a work-study program.);
 - (12) grade level;
 - (13) enrollment status (e.g. undergraduate or graduate; full-time or part-time);
 - (14) degrees;
 - (15) honors and awards received;
 - (16) the most recent educational agency or institution attended by the student. 34 C.F.R. § 99.3;
 - (17) a student ID number, user ID, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user; and
 - (18) a student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

Directory information may also include the name, address, and telephone number of the student's parent(s). Data on nonpublic school students collected by a public school is private data and may not be designated as directory information unless prior written consent is given by the child's parent or guardian. Minn. Stat. § 13.32, Subd. 4a.

In addition, the federal regulations establish a standard to interpret the scope of the legislation and

further define directory information to mean “information contained in the education records of a student which would not generally be considered harmful or an invasion of privacy if disclosed.” 34 C.F.R. § 99.3.

1. Designation of Directory Information: If a district wishes to designate certain of this information as directory information, it must give public notice of:
 - a. The categories of information it wishes to designate;
 - b. The right of the parent or adult student to refuse to permit the designation of some or all of the categories as directory information with respect to that particular student; and
 - c. The period of time in which the parent or adult student must inform the district that this information is not to be designated as to that student.

A government entity may designate certain educational data as “limited directory information” and may disclose that directory information only to specific parties or for specific purposes or both as identified in the annual FERPA notice.

Consequently, a school district that chooses to designate limited directory information may have two sets of data: one that is general directory information and one that is limited directory information. See Advisory Op. No. 14-009 (July 18, 2014) and 34. CFR § 99.37(d).

2. Opt Out of Directory Information Disclosures: When conducting the directory information designation and notice process required by federal law, a school district shall give parents and students notice of the right to refuse to let the school district designate any or all data about the student as directory information. This notice may be given by any means reasonably likely to inform the parents and students of the right. Minn. Stat. § 13.32, Subd. 5. See MSBA/MASA Policy Reference Manual - Model Policy No. 515.
 - a. An educational agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while the student was in attendance unless the student rescinds the opt out request.
 - b. A parent or eligible student may not use the right to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student’s name, identifier or institutional email address in a class in which the student is enrolled. 34 C.F.R. § 99.37(c)(1).
 - c. In addition, a parent or eligible student may not use the right to opt out of directory information to prevent an education agency from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information and that has been properly designated by the educational agency as directory information in the public notice provided under this section. 34 C.F.R. § 99.37(c)(2).
3. Non-designation: If the district does not designate this data as directory information, does not provide the public notice as set forth above, or if the parent or student objects to the designation in the manner provided above, the classification remains private.
4. Disclosure of directory information when tied to other non-public information: Directory information, if tied to other non-public information, may not be disclosed. An example of this would be a request for the name, address, and telephone number of all students of Asian origin.
 - a. Directory information does not include a student’s social security number or student identification number, except as provided in paragraph B (17) above.

- b. An educational agency or institution may not disclose or confirm directory information without first obtaining written consent if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records. 34 C.F.R. § 99.37(d).
- C. Access by Noncustodial Parent: Minn. Stat. § 120A.22, Subd. 1a provides that, upon request, a noncustodial parent has the right of access to, and to receive copies of, school records and information, to attend conferences, and to be informed about the child's welfare, educational progress and status. The school is not required to hold a separate conference for each parent. Minn. Stat. § 518.17, Subd. 3 requires that each custody order from the court include these rights unless the court finds that a waiver is necessary to protect the welfare of a spouse or the child. See also, 20 U.S.C. 1232g and 34 C.F.R. § 99.4.
- D. The District's Obligation to Notify Parents or Eligible Students of Their Access Rights to Educational Records. The school district must inform the parent or eligible student of the rights accorded them under § 1232g on an annual basis. 20 U.S.C. § 1232g(e). See MSBA/MASA Policy Reference Manual- Model Policy No. 515.

Such notice must inform parents or eligible students that they have the right to:

1. Inspect and review the student's education records;
2. Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;
3. Consent to disclosures of personally identifiable information contained in the student's education record, except to the extent that the federal law and regulations authorize disclosure without consent; and
4. File with the Department a complaint concerning alleged failures by the school district to comply with the federal law and regulations.

Such notice must also include all of the following:

1. The procedure for exercising the right to inspect and review education records;
2. The procedure for requesting amendment of records;
3. If the school district has a policy of disclosing education records to other school officials, including teachers, within the school district to whom the school district has determined to have legitimate educational interests, a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest; and
4. If the school district forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll, notice of such a practice including, if applicable, notice that the school district will transfer all data about a student's history of violent behavior, and notice that the school district will transfer suspension or expulsion records pursuant to the federal No Child Left Behind Act.

The notice may also specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those described in its public notice.

Such notice may be provided by the school district by any means that are reasonably likely to inform the parents or eligible students of their rights.

The school district must effectively notify parents or eligible students who are disabled.

The school district must effectively notify parents who have a primary or home language other than English.

- E. Exceptions to Obtaining Consent Prior to Disclosure of Educational Data - State Law. (Minn. Stat. § 13.32)
1. Pursuant to Minn. Stat. § 13.05 dealing with disclosure of public data. (See discussion above relative to warnings as to use of data, disclosure of private data on individuals and informed consent.)
 2. Pursuant to a valid court order (but see federal requirement regarding notification of the parent or student prior to disclosure in accordance with 34 C.F.R. § 99.31(a)(9)).
 3. Pursuant to a statute specifically authorizing access to the private data.
 4. To disclose information in health, including mental health, and safety emergencies pursuant to 20 U.S.C. § 1232g(b)(1)(I) and 34 C.F.R. § 99.36.
 - a. Under those provisions, knowledge of the information must be necessary to protect the health or safety of the student or other individuals.
 - b. In determining whether to disclose the data, the totality of the circumstances pertaining to a threat to the health and safety of a student or other individuals may be taken into account. If there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. 34 C.F.R. § 99.36.
 1. The Department of Education has described “articulable and significant threat” to mean that if a school official can explain why, based on all of the information then available, the official reasonably believes that a student poses a significant threat, such as a threat of substantial bodily harm, to any person, including the student, the school official may disclose education records to any person whose knowledge of information from those records will assist in protecting a person from that threat.
 2. The Commissioner of Administration has opined that a school district has the authority to disseminate, without obtaining either consent or a court order, data to law enforcement officials regarding actual or suspected criminal activity by students, such as assaults or possession of illegal drugs, which occurs at school, on school property, or at a school - related event. However, the Commissioner also stated that a school district does not have the authority to release, without obtaining either consent or a court order, the following data: (1) data that identify students who meet law enforcement officials’ description of gang-related actions and/or paraphernalia; and/or (2) data that identify students who meet law enforcement officials’ description of suspected illegal drug or chemical users. See Advisory Op. No. 97-050 (Dec. 19, 1997).
 - c. In addition, if a school district decides to disclose personally identifiable information from education records under the health and safety exception, the school district must record the articulable and significant threat to the health and safety of a student or other individuals that formed the basis for disclosure and the identities of the parties to whom the disclosure was made. 34 C.F. R. § 99.32(a)(5).
 1. The record of the threat must be maintained with the education records of the student for as long as the student’s records are maintained. 34 C.F.R. § 99.32(a)(2).
 2. The Department of Education interprets the recording requirement to mean that the record of the articulable and significant threat disclosure must be made within a reasonable period of time after the disclosure has been made and not just at the time, if

any, when a parent or student asks to inspect the student's record of disclosures.

5. Pursuant to the following provisions of the federal law and the federal regulations:
 - a. 20 U.S.C. § 1232g(b)(1) and 34 C.F.R. § 99.31 (disclosure without prior consent). (See Section XV F for further information.)
 - b. 20 U.S.C. § 1232g(b)(4)(A) and 34 C.F.R. § 99.32 (record of disclosures to be maintained). (See Section XV G for further information.)
 - c. 20 U.S.C. § 1232g(b)(4)(B) and 34 C.F.R. § 99.34 (conditions for other schools and school systems). (See Section XV F3 for further information.)
 - d. 20 U.S.C. § 1232g(b)(3) and 34 C.F.R. § 99.35 (disclosure to certain federal and state officials for federal program purposes). (See Section XV F4 for further information.)
 - e. 20 U.S.C. § 1232g(b)(6), (b)(7) and (i) and 34 C.F.R. § 99.39 (disclosure of information related to crimes of violence, registered sex offenders, and drug and alcohol violations). (See Section XV F15, XV F16 and XV F17 for further information.)
6. To appropriate health authorities but only to the extent necessary to administer immunization programs and for bona fide epidemiologic investigations which the Commissioner of Health determines are necessary to prevent disease or disability to individuals in the public educational agency or institution in which the investigation is being conducted. Note that the Attorney General has ruled that this clause precludes the consolidation of dismissal proceedings for pupils who have failed to comply with the immunization laws. Op. Atty. Gen. 169w, July 23, 1980.
7. When disclosure is required for institutions that participate in a program under Title IV of the Higher Education Act, 20 U.S.C. Ch. 1092.
8. To the appropriate school district officials to the extent necessary under Minn. Stat. § 13.32, Subd. 6, annually to indicate the extent and content of remedial instruction, including the results of assessment testing and academic performance at a postsecondary institution during the previous academic year by a student who graduated from a Minnesota school district within two years before receiving the remedial instruction.
9. To appropriate authorities if the data concern the juvenile justice system and the ability of the system to effectively serve, prior to adjudication, the student whose records are released; provided that the authorities to whom the data are released submit a written request for the data that certifies that the data will not be released to any other person except as authorized by law without the written consent of the parent of the student and the request and a record of the release are maintained in the student's file.
 - a. The "juvenile justice system" includes criminal justice agencies and the judiciary when involved in juvenile justice activities. Minn. Stat. § 13.32, Subd. 1(b).
 - b. Under this provision, the following education data shall be disclosed to the juvenile justice system: a student's full name, home address and telephone number; date of birth; a student's school schedule, daily attendance record, and photographs, if any and parents' names, home addresses and telephone numbers. Minn. Stat. § 13.32, Subd. 8.

The Commissioner of Administration noted that when disclosure of private data is authorized pursuant to Minn. Stat. § 13.32, Subd. 3(i), only those data described in Minn. Stat. § 13.32, Subd. 8 can be disseminated. Advisory Op. No. 97-050 (Dec. 19, 1997).

10. To volunteers who are determined to have a legitimate educational interest in the data and who

are conducting activities and events sponsored by or endorsed by the educational agency or institution for students or former students. Note that the MSBA/MASA Model Policy 515 defines “Legitimate Educational Interest” as follows: an interest directly related to classroom instruction, teaching, student achievement and progress, discipline of a student, student health and welfare, and the ability to respond to a request for educational data. It includes a person’s need to know in order to:

- a. Perform an administrative task required in the school or employee’s contract or position description approved by the school board;
- b. Perform a supervisory or instructional task directly related to the student’s education;
- c. Perform a service or benefit for the student or the student’s family such as health care, counseling, student job placement or student financial aid; or
- d. Perform a task directly related to responding to a request for data.

The Commissioner of Administration has opined that an individual hired by an educational institution as a public information officer to respond to data requests did not have a “legitimate educational interest” in educational data. See Advisory Op. No. 97-011 (March 11, 1997).

In another opinion, the Commissioner of Administration opined that the presence of a union representative during a meeting with a teacher and parents resulted in the inappropriate dissemination of data about the parents’ child. It was acknowledged by the school district that the union representative’s work assignment did not require that he/she be present for the meeting. Advisory Op. No. 00-009 (March 30, 2000).

11. To provide student recruiting information, from educational data held by colleges and universities, as required by and subject to 32 C.F.R. § 216.
12. To the juvenile justice system information on the existence of data regarding a student including:
 - a. use of a controlled substance, alcohol or tobacco;
 - b. assaultive or threatening conduct that could result in dismissal from school under the Pupil Fair Dismissal Act;
 - c. possession or use of weapons or look-alike weapons;
 - d. participation in gang activity;
 - e. theft; or
 - f. vandalism or other damage to property

provided that the request for access to data must contain an explanation of why access to the data is necessary to serve the student or to protect students or staff. In addition, prior to releasing this data, the superintendent must send by certified mail a notice to the parent or eligible student of the request and intent to comply with the request. The parent or student then has ten days to object to the dissemination of this data. If the parent or eligible student objects to the dissemination of the data, the superintendent must not supply the information, instead, must notify the juvenile justice system of the objection.

13. With respect to Social Security numbers of students in the adult basic education system, to Minnesota State Colleges and Universities and the Department of Employment and Economic Development for the purpose and in the manner described in Minn. Stat. § 124D.52, Subd. 7.
14. To the Commissioner of Education for purposes of an assessment or investigation of a report of alleged maltreatment of a student. Upon request by the Commissioner of Education, data that are relevant to a report of maltreatment and are from charter school and school district investigations

of alleged maltreatment of a student must be disclosed to the Commissioner, including, but not limited to, the following:

- a. information regarding the student alleged to have been maltreated;
- b. information regarding student and employee witnesses;
- c. information regarding the alleged perpetrator; and
- d. what corrective or protective action was taken, if any, by the school facility in response to a report of maltreatment by an employee or agent of the school or school district.

An opinion issued by the Commissioner advised school districts on the proper release of data to the Department of Education (“MDE”) in cases where MDE is conducting an investigation regarding the maltreatment of minors under Minn. Stat. § 626.556. A concern was noted as to whether the school district would be in violation of FERPA if it releases documentation including private education records and data regarding the student victim or student witnesses to MDE. The Commissioner opined that there will not be a violation of FERPA if the school district complies with the reporting requirements under Minn. Stat. § 626.556. See Advisory Op. No. 02-001 (Jan. 7, 2002). In November 2006, the Family Policy Compliance Office of the United States Department of Education concluded that “given the choice between promoting the purposes of the later enacted Federal child abuse reporting and investigation requirements and a parent’s right to protect against the disclosure of his or her child’s educational records without their consent, Congress intended that any suspected incidents of abuse should be reported and investigated.” *Letter to Jondahl*, November 21, 2006. Consequently, the two opinions taken together provide school districts with the authority to provide the information requested by the MDE under Minn. Stat. §§ 13.32, Subd. 3(n) and 13.43, Subd. 14 pursuant to an investigation under Minn. Stat. § 626.556.

15. When the disclosure is of the final results of a disciplinary proceeding on a charge of a crime of violence or nonforcible sex offense to the extent authorized under 20 U.S.C. § 1232g(b)(6)(A) and (B) and 34 C.F.R. §§ 99.31(a)(13) and (14).
16. When the disclosure is information provided to the school district under 42 U.S.C. § 14071, concerning registered sex offenders to the extent authorized under 20 U.S.C. § 1232g(b)(7).
17. When the disclosure is to a parent of a student at an institution of postsecondary education regarding the student’s violation of any federal, state, or local law or of any rule or policy of the institution, governing the use or possession of alcohol or of a controlled substance, to the extent authorized under 20 U.S.C. § 1232g(I) and 34 C.F.R. § 99.31(a)(15), and provided the institution has an information release form signed by the student authorizing disclosure to a parent. The institution must notify parents and students about the purpose and availability of the information release forms. At a minimum, the institution must distribute the information release forms at parent and student orientation meetings.
18. Disclosure of information from a disposition order received by the superintendent to the principal where the student attends; any counselor directly supervising or reporting on the behavior or progress of the subject student; any teacher or administrator who directly supervises or reports on the behavior or progress of the subject student whom the principal believes needs the data to work with the student in an appropriate manner, to avoid being needlessly vulnerable; or to protect other persons from needless vulnerability other school district employees, substitutes and volunteers who are in direct contact with the student, if determined these individuals need the data to work with the student in an appropriate manner, to avoid being needlessly vulnerable; or to protect other persons from needless vulnerability. Such notice shall include the identity of the

student, an outline of the offense, and a description of any conditions of probation about which the school must provide information.

This data may not be further disseminated except as necessary to serve the student, to protect students or staff, or as otherwise required by law, and only to the following persons:

- a. the student;
 - b. the student's parent or guardian;
 - c. law enforcement officers; or
 - d. the student's probation officer.
19. To military recruiting officers the names, addresses, and home telephone numbers of secondary school students within 60 days after the date of the request. Parents and students must be given notice of the right to refuse release of this data to military recruiting officers. Notice may be given by any means reasonably likely to inform the parents and students of the right. In the event that the parents or student exercise their right to refuse the release of such data, the data may not be released to military recruiters. Federal No Child Left Behind Act, § 9528(a)(2), Minn. Stat. § 13.32, Subd. 5a. NOTE: This does not, however, prohibit military recruiters from gaining access to some or all of the data by requesting directory information.

An opinion provided by the Commissioner discussed whether FERPA limits the Minnesota Data Practices Act mandate regarding military recruitment data. The Commissioner opined that to act in conformance with FERPA, the school district may provide the following data to military recruiters: (1) data designated as "directory information" in accordance with 34 C.F.R. § 99.37; (2) data about those students whose parents have not chosen to generally restrict access to "directory information" about their children pursuant to 34 C.F.R. § 99.37; and (3) data about those 11th and 12th graders whose parents have not refused release of data to military recruiters pursuant to Minn. Stat. § 13.32 Subd. 5a. See Advisory Op. No. 01-078 (Sept. 28, 2001). The federal No Child Left Behind Act, effective Jan. 8, 2002, at § 9528, changed the grade levels covered under this requirement to all secondary school students.

20. Information designated as directory information under the federal law and the federal regulation which were in effect on July 1, 1993, is public data on individuals. Minn. Stat. § 13.32, Subd. 5; 20 U.S.C. § 1232g(a)(5)(b); 34 C.F.R. § 99.37. See MSBA/MASA Policy Reference Manual - Model Policy No. 515. (See Section XV B for further information.)

F. Exceptions to Obtaining Consent Prior to Disclosure of Education Data - Federal Law. A school district may release student education records, or any of the information contained therein, without the consent of the parent (or eligible student) to:

- 1. Other school officials:
 - a. Other school officials, including school board members and teachers, within the educational institution or school district if they have a legitimate educational interest, including the educational interests of the child for whom consent would otherwise be required, as determined by the school board.
 - b. A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official provided that: the outside party performs an institutional service or function for which the school district would otherwise use employees; is under the direct control of the school district with respect to the use and maintenance of records; and is subject to the regulations governing the use and disclosure of personally identifiable information from education records. 34 C.F.R. §

99.31(a)(1)(i)(B).

- (1) A school district must use reasonable methods to ensure that school officials obtain access only to those education records in which they have legitimate educational interests. If a school district does not use physical or technological access controls, the school district must ensure that its administrative policy is effective and that it remains in compliance with the legitimate educational interest requirements.

A third-party company that operates an online system allowing parent access to their child's records may fall within the definition of a "school official." Under the circumstances provided, the FPCO found that the arrangements between the school district and the third-party company met the requirements for disclosing specified information from education records to the company as a "school official." In this regard, 1) the company provided online hosting services that permit parents to view some of their children's education records, and the company used the information from education records to perform those services that would otherwise be provided by school employees; 2) the company's online access services provide it with "legitimate educational interests" in the information disclosed to the company by each school; and 3) the company's use and maintenance of personally identifiable information from education records was subject to the direct control of each school within the District. Each school or the District must ensure that the company does not redisclose or permit the redisclosure of any personally identifiable information from education records except as specifically authorized by the school or District that is responsible for the contract. The school (or District), in turn, remains responsible for an FERPA violations committed by its service provider. In that regard, the FPCO noted that the company takes reasonable and appropriate steps to ensure that information from education records is not disclosed or made available to other parties and does not use the information for any other purpose. *Letter to Clark County School District (NV) re: Disclosure of Education Records to Outside Service Providers (June 28, 2006).*

2. Information regarding the student's conduct and behavior. Federal law does not prohibit a school district from:
 - a. Including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or
 - b. Disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student. 20 U.S.C. § 1232g(h)
 - c. Disclosing appropriate information maintained regarding disciplinary action taken against a student for conduct that proposed a significant risk to the safety or well-being of that student, other students, or other members of the school community to teachers and school officials in other schools who have been determined to have a legitimate educational interest in the behavior of the student.
 - d. Disclosing educational records, relevant to an investigation or prosecution for an act of domestic or international terrorism, to a designated federal employee who has received an ex parte order. 20 U.S.C. § 1232g(j)

These paragraphs regarding a disclosure of behavior of the student are to be strictly construed.
3. Officials of other schools or school systems in which the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer, *but only if*: the agency makes a reasonable attempt to notify the parent or eligible student of the disclosure, unless:

- a. The disclosure is initiated by the parent or eligible student; or
- b. The annual notification by the agency to the parent or eligible student includes a notice that the agency forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;
- c. Gives the parent or eligible student a copy of the record that was disclosed upon request; and
- d. Gives the parent or eligible student, upon request, a reasonable opportunity for a hearing to challenge the accuracy and completeness of the information contained in the student's record.

An educational agency may disclose an education record of a student in attendance to another education agency if the student is enrolled in or receives services from the other agency or institution and the school meets the disclosure requirements set forth above.

To meet the requirements of section 4155(b) of the No Child Left Behind Act of 2001, a school district must have in place a procedure to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends or is instructed to enroll.

4. Authorized representatives of:

- a. The Comptroller General of the United States;
- b. The Attorney General of the United States;
- c. The Secretary of the U.S. Department of Education;
- d. The Minnesota Commissioner of Education; or
- e. State and local education officials.

The officials listed in a. through e. above may have access to education records in connection with an audit or evaluation of federal or state-supported education programs, or for the enforcement of or compliance with federal legal requirements which regulate those programs. 20 U.S.C. § 1232g(b)(5). The information to be collected must be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in a. through e. above and be destroyed when no longer needed for the purposes for which they are disclosed. 20 U.S.C. § 1232g(b)(3). The state or local agency must enter into an agreement to designate an authorized representative with specific conditions to receive personally identifiable information to conduct the audit or evaluation. These requirements do not apply if the parent or eligible student has given written consent for the disclosure or the collection of personally identifiable information if specifically authorized by federal law. If any of these officials request student education records and do not meet the criteria set out above, they must have the written consent of the parent (or eligible student) before the school district may make the education records accessible.

- 5. Agencies having a connection with a pupil's application for, or receipt of, financial assistance.
- 6. State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to a state statute adopted:
 - a. Before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or
 - b. After November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice

system and such system's ability to effectively serve, prior to adjudication, the student whose records are released, and the officials and authorities to whom such information is disclosed certify in writing to the school district that the information will not be disclosed to any other party except as provided under state statute without the prior written consent of the parent of the student.

- (1) The "juvenile justice system" includes criminal justice agencies and the judiciary when involved in juvenile justice activities. Minn. Stat. § 13.32, Subd. 1(b).
 - (2) According to Minn. Stat. § 13.32, Subd. 8, the following educational data shall be disclosed to the juvenile justice system: a student's full name, home address, telephone number; date of birth; a student's school schedule, attendance record, and photographs, if any; and parents' names, home addresses, and telephone numbers.
7. Organizations conducting studies for educational agencies or institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction. Allows state and local education agencies to enter into agreements to disclose personally identifiable information to organizations conducting studies on their behalf under certain conditions and subject to certain requirements. Such studies must be conducted in a way which will not permit the personal identification of students and their parents to others. Such information must be destroyed when no longer needed. The school district must enter into a written instrument with the organization that specifies the purpose, scope, and duration of the study(ies) and the information to be disclosed; limits the use of personally identifiable information from education records only to meet the purpose(s) of the study as stated in the written agreement; requires the organization to conduct the study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests; and requires the organization to destroy or return to the school district all personally identifiable information when it is no longer needed for the purpose for which the study was conducted and specifies the time period in which the information must be returned or destroyed. Finally, a school district is not required to initiate a study or agree with or endorse the conclusions or results of the study.
 8. Accrediting organizations when carrying out their functions.
 9. Parents of a dependent student regardless of age or the educational agency or institution attended. Under this section a dependent student means an individual who during each of five calendar months during the calendar year in which the taxable year of the parent begins:
 - a. Is a full-time student at an educational institution; or
 - b. Is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of an educational institution or of a state or political subdivision of a state.
 10. A caseworker or other representative of a State or local child welfare agency, or tribal organization, who has the right to access a student's case plan, as defined and determined by the State or tribal organization, when such agency or organization is legally responsible under State or tribal law, for the care and protection of the student, provided that the education records or the personally identifiable information contained in such records of the student will not be disclosed by such agency or organization, except to an individual or entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with the State or tribal laws applicable to protecting the confidentiality of a student's education records.
 11. Legal actions.

1. If the school district initiates legal action against a parent or student, the school district may disclose to the court, without a court order or subpoena, the student's education records that are relevant to the school district's case.
 2. If a parent or eligible student initiates a legal action against the school district, the school district may disclose to the court, without a court order or subpoena, the student's educational records that are relevant for the school district to defend itself. See 34 C.F. R. § 99.31(a)(1)(9)(iii).
12. Court Orders, Subpoenas. 20 U.S.C. § 1232g(b)(2)(B). Except as provided in 10 above, the school district may release student education records in compliance with judicial order or pursuant to any lawfully issued subpoenas, but only if the parents and the students are notified of all such orders or subpoenas in advance of the school district's compliance. In addition, Minn. R. 1205.0100, Subp. 5 provides that in the event of the issuance of a subpoena duces tecum for any private or confidential data requiring any agent of an entity to testify concerning any private or confidential data, the court's attention must be called, through the proper channels, to those statutory provisions, rules, or regulations which restrict the disclosure of such information.
- The entity or persons designated in a federal grand jury subpoena, in which case the court must order, for good cause shown, the school district (and any officer, director, employee, agent or attorney for such school district) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena. In addition, the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the school district (and any officer, director, employee, agent or attorney for such school district) on which the subpoena is served, to not disclose to any person the existence of contents of the subpoena or any information furnished in response to the subpoena.
13. In connection with a health or safety emergency. (See Section XV E 4 for further information.)
 14. The information the school district has designated as "directory information." (See Section XV B for further information.)
 15. The parent of a student who is not an eligible student or the student.
 16. Institutions of postsecondary education are not prohibited from disclosing, to an alleged victim of any crime of violence, the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator of such crime with respect to such crime. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13); 34 C.F.R. § 99.31(a)(14); 34 C.F.R. § 99.39.
 17. Educational institutions are not prohibited from disclosing information provided to the institution under 42 U.S.C. § 14071 concerning registered sex offenders who are required to register. 34 C.F.R. § 99.31 (a)(16).
 18. Representatives of the U.S. Attorney General, in connection with an "ex parte" court order obtained with respect to an "authorized" terrorism investigation or prosecution. FERPA was revised in 2003 to allow the U.S. Attorney General (or designee not lower than an Assistant Attorney General) to seek a court order permitting his or her office to collect - and disseminate and use, if necessary - education records in a school district's possession that are relevant to an "authorized" terrorism investigation or prosecution, without notification of the student or parents. In seeking such an "ex parte" court order, the U.S. Attorney General's office must

certify to the court that there are “specific and articulable facts” giving reason to believe that the education records are likely to contain such relevant information. This provision specifically states that school districts that produce records in good faith compliance with such an order “will not be liable to any person for that production.” 20 U.S.C. § 1232g(j); 34 C.F.R. § 99.31(a)(9)(ii)(c).

19. While a school district may release education data without consent, the school district is not required to do so to any parties as provided in Section XV F 1,3,4,5,6,7,8,9,10,11,12,13,15 and 16 above. 34 C.F.R. § 99.31(d).
20. A school district must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records. 34 C.F.R. § 99.31 (c).

G. Record Keeping Requirements Regarding Requests for Personally Identifiable Information. (See also state law reference in Minn. Stat. § 13.32, Subd. 3(d).)

1. Record Keeping. The school district must make a record of all persons, agencies or organizations, except school officials within the educational institution or school district who have been determined to have legitimate educational interests, who desire access to student education records and indicate specifically the legitimate interest they have in obtaining such information. Note that this is required regardless of whether they are required to obtain written consent to receive student education record information or whether or not they eventually obtain access to the student education records. The requirement to maintain a record of each request for access to and disclosure of personally identifiable information shall not apply to requests from or disclosures to the parent or eligible student; a school official; a party with written consent from the parent or eligible student; a party seeking directory information; or a party seeking or receiving the records as directed by a federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or contents of the subpoena or the information furnished in response to the subpoena not be disclosed. 20 U.S.C. § 1232g(b)(4)(A).
2. Maintenance of Access Records. The record prepared and kept by the district must be maintained with each student’s education record file for as long as the records are maintained. They may be shown only to the parents (or eligible student), the school official responsible for such records, other school officials within the district who have been determined to have legitimate educational interests and authorized representatives of the officials set out in Section XV F4 above and subject to the conditions noted therein and only as a means of auditing the operation of the system. 20 U.S.C. § 1232g(b)(4)(A).
3. Redisclosure by Third Parties. Any third party seeking student education records, regardless of whether they are required to obtain written consent to receive student education records, must guarantee that, if received, the personal information will not be provided to any other party without written consent from the parent (or eligible student). In the event a third party outside the school district permits access to information without the consent of the student’s parents, or fails to destroy information in violation of 20 U.S.C. § 1232g(b)(1)(F), the school district is prohibited from permitting access to information from education records to that third party for a period of not less than five years. 20 U.S.C. § 1232g(b)(4)(B). In August of 2007, the Family Compliance Office of the United States Department of Education issued an opinion that FERPA does not prohibit Supplemental Educational Service (“SES”) Providers from using contact information for parents of students they previously served to contact those parents

again regarding their services, without the written consent of the student's parent. See Letter to School District re: SES Providers Contacting Parents, August 10, 2007.

H. Other Provisions Governing Education Data.

1. Law Enforcement Records. If the school utilizes a law enforcement individual, office, department, division, or other component to enforce all laws, to refer to appropriate authorities a matter for enforcement of local, state or federal laws against an individual or organization, or maintain the physical security and safety of the agency or institution, the agency or institution is subject to special rules and regulations.

The federal law and statutes neither require nor prohibit the education agency or institution from disclosing its law enforcement unit records. However, state law does so and it must be followed.

Reports of a law enforcement unit include those records, files, documents, and other materials that are:

- a. Created by a law enforcement unit;
- b. Created for a law enforcement purpose; and
- c. Maintained by the law enforcement unit.

A law enforcement component of the educational agency does not lose its special status if it performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student. However, the records of the law enforcement agency do not include:

- a. Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or
- b. Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

2. Financial Records of Parents. A student does not have the right of access to private data containing financial records and statements of his/her parents. Minn. Stat. § 13.32, Subd. 4.

3. Desk Drawer Exception. Records of instructional personnel that are:

- a. in the sole possession of the maker thereof;
- b. not accessible or revealed to any other individual except a substitute teacher; and
- c. are destroyed at the end of the school year

are not deemed to be government or educational data. Thus, they need not be disclosed upon a request for private information. Minn. Stat. § 13.32, subdivision 1 (a).

4. Student Health Data. Health data concerning students, including but not limited to data concerning immunizations, notation of special physical or mental problems, and records of school nurses, are considered educational data and thus generally considered as private. Minn.

Stat. § 13.32, Subd. 2a. Parents have access to student health data unless the student requests that the information not be disclosed and the responsible authority determines that withholding the data would be in the best interest of the minor. Minn. Stat. § 13.02, Subd. 8. However, as previously noted, a school district does not have authority to deny a parent access to an “educational record” of a minor data subject as that term is used in the federal Family Educational Rights and Privacy Act of 1974 which may supercede the nondisclosure provisions of Minnesota Statutes. See Letter to School and College Legal Services re: Parental Access to Records of Confidential Medical Services for K-12 Students, Family Policy Compliance Office, March 14, 2005. The federal Health Insurance Portability and Accountability Act (“HIPAA”), P.L. 104-191, specifically excludes “education records covered by FERPA” from HIPAA’s strict confidentiality requirements, on the theory that FERPA already provides adequate protection for such records. See 45 C.F.R. § 160.103 (definition of “protected health information”).

5. Pupil Census Data. Pupil census data including emergency information and family information are considered educational data and thus generally classified as private. Minn. Stat. § 13.32, Subd. 2(b).
6. Data on Parents. Data concerning parents are private data on individuals but may be treated as directory information if the same procedures that are used by a school district to designate student data as directory information are followed. Minn. Stat. § 13.32, Subd. 2(c).

In a recent opinion, the Commissioner of Administration concluded that a school district cannot place limits on the use of directory information regarding the parents of students. Advisory Op. No. 04-065 (October 18, 2004).

- a. Data Regarding Both Parent and Child. It is not uncommon for a school district to maintain data relating to both a student and the student’s parent. Where parents were never married or currently are divorced, it may be argued that the release of data about the child will inadvertently or directly release data about the parent. The Commissioner opined that a government entity should not be precluded from providing data to one parent simply because doing so may mean the entity inadvertently or directly releases data about the other parent. Advisory Op. No. 02-042 (November 12, 2002). Subsequently, the Minnesota Court of Appeals in an unpublished decision considered a similar request. In this case, however, the data in question was private data of which the mother was the subject. Since data about the child was incidental to the data about the mother, the child’s father was not entitled to any data beyond that which had been provided. In a recent opinion, the Commissioner citing the aforementioned opinion and court decision, offered guidance. More specifically, a parent is entitled to gain access to any data of which he/she is the subject and to gain access to other data of which her/his child is the subject. Advisory Op. No. 05-006 (January 27, 2005).
7. Access by Noncustodial Parent. A noncustodial parent, upon request, has the right of access to, and to receive copies of, school records and information, to attend conferences, and to be informed about the child’s welfare, educational progress, and status. Minn. Stat. § 120A.22, Subd. 1a. The school is not required to hold a separate conference for each parent. Note that state statute requires that each custody order from the court include these rights unless the court finds that a waiver is necessary to protect the welfare of a spouse or the child. Minn. Stat. § 518.17, Subd. 3. The school should require a custodial parent who is claiming that the other parent does not have rights to the child[ren]’s education records to provide a copy of the order specifying this provision.

8. Use of Data on Juveniles. Minn. Stat. § 13.32, Subd. 7 provides that school officials who receive data on juveniles as authorized under Minn. Stat. § 260B.171 may use and share that data as provided under Minn. Stat. § 121A.75 and discussed above.
9. Transfer Information. The Commissioner of Administration has opined that a school district that provided information consisting of the preparation, participation, and performance of a transferring student, including information related to the diagnosis and evaluation of possible substance abuse to another school district, without obtaining prior informed consent of the parent, violated Minn. Stat. §§ 13.32, FERPA, and 42 C.F.R. §§ 2.1 and 2.2 (records relating to alcohol and/or drug abuse). See Advisory Op. No. 97-045 (Oct. 31, 1997). Note that section 4155 of the federal No Child Left Behind Act requires that a school district transfer suspension and expulsion information along with other student records to a receiving school district. A school district will need to ensure that these records specifically are mentioned in the school district's annual required notice to parents and students under 34 C.F.R. § 99.37 and Minn. Stat. § 13.32. See Section XV B above. The same is true for a student's history of violent behavior, if a school district has a policy providing for transfer of such information to a receiving school district.
10. Student Petition Criticizing an Employee. An opinion rendered by the Commissioner held that a petition signed by students that criticized a school district employee, linked the students' names with their opinions about the employee and the action they believed the school district should take, rendered the data about students in the petition private. See Advisory Op. No. 00-020 (June 16, 2000).
11. Expulsion Data. The Commissioner has opined that although data about students is private and the fact that a particular student is expelled is also private does not necessarily mean that a school district would not be able to provide data about an expulsion in response to a request. Summary data is accessible to the public and may include reports of individuals once "all data elements that could link the data to a specific individual are removed." Consequently, in response to a request, the school district is obligated to provide data that does not identify the student. In addition, some demographic data may be released to the extent the identity of the student cannot be ascertained. For example, if the expelled student is a male Caucasian in grade 11 and the school district has only one Caucasian in grade 11, the school district cannot release any combination of grade, gender or race. Advisory Op. No. 00-014 (May 3, 2000). Note that the federal No Child Left Behind Act requires a school district to forward individual student expulsion (and suspension) data to a receiving school district along with the rest of a student's records. As noted above, school districts will need to reference such data in their annual notices to parents and students.
12. Data Regarding Nonpublic school students. Data collected by a school district about nonpublic school students pursuant to Minn. Stat. § 120A.24 is classified as private data unless specifically provided otherwise. Minn. Stat. § 13.32, Subd. 4a. Consistent with the statute, the Commissioner of Administration opined that data collected regarding home-schooled students or their parents pursuant to Minn. Stat. § 120A.24 was private. Advisory Op. No. 05-026 (August 9, 2005).
13. Waivers. 20 U.S.C. § 1232g(a)(1)(D).
 - a. A student or a person applying for admission may waive his right of access to confidential recommendations, as noted immediately above.
 - b. This is the only provision for waiver of a right of access specifically contained in § 1232g.
 - c. If the student has signed a valid waiver, the student shall receive, upon request, the names

of all persons making such recommendations and such recommendations may only be used for their intended purposes.

- d. Waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from the school district.
- e. The requirements of a valid waiver, the school district's responsibilities, and revocation of a waiver are set forth in 34 C.F.R. § 99.12(c).

14. Subject of the Data. When a student's name is contained in a document but the mention of the student is merely incidental to the data, the data is not classified as educational data under Minn. Stat. § 13.32. Therefore, a student or his or her parent/guardian is not entitled to access to such data. See Advisory Op. No. 07-021 (Oct. 17, 2007) (a student's name, which appears in certain data relating to an investigation of allegations of misconduct by a teacher, is only incidental to the data, and is not private educational data).

15. Student Conference Data. A parent or guardian may designate one additional adult to participate in a school conference involving a child of the parent or guardian. The school must first receive written consent from the parent or guardian allowing the individual to participate in the conference and receive any data on the child of the consenting parent or guardian that are necessary and relevant to the conference discussions. Minn. Stat. § 13.32, Subd. 10a.

XVI. OTHER STATE STATUTES RELATED TO EDUCATION DATA:

- A. Pupil Fair Dismissal Act. "At a reasonable time prior to exclusion or expulsion hearing, the pupil, parent or guardian, or his representative, shall be given access to all public school system records pertaining to the pupil, including any tests or reports upon which the proposed action may be based." Minn. Stat. § 121A.47, Subd. 8. Note under a recent appellate decision, the names of the school district's potential witnesses must be disclosed to the student and cannot be withheld. See In Matter of Expulsion of E.J.W., 632 N.W.2d 775 (Minn. App. 2001).

Comment: This right to access should be accorded even if previous access has been provided within six months under the Minnesota Government Data Practices Act.

- B. Pre-School Screening Programs. Data on individuals collected during early childhood developmental screenings pursuant to Minn. Stat. § 121A.17 are private data. Individual and summary data must be reported to the district by the health provider who performs the screening services, for the purposes of developing appropriate educational programs to meet the individual needs of children and designing appropriate health education programs for the district. *No data on an individual* shall be disclosed to the district without the consent of that individual's parent or guardian. Minn. Stat. § 121A.18.

Comment: Although the school district pays for the screening, it cannot receive the screening information unless a consent form is signed by the pupil's parent or guardian.

- C. Department of Education Program Services. Data on individuals receiving services under programs administered by the Department, including community action programs (Minn. Stat. § 119A.376); food shelf (Minn. Stat. § 119A.44); and Head Start programs (Minn. Stat. § 119A.50), is private data.

- D. Reports on Maltreatment of Minors.

- 1. Minn. Stat. § 626.556 requires educational professionals, or a professional's delegate, who have knowledge of or reasonable cause to believe a child is the subject of substantial child

- endangerment within the preceding three years to report that information to the local welfare agency, agency responsible for investigating the report, police department, or county sheriff. Minn. Stat. § 626.556, Subd. 3. Other school personnel may voluntarily make such reports. A written copy of the report that is maintained by the school district is classified as confidential. Minn. Stat. § 626.556, Subd. 7c.
- a. The Department of Education is the agency responsible for assessing or investigating allegations of child maltreatment in schools. Minn. Stat. § 626.556, Subd. 3b.
 - b. Regardless of whether a written report is made, as soon as practicable after a school receives information regarding an incident that may constitute maltreatment of a child in a school facility, the school shall inform the parent, legal guardian or custodian of the child that an incident occurred that may constitute maltreatment of the child, when the incident occurred, and the nature of the conduct that may constitute maltreatment. (School districts cannot reveal personally identifiable data regarding other students, and should be cautious about releasing personally identifiable data regarding employees, even though an exception was included for the release of personnel data when making a report to parents under this section. See Minn. Stat. § 13.43, Subd. 14.)
 - c. The commissioner of education must inform the parent, guardian, or legal custodian of the child who is the subject of a report of alleged maltreatment in a school facility within ten days of receiving the report, either orally or in writing, whether the commissioner is assessing or investigating the report of alleged maltreatment. Minn. Stat. § 626.556, Subd. 7b.
2. A local social service or child protection agency, or agency responsible for assessing or investigating the report of maltreatment, may provide relevant private data on individuals obtained under this section to mandated reporters who have an ongoing responsibility for the health, education, or welfare of a child affected by the data. Minn. Stat. § 626.556, Subd. 10j. This classification includes teachers or other appropriate school personnel, but must be limited to data pertinent to the individual's responsibility for caring for the child.
 3. An individual subject of the report can obtain access to the maltreatment report in accordance with the Data Practices Act, except that the name of the reporter remains confidential while the report is under investigation. After the investigation is completed, the name of the reporter is confidential. The subject of the report may compel disclosure of the name of the reporter only with the consent of the reporter or upon a written finding by the court that the report was false and there is evidence that the report was made in bad faith. Minn. Stat. § 626.556, Subd. 11.
 4. Within ten days after an investigation is completed based upon a report alleging neglect, physical abuse, sexual abuse or maltreatment of a child while in the care of a school, the investigating agency shall provide certain designated information by written notification to the parent, guardian or legal custodian of any student alleged to have been maltreated. The commissioner of education may also notify the parent, guardian or legal custodian of any student involved as a witness to alleged maltreatment. Minn. Stat. § 626.556, Subd. 10d(c).
 5. At the conclusion of every family assessment or investigation, a local welfare agency must determine whether maltreatment has occurred and whether child protective services are needed. Minn. Stat. § 626.556, Subd. 10e. Such a determination must be made based on a preponderance of the evidence. If the maltreatment investigation involves a school, the Department of Education shall report to the employer, the school board, and any appropriate licensing entity the determination that maltreatment occurred and what corrective or protective actions was taken by the school facility. If maltreatment was determined not to have occurred,

the Commissioner shall inform the school board that a report was received, the subject of the report, the date of the initial report, the category of maltreatment alleged, the fact that maltreatment was not determined, and a summary of the specific reasons for the determination.

Within 10 working days of the conclusion of a family assessment, the local welfare agency shall notify the parent or guardian of the child of the need for services to address child safety concerns or significant risk of subsequent child maltreatment.

Within 10 working days of the conclusion of the investigation, the local welfare agency must notify the parent or guardian of the child, the person determined to be maltreating the child and, if applicable, the director of the facility, of the determination and a summary of the specific reasons for the determination. The investigating agency must notify the designee of the child who is the subject of the report, and any person or facility determined to have maltreated a child, of their appeal rights. Minn. Stat. § 626.556, Subd. 10f.

Notwithstanding the laws relating to destruction of governmental records, records maintained by, or records derived from reports of abuse by, local welfare agencies or schools shall be destroyed as hereafter provided:

- a. For family assessment cases and cases where an investigation results in no determination of maltreatment or the need for child protective services, the records must be maintained for a period of four years. Records under this paragraph may not be used for employment, background checks, or purposes other than to assist in future risk and safety assessments.
 - b. All records relating to reports which, upon investigation, indicate either maltreatment or a need for child protective service, shall be maintained at least ten (10) years after the date of the final entry in the case record.
 - c. All records governing a report of maltreatment, including any notification of intent to interview which was received by a school under the child abuse reporting law, shall be destroyed by the school when ordered to do so by the agency conducting the assessment or investigation. The agency shall order the destruction of the notification when other records relating to the report under investigation or assessment are destroyed. (Minn. Stat. § 626.556, Subd. 11c.)
6. Any person mandated to report must receive a summary of the disposition of any report made by that reporter, unless release would be detrimental to the best interests of the child. Any person not mandated to report must, upon request to the local welfare agency, receive a concise summary of the disposition of any report made by that reporter, unless release would be detrimental to the best interests of the child. Minn. Stat. § 626.556, Subd. 3(d).
- E. Chemical Abuse Reporting. Minn. Stat. § 121A.28 requires a law enforcement agency to provide notice of drug incidents occurring within the agency's jurisdiction in which the agency has probable cause to believe a student violated the laws relating to possession or use of alcohol, controlled substance, or simulated controlled substances. The notice must be in writing and be provided within two weeks after an incident occurs to the chemical abuse preassessment team in the school where the student is enrolled. Minn. Stat. § 121A.29 requires a teacher who knows or has reason to believe a student is using, possessing or transferring alcohol or a controlled substance while on the school premises or involved in school related activities to notify the school's chemical abuse preassessment team of this information.

Within 45 days of receipt of a report, the chemical abuse preassessment team must make a determination whether to provide the student or a minor student's parents with information about school and community services in connection with chemical abuse. The data may be disclosed

without consent in health and safety emergencies and pursuant to applicable federal laws and regulations.

In addition, the Minnesota Attorney General has ruled that the data obtained from a law enforcement agency may be disclosed by the chemical preassessment team or to other officials within the school district who have a “legitimate educational interest” in the information without first obtaining the consent of the student or the student’s parents. Op. Minn. Atty. Gen. No. 169-f (March 28, 1989). The chemical preassessment team may also release the data obtained from a law enforcement agency to other school district personnel, without the consent of the student or the student’s parents, provided a determination is made that such release is necessary for the administration and management of programs specifically authorized by the legislature, school district, or mandated by the federal government.

The laws governing destruction of these records are governed by Minn. Stat. § 121A.26.

1. If the preassessment team decides not to provide a student or a minor student’s parents with information about services in connection with chemical abuse, records created or maintained by the preassessment team shall be destroyed not later than six months after the determination is made.
2. If the preassessment team decides to provide a student and a minor student’s parents with information about services in connection with chemical abuse, records created or maintained by the preassessment team about the student shall be destroyed not later than six months after the student is no longer enrolled in the district.

XVII. PROTECTION OF PUPIL RIGHTS. 20 U.S.C. § 1232h provides as follows:

- A. Inspection of instructional materials by parents or guardians. All instructional materials, including teacher’s manuals, films, tapes or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.
- B. Limits on survey, analysis, or evaluations. No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning:
 1. political affiliations or beliefs of the student or the student’s parent;
 2. mental and psychological problems of the student or the student’s family;
 3. sex behavior and attitudes;
 4. illegal, anti-social, self-incriminating and demeaning behavior;
 5. critical appraisals of other individuals with whom respondents have close family relationships;
 6. legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers;
 7. religious practices, affiliations or beliefs of the student or the student’s parent; or
 8. income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent or guardian.
- C. Notice. Educational agencies and institutions shall directly notify parents and students of their rights under this section and at a minimum provide notice annually at the beginning of the school year and within a reasonable time of any substantive changes.
- D. Enforcement. The Secretary shall take action as the Secretary determines appropriate to enforce

this section, except that action to terminate assistance provided under an applicable program shall be taken only after the secretary has provided a statement of the specific steps that the recipient needs to take to comply and provides a reasonable period of time for the recipient to comply voluntarily.

- E. Office and Review Board. The Secretary has designated an office in with the Department of Education to investigate, process, review and adjudicate violations of the rights established under this section. That office is the Family Educational Rights and Privacy Act Office, U.S. Department of Education.

XVIII. PROCEDURAL SAFEGUARDS - CHILDREN WITH DISABILITIES. 20 U.S.C. § 1415 provides in pertinent part as follows: “Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USC §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include-

- (1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child...”

Additionally, during the 2005 legislative session, the Minnesota Legislature added a subdivision to Minn. Stat. § 13.32 relating to review, inspection and fees for educational records of a child with a disability. More specifically, nothing contained in chapter 13 shall be construed to limit the frequency of inspection of the educational records of a child with a disability by the child’s parent or guardian or by the child upon the child reaching the age of majority. A school district may not charge a fee to search for or to retrieve educational records. A school district may charge a fee that reflects the costs of reproducing the records except when to do so would impair the ability of the child’s parent or guardian, or the child who has reached the age of majority, to exercise their right to review those records. Minn. Stat. § 13.32, Subd. 10.

XIX. OTHER DATA CLASSIFICATIONS. The Minnesota Government Data Practices Act also makes classifications of and provides for access to certain other data which are beyond the scope of this bulletin, including Minn. Stat. § 13.30 through Minn. Stat. § 13.88.

- A. Examination Data. Data consisting solely of testing or examination materials or scoring keys used to determine individual qualifications for appointment or promotion in public service or used to administer a licensing examination or academic examination are classified as nonpublic if their disclosure would compromise the objectivity or fairness of the testing or examination process. Completed versions of personnel licensing or academic examinations shall be accessible to the individual who completed the examination unless the responsible authority determines that access would compromise the objectivity, fairness or integrity of the examination process. The responsible authority is not required, however, to provide copies of completed examinations or answer keys to any individual who has completed an examination. Minn. Stat. § 13.34.

In a recent Advisory Opinion the Commissioner concluded that routine, written K-12 classroom tests and quizzes, that are completed by students and count toward their grade for the class, fall within the definition of “academic examinations” for purposes of Minn. Stat. § 13.34, such that a student who completed an “academic examination” and his/her parents would have only the access

rights accorded by section 13.34 (i.e. allow inspection, but not copies.)

- B. General Nonpublic Data. Minn. Stat. § 13.37. The following government data is classified as nonpublic data with regard to data not on individuals and as private data with regard to data on individuals:
1. Security information, which is defined as government data, the disclosure of which the responsible authority determines would be likely to substantially jeopardize the security of information, possessions, individuals or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass or physical injury and includes **checking account numbers**, crime prevention block maps and lists of volunteers who participate in community crime prevention programs and their home addresses and telephone numbers.
 - a. If a government entity denies a data request based on a determination that the data are security information, upon request, the government entity must provide a short description explaining the necessity for the classification.
 - b. The Commissioner has opined that while contingency plans for groups who strike may not be classified as private data, if the plan contains certain security information classified as nonpublic under Minn. Stat. § 13.37, the security information need not be released. See Advisory Op. No. 07-008 (March 27, 2007).
 2. Labor relations information, which is defined as management positions on economic and non-economic items that have not been presented during the collective bargaining process, or interest arbitration, including information specifically collected or created to prepare the management position. NOTE: A district may use this provision to protect district negotiation background materials prepared for review by the board. Specific labor relations information which relates to a specific labor organization is classified as protected nonpublic data.
 3. Mediation Data. Data received or maintained by the Bureau of Mediation Services during the course of providing mediation services to the parties to a labor dispute under Chapter 179 are classified as protected nonpublic or confidential data on individuals, except to the extent the commissioner of BMS determines access to data is necessary to fulfill the requirements of section 179A.16 or to identify the general nature of or parties to a labor dispute. Minn. Stat. § 13.7908. Data documenting the terms of a tentative agreement reached during a closed mediation session and disseminated by BMS to the parties might be classified as nonpublic under this section to the extent that the data are classified in the hands of the government entity in the same way they are classified by BMS. See Minn. Stat. § 13.03, Subd. 4(c); See also Advisory Op. No. 10-015 (May 17, 2010)., Advisory Op. No. 10-021, (Sept. 27, 2010).
 4. Trade secret information.
 - a. The Commissioner has opined that whether a response to a request for proposals may be classified as private trade secret data under Minn. Stat. § 13.37 is to be determined by the government entity after receiving information from the creator of the data as to the factors contained in Minn. Stat. § 13.37 1(b). Advisory Op. 06-005 (February 21, 2005).
 5. Sealed absentee ballots prior to opening by an election judge.
 - a. Absentee ballots that were sealed inside ballot return envelopes and marked “rejected” by at least two election judges and returned to the county were “sealed absentee ballots prior to opening by an election judge” under Minn. Stat. § 13.37, Subd. 2. Therefore, the absentee ballots were classified as not public data under Chapter 13. See KSTP-TV v. Ramsey County, 806 N.W.2d 785 (Minn. 2011).
 6. Sealed bids, including the number of bids received, prior to the opening of the bids.
 7. Parking space leasing data, including the following government data on an applicant for, or lessee of, a parking space: residence address; home telephone number; beginning and ending work hours; place of employment; work telephone number, and location of the parking space.
 8. a. If a government entity denies a data request based on a determination that the data are

security information, upon request, the government entity must provide a short description explaining the necessity for the classification.

The Minnesota Court of Appeals held that the inclusion of nonpublic data in a government document does not render the entire document nonpublic unless the nonpublic data is so inextricably intertwined with the public data that segregating the data would impose a significant financial burden and render the remaining portions of the document of little informational value. Northwest Publications, Inc., v. City of Bloomington, 499 N.W.2d 509 (Minn. App. 1993).

After the passage of time, certain pieces of the data may change in classification. See Minn. Stat. § 13.03, Subd. 8 for specific examples.

- C. Federal Contract Data. Minn. Stat. § 13.35. To the extent that a federal agency requires it as a condition for contracting with a government entity, all data collected and maintained because of the federal contract are classified as other private or nonpublic.
- D. Property Complaint Data. Minn. Stat. § 13.44. The identities of individuals who register complaints with government entities concerning violation of state law or local ordinances concerning the use of real property are classified as confidential data.
- E. Library Data. Minn. Stat. § 13.40.
 - 1. All records collected, maintained, used or disseminated by a library or historical records repository operated by any State agency, political subdivision (including a school district), or statewide system must be administered in compliance with the state data practices and official records acts. A “historical records repository” means an archives or manuscript repository operated by any state agency, statewide system, or political subdivision whose purpose is to collect and maintain data to further the history of a geographic area, but does not include the state archives as defined in Minn. Stat. § 138.17, Subd. 1(5).
 - 2. The part of the library’s records which link a patron’s name with materials requested or borrowed by the patron or which links a patron’s name with a specific subject about which the patron has requested information or materials or data in applications for borrower cards, other than the name of the borrower, is classified as private except pursuant to a valid court order.
- F. Elected Officials - Correspondence. Minn. Stat. § 13.601, Subd.2. Correspondence between individuals and elected officials is *private* data on individuals. However, unlike other private data, it may be made public by either:
 - 1. The sender; or
 - 2. The recipient.

Where an employee wrote a letter to an elected official in the employee’s capacity as a citizen, the data could be withheld under Minn. Stat. § 13.601. Advisory Op. No. 07-004 (January 22, 2007). In addition, an email sent by a member of the public to the board chair with information relating to a finalist for the superintendent position was “government data” under Chapter 13, and because the email was not disclosed to any other board member or the school district, the email is classified as correspondence under Minn. Stat. § 13.601, Subd. 2 and the sender and receiver are the only subjects of the data. Therefore, the superintendent was not the subject of the data and not entitled to obtain the contents of the email unless the board chair or sender decides to make it public. Advisory Op. No. 11-006 (June 8, 2011).

In 2011, the Commissioner addressed several questions regarding correspondence (emails) between individuals and elected officials as follows: Whether a single individual or multiple

individuals send correspondence to a single school board member or multiple school board members, the correspondence is private assuming that neither the individuals nor board members previously made the correspondence public. When a request is made for correspondence, there is no affirmative duty on the part of the school district to ask the individuals or school board members whether any of them wish to make the correspondence public. When the correspondence is sent or received by multiple individuals or board members, the agreement of all individuals or board members to make the correspondence public is not required and a single individual or board member may make the correspondence public. If the correspondence has been shared by any single individual or school board member with any person or entity outside of the school district, the correspondence is public. If a school district employee sends correspondence to a board member as a private citizen and not as an employee, the employee is considered an “individual” for purposes of the statute. Finally, the Commissioner noted that the statute does not extend protection to correspondence relating to an issue involving an organization that the writer represents. In such case, correspondence from an individual who is authorized to represent the organization to a board member is presumptively public. Advisory Op. No. 11-019 (December 22, 2011).

On the other hand, a letter sent to an elected official by the officer of an organization relating to an issue involving the organization, is not protected by Minn. Stat. § 13.601, Subd. 2. Advisory Op. No. 10-023 (October 27, 2010).

- G. Social Recreation Data. Minn. Stat. § 13.57. The following data maintained by a school district for the purpose of enrolling individuals in recreational and other social programs are classified as private:
1. Name, address, telephone number, and any other data that identifies the individual;
 2. Data which describes the health or medical condition of the individual;
 3. Data which describes the family relationships and living arrangements of an individual; and
 4. Data which are opinions as to the emotional makeup or behavior of an individual.

The Commissioner has opined that name, address, and telephone data regarding an adult or child enrolled in a community education program offered by a school district is not classified as educational data under Minn. Stat. § 13.32, but rather is classified under Minn. Stat. § 13.548 as social recreation data and is private. See Advisory Op. No. 08-025 (September 2008).

- H. Civil Investigative Data. Minn. Stat. § 13.39. Data collected by a government entity as part of an active investigation for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are classified as protected nonpublic data in the case of data not on individuals and confidential data in the case of data on individuals. A pending civil legal action is defined to include, but not be limited to, judicial, administrative or arbitration proceedings. The decision of whether a civil legal action is pending shall be determined by the chief attorney acting for the state agency, political subdivision or statewide system. The government entity may make any data classified as confidential or protected nonpublic under this section accessible to any person, agency or the public if the government entity determines that the access will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest. The need to dispel rumor or unrest is interpreted to mean rumors that threaten community repose. Deli v. Hasselmo, 542 N.W.2d 649 (Minn. App. 1996). Provided, a complainant has access to a statement provided by the complainant to a school district as part of an active investigation. Minn. Stat. § 13.39, Subd. 2(b). During the time when a civil legal action is pending, any person may bring an action in the district court in the county where the data are maintained to obtain disclosure of data classified as confidential or protected nonpublic under Minn. Stat. § 13.39, Subd. 2. The court, after examining the data in camera, may order that all or part of the data be released to the public or to the person bringing the action. In making the determination whether the data shall be disclosed, the court must consider

whether the benefit to the person bringing the action or to the public outweighs any harm to the public, the school district or any person identified in the data. Minn. Stat. § 13.39, Subd. 2a. Inactive civil investigative data are public unless the release of the data would jeopardize another pending civil legal action and except for those portions of the file classified as not public by Chapter 13 or other law.

The Minnesota Supreme Court has held that a notice of claim pursuant to Minn. Stat. § 466.05 is not “collected” by a political subdivision in anticipation of possible commencement of litigation and, therefore, is not classified as confidential or protected nonpublic data under Minn. Stat. § 13.39. Thus, the court concluded, a notice of claim is public data. St. Peter Herald, et al. v. City of St. Peter, 496 N.W.2d 812 (Minn. 1993), reh. denied (1993).

The Commissioner of Administration opined that video tapes prepared by an employee which triggered an investigation that ultimately led to discipline of that employee were not investigative data. In reaching that conclusion, the Commissioner noted that since the employee prepared the video tapes and, therefore, knew of the existence of the tapes and their content, no practical reason existed for the tapes to be considered civil investigative data in light of the underlying purpose of the statute. Advisory Op. No. 93-003 (Oct. 15, 1993).

The Commissioner of Administration also opined that Minn. Stat. § 13.39 does not prevent a parent from gaining access to those portions of an investigative report which constitute education data regarding the parent’s child/student. Advisory Op. No. 02-001.

The Minnesota Supreme Court recently held that Minn. Stat. § 13.39, Subd. 2 does not allow a party holding personnel data to make such data accessible to the public where there is no indication that the chief attorney acting for the party holding the data was consulted about a pending civil legal action or that access to such data by the public would aid the law enforcement process, promote public health or safety, or dispel widespread rumor or unrest. Navarre v. South Washington County schools, 652 N.W.2d 9, (Minn. 2002).

- I. Appraisals. Minn. Stat. § 13.44, Subd. 3(a). Estimated or appraised values of individual parcels of real property which are made by personnel of a government entity or by independent appraisers acting for a government entity for the purpose of selling or acquiring land through purchase or condemnation are classified as confidential data on individuals or protected nonpublic data.

However, the appraisal data may become public at the discretion of the government entity, determined by a majority vote of the governing body of the government entity.

- J. Personal Contact and Online Account Data. The telephone number, email address and Internet user name, password, Internet protocol address and any other similar data related to the individual’s online account or access procedures that is collected, maintained or received by a government entity for notification purposes or as part of a subscription list for the entity’s periodic publications as requested by the individual are private data. The data may only be used for the specific purpose for which the individual provided the data. The Tennessee Warning requirement is not required for the collection of this data. Minn. Stat. § 13.356.

XX. TEMPORARY CLASSIFICATIONS OF DATA: Minn. Stat. § 13.06.

1. A responsible authority may apply to the Commissioner of Administration for permission to have data on individuals classified as private or confidential or to have data not on individuals classified as nonpublic or protected nonpublic on a temporary basis until a proposed statute may be acted upon by the legislature.

2. Contents of Application for Classification as Private or Confidential Data: An application for temporary classification of data on individuals shall establish:

- a. That no statute currently exists which either allows or forbids classification as private or confidential; and either
- b. That data similar to that for which the temporary classification is sought has been treated as either private or confidential by other governmental entities, and by the public; or
- c. That a compelling need exists for an immediate temporary classification, which if not granted could adversely affect the public interest or the health, safety, well-being or reputation of the data subject.

3. Contents of Application for Classification as Nonpublic: An application for temporary classification of government data shall establish:

- a. That no statute currently exists which either allows or forbids classification as nonpublic or protected nonpublic; and either
- b. That data similar to that for which the temporary classification is sought have been classified not public by other governmental entities; or
- c. That public access to the data would render unworkable a program authorized by law.
- d. The applicant must also clearly establish that a compelling need exists for immediate temporary classification, which if not granted, could adversely affect the health, safety or welfare of the public, or the data subject's well-being or reputation.

4. Burden of Proof: The burden of proof is on the applicant to clearly establish the need and qualification for the temporary classification.

5. Statewide Application:

- a. If the Commissioner determines that an application for temporary classification involves data which would reasonably be classified in the same manner by all entities similar to the applicant, he may approve or disapprove the classification for data of the kind which is the subject of the application for the use of all agencies, political subdivisions or statewide systems similar to the applicant. If requested in the application, the commissioner may also determine that the data classification affects similar government entities.
- b. Prior to utilizing this option, the Commissioner must publish notice of his intention to do so in the State Register and by notification to the intergovernmental information systems advisory council, within 15 days of receiving the application.
- c. Within 30 days after publication and notice to the council, an affected agency, system or political subdivision may submit comments on the application. The Commissioner is required to consider all comments received.
- d. Within 45 days after the close of the comment period, the Commissioner shall approve or disapprove the application.
- e. All applications must be approved or disapproved within 90 days after receipt. Data which is the subject of the classification is deemed classified as set forth in the application for 90 days or until the application is approved or disapproved by the Commissioner, whichever is earlier.

6. Withdrawal: Except when an application is processed through public notice and comment as outlined in 5. above, an application may be withdrawn by the responsible authority prior to the Commissioner granting or disapproving the temporary classification. The responsible authority shall notify the Commissioner in writing or the entity's intent to withdraw the application. The written withdrawal must state the reason the temporary classification is no longer necessary and must be signed by the responsible authority.

7. Determination:

- a. The Commissioner shall either grant or disapprove the application for temporary

classification within 45 days after receipt by the Commissioner. The Commissioner may also reject an application if s/he determines it has been submitted for purposes not consistent with the law.

b. If the Commissioner disapproves the application, s/he shall set forth in detail her/his reasons for disapproval, and shall include a statement of what classification s/he believes is appropriate for the data which is the subject of the application. The date of disapproval is the date the responsible authority actually receives the disapproval notification from the Commissioner.

c. Twenty days after the date the responsible authority receives the Commissioner's disapproval of an application, the data which are the subject of the application shall become public data, unless the responsible authority submits an amended application for temporary classification which requests the classification be deemed appropriate by the Commissioner in his/her statement of disapproval or which sets forth additional information relating to the original proposed classification.

d. Upon the filing of an amended application, the data which are the subject of the amended application shall be deemed to be classified as set forth in the amended application for a period of 20 days or until the amended application is granted or disapproved by the Commissioner, whichever is earlier.

e. The Commissioner shall either grant or disapprove the amended application within 20 days after it is filed.

f. Five working days after the date the responsible authority receives the Commissioner's disapproval of the amended application, the data which are the subject of the application shall become public data.

g. No more than one amended application may be submitted for any single file or system.

h. If the Commissioner grants an application for temporary classification under Minn. Stat. § 13.06, Subd. 5, it shall become effective immediately, and the complete record relating to the application shall be submitted to the attorney general, who shall review the classification as to form and legality.

8. Attorney General Review:

a. Within 25 days after receipt of the record the date the Attorney General actually receives the record from the Commissioner of Administration, the Attorney General shall approve the classification, disapprove a classification as confidential or protected nonpublic but approve a classification as private or nonpublic, or disapprove the classification.

b. If the Attorney General disapproves a classification, the data which are the subject of the classification shall become public data five working days after the date of the Attorney General's disapproval.

9. Data Use and Dissemination: During the period of the temporary classification a responsible authority may request approval from the Commissioner for a new or different use or dissemination of the data as provided in section 13.05, Subd. 4, for any data temporarily classified under this section.

10. Application Public: The application for temporary classification is itself public.

11. Expiration: Minn. Stat. § 13.06, Subd. 7 requires that on or before January 15th of each year, the Commissioner must submit all temporary classifications in effect on January 1 in bill form to the legislature, and that the temporary classification expires August of the year following its submission to the legislature.

XXI. OFFICIAL RECORDS ACT: Minn. Stat. § 15.17 also relates to school district record-keeping and access requirements. It provides:

A. 15.17. Official records. Subd. 1. Must be kept. All officers and agencies of the state, cities, towns, school districts, municipal subdivisions or corporations, or other public authorities or political

entities within the state, hereinafter “public officer”, shall make and preserve all records necessary to a full and accurate knowledge of their official activities. Government records may be produced in the form of computerized records. All government records shall be made on a physical medium of a quality to insure permanent records. Every public officer is empowered to reproduce records if the records are not deemed to be of permanent or archival value by the Commissioner of Administration and the records disposition panel under Minn. Stat. § 138.17. The public officer is empowered to reproduce these records by any photographic, photostatic, microphotographic, optical disk imaging system, microfilming, or other reproduction method that clearly and accurately reproduces the records. Each public officer may order that those photographs, photostats, microphotographs, microfilms, optical disk images, or other reproductions, be substituted for the originals of them. He may direct the destruction or sale for salvage or other disposition of the originals from which they were made, in accordance with the disposition requirements of Minn. Stat. § 138.17. Photographs, photostats, microphotographs, microfilms, optical disk images, or other reproductions are for all purposes deemed the original recording of the papers, books, documents and records reproduced when so ordered by any public officer and are admissible as evidence in all courts and proceedings of every kind. A facsimile or exemplified or certified copy of a photograph, photostat, microphotograph, microfilm, optical disk image, or other reproduction, or an enlargement or reduction of it, has the same effect and weight as evidence as would a certified or exemplified copy of the original.

- B. Subd. 2. Responsibility for records. The chief administrative officer of each public agency shall be responsible for the preservation and care of the agency’s government records, which shall include written or printed books, papers, letters, contracts, documents, maps, plans, computer-based data and other records made or received pursuant to law or in connection with the transaction of public business. It shall be the duty of each agency, and of its chief administrative officer, to carefully protect and preserve government records from deterioration, mutilation, loss, or destruction. Records or record books may be repaired, renovated, or rebound when necessary to preserve them properly.
- C. Subd. 3. Delivery to successor. Every legal custodian of government records, at the expiration of his term of office or authority, or on his death his legal representative, shall deliver to his successor in office all government records in his custody; and the successor shall receipt therefor to his predecessor or his legal representative and shall file in his office a signed acknowledgment of the delivery. Every public officer shall demand from his predecessor in office, or his legal representative, the delivery of all government records belonging to his office.
- D. Subd. 4. Accessible to public. Access to records containing government data is governed by sections 13.03 and 138.17. When government data that is classified as not public is physically transferred to the state archives, the data is no longer classified as not public and access is governed by section 138.17.

City wrongfully denied access to financial documents provided by private company which received financial assistance from the City by claiming that the City did not possess the documents. Advisory Op. No. 11-016 (November 7, 2011).

XXII. RECORDS DISPOSITION: See Minn. Stat. §§ 138.17 to 138.225 regarding records disposition procedures. Note: The Minnesota Department of Administration has prepared a General Records Retention Schedule for school districts.

The Court of Appeals affirmed a jury verdict of \$140,000 plus attorneys fees and costs awarded to a student whose educational records were not sufficiently destroyed when they were thrown away without

tearing or shredding. The Court of Appeals found that the school districts responsible authority did not proscribe appropriate methods for destruction of student data thus failing to perform a duty set forth in Minn. Stat. § 13.05, Subd 5(2). Scott v. Minneapolis Public Schools, Special District No. 1, Co. No. A05-649 2006 WL 997721 (Minn. Ct. App. 2006) (unpublished).

In 2006, the Legislature amended Minn. Stat. § 138.17 to provide that when records containing not public data are disposed of in accordance with the Records Retention Act, the records must be destroyed in a way that prevents their contents from being determined.

XXIII. OPEN MEETING LAW: Chapter 13D of the Minnesota Statutes. Generally, all meetings of a public body must be open to the public. The Open Meeting Law provides that certain portions of a meeting must be closed to the public if expressly required by other law or if any of the following types of data are discussed:

- A. Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults;
- B. Active investigative data as defined in Minn. Stat. § 13.82, Subd. 7, or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision;
- C. Educational data, health data, medical data, welfare data, or mental health data that are not public data under Minn. Stat. §§ 13.32, 13.3805, Subd.1, 13.384, or 13.46, Subds. 2 or 7, or
- D. An individual's medical records governed by section 144.335.

Under the Open Meeting Law, meetings for preliminary consideration of allegations or charges against an individual subject to the authority of the school board *must be* closed, and meetings to evaluate an individual who is subject to the authority of the board *may be* closed. Finally, meetings may be closed if the closure is expressly authorized by statute or permitted by the attorney-client privilege.

Under the Open Meeting Law, data that are not public data may be discussed at a meeting without liability or penalty, if the disclosure relates to a matter within the scope of the public body's authority and is reasonably necessary to conduct the business or agenda item before the public body.

Comment: This provision will require the Board or administration to have a working knowledge of the classification system under the Minnesota Government Data Practices Act. Note that there are civil penalties for violations of either law.

XXIV. HUMAN RIGHTS ACT: Chapter 363A of the Minnesota Statutes governs access to human rights investigative data and case files. See Schocker v. State of Minnesota, 477 N.W.2d 767 (Minn. Ct. App. 1991).

XXV. REMEDIES:

- A. Civil Action. An individual may seek to enforce his/her rights under chapter 13 or obtain access to data by bringing an action in district court.
 - 1. An individual damaged by an agency's violation of the act may recover damages, costs and attorney's fees as part of a civil action. The court may also issue an injunction ordering the agency to not violate the act. Minn. Stat. § 13.08, Subds. 1 and 2.
 - 2. An individual seeking access to data or enforcement of other rights under the act may seek an order to compel the agency to follow the requirements of the law in a special district court action. Minn. Stat. § 13.08, Subd. 4.

B. Administrative Remedy: Beginning July 1, 2010, an individual may choose an alternative expedited proceeding to compel compliance with the act.

1. In this process, a complaint is filed with the Office of Administrative Hearings. An administrative law judge reviews the complaint and, if sufficient facts have been alleged to believe that the agency has not complied, a hearing on the matter is scheduled. The administrative law judge may dismiss the complaint, find a violation occurred, impose a civil penalty, order the agency to produce the data, and refer the complaint for consideration of criminal charges. A successful complainant may be awarded attorneys fees and a refund of all but \$50 of the fee for filing the complaint. Minn. Stat. § 13.085, Subds. 3-5.
 - a. This administrative remedy was established as an expedited alternative consequently the timeliness for response are shorter (15 business days from receipt of the notice). Consequently it is important that when a school district receives notice of a complaint, that legal counsel be contacted promptly.

XXVI. PENALTIES:

A. Civil Penalties. If either the school district or its responsible authority violates any provision of the Act, it is liable to any person who suffers any damages as a result of the violation. In light of the reference to “any damages” in the statute the Minnesota Supreme Court has held that a plaintiff can recover damages for emotional harm under the Data Practices Act. See Navarre v. South Washington County Schools, 652 N.W.2d 9 (Minn. 2002). In doing so the court stated that “where a plaintiff seeks emotional damages under the MGDPA and puts her emotional state at issue, the defendant should be allowed to introduce probative evidence of the plaintiff’s preexisting condition, treatment and prognosis, including expert testimony and/or medical records, that is relevant to the plaintiff’s claim for emotional damages.” Id. at 46. The Navarre court also held that a plaintiff may be able to recover loss of reputation damages under the Data Practices Act even though the plaintiff’s defamation action had been dismissed. See id. at 49. If the violation and consequent damages are proven in an action brought against the school district or the responsible authority, the person may be awarded any damages sustained, plus costs and reasonable attorney fees. See, e.g., Crowell et al. v. McConnell, et al., Court File No. C5-88-732 (D.C. 5th Jud. Dist.) (March 17, 1989) (four separate plaintiffs were awarded a total of \$95,000 as well as attorneys fees for violations of the Act). If the violation is found to be willful, the person may recover in addition to actual damages, not less than \$1,000, nor more than \$15,000, for each violation. An injunction is an available remedy to halt any violation or proposed violation of the act by the responsible authority. Minn. Stat. § 13.08. However, if a school district requests and receives a written opinion from the Commissioner of Administration pursuant to Minn. Stat. § 13.072, and then acts in conformity with that opinion, the school district is not liable for compensatory or exemplary damages or awards of attorneys’ fees. Minn. Stat. § 13.072, Subd. 2.

1. An individual may also seek to enforce his/her rights under chapter 13 or obtain access to data by bringing an action in district court to compel compliance. The individual may recover costs and disbursements including reasonable attorney’s fees. For a willful violation, exemplary damages of \$1,000 to \$15,000 per violation may be imposed. In addition, if the court issues an order to compel compliance, the court may impose a civil penalty of up to \$1,000 against the government entity in addition to any other damages.
2. Under the administrative remedy, the administrative law judge may impose a civil penalty against an agency of up to \$300.

B. Criminal Penalties. Any person who willfully violates the provisions of Chapter 13 and the rules

adopted thereunder, **or whose conduct constitutes the knowing unauthorized acquisition of not public data**, may be found guilty of a misdemeanor. Note that this provision is not limited to the school district or its responsible authority, but may also include the outside delegate of the responsible authority charged with summarizing data who intentionally discloses data to third parties in violation of his/her agreement with the responsible authority not to do so. Under the administrative remedy, the administrative law judge may refer the matter for consideration of criminal charges. Minn. Stat. § 13.085, Subd. 5. A school district that acts in conformity with a written opinion issued by the Commissioner of Administration pursuant to Minn. Stat. § 13.072, is not liable for a penalty under Minn. Stat. § 13.09. Minn. Stat. § 13.072, Subd. 2. However, if the agency fails to comply with an opinion of the Commissioner of Administration, the agency must be ordered to pay a complainant's reasonable attorney's fees, if the contents of the opinion are directly related to the matter under dispute. Minn. Stat. § 13.08, Subd. 4. In actions using the administrative process, the attorneys fees are capped at \$5,000. Minn. Stat. § 13.085, Subd. 6.

- C. Job Sanctions. "Willful violation of the Act by any public employee constitutes just cause for suspension without pay or dismissal of the public employee." Minn. Stat. § 13.09.
- D. Frivolous Requests. "If the court determines that an action brought under this subdivision is frivolous and without merit and a basis in fact, it may award reasonable costs and attorney's fees to the responsible authority." Minn. Stat. § 13.08, Subd. 4. If an administrative law judge determines that a complaint is frivolous or brought for purposes of harassment, the judge must order that the complainant pay the agency's reasonable attorneys fees up to \$5,000. Minn. Stat. § 13.085, Subd. 6.
- E. Immunity from Liability. "No cause of action may arise as a result of the release of data contained in a termination or personnel settlement agreement if the data were not public data as defined in [Minn. Stat. § 13.02] at the time the agreement was executed but became public data under a law enacted after execution." Laws 1991, Ch. 319, Sec. 30. Note that this is a very narrow exception.
 - 1. A government agency or other person is immune from civil and criminal liability for releasing data in compliance with a court order or order issued by an administrative law judge. Minn. Stat. § 13.08, Subd. 5; Minn. Stat. § 13.085, Subd. 5.
 - 2. A government agency or other person that complies with an order issued by an administrative law judge is not liable for compensatory or exemplary damages, or awards of attorney fees in a civil action, and is not subject to a criminal penalty. Minn. Stat. § 13.085, Subd. 5(f).
- F. Rule Making. Minn. Stat. § 13.07. The Commissioner of Administration has the authority to promulgate rules to implement the enforcement and administration of the Data Practices Act. See Minn. R. 1205.0100 to 1205.0200.

XXVII. FEDERAL REGULATIONS AND DEPARTMENT OF EDUCATION INTERPRETATIONS:

- 1. Background: On and effective June 17, 1976, the U.S. Department of Health, Education and Welfare promulgated final rules pursuant to authority granted by the federal "Family Educational Rights and Privacy Act of 1974." The rules provide some interpretation to that Act. In conjunction with the rulemaking, HEW published an analysis of selected solicited comments made to HEW by interested parties in the course of the rulemaking, together with HEW responses to the comments. The responses shed additional light on the interpretation placed upon the Act by HEW and are referred to below where pertinent. The rules may be cited as 34 C.F.R. § 99, and the analysis of comments may be found at 41 Fed. Reg. 24662 (June 17, 1976).

These rules were subsequently revised after the creation of the United States Department of Education. The final revised regulations were published in 53 Fed. Reg. 11942 (April 11, 1988). The regulations were further revised effective December 23, 1996. These revisions were published in 61 Fed. Reg. 59292 (Nov. 21, 1996). The regulations were further amended effective August 7, 2000, April 21, 2004, December 9, 2008, and December 2, 2011. The final revised regulations are as follows:

Family Educational Rights and Privacy Act Regulations

34 CFR Part 99

Subpart A-General

Section

99.1 To which educational agencies or institutions do these regulations apply?

99.2 What is the purpose of these regulations?

99.3 What definitions apply to these regulations?

99.4 What are the rights of parents?

99.5 What are the rights of students?

99.7 What must an educational agency or institution include in its annual notification?

99.8 What provisions apply to records of a law enforcement unit?

Subpart B-What are the Rights of Inspection and Review of Education Records?

Section

99.10 What rights exist for a parent or eligible student to inspect and review education records?

99.11 May an educational agency or institution charge a fee for copies of education records?

99.12 What limitations exist on the right to inspect and review records?

Subpart C-What are the Procedures for Amending Education Records?

Section

99.20 How can a parent or eligible student request amendment of the

student's education records?

99.21 Under what conditions does a parent or eligible student have the right to a hearing?

99.22 What minimum requirements exist for the conduct of a hearing?

Subpart D-May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?

Section

99.30 Under what conditions is prior consent required to disclose information?

99.31 Under what conditions is prior consent not required to disclose information?

99.32 What recordkeeping requirements exist concerning requests and disclosures?

99.33 What limitations apply to the redisclosure of information?

99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

99.35 What conditions apply to disclosure of information for Federal or State program purposes?

99.36 What conditions apply to disclosure of information in health and safety emergencies?

99.37 What conditions apply to disclosing directory information?

99.38 What conditions apply to disclosure of information as permitted by State statute adopted after

November 19, 1974, concerning the juvenile justice system?

99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or nonforcible sex offenses?

Subpart E -What are the Enforcement Procedures?

Section

99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

99.62 What information must an educational agency or institution submit to the Office?

99.63 Where are complaints filed?

99.64 What is the investigation procedure?

99.65 What is the content of the notice of investigation issued by the Office?

99.66 What are the responsibilities of the Office in the enforcement process?

99.67 How does the Secretary enforce decisions?

(Authority: 20 U.S.C. 1232g, unless otherwise noted).

PART 99 - FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

The authority citation for this part continues to read as follows:

(Authority: 20 U.S.C. 1232g, unless otherwise noted).

Subpart A-General

§ 99.1 *To which educational agencies or institutions do these regulations apply?*

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, If –

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive nonmonetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution if funds under one or more of the programs referenced in paragraph (a) of this section –

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or (2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV-A-I and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part

apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

Note to § 99.2: 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data, information, and records collected or maintained pursuant to Part B of the IDEA.

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

"Act" means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

"Attendance" includes, but is not limited to –

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

"Authorized representative" means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31 (a)(3) to conduct-with respect to Federal- or State-supported education programs - any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

"Biometric record," as used in the definition of "personally identifiable information," means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

"Dates of attendance"

(a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

"Directory information" means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's –

- (1) Social security number; or
- (2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes –

- (1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and
- (2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such

as a PIN, password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

"Disciplinary action or proceeding" means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

"Disclosure" means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

"Early childhood education program" means –

(a) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 et seq.), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(b) A State licensed or regulated child care program; or

(c) A program that –

- (1) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and
- (2) Is –
 - (i) A State prekindergarten program;
 - (ii) A program authorized under section

619 or part C of the Individuals with Disabilities Education Act; or
 (iii) A program operated by a local educational agency.

"Education program" means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(3), (b)(5))

"Educational agency or institution" means any public or private agency or institution to which this part applies under § 99.1 (a).

(Authority: 20 U.S.C. 1232g(a)(3))

"Education Records"

(a) The term means those records that are:

- (1) Directly related to a student; and
- (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

- (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
- (2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.
- (3)(i) Records relating to an individual who is employed by an educational agency or institution, that:
 - (A) Are made and maintained in the normal course of business;
 - (B) Relate exclusively to the individual

in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution;

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

(Authority: 20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

"Institution of postsecondary education" means an institution that provides education to students beyond the secondary school level; "secondary

school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

"Party" means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

"Personally Identifiable Information"

The term includes, but is not limited to –

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Authority: 20 U.S.C. 1232g)

"Record" means any information recorded in any way, including, but not limited to, hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

"Student," except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

§ 99.4 *What are the rights of parents?*

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 *What are the rights of students?*

(a)(1) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from

education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in §99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have the rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C. 1232g(d))

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to –

- (i) Inspect and review the student's education records;
- (ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;
- (iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

- (i) The procedure for exercising the right to inspect and review education records.
- (ii) The procedure for requesting amendment of records under § 99.20.
- (iii) If the educational agency or institution has a policy of disclosing education records under § 99.31 (a) (1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1875-0246)

(Authority: 20 U.S.C. 1232g(e) and (f))

§ 99.8 What provisions apply to records of a law enforcement unit?

- (a) (1) "Law enforcement unit" means any individual office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to –
- (i) Enforce any local, State, or Federal

law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or
 (ii) Maintain the physical security and safety of the agency or institution.
 (2) A component of an educational agency or institution does not lose its status as a "law enforcement unit" if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b) (1) Records of law enforcement unit means those records, files, documents, and other materials that are –
 (i) Created by a law enforcement unit;
 (ii) Created for a law enforcement purpose; and
 (iii) Maintained by the law enforcement unit.
 (2) Records of law enforcement unit does not mean –
 (i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or
 (ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c) (1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.
 (2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while

in possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by any educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

Subpart B-What are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to
 (1) Any educational agency or institution; and
 (2) Any State educational agency (SEA) and its components.
 (i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.
 (ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component, shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent

the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall –

- (1) Provide the parent or eligible student with a copy of the records requested; or
- (2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component, shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an educational agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1)(A) and (B))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

- (1) Financial records, including any information those records contain, of his or her parents;
- (2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and
- (3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:
 - (i) The student has waived his or her right to inspect and review those letters and statements; and
 - (ii) Those letters and statements are related to the student's:
 - (A) Admission to an educational institution;
 - (B) Application for employment; or
 - (C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph

(b)(3)(i) of this section is valid only if:

- (i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and
 - (ii) The waiver is made in writing and signed by the student, regardless of age.
- (2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:
- (i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and
 - (ii) Use the letters and statements of

recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

Subpart C-What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's

education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

- (i) Amend the record accordingly; and
- (ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

- (1) Maintain the statement with the contested part of the record for as long as the record is maintained; and
- (2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual including an official of the educational agency or institution, who does not have direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C.1232g(a)(2))

Subpart D-May an Educational Agency or Institution disclose Personally Identifiable Information from Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

- (1) Specify the records that may be disclosed;
- (2) State the purpose of the disclosure; and
- (3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

- (1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and
- (2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(d) "Signed and dated written consent" under this part may include a record and signature in electronic form that –

- (1) Identifies and authenticates a particular person as the source of the electronic consent; and
- (2) Indicates such person's approval of the information contained in the electronic consent.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2) (A))

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

- (1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
- (B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered

a school official under this paragraph provided that the outside party –

- (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
 - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
 - (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.
- (ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

Note: Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(3) The disclosure is, subject to the

requirements of § 99.35, to authorized representatives of –

- (i) The Comptroller General of the United States;
 - (ii) The Attorney General of the United States;
 - (iii) The Secretary; or
 - (iv) State and local educational authorities.
- (4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:
- (A) Determine eligibility for the aid;
 - (B) Determine the amount of the aid;
 - (C) Determine the conditions for the aid; or
 - (D) Enforce the terms and conditions of the aid.
- (ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically –

- (A) Allowed to be reported or disclosed pursuant to a State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or
- (B) Allowed to be reported or disclosed pursuant to a State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of,

educational agencies or institutions to:

- (A) Develop, validate, or administer predictive tests;
- (B) Administer student aid programs; or
- (C) Improve instruction.

(ii) Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of § 99.33(b).

(iii) An educational agency or institution may disclose personally identifiable information under paragraph (a)(6)(i) of this section, and a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under paragraph (a)(6)(i) and (a)(6)(ii) of this section, only if –

- (A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;
- (B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and
- (C) The educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section enters into a written agreement with the organization that –
 - (1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;
 - (2) Requires the organization to use personally identifiable information from education records only to meet the

purpose or purposes of the study as stated in the written agreement;

(3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and

(4) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

(iv) An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(v) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with –

- (A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the

subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(iii) (A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information," under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect

to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education.

The institution must not disclose the final results of the disciplinary proceeding unless it determines that

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if –

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided

to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that--

- (i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;
- (ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and
- (iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution

discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j))

§ 99.32 *What recordkeeping requirements exist concerning requests and disclosures?*

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

- (i) The parties who have requested or received personally identifiable information from the education records; and
- (ii) The legitimate interests the parties had in requesting or obtaining the information.

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

- (i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and
- (ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

- (i) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and
- (ii) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(2)(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

- (A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

- (B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

- (ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by

the student's class, school, district, or other appropriate grouping rather than by the name of the student.

- (iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

(c) The following parties may inspect the record relating to each student:

- (1) The parent or eligible student.

- (2) The school official or his or her assistants who are responsible for the custody of the records.

- (3) Those parties authorized in § 99.31(a)(1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

- (1) The parent or eligible student;

- (2) A school official under § 99.31

- (a)(1);

- (3) A party with written consent from the parent or eligible student;

- (4) A party seeking directory information; or

- (5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

(Approved by the Office of Management and Budget under control number 1875-0246)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4) (A))

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an

education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if –

(i) The disclosures meet the requirements of § 99.31; and

(ii) (A) The educational agency or institution has complied with the requirements of § 99.32(b); or
(B) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a) (2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or
(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or

institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) is responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or individual designated as its authorized representative –

(i) Uses personally identifiable information only to carry out an audit or evaluation of Federal- or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements related to these programs;

(ii) Protects the personally identifiable information from further disclosures or other uses, except as authorized in paragraph (b)(1) of this section; and

(iii) Destroys the personally identifiable information in accordance with the requirements of paragraphs (b) and (c) of this section.

(3) The State or local educational authority or agency headed by an official listed in § 99.31 (a)(3) must use a written agreement to designate any authorized representative, other than an employee. The written agreement must –

(i) Designate the individual or entity as an authorized representative;

(ii) Specify-

(A) The personally identifiable

information from education records to be disclosed;

(B) That the purpose for which the personally identifiable information from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and

(C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of § 99.31(a)(3), including a description of how the personally identifiable information from education records will be used;

(iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;

(iv) Specify the time period in which the information must be destroyed; and

(v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

(b) Information that is collected under paragraph (a) of this section must –

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and their authorized representatives, except that the State or

local educational authority or agency headed by an official listed in § 99.31(a)(3) may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b); and
 (2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

- (1) The parent or eligible student has given written consent for the disclosure under § 99.30; or
- (2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C.1232g(b)(1)(C), (b)(3), and (b)(5))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in the Act or this part shall prevent an educational agency or institution from –

- (1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;
- (2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school

officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

- (1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student designated as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to –

(1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled; or

(2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under § 99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may

specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

(e) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g((b)(1)(J))

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or nonforcible sex offenses?

As used in this part:

"Alleged perpetrator of a crime of violence" is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson
Assault offenses
Burglary
Criminal homicide-manslaughter by negligence
Criminal homicide-murder and nonnegligent manslaughter
Destruction/damage/vandalism of property
Kidnapping/abduction
Robbery
Forcible sex offenses

"Alleged perpetrator of a nonforcible sex offense" means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

"Final results" means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

"Sanction imposed" means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

"Violation committed" means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C. 1232g(b)(6))

Subpart E-What are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, "Office" means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and
(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term "applicable program" is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234))

§ 99.61 What responsibility does an educational agency or institution, a recipient of Department funds, or a third party outside of an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with

State or local law, it must notify the Office within 45 days, giving the text and citation of the conflicting law. If another recipient of Department funds under any program administered by the Secretary or a third party to which personally identifiable information from education records has been nonconsensually disclosed determines that it cannot comply with the Act or this part due to a conflict with State or local law, it also must notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

§ 99.62 What information must an educational agency or institution or other recipient of Department funds submit to the Office?

The Office may require an educational agency or institution, other recipient of Department funds under any program administered by the Secretary to which personally identifiable information from education records is nonconsensually disclosed, or any third party outside of an educational agency or institution to which personally identifiable information from education records is nonconsensually disclosed to submit reports, information on policies and procedures, annual notifications, training materials, or other information necessary to carry out the Office's enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 What is the investigation procedure?

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a violation is based on a policy or practice of the educational agency or institution, other recipient of Department funds under any program administered by the Secretary, or any third party outside of an educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution or other recipient. The Office also investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether a third party outside of the educational agency or institution has failed to comply with the provisions of § 99.31 (a)(6) (iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of § 99.33.

(c) A timely complaint is defined as an allegation of a violation of the Act that is

submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f) and (g))

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies in writing the complainant, if any, and the educational agency or institution, the recipient of Department funds under any program administered by the Secretary, or the third party outside of an educational agency or institution if it initiates an investigation under § 99.64(b). The written notice –

- (1) Includes the substance of the allegations against the educational agency or institution, other recipient, or third party; and
- (2) Directs the agency or institution, other recipient, or third party to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, other recipient of Department funds under any

program administered by the Secretary, or third party outside of an educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution, other recipient, or third party a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution or other recipient has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the agency or institution or other recipient. A notice of findings issued under paragraph (b) of this section to an educational agency or institution, or other recipient that has not complied with a provision of the Act or this part –

- (1) Includes a statement of the specific steps that the agency or institution or other recipient must take to comply; and
- (2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution or other recipient may comply voluntarily.

(d) If the Office finds that a third party outside of an educational agency or institution has not complied with the provisions of § 99.31(a)(6)(iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of § 99.33, the Office's notice of findings issued under paragraph (b) of this section –

- (1) Includes a statement of the specific steps that the third party outside of the educational agency or institution must take to comply; and
- (2) Provides a reasonable period of time, given all of the circumstances of the case, during which the third party may comply voluntarily.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

§ 99.67 How does the Secretary enforce decisions?

(a) If an educational agency or institution or other recipient of Department funds under any program administered by the Secretary does not comply during the period of time set under § 99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part D of the General Education Provisions Act –

- (1) Withhold further payments under any applicable program;
- (2) Issue a complaint to compel compliance through a cease and desist order; or
- (3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution, other recipient, or third party has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution, other recipient, or third party with written notice of the decision and the basis for the decision.

(c) If the Office finds that a third party, outside the educational agency or institution, violates § 99.31(a)(6)(iii)(B), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation of § 99.31(a)(6)(iii)(B) access to personally identifiable information from education records for at least five years.

(d) If the Office finds that a State or local educational authority, a Federal agency headed by an official listed in § 99.31(a)(3), or an authorized

representative of a State or local educational authority or a Federal agency headed by an official listed in § 99.31(a)(3), improperly rediscloses personally identifiable information from education records, then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the improper redisclosure access to personally identifiable information from education records for at least five years.

(e) If the Office finds that a third party, outside the educational agency or institution, improperly rediscloses personally identifiable information from education records in violation of § 99.33 or fails to provide the notification required under § 99.33(b)(2), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C. 1232g(b)(4)(B) and (f); 20 U.S.C. 1234c)

Appendix A to Part 99 - Crimes of Violence Definitions

Arson

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Assault Offenses

An unlawful attack by one person upon another.

(NOTE: By definition there can be no "attempted" assaults, only "completed" assaults.)

(a) Aggravated Assault

An unlawful attack by one person upon

another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) Simple Assault

An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) Intimidation

To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

(NOTE: This offense includes stalking.)

Burglary

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

Criminal Homicide-Manslaughter by Negligence

The killing of another person through gross negligence.

Criminal Homicide-Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent

of the owner or the person having custody or control of it.

Kidnapping/Abduction

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

(NOTE: Kidnapping/Abduction includes hostage taking.)

Robbery

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

(NOTE: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.)

Sex Offences, Forcible

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) Forcible Rape (Except "Statutory Rape")

The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) Forcible Sodomy

Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent

mental or physical incapacity.

(c) Sexual Assault With An Object

To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(NOTE: An "object" or "instrument" is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc.)

(d) Forcible Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(NOTE: Forcible Fondling includes "Indecent Liberties" and "Child Molesting.")

Nonforcible Sex Offenses

(Except "Prostitution Offenses")

Unlawful, nonforcible sexual intercourse.

(a) Incest

Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) Statutory Rape

Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

[This is not an official version of the regulations. These regulations are codified in 34 CFR Part 99.]

[Updated January 2012.]

XXVIII. CONCLUSION. As stated earlier, this area of the law is very complex and fast changing. The responsible authority and the various school district personnel must have a firm grasp of the laws, regulations and district procedures to bring themselves into and to remain in compliance. It cannot be stressed too strongly that this is a very important field which needs immediate attention and action by all districts in the state.

XXIX. FORMS

FORMS	<u>IDENTIFICATION OF FORMS</u>	<u>LEGAL REFERENCE</u>
1	Resolution Adopting Responsible Authority	Minn. Stat. § 13.02, Subd. 16
2	Description of Each Category of Record, File or Process Relating to Private or Confidential Data on Individuals Maintained by the School District	Minn. Stat. § 13.025
3	Application for Temporary Classification of Government Data	Minn. Stat. § 13.06, Subds. 2 and 3
4	Request for Preparation of Summary Data	Minn. Stat. § 13.05, Subd. 7
5	Notice to Accompany all Requests for Private or Confidential Data	Minn. Stat. § 13.04, Subd. 2
6a	Request by Individual to Determine Whether He is the Subject of Stored Data	Minn. Stat. § 13.04, Subd. 3
6b	Request to be Informed of or Shown the Data 20 U.S.C.A. § 1232g(a)(1)(A)	Minn. Stat. § 13.04, Subd. 3
7	Notice to Responsible Authority of Challenge 20 U.S.C.A. § 1232g(a)(2)	Minn. Stat. § 13.04, Subd. 4
8	Determination of Responsible Authority	Minn. Stat. § 13.04, Subd. 4
9	Notice to Past Recipients	Minn. Stat. § 13.04, Subd. 4
10	Nondisclosure Agreement for Preparers of Summary Data	Minn. Stat. § 13.05, Subd. 7
11	Request for Information by members of Juvenile Justice System	Minn. Stat. § 13.32, Subd. 9
12	Minnesota Standard Consent Form to Release Health Information	Minn. Stat. § 144.292, Subd. 8
13-20	(Reserved for Future Use)	
21	Proposed Rules for Conduct of Required Hearings with Exhibits A-G	Minn. Stat. § 14.57 <u>et seq.</u>
22	Compliance Checklist	Minn. Stat. Chap. 13
23	Informed Consent for the Release of Government Data	Minn. Stat. § 13.05, Subd. 4
24	Sample Data Access Policy for Members of the Public	Minn. Stat. § 13.03, Subd. 2
25	Sample Data Access Policy for Data Subjects	Minn. Stat. § 13.05, Subd. 8
26	Worksheet for Developing Data Access Policies	
27	Example Policy for Ensuring the Security of Not Public Data	Minn Stat. § 13.05, Subd. 5

FORM 1

SAMPLE RESOLUTION APPOINTING
A RESPONSIBLE AUTHORITY

RESOLUTION APPOINTING A RESPONSIBLE AUTHORITY

BE IT RESOLVED by the School Board of Independent School District No. _____, as follows:

Pursuant to the provisions of Minn. Stat. § 13.02, Subd. 16, as amended, _____ (Insert name of individual), an employee of the school district, is hereby appointed responsible authority for Independent School District No. _____.

(Insert name of individual appointed) is hereby authorized to take all actions necessary to assure that all programs, administrative procedures and forms used within Independent School District No. _____ are administered in compliance with the provisions of Minnesota Statutes, Chapter 13 as amended, and with Minnesota Rules, Chapter 1205.

FORM 2

Responsible Authority, Designee, and Data Practices Compliance Official

The Data Practices Act (Chapter 13 of Minnesota Statutes) and Minnesota Rules, Chapter 1205, assign a number of duties to government entities. The specific employees in the entity who have the authority and responsibility for carrying out these duties are the:

- responsible authority (RA);
- designee (one or more); and
- data practices compliance official (DPCO).

Responsible Authority: Each entity *must* identify, designate or appoint one individual as its RA. The RA is the person who ultimately is responsible for the collection, use, and dissemination of all entity data, and for all of the entity's data practices decisions. The RA also must make sure the entity complies with all of the requirements of the Act and the Rules. Both the entity and the RA are liable for violations of Chapter 13.

(Minnesota Statutes, sections 13.02, subdivision 16; 13.025; Minnesota Rules 1205.0200, subparts 12-15, and 1205.0800-1500)

State agency: the RA is the commissioner, the chief executive officer, or an agency official appointed by the agency's governing body. (Minnesota Rules 1205.0200, subpart 13)

Constitutional officer: the constitutional officer is the RA for his/her office. (Minnesota Rules 1205.0200, subpart 13)

County

- **Elected official:** the elected official is the RA for his/her office. (Minnesota Rules 1205.0200, subpart 14(A))
- **Data outside of offices of elected officials:** the governing body must appoint a county employee to be the RA. (Minnesota Rules 1205.0200, subpart 14(A))
- **County social services agency:** the RA is the director of the agency. (Minnesota Statutes, section 13.46, subdivision 10)

City or school district: The governing body must appoint a city or school district employee, respectively, to be the RA. (Minnesota Rules 1205.0200, subparts 14(B) and (C))

If your entity is not one described above, look to Minnesota Rules 1205 and Chapter 13 for guidance.

Designee: A designee is a person designated by RA to help administer and implement the requirements of Chapter 13 and the Rules. The law specifically states that a designee is responsible for receiving and complying with requests for government data, and for answering inquiries from the public concerning the provisions of Chapter 13 or the Rules. The RA decides whether to appoint designees and how many are appointed. The RA is not required to appoint designees.

The law defines the designee as a person who is in charge of and responsible for individual files or systems containing government data. Often, an RA will appoint a division head – or the director of a unit within the entity – as the designee for the data maintained by that division or unit. (Minnesota Statutes, section 13.02, subdivision 6)

Data Practices Compliance Official: The RA *must* designate or appoint one employee to be the entity's DPCO. Instead of making this appointment, the responsible authority may choose to serve as the DPCO. The DPCO receives and responds to questions or concerns about data practices problems, including problems in obtaining access to data the entity keeps. (Minnesota Statutes, section 13.05, subdivision 13)

Table Showing Duties of Responsible Authority, Designee, and Data Practices Compliance Official

Statutory Responsibility	Responsible Authority	Designee	Data Practices Compliance Official
Prepare access procedures for members of the public and data subjects. (13.03, Subd. 2; 13.025, Subd. 8)	x		
Establish procedures to ensure that data on individuals are accurate, complete, and current. (13.05, Subd. 5)	x		
Establish security safeguards for data on individuals. (13.05, Subd. 5)	x		
Establish procedures to ensure that the entity responds to requests for government data appropriately and promptly. (13.03, Subd. 2)	x		
Prepare summary data. (13.05, Subd. 7)	x		
Apply to the Commissioner of Administration for a temporary classification of data. (13.06)	x		
Ensure that the entire entity complies with Chapter 13 and the Rules. (13.02, Subd. 16; Minn. Rules 1205.0900)	x		
Appoint designee(s). (13.02, Subd. 6)	x		
Appoint a data practices compliance official. (13.05, Subd. 13)	x		
Respond to requests for government data. (13.02, Subd. 6; 13.03; 13.04)	x	x	
Responsible for files and systems containing government data. (13.02, Subds. 6 and 16)	x	x	
Answer inquiries from the public concerning Chapter 13 or the Rules. (13.02, Subds. 6 and 16; 13.05, Subd. 13)	x	x	x

Application for Temporary Classification of Government Data

Submission. Government entities can submit this application by mail or email to:

Commissioner of Administration
c/o Information Policy Analysis Division (IPAD)
201 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

info.ipad@state.mn.us

Not public data. Once the Commissioner receives your application, the data are no longer public.

Public data. The application itself is public.

Commissioner's decision. The Commissioner has 45 calendar days to decide whether to grant the temporary classification. The Commissioner has 90 calendar days to make a decision if you request that the temporary classification apply to both your government entity and similar government entities, or the Commissioner decides the classification has statewide implications.

NAME AND TITLE OF RESPONSIBLE AUTHORITY

Minnesota Statutes, section 13.06, subdivision 1, requires a government entity's responsible authority to authorize submission of the application.

REQUESTING GOVERNMENT ENTITY'S NAME AND ADDRESS

ADDITIONAL CONTACT INFORMATION

If entity staff or legal counsel helps prepare the application, please include that person's contact information.

NAME: _____

PHONE NUMBER: _____

EMAIL ADDRESS: _____

TYPE OF APPLICATION

☐

New Application

☐

Amended Application

REQUESTED CLASSIFICATION

☐

Private or nonpublic

☐

Confidential or protected nonpublic

CLASSIFICATION WILL APPLY TO (check one)

☐

Only the requesting government entity

☐

All similar government entities

If applying on behalf of similar entities, identify all entities. You must provide documentation that the other entities agree to participate in the application and to be bound by the classification.

DESCRIBE DATA TO BE CLASSIFIED AS NOT PUBLIC

Describe the data you would like to be classified as not public. Be as specific as possible. Listing each data element is not necessarily required, but try to avoid general descriptions, such as "all files" or "all records maintained by this entity." It may be helpful to submit data collection forms. You should also identify data elements or types of data that are excluded from the temporary classification. If any of the data will become public at some point, describe the circumstances and/or timing. *(Please attach description.)*

CURRENT CLASSIFICATION

Is there a Minnesota statute or federal law that currently classifies these data as not public?

☐

No

☐

Yes *(If you are able to cite a state statute or federal law, there is no need to submit this application.)*

Is there a Minnesota statute or federal law that could be interpreted to forbid classification of these data as not public?

☐

No

☐

Yes

If yes, cite the statute or law and discuss your interpretation. *(Please attach interpretation.)*

DATA SHARING

Will you be legally required to share the data described in this application with persons outside of your entity during the time of the temporary classification?

☐

No

☐

Yes

If yes, describe the required sharing, including statutory authority. *(Please attach description.)*

JUSTIFICATION

You must clearly establish that a compelling need exists for immediate temporary classification of the data as not public, which if not granted could adversely affect the public's health, safety or welfare, or the data subject's well-being or reputation. If relevant, include any past instances where release of the data had an adverse effect on the public or data subject. *(Please attach compelling need justification.)*

In addition to the compelling need justification, you must describe one or more of the following.

1. Establish that data similar to that which the temporary classification is sought are currently classified as not public. Include the Minnesota statute citation to the similar data's current classification. Discuss similarities in the data, in the functions of the entities which maintain similar data, and in the programs/purposes for which the data are collected and used. *(Please attach similar data argument.)*

2. Establish that making the data available to the public would render unworkable a program authorized by law. Describe the program and cite the statute or federal law that authorizes it. If relevant, include past instances where release of the data rendered a program unworkable. *(Please attach render a program unworkable argument.)*

I affirm that all of the above statements are true to the best of my knowledge.

I am aware that a temporary classification expires August 1st of the year following its submission to the Legislature pursuant to Minnesota Statutes, section 13.06, subdivision 7, unless the Legislature takes action on the classification.

Signature of Responsible Authority

Date

FORM 4

SAMPLE REQUEST FOR PREPARATION OF SUMMARY DATA
REQUEST FOR PREPARATION OF SUMMARY DATA

In making the request for preparation for “summary data” contained herein, I acknowledge that Minn. Stat. § 13.02, Subd. 19, defines summary data to mean:

“Statistical records and reports derived from data on individuals but in which individuals are not identified and from which neither their identities nor any other characteristic that could uniquely identify an individual is ascertainable.”

I, _____, _____, do hereby request from

_____ name title, if any
the responsible authority of Independent School District No. _____, that the following summary data be prepared:

[set forth a clear and concise indication of the data requested to be prepared]

I understand that this data will only be prepared if I agree to pay all costs of preparation in advance. I have been informed that the estimated cost of preparation is _____ which may be increased if unforeseen problems arise.

Dated _____

Applicant _____

FORM 5

SAMPLE NOTICE TO ACCOMPANY ALL REQUESTS BY THE DISTRICT
FOR PRIVATE OR CONFIDENTIAL DATA

NOTICE

You have been asked to supply private or confidential information concerning yourself to Independent School District No. _____. Pursuant to Minn. Stat. § 13.04, the School District is required to supply you with the following information:

1. The school district intends to use the requested personal information for the following purposes:
[set forth a clear and concise statement of the purposes and the intended uses of the requested data.]
2. You (are legally required) (may refuse) to supply the requested personal information.
3. The following are known consequences arising from your (supplying) (refusing to supply) the requested personal data.
[NOTE :Use whichever of the parentheses contains the appropriate notice for the information requested.]
4. The following persons or entities are authorized by state or federal law to receive the data:

Responsible Authority _____

Receipt of notice acknowledged.

Supplier of Data _____ Date _____

FORM 6a

SAMPLE REQUEST BY INDIVIDUAL TO DETERMINE
WHETHER S/HE IS THE SUBJECT OF STORED DATA

REQUEST

Pursuant to Minn. Stat. § 13.04, Subd. 3, I hereby request that the responsible authority of Independent School District No. _____ inform me whether I am the subject of stored data and if so, whether it is classified as public, private or confidential.

Date

Requesting Party

FORM 6b

SAMPLE REQUEST TO BE INFORMED OF OR SHOWN THE DATA

REQUEST TO BE INFORMED OF OR SHOWN DATA

Having been informed by the responsible authority for Independent School District No. _____ that I am the subject of stored public or private data, I hereby request that I be informed of the content and meaning of that data recorded about me or shown such data without charge to me. I recognize that the District and its responsible authority may take up to ten days of the date of the request, excluding Saturdays, Sundays and legal holidays, if immediate compliance is not possible, in responding to my request. I acknowledge that after I have been so informed about or shown such data that, except for student education records, the same need not be disclosed to me by the responsible authority for a period of six months from the date below unless a dispute or action between myself and the district regarding the accuracy, completeness or appropriateness is pending.

Dated: _____

Date received by Responsible
Authority _____

Requesting Party

Date disclosed to Requesting
Party _____

FORM 7

SAMPLE NOTICE TO RESPONSIBLE AUTHORITY

NOTICE TO RESPONSIBLE AUTHORITY

Having had the opportunity to review personal information about me, either by having been informed of the content and meaning of such information or having been shown the same, which is stored by Independent School District No. ____ in custody of its responsible authority, I hereby notify the responsible authority that I wish to exercise my right to challenge the accuracy or completeness of the following public or private data:

Description of Information Grounds of Challenges: Description of
Contested accuracy or completeness, nature of disagreement
and changes sought

Dated: _____
Requesting Party

Handling Data Challenges

Minnesota Statutes, Chapter 13 (the Data Practices Act) gives individual data subjects the right to **challenge** the accuracy and/or completeness of public and/or private government data about them and the right to **appeal** the responsible authority's determination about that challenge. The laws that detail this process are in Minnesota Statutes, section 13.04, subdivision 4 and Minnesota Rules 1205.1600.

This document describes the process that you, as a government entity's Responsible Authority (RA), must follow when a data subject submits a challenge to the accuracy and/or completeness of government data that your entity maintains about him/her. **Part I** explains how to respond to a data subject's *challenge*. **Part II** explains the process if a data subject *appeals* your determination.

Definitions

Access. Inspect (look at) or get copies of data.

Determination. The decision the RA makes about the accuracy and/or completeness of the challenged data.

Government data or data. Factual information that a government entity maintains in some physical form (e.g., paper, electronic, email, DVD.) This includes all data collected, created, received, maintained or disseminated by the government entity.

Inaccurate data. Data that are not reasonably correct and free from error. Examples: a misspelled name, someone is not quoted correctly, or facts such as a time or date are wrong.

Incomplete data. Data that do not reasonably reflect the data subject's history of transactions with the entity. Examples: words left out of a report, an existing document is missing from a file, or the entity changed an initial decision about the data subject and did not record the change.

Responsible authority (RA). The individual employee in the government entity who is ultimately responsible for the data kept by the entity. As the RA, you are the individual in a government entity who is ultimately responsible for the data kept by the government entity. You are the person to whom a data subject requests access to data and to whom a data subject makes a challenge to the accuracy and/or completeness of data about them. For purposes of a data challenge, you must make the decision about the accuracy and/or completeness of the challenged data. This means your name must be on the determination.

Statement of disagreement. The data challenge the data subject makes to the RA.

Part I: Responding to a Data Subject's Challenge to the Accuracy and/or Completeness of Government Data

Data subjects can challenge only factual data about themselves. Parents can challenge data about their child if the child is a minor (under age 18). If a court has appointed a legal guardian, s/he can challenge data on that person's behalf. The law does not allow a challenge to data about someone else's thoughts, impressions, perceptions or opinions because those are not data about the data subject. The law also does not allow a challenge of how the government uses data, such as the process or procedures an entity uses to provide or deny a benefit.

1. When you receive a data challenge

The data subject must make a written data challenge to you, the RA. You must decide if the challenge is valid. For example, did the data subject challenge only factual data only about him/herself? (See the Appendix for a checklist to determine if the challenge is valid, and some examples.)

Your entity must include a copy of the data subject's statement of disagreement every time you disclose a copy of the data in dispute from the time you receive the data challenge until the time that you make your determination.

2. Making a determination

You have 30 days from the day you receive a challenge to review it and determine if the data are inaccurate and/or incomplete. You, not a designee or an attorney representing you or the government entity, must make that determination. This does not mean that a designee or others in the entity cannot assist in evaluating the data challenge; it just means that your name must be on the determination. You may agree with all, part, or none of the data challenge. (See the Appendix for more information.)

3. Deadlines

You need to inform the data subject in writing of your determination. There is a deadline for a data subject to appeal your determination to the Commissioner of Administration, which depends upon what you tell her/him about the appeal process in your determination. (See Minnesota Rules, 1205.1600, subpart 2.)

If you inform the data subject in your written determination that s/he has the right to appeal your determination, the deadline to submit an appeal to the Commissioner of Administration is 60 days from the date of your determination.

If you do not inform the data subject of the right to appeal, s/he has 180 days from the date of your determination to submit an appeal to the Commissioner of Administration.

Now What?

If you agree with the challenge, in whole or in part, you must make the requested changes and try to notify anyone you sent the data to in the past, including anyone the data subject names. Once you have done so, the data challenge is complete, and you no longer need to include the statement of disagreement when you disclose the corrected data.

If the data subject decides to appeal any part of your determination (see **Part II**) once you receive notice of the appeal, you must continue to include his/her statement of disagreement every time you disclose the disputed data throughout the appeal process.

Part II: Responding to an Appeal of Your Determination

If the data subject disagrees, in whole or in part, with your determination, s/he can appeal the part(s) with which s/he disagrees to the Commissioner of Administration (Commissioner). If the data are not about the data subject, it is not a valid data challenge, and there is no right to appeal to the Commissioner of Administration.

1. Notice of appeal

A data subject can appeal your determination of the accuracy and/or completeness of data about her/him to the Commissioner of Administration only in writing. The Commissioner will send a written notice to you if she accepts the appeal.

2. Informal Dispute Resolution

If the Commissioner accepts an appeal, the Information Policy Analysis Division (IPAD) will offer to resolve the dispute in an informal way using conferences and/or conciliation. IPAD may also suggest that you and the data subject take the matter to mediation. These informal methods will be used only if both you and the data subject agree to use them.

- If these informal methods are successful, the Commissioner will issue a Final Order stating that both sides have agreed to settle the case upon completion of the agreement you reach with the data subject. The Commissioner will close the record and the appeal process will end. Your entity is no longer required to include the data subject's statement of disagreement because the data are no longer in dispute.
- If both parties do not agree to use informal methods, or if the dispute is not resolved using an informal method, the Commissioner will order a contested case hearing before an administrative law judge (ALJ) in the State Office of Administrative Hearings. Your government entity is required to include the statement of disagreement every time it discloses a copy of the data in dispute throughout the contested case process.

3. If no informal resolution, move forward with a contested case hearing

If the Commissioner orders a contested case hearing before an ALJ, your entity must pay the cost of the hearing. Data subjects must pay their own costs to attend the hearing and for a lawyer, if they choose to have one represent them. Once the Commissioner has turned the contested case over to the ALJ, her involvement in the case ceases until the ALJ submits his/her recommendations to the Commissioner.

The ALJ hears evidence only about the challenged data. You will need to address other disputes with the data subject in some other way. The ALJ hears the case and makes a recommendation to the

Commissioner about the challenged data. A copy of the ALJ's recommendations will also be sent to you and the data subject.

When the Commissioner receives the ALJ's recommendations, she will provide you and the data subject with an opportunity to provide written exceptions and/or arguments explaining why she should not follow the ALJ's recommendation. The Commissioner sets a deadline from the date of her letter for the parties to submit written exceptions. Once this deadline passes, the Commissioner will close the record.

After the Commissioner closes the record, she reviews the ALJ's recommendations, along with any exceptions submitted, and has 90 days to issue an order deciding whether the data are accurate and/or complete. If the Commissioner does not issue an order in 90 days, then the recommendation of the ALJ becomes the final determination. Upon receipt of the Commissioner's order, you and the data subject each have the right to appeal the order to the Minnesota Court of Appeals.

If neither party appeals the Commissioner's order, the process ends. You must correct the data, if ordered to do so, and notify past recipients of the incorrect/incomplete data. Subsequently, your entity is no longer required to include a copy of the statement of disagreement with the data.

Appendix

CHECKLIST: What to Look for in a Challenge to the Accuracy and/or Completeness of Government Data

The following is a checklist to help you determine if a data challenge is valid. These are **not statutory requirements**, but rather things for you to consider as you review the data challenge. A data challenge must be in writing. It is your decision whether to accept written challenges by U.S. mail, email and/or fax.

- ☐ **Are the data about the data subject, not someone else?**
Data subjects cannot challenge data about another person or that person's thoughts, impressions, perceptions, or opinions. The law also does not allow a data subject to challenge the results of how your entity uses the data, such as the process or procedures you use to give or deny a benefit. If the data are not about the data subject, it is not a valid data challenge, and there is no right to appeal to the Commissioner of Administration.
- ☐ **Does the data challenge include?**
 - Date
 - Data subject's name
 - A way to contact the data subject, such as street address, email address, fax/phone number
- ☐ **Does the challenge state that the data subject is challenging the accuracy and/or completeness of certain data about him/herself under Minnesota Statutes, section 13.04, subdivision 4?**
- ☐ **Does the data subject specifically identify the data that s/he is challenging?**
- ☐ **Does the data subject specifically state why or how s/he thinks the data are inaccurate and/or incomplete?**
- ☐ **Does the data subject tell you how s/he thinks the data should be changed to make them accurate/complete?**
For example, s/he wants you to add a word (such as add "senior" to job title for 2003-2005), change the data (such as correcting the birth date on a driver's license), or to remove data from a file or delete some of the data.

Evaluating a Data Challenge – Some Examples

1. **Valid** data challenge example: A parent's letter to the RA about a student's transcript

January 1, 2009

Dear Responsible Authority:

According to the Minnesota Data Practices Act, I am challenging the accuracy and completeness of my son James Doe's school record. After looking at his school record, his transcript shows he has earned 12 credits after 3 terms. The record does not include a drivers' education course he took as an elective. His record should be changed to include this elective course and his credits should be listed as 13 credits, not 12 credits.

Sincerely,

Jane Doe

123 Main Street

Anywhere, MN 12345

(651) 123-4567

In this case, the parent sent a letter to the RA and provided contact information. She stated she was challenging the accuracy and/or completeness of the data pursuant to the Minnesota Data Practices Act. She identified the data that are inaccurate and/or incomplete and specified what needs to be done to make the data accurate and/or complete. This is a valid data challenge.

2. **Invalid** data challenge example: A Police officer's written arrest report of John Doe

The data in the arrest report:

Upon a second interview with the victim, my partner asked her if she was in fear for her safety. The victim again started to cry and stated she was afraid and that she would sign or do anything to keep (John Doe) out of her home.

John Doe's challenge:

The victim only spoke with the officers once. She did not tell officers she was afraid.

In this case, John Doe is attempting to challenge data that are about the victim, not about John Doe. This is not a valid data challenge that an RA would be required to accept.

3. **Invalid** data challenge example: A patient's record at a county Detox Center

The data in the record:

On December 28, 2008, Anytown police reported patient had contacted a known drug dealer.

The patient's (data subject) challenge:

This entry as written is not accurate and complete as required.

In this case, the data subject did not identify what specific data about her/him in the entry are inaccurate and/or incomplete, how they are inaccurate and/or incomplete, or what changes s/he wants the RA to make to the data. This is not a valid data challenge that an RA would be required to accept.

FORM 8

SAMPLE DETERMINATION OF RESPONSIBLE AUTHORITY

DETERMINATION OF RESPONSIBLE AUTHORITY

On behalf of Independent School District No. _____ and as its responsible authority in charge of the information which you have indicated, in writing, is inaccurate or incomplete, I must advise you that after having reviewed the stored public or private data relating to you and the information which you provided to the District in your notice, it is my determination as responsible authority as follows:

[Set out with specificity agreement, disagreement or compromise with respect to the challenge.]

You are further notified of your right to appeal this decision in accordance with the attached rules.

Dated: _____
Responsible Authority

[Attach rules set out in Form 21]

FORM 9

SAMPLE NOTICE TO PAST RECIPIENTS

NOTICE TO PAST RECIPIENTS

Dear _____:

You have previously received from Independent School District No. _____ personal information relating to _____. As a result of conferring with _____ with respect to such personal information, it has been discovered that the following information about him/her which was supplied to you was inaccurate or incomplete in the following respects:

[Set forth the changes in the information as noted in the District's file.]

Date

Responsible Authority

FORM 10

SAMPLE NONDISCLOSURE AGREEMENT

FOR PREPARERS OF SUMMARY DATA

1. I understand that the Responsible Authority for the School District may delegate the power to a person outside the District to prepare summary data.
2. I (have) (am the representative of an individual who has) requested the preparation of summary data on the following: (state nature of data requested)
3. I intend to use this summary data for the following purposes: (state purposes)
4. In preparing this summary data, it will be necessary to review the following private or confidential data on individuals: (list data to be used in preparation of summary data)
5. I agree not to disclose the contents of any private or confidential data on individuals which I may have reason to review in the preparation of this summary data. I understand that I may be subject to both civil and criminal penalties for unauthorized disclosure of this data.

Date

Applicant

FORM 11

REQUEST FOR INFORMATION

Family Educational Rights and Privacy Act/Minnesota Government Data Practices Act

DATE/TIME OF REQUEST

TO: _____
(Superintendent of school district or chief administrative officer of school)FROM: _____
(Requester's name/agency)

STUDENT: _____

BASIS FOR REQUEST

_____ Juvenile delinquency investigation/prosecution
 _____ Child protection assessment/investigation
 _____ Investigation/filing of CHIPS or delinquency petition

REASON FOR REQUEST (requester must describe why information regarding existence of the data marked below is necessary to effectively serve the student) _____

RESPONSE TO REQUEST

The school must indicate whether it has data on the student that document any activity or behavior marked by the requester.

INFORMATION REQUESTED (mark all that apply)

Indicate whether you have data that document the student's:

RESPONSE

(yes or no)

_____ use of a controlled substance, alcohol, or tobacco
 _____ assaultive or threatening conduct as defined in Minn.
 Stat. § 13.32, Subd. 8
 _____ possession or use of weapons or look-alike weapons
 _____ theft
 _____ vandalism and damage to property

CERTIFICATION: The undersigned certifies that the undersigned is a member of the juvenile justice system. The requested data are needed by the juvenile justice system so it may effectively serve, prior to adjudication, the student whose records are released. The undersigned will not disclose the information received to any other party, except as provided under state law, without prior written consent as required by Code of Federal Regulations, Title 34, § 99.38(b). The undersigned further certifies that the undersigned understands that by signing this request, the undersigned is subject to the penalties in Minn. Stat. § 13.09.

 Signature/Title



Instructions for Minnesota Standard Consent Form to Release Health Information

Important: Please read all instructions and information before completing and signing the form.

An incomplete form may not be accepted. Please follow the directions carefully. If you have any questions about the release of your health information or this form, please contact the organization you will list in section 3.

This standard form was developed by the Minnesota Department of Health as required by the Minnesota Health Records Act of 2007. If completed properly, this form must be accepted by the health care organization(s), specific health care facility(ies), or specific professional(s) identified in section 3.

A fee may be charged for the release of the health information.

The following are instructions for each section. Please type or print as clearly and completely as possible.

- 1) Include your full and complete name. If you have a suffix after your last name (Sr., Jr., III), please provide it in the "last name" blank with your last name. If you used a previous name(s), please include that information. If you know your medical record or patient identification number, please include that information. All these items are used to identify your health information and to make certain that only your information is sent.
- 2) If there are questions about how this form was filled out, this section gives the organization that will provide the health information permission to speak to the person listed in this section. **Completing this section is optional.**
- 3) In this section, state who is sending your health information. **Please be as specific as possible.** If you want to limit what is sent, you can name a specific facility, for example Main Street Clinic. Or name a specific professional, for example chiropractor John Jones. Please use the specific lines. Providing location information may help make your request more clear. Please print "All my health care providers" in this section if you want health information from all of your health care providers to be released.
- 4) Indicate where you would like the requested health information sent. It is best to provide a complete mailing address as not everyone will fax health information. A place has been provided to indicate a deadline for providing the health information. **Providing a date is optional.**
- 5) Indicate what health information you want sent. If you want to limit the health information that is sent to a particular date(s) or year(s), indicate that on the line provided.

For your protection, it is recommended that you initial instead of check the requested categories of health information. This helps prevent others from changing your form.
EXAMPLE: *h* All health information

If you select **all health information**, this will include any information about you related to mental health evaluation and treatment, concerns about drug and/or alcohol use, HIV/AIDS testing and treatment, sexually transmitted diseases and genetic information.

Important: There are certain types of health information that require special consent by law.

Chemical dependency program information comes from a program or provider that specifically assesses and treats alcohol or drug addictions and receives federal funding. This type of health information is different from notes about a conversation with your physician or therapist about alcohol or drug use. To have this type of health information sent, mark or initial on the line at the bottom of page 1.

Psychotherapy notes are kept by your psychiatrist, psychologist or other mental health professional in a separate filing system in their office and not with your other health information. **For the release of psychotherapy notes, you must complete a separate form noting only that category. You must also name the professional who will release the psychotherapy notes in section 3.**

- 6) Health information includes both written and oral information. If you do not want to give permission for persons in section 3 to talk with persons in section 4 about your health information, you need to indicate that in this section.
- 7) Please indicate the reason for releasing the health information. If you indicate marketing, please contact the organization in section 4 to determine if payment or compensation is involved. If payment or compensation to the organization is involved, indicate the amount.
- 8) This consent will expire one year from the date of your signature, unless you indicate an earlier date or event. Examples of an event are: "60 days after I leave the hospital," or "once the health information is sent."
- 9) Please sign and date this form. If you are a legally authorized representative of the patient, please sign, date and indicate your relationship to the patient. You may be asked to provide documents showing that you are the patient or the patient's legally authorized representative.



This form was approved by the Commissioner of the Minnesota Department of Health on January 30, 2008.



JAN2008

Minnesota Standard Consent Form to Release Health Information

1 Patient information

First name _____ Middle name _____ Last name _____
 Patient date of birth ____/____/____ Previous name(s) _____
MM DD YYYY
 Home address _____
 City _____ State _____ Zip code _____
 Daytime phone _____ E-mail address (optional) _____
 Medical Record/patient ID number (optional) _____

2 Contact for information about how this form was filled out (optional):

I give permission for the organization(s) listed in section 3 permission to talk to
 First name _____ Last name _____ about how this form was completed,
 this person can be reached at: Daytime phone _____ E-mail address (optional) _____

3 I am requesting health information be released from at least one of the following:

Organization(s) name _____
 Specific health care facility or location(s) _____
 Specific health care professional's name(s) _____

4 I am requesting that health information be sent to:

Organization(s) name _____
 And/or person: First name _____ Last name _____
 Mailing address _____
 City _____ State _____ Zip code _____
 Phone (optional) _____ Fax (optional) _____
 Information needed by (date) ____/____/____ (optional)
MM DD YYYY

5 Information to be released

IMPORTANT: indicate only the information that you are authorizing to be released.

- ☐ Specific dates/years of treatment _____
☐ All health information (see description in instructions for what is included)

OR to only release specific portions of your health information, indicate the categories to be released:

☐ History/Physical	☐ Mental health	☐ HIV/AIDS testing
☐ Laboratory report	☐ Discharge summary	☐ Radiology report
☐ Emergency room report	☐ Progress notes	☐ Radiology image(s)
☐ Surgical report	☐ Care plan	☐ Photographs, video, digital or other images
☐ Medications	☐ Immunizations	☐ Billing records
☐ Other information or instructions _____		

The following information requires special consent by law. Even if you indicate all health information, you must specifically request the following information in order for it to be released:

- ☐ Chemical dependency program (see definition in instructions)
☐ Psychotherapy notes (this consent cannot be combined with any other; see instructions)



This form was approved by the Commissioner of the Minnesota Department of Health on January 30, 2008.

JAN7008

Minnesota Standard Consent Form to Release Health Information

Patient's name _____

6 Health information includes written and oral information

By indicating any of the categories in section 5, you are giving permission for written information to be released and for a person in section 3 to talk to a person in section 4 about your health information.

If you do not want to give your permission for a person in section 3 to talk to a person in section 4 about your health information, indicate that here (check mark or initials) _____

7 Reason(s) for releasing information

- ☐ Patient's request
☐ Review patient's current care
☐ Treatment/continued care
☐ Payment
☐ Insurance application
☐ Legal
☐ Appeal denial of Social Security Disability income or benefits
☐ Marketing purposes (payment or compensation involved? ☐ NO ☐ YES, amount _____)
☐ Other (please explain) _____

8 I understand that by signing this form, I am requesting that the health information specified in Section 5 be sent to the third party named in section 4 above.

I may stop this consent at any time by writing to the organization(s), facility(ies) and/or professional(s) named in section 3. If the organization, facility or professional named in section 3 has already released health information based on my consent, my request to stop will not work for that health information.

I understand that when the health information specified in section 5 is sent to the third party named in section 4 above, the information could be re-disclosed by the third party that receives it and may no longer be protected by federal or state privacy laws.

I understand that if the organization named in section 4 is a health care provider they will not condition treatment, payment, enrollment or eligibility for benefits on whether I sign the consent form.

If I choose not to sign this form and the organization named in section 4 is an insurance company, my failure to sign will not impact my treatment; I may not be able to get new or different insurance; and/or I may not be able to get insurance payment for my care.

This consent will end one year from the date the form is signed unless I indicate an earlier date or event here:

Date ____/____/____ Or specific event _____
MM DD YYYY

9 Patient's signature _____ Date ____/____/____
MM DD YYYY
 Or legally authorized representative's signature _____ Date ____/____/____
MM DD YYYY
 Representative's relationship to patient (parent, guardian, etc.) _____



This form was approved by the Commissioner of the Minnesota Department of Health on January 30, 2008.

JAN2008

FORMS13-20 [Reserved for future use]

FORM 21

PROPOSED RULES FOR CONDUCT OF HEARINGS

RULE NO. 1 INTRODUCTION:

No person before this Agency shall have his rights, privileges, or duties determined without regard to fundamental fairness. To that end, these rules are intended to assure that all parties to contested cases before this Agency are provided with a speedy and just hearing. Such hearing shall include:

- (a) Adequate notice of involvement of all interested persons;
- (b) The opportunity to consult with the Agency informally to attempt to resolve conflicts on issues;
- (c) Notice at each stage of the proceeding sufficient to provide the opportunity to prepare therefor;
- (d) An objective decision supported by substantial evidence from the record.

RULE NO. 2 DEFINITIONS:

- (a) Agency. Agency means the school district or the board thereof.
- (b) Contested Case. Contested case means a proceeding before the Agency in which the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined after an Agency hearing.
- (c) Party. Party means a person whose legal rights, duties or privileges may be determined in a contested case. The term "party" shall include the Agency.
- (d) Person. Person means any individual, partnership, corporation, joint stock company, unincorporated association or society, a municipal corporation or any government or governmental subdivision, unit or agency, other than a court of law.
- (e) Hearing Officer. Hearing officer means the person or persons appointed by the agency to hear and report on the contested case.
- (f) Service; Serve. Service or serve means service in person or by mail addressed to the party at his last known address.

RULE NO. 3 INITIATING A CONTESTED CASE:

Any person authorized by law to have his rights, privileges or duties determined after an Agency hearing may initiate a contested case by making application. An application shall contain:

- (1) The name and address of the applicant;
- (2) A statement of the nature of the determination requested and the reasons therefore;
- (3) The signature of the applicant or his attorney. [See Exhibit A]

The statement required by (2) above shall be made as fully as possible, but if subsequent amendment is necessary, the amendment shall be supplied as soon as practicable and an opportunity shall be afforded to all parties to present evidence and argument with respect to the statement as amended.

RULE NO. 4 COMMENCEMENT OF THE CONTESTED CASE:

Within five days following receipt of an application initiating a contested case, the Agency shall appoint a hearing officer. The Agency may appoint any person, including an employee of the Agency, or a member or members of the board thereof, as the hearing officer provided that such person does not have a direct interest in the outcome of the hearing. The appointment of the hearing officer shall, to the extent permitted by law, authorize the hearing officer to make findings, conclusions and recommendations regarding the case. [See Exhibit B.]

RULE NO. 5 ANSWER:

Within seven days after service (excluding the day of service) of the application initiating a contested case, the Agency may interpose an answer to the initiating application. A copy of such answer shall be served on all parties to the contested case.

RULE NO. 6 RIGHT TO COUNSEL:

Any party may be represented by legal counsel throughout the proceedings in a contested case.

RULE NO. 7 INFORMAL DISPOSITION:

Informal disposition may be made of any contested case or any issue therein by stipulation, agreed settlement, or consent order at any point in the proceedings, subject to review by the school board in its discretion.

RULE NO. 8 DEFAULT:

The hearing officer may dispose of a contested case adverse to a party which defaults, subject to review by the school board in its discretion.

RULE NO. 9 NOTICE OF HEARING:

Within five days after the time for the Agency to interpose an answer expires, the hearing officer shall serve a notice of the hearing on all parties of the case. Such notice shall be served not less than ten days prior to the hearing. Such notice shall contain:

- (a) The time and place of the hearing;
- (b) A copy of these rules;
- (c) The issues to be determined; and
- (d) The name of the hearing officer who will preside. [See Exhibit C.]

RULE NO. 10 THE HEARING:

(a) Right to Hearing. All parties shall have the right to a hearing before the Agency, at which hearing the parties may cross-examine witnesses, and present evidence, rebuttal testimony and argument with respect to the issue.

(b) Witnesses. Any party may be a witness or may present witnesses on his behalf at the hearing. All testimony at the hearing shall be under oath. Every party shall have the right of cross-examination of witnesses who testify.

(c) Rules of Evidence.

(1) The hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. The hearing officer shall give effect to the rules and privileges recognized by law. The hearing officer may exclude incompetent, irrelevant, immaterial and repetitious evidence.

(2) All evidence to be considered in the case, including all records and documents (except tax returns and tax reports) in the possession of the agency, shall be offered and made a part of the record in the case. No other factual information or evidence (except tax returns and tax reports) shall be considered in the determination of the case. Documentary evidence in the form of copies or excerpts may be received or incorporated by reference in the discretion of the hearing officer or upon agreement of the parties.

(3) The hearing officer may take notice of judicially cognizable facts and, in addition, may take notice of general, technical, or scientific facts within his specialized knowledge. The parties shall be notified in writing either before or during the hearing or by oral statements in the record of the material so noticed. [See Exhibit D] The parties shall be afforded an opportunity to contest the facts so noticed.

[See Exhibit E] The hearing officer may utilize his experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to him.

(d) The Record

(1) The Agency shall prepare an official record which shall include all testimony. A verbatim record of the hearing shall be made and may be made by recording equipment. The verbatim record will not be transcribed unless requested by a party. If a transcript is requested, the Agency may require the requesting party to pay the reasonable costs of preparing the transcript. In no event is the Agency required to relinquish possession of the original of any shorthand notes or recorded transcript.

(e) Hearing Procedure

(1) The party initiating the contested case must prove the facts at issue by a preponderance of the evidence.

(2) After opening the hearing, the hearing officer shall indicate the following procedural rules:

- (aa) All parties may present evidence and argument with respect to issues;
- (bb) All witnesses must be sworn and identify the party that they represent;
- (cc) All parties who wish to introduce written matter may have it marked as an exhibit and offer it into evidence;
- (dd) The party who initiated the contested case shall make an opening statement. He shall be followed by other parties in a sequence determined by the hearing officer;
- (ee) When all parties and witnesses have been heard, opportunity shall be offered to present rebuttal evidence and final argument in a sequence determined by the hearing officer.

RULE NO. 11 FINAL DECISION:

Within five days after the hearing, the hearing officer shall render his findings, conclusions and recommendations which shall be in writing or stated in the record, and shall be accompanied by a statement of the reasons therefore. The statement of reasons shall consist of concise statement of the conclusions upon each issue of fact necessary to the decision. The parties to the proceedings shall be notified of the report in person or by mail. A copy of the report shall be served upon request to each party. [See Exhibit F] The school board may accept, reject or modify the report of the hearing officer and issue its final decision, or order a rehearing. [See Exhibit G]

RULE NO. 12 EXCEPTIONS:

A party adversely affected by the hearing examiner's report shall have 10 days to file exceptions and present argument to the school board with respect to the report.

FORM 21 - EXHIBIT A

STATE OF MINNESOTA
INDEPENDENT SCHOOL DISTRICT NO. _____

APPLICATION FOR HEARING TO DETERMINE WHETHER
PERSONAL DATA ON FILE IS INACCURATE

I, _____, residing at _____ do hereby request that the Board of Independent School District No. _____ set a hearing to determine whether public or private data on file in the District about me and relating to _____ is inaccurate.

On _____, the District served notice that it denied my request for a change of the existing stored private or confidential data. I am seeking a hearing to determine whether there exists sufficient grounds upon which to revise the private or confidential data.

STATE OF MINNESOTA
COUNTY OF _____

_____, (name of applicant), being first duly sworn deposes and says that (s)he has read the foregoing application and that the same is true of his (her) own knowledge, information and belief.

Signature of Applicant

Subscribed and sworn to before me
this _____ day of _____, 20____.

Notary Public

FORM 21 - EXHIBIT B

CERTIFICATE OF BOARD'S AUTHORIZING RESOLUTION

I, _____, do hereby certify that I am the clerk of the Board of Independent School District No. _____ and that the following is a true, complete and correct copy of a resolution adopted at a meeting of the Board duly and properly called and held on the _____ day of _____, 20____; that a quorum was present at said meeting; that a majority of those present voted for the resolution, that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

“RESOLVED, That _____, be and he hereby is appointed hearing officer in the matter of _____, a contested case to be heard before this District. He is authorized and empowered to hear and finally make findings, conclusions and recommendations regarding the matters therein and to perform any and all acts incidental thereto, including the signing of any orders or other documents in the name of the District.”

IN WITNESS WHEREOF, I have hereunto subscribed my name this _____ day of _____, 20____.

Clerk

(Attest by one other officer)

NOTE: Resolution would take the form of the language in quotes above and must be set forth in the official minutes of the meeting.

FORM 21 - EXHIBIT C

STATE OF MINNESOTA
INDEPENDENT SCHOOL DISTRICT NO. _____

In the matter of the application
of _____ to contest
the accuracy of personal data about
him on file with Independent School
District No. _____

NOTICE OF HEARING

Notice is hereby given that a hearing in this matter will be held in Room _____ of the _____ Building on _____, _____, 20____, commencing at _____ a.m. All persons receiving this notice are urged to attend. Failure to attend may prejudice your rights in this and subsequent proceedings.

The issues to be determined at this hearing are:

(1) Whether material inserted in the applicant's permanent file by _____ is an accurate representation of _____'s activity on _____
(date)

(2) Whether such information should be amended in the records.

All persons shall be given an opportunity to be heard orally, to present witnesses and to submit written data, statements or arguments.

_____ will preside as hearing officer at the hearing.

A copy of the rules relative to such hearing is attached hereto.

STATE OF MINNESOTA
INDEPENDENT SCHOOL DISTRICT NO. _____

Hearing Officer _____

Dated: _____

FORM 21 - EXHIBIT D
STATE OF MINNESOTA
INDEPENDENT SCHOOL DISTRICT NO. _____

In the matter of the application
of _____ to contest
the accuracy of personal data about _____ NOTICE OF NOTICE
him on file with Independent School OF FACTS
District No. _____

Notice is hereby given that _____, the hearing officer has taken notice of
the following facts on the basis of the authority outlined herein:

That the applicant herein was suspended from school on the date referred to in the records. Judicially
noted on the basis of the Commissioner of education's decision in the appeal number _____.

All parties who wish to contest the above noted facts must file a Petition for Permission to Contest
Noticed Facts with the hearing officer prior to the hearing.

STATE OF MINNESOTA
INDEPENDENT SCHOOL DISTRICT NO. _____

Hearing Officer _____

Dated: _____

FORM 21 - EXHIBIT E

STATE OF MINNESOTA
INDEPENDENT SCHOOL DISTRICT NO. _____

In the matter of the application
of _____ to
contest the accuracy of personal PETITION TO CONTEST
data about him on file with Independent NOTICED FACTS
School District No. _____

On _____, 20____, applicant _____
received notice that the hearing officer had taken notice of certain facts in this case to which applicant is a
party.

Applicant takes issue with noticed facts and petitions to contest said facts through the presentation of
evidence and argument.

Applicant _____

Dated: _____

FORM 21 - EXHIBIT F

STATE OF MINNESOTA
COUNTY OF _____

[Caption of matter] REPORT OF HEARING
EXAMINER

Based upon all the files, evidence, records, arguments, briefs and proceedings in the above matter, I make the following findings, conclusions and recommendations:

FINDINGS

[Set out in numbered paragraphs, with particularity]

CONCLUSIONS

[Set out in numbered paragraphs with particularity, the conclusions upon each contested issue of fact necessary to its decision, including reference to statutory authority, fulfillment of all substantial and procedural requirements including notice.]

RECOMMENDATIONS

I recommend that applicant's demand for amendment of his records be (granted/denied).

Date _____ Hearing Officer _____

Notice to parties adversely affected: You have 10 days to file exceptions and present argument to the school board with respect to this report.

FORM 21 - EXHIBIT G

STATE OF MINNESOTA
INDEPENDENT SCHOOL DISTRICT NO. _____

In the matter of the application
of _____ to
contest the accuracy of personal _____ SCHOOL BOARD DECISION
data about him on file with Independent
School District No. _____

Based on the Findings and Conclusions of the Hearing Officer in the above entitled matter which are attached hereto as Exhibit 1 and made a part hereof, and upon the transcript of the hearing in the above entitled matter held on _____, 20____.

IT IS HEREBY ORDERED.

1. That applicant's demand for amendment of the records of _____ on the basis of inaccuracy is hereby (granted/denied).
2. That Independent School District No. _____ may retain the file of _____ (as it presently exists/subject to the following alterations) and hold the same as the official record of _____.

Dated at _____, Minnesota, this _____ day of _____, 20____.

By Authority of the School Board of
Independent School District No. _____
by:

Clerk _____

FORM 22

Minnesota Government Data Practices Act:
Compliance Checklist

The Minnesota Government Data Practices Act (MGDPA), its accompanying rules, and related statutes impose specific obligations upon government entities to comply with the procedural requirements of the statute. This document summarizes these obligations.

The MGDPA is Chapter 13 of Minnesota Statutes. The Rules implementing the MGDPA are found in Minnesota Rules, Chapter 1205.

Minnesota Government Data Practices Act: Compliance Checklist			
<i>Authority</i>	<i>Topic</i>	<i>Specific Obligation</i>	<i>Purpose</i>
1 M.S. § 13.03, Subd. 2; MN Rules 1205.0300	Customer service	Establish procedures to ensure that officials respond promptly to requests for government data. Required in written form by January 1, 2001.	Facilitate public access; Hold entity accountable.
2 M.S. § 13.025	Access procedures	Prepare a public document setting forth the rights of data subjects to access public and private data about themselves.	Inform citizens of their rights as subjects of government data, and explain how to exercise those rights.
3 M.S. § 13.05, Subd. 5(1); MN Rules 1205.1500	Data quality	Establish procedures to ensure that data on individuals are accurate, complete, and current.	Protect against the use of erroneous data in making decisions that affect individuals.
4 M.S. § 13.05, Subd. 5(2)	Data security	Establish procedures to ensure security safeguards for data on individuals. Also include procedures for ensuring that data that are not public are only accessible to persons whose work assignment reasonably requires access to the data, and is only being accessed for the described purposes. Develop a policy incorporating the procedures.	Protect individual privacy; Prevent alteration of data; Protect access.

5 M.S. § 13.025; MN Rules 1205.1500, subpart 3	Inventory of Records	Create and annually update an inventory of records containing data on individuals, including data collection forms.	Create central repository of data classifications; Give notice of the data maintained by entity.
6 M.S. § 13.05, Subd. 6	Contract provisions	When preparing contracts by which a private sector contractor obtains data on individuals from a government entity, insert provisions that require the contractor to comply with the MGDPA.	Extend protections into the private sector where the government is sharing data on individuals; Prevent government entities from concealing data in the private sector.
7 M.S. § 13.05, Subd. 7; MN Rules 1205.0700, subpart 3	Contract provisions	When preparing contracts by which a private sector contractor performs government functions, insert provisions that clearly oblige the contractor to comply with MGDPA as if it were a government entity.	Extend protections into the private sector where the government is sharing data on individuals; Prevent government entities from concealing data in the private sector.
8 M.S. § 13.05, Subd. 7; MN Rules 1205.0700, subpart 3	Summary data	Prepare summary data upon the written request of any person; establish procedures for gaining access to summary data.	Provide reasonable access to data for research purposes while protecting individual identities.
9 M.S. § 13.05, Subd. 9, 10	Dissemination of not public data to other government entities without authority	An entity may not share public data with another entity unless required or permitted by state statute or federal law.	Assure public policy basis for dissemination of not public data; Protect individual privacy.
10 M.S. § 138.163; M.S. § 15.17, Subd. 3	Disposition of records.	Dispose of and transfer records in accordance with statutory procedures.	Ensure proper disposition of records preserved for legal or historical purposes.
11 MN Rules 1205.1500, subpart 1	Plan for periodic review	Entity must formulate a plan for reviewing the administration of data practices.	Ensure periodic determination of which data are necessary to maintain.
12 MN Rules 1205.1500, subparts 4, 5	Modification of data handling procedures	Modify data collection maintenance procedures to eliminate unnecessary data.	Appropriate step following determination described above (11).
13 MN Rules 1205.0400, subpart 3, 1205.0600	Prevent unauthorized access	Publish procedures for ensuring no unauthorized access to private and confidential data.	Secure private and confidential data.

14 MN Rules 1205.0500, subpart 3	Parental access and notice to minors	Procedures for parents to access data about their minor children.	Ensure parental rights while protecting minors' interests concerning parental access.
15 MN Rules 1205.1300, subpart 4	Authorized uses of data	Enumerate the authorized uses of data by category.	Enable administrators to respond appropriately to requests for data and to questions about release of data.
16 MN Rules 1205.1600	Informed consent	Design forms for obtaining informed consent for new release or use of private data.	Ensure that contents of informed consent forms comply with legal requirements.
17 MN Rules 1205.1000	Responsible Authority	Each governmental entity must appoint a responsible authority by September 30, 1981.	Identify the entity's principal decision maker about data practices.
18 M.S. § 13.025; MN Rules 1205.1200, subpart 2	Responsible Authority	Prepare a public document identifying responsible authority name, title, and address. SEE ITEM 2, ABOVE	Identify and inform citizens of the entity's principal decision-maker about data practices.
19 M.S. § 13.05, Subd. 13	Data practices compliance official	Each governmental entity must appoint a compliance official by December 1, 2000.	Identify the person within the entity to whom questions or data practices problems may be directed.
20 MN Rules 1205.1200, subpart 2; M.S. § 13.03, Subd. 2	Designees	Post the names of data practices designees, if appointed.	Identify the other key data practices officials in each entity.
21 MN Rules 1205.1300, subpart 5	Training	Responsible authority must train designees and other staff.	Ensure compliance and avoid liability.

Information Policy Analysis Division, Department of Administration
201 Administration Building, 50 Sherburne Avenue
St. Paul, Minnesota 55155
Voice: 651.296.6733 or 1.800.657.3721 Fax: 651.205.4219
www.ipad.state.mn.us
info.ipad@state.mn.us

FORM 23

MODEL

INFORMED CONSENTS
FOR THE USE AND RELEASE OF GOVERNMENT DATAFor Entities that are Subject to
The Minnesota Government Data Practices ActI. Purpose of This Document

This document explains how and when a government entity must obtain an individual's informed consent in order to use or release private data about that individual. These requirements are set forth at Minnesota Statutes, section 13.05, subdivision 4(d) and Minnesota Rules, 1205.1400.

The purpose of this document is to assist government entities in preparing consent forms that comply with the requirements of laws that regulate access to government data. It is intended for use by persons with data practices responsibilities. The document includes three *model consent forms* that are designed as templates, and provides information to assist entities in adapting each template to their specific needs.

In this document, the terms, "entity" and "government entity" mean any entity that is subject to the Minnesota Government Data Practices Act (MGDPA). The terms "data" and "government data" mean data that are collected, created, stored or released by an entity that is subject to the MGDPA.

Data Practices Policy for Members of the Public

*[Brackets are located in the sections in this document where an entity must fill in the blank.
In some of these instances, IPAD has included a recommendation.]*

Right to Access Public Data

The Government Data Practices Act (Minnesota Statutes, Chapter 13) presumes that all government data are public unless a state or federal law says the data are not public. Government data is a term that means all recorded information a government entity has, including paper, email, DVDs, photographs, etc.

The Government Data Practices Act also provides that this government entity must keep all government data in a way that makes it easy for you, as a member of the public, to access public data. You have the right to look at (inspect), free of charge, all public data that we keep. You also have the right to get copies of public data. The Government Data Practices Act allows us to charge for copies. You have the right to look at data, free of charge, before deciding to request copies.

How to Make a Data Request

To look at data or request copies of data that this government entity keeps, make a [*written request – IPAD recommends requiring written data requests*]. Make your request for data to the appropriate individual listed in the Data Practices Contacts on page 4. You may make your request for data by [*fill in way(s) in which your entity will accept data requests, e.g., mail, fax, or email*], using the data request form on page 6.

If you choose not to use the data request form, your request should include:

- that you, as a member of the public, are making a request for data under the Government Data Practices Act, Minnesota Statutes, Chapter 13;
- whether you would like to look at the data, get copies of the data, or both; and
- a clear description of the data you would like to inspect or have copied.

This government entity cannot require you, as a member of the public, to identify yourself or explain the reason for your data request. However, depending on how you want us to process your request (if, for example, you want us to mail you copies of data), we may need some information about you. If you choose not to give us any identifying information, we will provide you with contact information so you may check on the status of your request. In addition, please keep in mind that if we do not understand your request and have no way to contact you, we will not be able to begin processing your request.

How We Respond to a Data Request

Upon receiving your request, we will work to process it.

- If we do not have the data, we will notify you [*in writing –IPAD recommends responding to data requests in writing*] as soon as reasonably possible.
- If we have the data, but the data are not public, we will notify you as soon as reasonably possible and state which specific law says the data are not public.
- If we have the data, and the data are public, we will respond to your request appropriately and promptly, within a reasonable amount of time by doing one of the following:
 - arrange a date, time, and place to inspect data, for free, if your request is to look at the data, or

- o provide you with copies of the data as soon as reasonably possible. You may choose to pick up your copies, or we will mail or fax them to you. If you want us to send you the copies, you will need to provide us with an address or fax number. We will provide electronic copies (such as email or CD-ROM) upon request if we keep the data in electronic format.

Information about copy charges is on page 5.

[We also will arrange for you to pre-pay for the copies.]

If you do not understand some of the data (technical terminology, abbreviations, or acronyms), please let us know. We will give you an explanation if you ask.

The Government Data Practices Act does not require us to create or collect new data in response to a data request if we do not already have the data, or to provide data in a specific form or arrangement if we do not keep the data in that form or arrangement. (For example, if the data you request are on paper only, we are not required to create electronic documents to respond to your request.) If we agree to create data in response to your request, we will work with you on the details of your request, including cost and response time.

In addition, the Government Data Practices Act does not require us to answer questions that are not requests for data.

Requests for Summary Data

Summary data are statistical records or reports that are prepared by removing all identifiers from private or confidential data on individuals. The preparation of summary data is not a means to gain access to private or confidential data. We will prepare summary data if you make your request in writing and *[pre-pay/pay]* for the cost of creating the data. Upon receiving your written request – you may use the data request form on page 6 – we will respond within ten business days with the data or details of when the data will be ready and how much we will charge.

Data Practices Contacts

Responsible Authority

Name

Address

Phone number, fax number, email address

Data Practices Compliance Official

Name

Address

Phone number, fax number, email address

Data Practices Designee(s)

Name

Address

Phone number, fax number, email address

Copy Costs – Members of the Public

This government entity charges members of the public for copies of government data. These charges are authorized under Minnesota Statutes, section 13.03, subdivision 3(c).

[You must pay for the copies before we will give them to you.]

[We do not charge for copies if the cost is less than \$10.]

For 100 or Fewer Paper Copies – 25 cents per page

100 or fewer pages of black and white, letter or legal size paper copies cost 25¢ for a one-sided copy, or 50¢ for a two-sided copy.

Most Other Types of Copies – Actual cost

The charge for most other types of copies, when a charge is not set by statute or rule, is the actual cost of searching for and retrieving the data, and making the copies or electronically transmitting the data (e.g. sending the data by email).

In determining the actual cost of making copies, we factor in employee time, the cost of the materials onto which we are copying the data (paper, CD, DVD, etc.), and mailing costs (if any). If your request is for copies of data that we cannot reproduce ourselves, such as photographs, we will charge you the actual cost we must pay an outside vendor for the copies.

The cost of employee time to search for data, retrieve data, and make copies is _____ *[fill in hourly rate - \$XX.XX]* per hour.

If, because of the subject matter of your request, we find it necessary for a higher-paid employee to search for and retrieve the data, we will calculate the search and retrieval portion of the copy charge at the higher salary/wage.

[Copy Charges Set by Statute or Rule]

[Include if applicable]

Data Request Form – Members of the Public

Date of request: _____

I am requesting access to data in the following way:

☐ Inspection

☐ Copies

☐ Both inspection and copies

Note: inspection is free but _____ [government entity needs to fill in if they charge for data – e.g., we charge for copies when the cost is over \$10.00].

These are the data I am requesting:

Describe the data you are requesting as specifically as possible. If you need more space, please use the back of this form.

Contact Information

Name: _____

Address: _____

Phone number: _____ Email address: _____

You do not have to provide any of the above contact information. However, if you want us to mail/email you copies of data, we will need some type of contact information. In addition, if we do not understand your request and need to get clarification from you, without contact information we will not be able to begin processing your request until you contact us.

We will respond to your request as soon as reasonably possible.

Data Practices Policy for Data Subjects

*[Brackets are located in the sections in this document where an entity must fill in the blank.
In some of these instances, IPAD has included a recommendation.]*

Data about You

The Government Data Practices Act (Minnesota Statutes, Chapter 13) says that data subjects have certain rights related to a government entity collecting, creating, and keeping government data about them. You are the subject of data when you can be identified from the data. Government data is a term that means all recorded information a government entity has, including paper, email, DVDs, photographs, etc.

Classification of Data about You

The Government Data Practices Act presumes that all government data are public unless a state or federal law says that the data are not public. Data about you are classified by state law as public, private, or confidential. See below for some examples.

1. **Public data:** We must give public data to anyone who asks; it does not matter who is asking for the data or why.

The following is an example of public data about you:

[fill in your own example or use this example: the names of Minnesota government employees.]

2. **Private data:** We cannot give private data to the general public, but you have access when the data are about you. We can share your private data with you, with someone who has your permission, with our government entity staff who need the data to do their work, and as permitted by law or court order.

The following is an example of private data about you:

[fill in your own example or use this example: Social Security numbers].

3. **Confidential data:** Confidential data have the most protection. Neither the public nor you can get access even when the confidential data are about you. We can share confidential data about you with our government entity staff who need the data to do their work and to others as permitted by law or court order. We cannot give you access to confidential data.

The following is an example of confidential data about you:

[fill in your own example or use this example: the identity of the subject of an active criminal investigation].

Your Rights under the Government Data Practices Act

This government entity must keep all government data in a way that makes it easy for you to access data about you. Also, we can collect and keep only those data about you that we need for administering and managing programs that are permitted by law. As a data subject, you have the following rights.

- **Access to Your Data**

You have the right to look at (inspect), free of charge, public and private data that we keep about you. You also have the right to get copies of public and private data about you. The Government Data Practices Act allows us to charge for copies. You have the right to look at data, free of charge, before deciding to request copies.

Also, if you ask, we will tell you whether we keep data about you and whether the data are public, private, or confidential.

As a parent, you have the right to look at and get copies of public and private data about your minor children (under the age of 18). As a legally appointed guardian, you have the right to look at and get copies of public and private data about an individual for whom you are appointed guardian.

Minors have the right to ask this government entity not to give data about them to their parent or guardian. If you are a minor, we will tell you that you have this right. We may ask you to put your request in writing and to include the reasons that we should deny your parents access to the data. We will make the final decision about your request based on your best interests.

Note: Minors do not have this right if the data in question are educational data maintained by an educational agency or institution.

- **When We Collect Data from You**

When we ask you to provide data about yourself that are not public, we must give you a notice. The notice is sometimes called a Tennesen warning. The notice controls what we do with the data that we collect from you. Usually, we can use and release the data only in the ways described in the notice.

We will ask for your written permission if we need to use or release private data about you in a different way, or if you ask us to release the data to another person. This permission is called informed consent. If you want us to release data to another person, you _____ [may/must] use the consent form we provide.

- **Protecting your Data**

The Government Data Practices Act requires us to protect your data. We have established appropriate safeguards to ensure that your data are safe.

[Applies only to state agencies: In the unfortunate event that we determine a security breach has occurred and an unauthorized person has gained access to your data, we will notify you as required by law.]

- **When your Data are Inaccurate and/or Incomplete**

You have the right to challenge the accuracy and/or completeness of public and private data about you. You also have the right to appeal our decision. If you are a minor, your parent or guardian has the right to challenge data about you.

How to Make a Request for Your Data

To look at data, or request copies of data that this government entity keeps about you, your minor children, or an individual for whom you have been appointed legal guardian, make a [*written request – IPAD recommends requiring written data requests*]. Make your request for data to the appropriate individual listed in the Data Practices Contacts on page 6. You may make your request by [*fill in how you will accept requests, e.g., mail, fax, or email*], using the data request form on page 8.

If you choose not use to use the data request form, your request should include:

- that you are making a request, under the Government Data Practices Act (Minnesota Statutes, Chapter 13), as a data subject, for data about you;
- whether you would like to inspect the data, have copies of the data, or both;
- a clear description of the data you would like to inspect or have copied; and
- identifying information that proves you are the data subject, or data subject's parent/guardian.

This government entity requires proof of your identity before we can respond to your request for data. If you are requesting data about your minor child, you must show proof that you are the minor's parent. If you are a guardian, you must show legal documentation of your guardianship. Please see the Standards for Verifying Identity located on page 9.

How We Respond to a Data Request

Once you make your request, we will work to process your request. If it is not clear what data you are requesting, we will ask you for clarification.

- If we do not have the data, we will notify you [*in writing – IPAD recommends responding to data requests in writing*] within 10 business days.
- If we have the data, but the data are confidential or private data that are not about you, we will notify you within 10 business days and state which specific law says you cannot access the data.
- If we have the data, and the data are public or private data about you, we will respond to your request within 10 business days, by doing one of the following:
 - arrange a date, time, and place to inspect data, for free, if your request is to look at the data, or
 - provide you with copies of the data within 10 business days. You may choose to pick up your copies, or we will mail or fax them to you. We will provide electronic copies (such as email or CD-ROM) upon request if we keep the data in electronic format.

Information about copy charges is on page 7.

[*We also will arrange for you to prepay for the copies.*]

After we have provided you with access to data about you, we do not have to show you the data again for 6 months unless there is a dispute or we collect or create new data about you.

If you do not understand some of the data (technical terminology, abbreviations, or acronyms), please let us know. We will give you an explanation if you ask.

The Government Data Practices Act does not require us to create or collect new data in response to a data request if we do not already have the data, or to provide data in a specific form or arrangement if we do not keep the data in that form or arrangement. (For example, if the data you request are on paper only, we are not required to create electronic documents to respond to your request.) If we agree to create data in response to your request, we will work with you on the details of your request, including cost and response time.

In addition, we are not required under the Government Data Practices Act to respond to questions that are not specific requests for data.

Data Practices Contacts

Responsible Authority

Name

Address

Phone number, fax number, email address

Data Practices Compliance Official

Name

Address

Phone number, fax number, email address

Data Practices Designee(s)

Name

Address

Phone number, fax number, email address

Copy Costs – Data Subjects

This government entity charges data subjects for copies of government data. These charges are authorized under Minnesota Statutes, section 13.04, subdivision 3.

[You must pay for the copies before we will give them to you.]

[We do not charge for copies if the cost is less than \$10.00.]

Actual Cost of Making the Copies

In determining the actual cost of making copies, we factor in employee time, the cost of the materials onto which we are copying the data (paper, CD, DVD, etc.), and mailing costs (if any). If your request is for copies of data that we cannot reproduce ourselves, such as photographs, we will charge you the actual cost we must pay an outside vendor for the copies.

The cost of employee time to make copies is _____ *[fill in hourly rate - \$XX.XX]* per hour.

[Copy Charges Set by Statute or Rule]

[Include if applicable]

Data Request Form – Data Subjects

Date of request: _____

To request data as a data subject, you must show _____ [a valid state ID, such as a driver's license, military ID, or passport] as proof of identity.

I am requesting access to data in the following way:

☐ Inspection

☐ Copies

☐ Both inspection and copies

Note: inspection is free but _____ [government entity needs to fill in if they charge for data – e.g., we charge for copies when the cost is over \$10.00].

These are the data I am requesting:

Describe the data you are requesting as specifically as possible. If you need more space, please use the back of this form.

Contact Information

Data subject name _____

Parent/Guardian name (if applicable) _____

Address _____

Phone number _____ Email address _____

Staff Verification

Identification provided _____

We will respond to your request within 10 business days.

Standards for Verifying Identity

The following constitute proof of identity.

- An **adult individual** must provide a valid photo ID, such as
 - a state driver's license
 - a military ID
 - a passport
 - a Minnesota ID
 - a Minnesota tribal ID
- A **minor individual** must provide a valid photo ID, such as
 - a state driver's license
 - a military ID
 - a passport
 - a Minnesota ID
 - a Minnesota Tribal ID
 - a Minnesota school ID
- The **parent or guardian of a minor** must provide a valid photo ID *and either*
 - a certified copy of the minor's birth certificate *or*
 - a certified copy of documents that establish the parent or guardian's relationship to the child, such as
 - ❖ a court order relating to divorce, separation, custody, foster care
 - ❖ a foster care contract
 - ❖ an affidavit of parentage
- The **legal guardian for an individual** must provide a valid photo ID *and* a certified copy of appropriate documentation of formal or informal appointment as guardian, such as
 - court order(s)
 - valid power of attorney

Note: Individuals who do not exercise their data practices rights in person must provide *either* notarized or certified copies of the documents that are required *or* an affidavit of ID.

Worksheet for Developing Data Practices Policies

Part 1: Identification of Staff with Data Practices Responsibilities (Policies for Members of the Public and Data Subjects)

Name and contact information for these staff members should be listed in the *Data Practices Contacts* form.

- Each government entity must designate or appoint an individual to be the responsible authority (RA). (Minnesota Statutes, section 13.02, subdivision 16, and Minnesota Rules 1205.1000.) Entities seeking guidance in selecting a responsible authority should look to language in Minnesota Rules 1205.0200, subparts 12 – 15, and Minnesota Statutes, section 13.46, subdivision 10. More information is available on IPAD's website at www.ipad.state.mn.us/docs/radpco.html. Sample forms to use for appointing an RA are at Minnesota Rules 1205.2000.

Who is your responsible authority? _____

- Minnesota Statutes, section 13.05, subdivision 13, requires all RAs to appoint or designate a data practices compliance official (DPCO). The RA and DPCO may be the same person. The DPCO must be a government entity employee who assists with data practices related issues.

Who is your DPCO? _____

- Minnesota Statutes, section 13.03, subdivision 2, allows RAs to appoint one or more designees. The definition of designee is in Minnesota Statutes, section 13.02, subdivision 6.

Has your RA appointed/designated any staff to be data practices designees?

☐ Yes

☐ No

Who are they? _____

Do you want to direct requestors to specific designees depending on what data are requested?

☐ Yes

☐ No

If yes, list name and type of data for which designee is responsible.

If the answer to this question is "No," all requests should be directed to the RA. The RA may appoint the DPCO as the designee for all data requests.

Note: By law, all data requests must be made to the RA or designee; however, you need to make decisions about how your specific entity will handle requests in a way that ensures you respond within

the statutory time frames. For example, once a data request is made to the RA, will the RA handle the request, or will the RA give all requests to the DPCO or another staff person to coordinate responses? Regardless of which staff person actually manages a data request, the RA ultimately is responsible.

Part 2: Setting Parameters for Data Requests

(Policies for Members of the Public and Data Subjects)

- Minnesota Statutes, Chapter 13, does not require that individuals make data requests in writing; however, IPAD recommends that government entities make this their policy. If you decide to require written requests, you should include it in your Data Practices Policy (see [Advisory Opinion 01-014](#)). If you decide not to require written requests, you should still have some system of documenting data requests made verbally.

Do you want to require requestors to make their data requests in writing?

- ☐ Yes
☐ No

If you require that data requests be made in writing, will you allow requests by mail, fax, and/or email?

- ☐ Yes
☐ No

Notes (if necessary) _____

If you allow for data requests to be made by email, do you have a central location where email messages are sent that can be accessed by more than one staff person?

- ☐ Yes
☐ No

Notes (if necessary) _____

- Minnesota Statutes, section 13.05, subdivision 5, requires that all government entities establish appropriate security safeguards for all records containing data on individuals.

When an individual requests data about him/herself, you must verify that the requestor is the data subject or the data subject's parent or guardian. You should know how you verify someone's identity and it is good practice to document how you made the verification.

Part 3: Responding to Data Requests

(Policies for Members of the Public and Data Subjects)

Time frames

- Minnesota Statutes, Chapter 13 sets forth the time frames within which government entities must respond to data requests.

Entities must respond to members of the public seeking public data in an appropriate and prompt manner (section 13.03), and within a reasonable time (Minnesota Rules 1205.0300).

Entities must respond to data subjects seeking access to data about them within ten business days (section 13.04). In other words, entities must either provide the data to the data subject or inform the data subject there are no data available within ten business days. This does not mean that an entity can not arrange for a longer period of the time to respond, as long as the data subject agrees.

IPAD recommends that entities respond to all data requests in writing.

Charging for copies of data

- Minnesota Statutes, Chapter 13, allows, but does not require, government entities to charge for copies of data.

Some entities choose an amount below which it is not cost effective to charge for copies. You should check with your entity's financial department to find out if there is such an amount. Do you have a dollar figure below which you will not charge for copies?

- ☐ Yes
☐ No

If yes, what is the amount? _____

- Government entities may require pre-payment for copies of data if documented in the Data Practices Policy (see [Advisory Opinion 04-068](#)).

Will you require pre-payment for copies?

- ☐ Yes
☐ No

- If you decide to charge for copies of data, the allowable amount depends upon whether the person requesting the data is the data subject or a member of the public.

Members of the public

Minnesota Statutes, section 13.03, subdivision 3(c)

For 100 or fewer black and white paper copies, the maximum amount government entities can charge is 25¢ per page.

For more than 100 black and white paper copies and most other types of copies (photographs, audiotapes, data on a CD or DVD, data stored electronically, etc.) government entities can charge only the actual cost of employee time to: (1) search for and retrieve the data and (2) make the copies. See also Minnesota Rules 1205.0300. When a requestor asks that the data be sent electronically (e.g., via email), the copy charge may include the actual cost of sending the data. When calculating employee time for making the copies, you should use the hourly wage of the lowest-paid employee who is able to search for, retrieve, and make the copies. **Note:** Your actual cost could be less than 25¢ per page.

If you charge members of the public for copies, IPAD recommends re-calculating, on an annual basis, your actual costs for copying. IPAD also recommends documenting this calculation. More

information about charging members of the public for copies is located on IPAD's website at www.ipad.state.mn.us/docs/copycost.html.

Are there statutes, other than Minnesota Statutes, section 13.03, that set specific copy charges for your data?

- ☐ Yes
☐ No

If yes, cite the statute section(s) and corresponding fee(s) _____

[For example, under Minnesota Statutes, section 144.226, subdivisions 1, 3, and 4, the Minnesota Department of Health charges \$16 for a certified copy of a birth certificate. Under Minnesota Statutes, section 169.09, the Commissioner of Public Safety charges certain persons \$5 for a copy of an accident report.]

Data subjects

Minnesota Statutes, section 13.04, subdivision 3

When a data subject asks for copies, a government entity may charge the actual cost for an employee to make paper copies or to print copies of electronically stored data. See also Minnesota Rules 1205.0300 and 1205.0400. When calculating employee time for making the copies, you should use the hourly wage of the lowest-paid employee who is able to make the copies.

Note: Government entities may not charge for search and retrieval time if a data subject requests copies.

Part 4: Creating New Data

(Policies for Members of the Public and Data Subjects)

- Requests for creation of new data not already collected or maintained by a government entity fall outside the requirements of Chapter 13. So, you are not required to create data to respond to a data request. If you choose to create data, IPAD recommends working with the requestor on a case-by-case basis.

Part 5: Summary Data

(Policy for Members of the Public)

- Minnesota Statutes, section 13.02, subdivision 19, defines summary data and Minnesota Statutes, section 13.05, subdivision 7, discusses the preparation of summary data. Section 13.05 requires an RA to prepare summary data if the request is made in writing and the cost of preparing the summary data is paid for by the requestor. Section 13.05 also allows the RA to delegate the preparation of summary data.
- Minnesota Rules 1205.0700 discusses requirements for responding to summary data requests and preparing summary data. Subpart 3 requires RAs to prepare and implement summary data access procedures. Subpart 4 requires government entities to respond to summary data requests within ten days.

- Minnesota Rules 1205.0700, subpart 5, discusses the requirements of a nondisclosure agreement.

Part 6: Parent Access to Private Data about Minor Children
(Policy for Data Subjects)

- Based on the definition of “individual” in Minnesota Statutes, section 13.02, subdivision 8, parents and guardians generally are entitled to the same Chapter 13 rights as their minor children. However, Minnesota Rules 1205.0500 discusses that a minor has the right to ask that his/her private data not be released to his/her parent or guardian. The rules provide guidance to government entities about responding to a minor’s request to limit access to data about him/her.
Note: Government entities may not deny parents/guardians access to educational data that are maintained by an educational agency or institution.

Document your policy or practice for notifying minors that they have a right to request that you not release their private data to their parent or guardian. Also, for each situation where you receive a request from a minor, document how/why you made the determination to withhold or release.

Part 7: Tennesen Warning Notices
(Policy for Data Subjects)

- Minnesota Statutes, section 13.04, subdivision 2, discusses the notice that government entities must provide to an individual when collecting private and/or confidential data about that individual from that individual. This notice is commonly referred to as a Tennesen warning.

With limited exceptions, you may not collect, store, use or disseminate private or confidential data for any purpose other than those you specified in the Tennesen warning notice. Because the consequences of not giving a proper notice are so severe, you must tailor your notices to your entity’s specific programs. IPAD suggests you seek legal advice when developing your notices. More information about Tennesen warning notices located on IPAD’s website at www.ipad.state.mn.us/docs/tw.html.

Part 8: Informed Consent
(Policy for Data Subjects)

- Minnesota Statutes section 13.05, subdivision 4, and Minnesota Rules 1205.1400, discuss informed consents. You must create legally-valid consent forms. More information about informed consent requirements, including sample consent forms, is located on IPAD’s website at www.ipad.state.mn.us/docs/consentmain.html.

Will you require data subjects to use only the consent forms your entity has created or will you release data pursuant to a consent form created by another entity?

Explain _____

Part 9: Keeping Data Secure
(Policy for Data Subjects)

- Minnesota Statutes, section 13.05, subdivision 5, requires that all government entities establish appropriate security safeguards for all records containing data on individuals.

IPAD recommends documenting your policy or practice for keeping data on individuals secure.

- Minnesota Rules 1205.0400 states that private data are accessible to individuals within a government entity whose work assignments reasonably require access. Minnesota Rules 1205.0600 states that confidential data are accessible to individuals within a government entity whose work assignments reasonably require access. The rule parts require government entities to create written procedures ensuring that only appropriate individuals get access to private and confidential data.

Document your policy or practice for identifying which staff, because of their work assignment, gets access to what private and confidential data.

- Minnesota Statutes, section 13.055, requires state agencies to notify data subjects when a security breach has occurred and an unauthorized person has gained access to data. Although this section only applies to state agencies, IPAD recommends that local government entities follow a similar practice.

IPAD recommends documenting your policy or practice for meeting the requirements in section 13.055.

Part 10: Creating, Updating, and Posting Policies
(Policies for Members of the Public and Data Subjects)

- Minnesota Statutes, section 13.025 require government entities to create policies that describe the processes members of the public and data subjects need to follow when requesting data.
- Government entities should update their policies yearly. Particularly, entities should update the data practices contact information (to be consistent with staff changes) and make sure the hourly wage rates they use for determining actual copy charge costs are current.

Have you updated your access documents within the last year?

☐ Yes

☐ No

- Minnesota Statutes, section 13.025, subdivision 4, also requires that government entities make their policies easily available to the public by distributing free copies, or by posting a copy on the government entity's website.

Do you have free copies available for the public, or have them posted at your website?

☐ Yes

☐ No

Government Entity Decision Checklist

To complete the Data Practices Policies for Members of the Public and Data Subjects, your entity must make the following decisions.

* Indicates obligation under Chapter 13.

	Yes	No
Do we have an RA? *		
Do we have a DPCO? *		
Do we have any designees?		
Do we have our policies available for distribution, or have them posted within our entity? *		
Do we direct data requestors to staff, other than the RA, for response to data requests?		
Do we require written requests?		
If requests must be in writing, do we allow requests by mail, fax, and/or email?		
Do we have a policy to verify a data subject's identity? *		
Do we respond to data requests in writing?		
Are there statutory provisions, outside of Chapter 13, that give us authority to charge specific amounts for copies of data?		
If we charge for copies of data, do we have a minimum amount before we charge?		
If we charge for copies of data, do we require pre-payment?		
Do we have a policy for creating new data?		
Do we have a written policy describing our policy/practice for notifying minors that they have the right to ask us to withhold their private data from their parents/guardians? *		
Do we have a written policy describing our policy/practice for evaluating a minor's request? *		
Each time we evaluate a minor's request, do we document how we make our decision? *		
Do we require that individuals use our consent forms?		
Do we have a written policy/practice on how we keep data on individuals secure?*		
Do we have a written policy/practice detailing which staff has access to private and/or confidential data?*		
Have we documented our policy/practice on how we will handle a breach in security of private or confidential data? (applies only to state agencies)		
When did we last update our access documents? *	Date:	

Policy for Ensuring the Security of Not Public Data

Legal requirement

The adoption of this policy by the Department of Administration (Admin) satisfies the requirement in Minnesota Statutes, section 13.05, subd. 5, to establish procedures ensuring appropriate access to not public data. By incorporating employee access to not public data in Admin's Data Inventory (required by Minnesota Statutes, section 13.025, subd. 1), in the individual employee's position description, or both, Admin's policy limits access to not public data to employees whose work assignment reasonably requires access.

Please direct all questions regarding this policy to the Department of Administration's Data Practices Compliance Official (DPCO):

Curt Yoakum

Curtis.yoakum@state.mn.us

Phone: 651.201.2771

Fax: 651.297.7909

200 Administration Building

50 Sherburne Avenue

St. Paul, MN 55155

Procedures implementing this policy

Data inventory

Under the requirement in Minnesota Statutes, section 13.025, subd. 1, Admin has prepared a Data Inventory which identifies and describes all not public data on individuals maintained by Admin. To comply with the requirement in section 13.05, subd. 5, Admin has also modified its Data Inventory to represent the employees who have access to not public data.

In the event of a temporary duty as assigned by a manager or supervisor, an employee may access certain not public data, for as long as the work is assigned to the employee.

In addition to the employees listed in Admin's Data Inventory, the Responsible Authority, the Data Practices Compliance Official (DPCO), Admin's Senior Leadership Team, and the Agency General Counsel may have access to *all* not public data maintained by Admin if necessary for specified duties. Any access to not public data will be strictly limited to the data necessary to complete the work assignment.

Employee position descriptions

Position descriptions may contain provisions identifying any not public data accessible to the employee when a work assignment reasonably requires access.

Data sharing with authorized entities or individuals

State or federal law may authorize the sharing of not public data in specific circumstances. Not public data may be shared with another entity if a federal or state law allows or mandates it. Individuals will have notice of any sharing in applicable Tennessee warnings (see Minnesota Statutes, section 13.04) or Admin will obtain the individual's informed consent. Any sharing of not public data will be strictly limited to the data necessary or required to comply with the applicable law.

Ensuring that not public data are not accessed without a work assignment

Within Admin, divisions may assign tasks by employee or by job classification. If a division maintains not public data that all employees within its division do not have a work assignment allowing access to the data, the division will ensure that the not public data are secure. This policy also applies to divisions that share workspaces with other divisions within Admin where not public data are maintained.

Recommended actions for ensuring appropriate access include:

- Assigning appropriate security roles, limiting access to appropriate shared network drives, and implementing password protections for not public electronic data
- Password protecting employee computers and locking computers before leaving workstations
- Securing not public data within locked work spaces and in locked file cabinets
- Shredding not public documents before disposing of them

Penalties for unlawfully accessing not public data

Admin will utilize the penalties for unlawful access to not public data as provided for in Minnesota Statutes, section 13.09, if necessary. Penalties include suspension, dismissal, or referring the matter to the appropriate prosecutorial authority who may pursue a criminal misdemeanor charge.

Data on Individuals
Maintained by the Minnesota Department of Administration
July 2014

This document identifies the name, title and address of the Responsible Authority for Admin and describes private or confidential data on individuals maintained by Admin (see Minn. Stat. 13.05 and Minn. Rules 1205.1200).

This document is also part of Admin's procedures for ensuring that not public data are only accessible to individuals whose work assignment reasonably requires access (see Minn. Stat. 13.05, subd. 5). In addition to the employees listed, Admin's Responsible Authority, Data Practices Compliance Official, Senior Leadership Team, and the Agency General Counsel will also have access to all not public data on an as needed basis as part of a specific work assignment.

Admin's Responsible Authority is:
Matthew Massman, Acting Commissioner
200 Administration Building
50 Sherburne Ave.
St. Paul, MN 55155

Direct all questions about this document to Admin's Data Practices Compliance Official (DPCO):

Curt Yoakum
Curtis.yoakum@state.mn.us
Phone: 651.201.2771
Fax: 651.297.7909
200 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

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Data Maintained by Many or All Admin Division

The following data are maintained by more than one division in Admin.

Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
Security information	Data that would substantially jeopardize the security of information, possessions, individuals or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass, or physical injury, if the data were released to the public	Private	MS 13.37	Certain employees on an as needed basis as part of specific work assignments
Civil investigative data	Data that are collected in order to start or defend a pending civil legal action, or because a civil legal action is expected	Confidential Public	MS 13.39	Certain employees on an as needed basis as part of specific work assignments
Social Security numbers	Social Security numbers assigned to individuals	Private	MS 13.355	Certain employees on an as needed basis as part of specific work assignments
Personnel data	Data about employees, applicants, volunteers and independent contractors; labor relations information	Public Private Confidential	MS 13.43 179A.03, subd. 4	Certain employees on an as needed basis as part of specific work assignments
Correspondence	Letters and electronic correspondence	Public Private Confidential	Various	Certain employees on an as needed basis as part of specific work assignments
Advisory council member data	Data pertaining to advisory council applicants and appointees.	Public Private Confidential	MS 13.601	Certain employees on an as needed basis as part of specific work assignments

Continuity of Operations	Personal home contact information used to ensure that an employee can be reached in the event of an emergency or other disruption affecting continuity of operation of a government entity.	Private	MS 13.43, subd. 17	Certain employees on an as needed basis as part of specific work assignments
Personal contact and online account information	Telephone number, email address and usernames and passwords collected, maintained, or received by a government entity for notification purposes or as part of a subscription list for an entity's electronic periodic publications as requested by the individual	Private	MS 13.356	Certain employees on an as needed basis as part of specific work assignments
Legislative Data	Preliminary drafts of legislative and budget proposals	Nonpublic	13.605	Certain employees on an as needed basis as part of specific work assignments
Attorney Data	Data related to attorney work product or data protected attorney-client privilege	Private	MS 13.393	Certain employees on an as needed basis as part of specific work assignments

Commissioner's Office

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Commissioner's Office		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
Admin Response to data requests	Data collected by Admin data practices compliance official in responding to requests for data maintained by Admin	Public Private	Various	- Responsible Authority - Data Practices Compliance Official
Internal audit data	- Data created, collected, and maintained for the purpose of performing audits and/or relating to an audit or investigation; - Working papers gathered or generated until the final report is published or audit becomes inactive	Public Private Confidential	MS 13.392 MS 13.43 MS 13.37	- Commissioner - Assistant Commissioner for Finance - Internal Auditor - Agency General Counsel

State Archaeologist

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> State Archaeologist		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> Fort Snelling History Center St. Paul, MN 55111-4061		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
State Archaeologist Burial Site File	Information about individuals who own or lease private property that contains unplatted human burials.	Public Private	MS 307.08 MS 13.37	• Community Services Director • State Archeologist • SPA Senior

Minnesota Office of Continuous Improvement

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Minnesota Office of Continuous Improvement		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
The Minnesota Office of Continuous Improvement only maintains all Admin data listed on pages 3-4.				

Financial Management and Reporting

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Financial Management and Reporting		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 309 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
Employee expense reports (Also may be maintained by the division where the transaction originated)	Expense reimbursement requests	Public Private	MS 13.43	All FMR staff (17 employees) on an as needed basis as part of specific work assignments
Travel expense/per diem reports for council, advisory task force and board members	Travel expense reimbursement requests	Public Private	MS 13.601 MS 13.43	All FMR staff (17 employees) on an as needed basis as part of specific work assignments
Workers compensation billings	Records of billings from DOER for employees who receive workers compensation benefits	Private	MS 13.43	All FMR staff (17 employees) on an as needed basis as part of specific work assignments
Unemployment compensation billings	Records of billings from DEED for employee unemployment compensation	Private	MS 13.43	All FMR staff (17 employees) on an as needed basis as part of specific work assignments

Government services transactions data	Credit card, charge card, debit card and other electronic transactions	Private	MS 16A.626	All FMR staff (17 employees) on an as needed basis as part of specific work assignments

Fleet and Surplus Services

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Fleet and Surplus Services		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 5420 Old Highway 8 Arden Hills, MN 55112		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
Government services transactions data	Credit card, charge card, debit card and other electronic transaction information	Private	MS 16A.626	Surplus Staff (6 employees) on an as needed basis to set up online MinnBid accounts and process payments
Motor vehicle data	Information on license plate numbers, owners, and registration status of vehicles	Private	MS 168.346	Fleet and Surplus Services Assistant Director (1 employee)

State Demographic Center

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> State Demographic Center		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 300 Centennial Building 658 Cedar Street, St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
The State Demographic Center only maintains all Admin data listed on pages 3-4.				

Governor's Council on Developmental Disabilities

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Governor's Council on Developmental Disabilities		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 370 Centennial Building 658 Cedar Street, St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
The Governor's Council on Developmental Disabilities only maintains all Admin data listed on pages 3-4.				

Human Resources

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Human Resources		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 300 Centennial Building 658 Cedar Street, St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
Employee personnel records	Record of prior and current employment history. Data relating to hiring, assessments, promotion, discipline and related administrative personnel actions	Public Private	MS 13.43	All HR staff (under 15 employees) on an as needed basis as part of specific work assignments
Applicant records	Completed assessments and results, related documentation, and application forms	Public Private	MS 13.43	All HR staff (under 15 employees) on an as needed basis as part of specific work assignments
Unemployment compensation billings	Records of billings from DEED for employee unemployment compensation	Private	MS 13.43	All HR staff (under 15 employees) on an as needed basis as part of specific work assignments
Labor relations information	Management positions that have not been presented during the collective bargaining process or interest arbitration, including information collected or created to prepare the management position	Private Confidential	MS 13.37, subd. 1(a)	All HR staff (under 15 employees) on an as needed basis as all or part of specific work assignments

Workers compensation information	Records of billings from Risk Management for employees who receive workers compensation benefits	Private	MS 13.43	All HR staff (under 15 employees) on an as needed basis as part of specific work assignments

Information Policy Analysis

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Information Policy Analysis		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 201 Administration Building 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
Advisory Opinion data	Data collected as a result of researching and issuing advisory opinions pursuant to MS 13.072	Public Private	MS 13.072	• Community Services Director • IPAD Administrator • IPAD Policy Analysts (3 employees) • IPAD Student Workers (as part of specific work assignments)
Appeal data	Data maintained as a result of processing appeals of determinations about the accuracy and/or completeness of public and private data on individuals	Public Private	MS 13.03, subd. 4	• Community Services Director • IPAD Administrator • IPAD Policy Analysts (3 employees) • IPAD Student Workers (as part of specific work assignments)

Materials Management

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Materials Management		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 112 Administration Building 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
Responses to Requests for Proposals (RFPs) and requests for bids	Responses to Requests for Proposals (RFPs) and requests for bids	Public Private	MS 13.591	All MMD staff (75 employees) on an as needed basis as part of specific work assignments
Responses to Requests for Proposals (RFPs) and requests for bids	Trade secret data in response to Request for Proposal (RFP) and requests for bids	Private	MS 13.37	All MMD staff (75 employees) on an as needed basis as part of specific work assignments
Government services transactions data	Credit card, charge card, debit card and other electronic transaction information	Private	MS 16A.626	• P-card holders (5) • Exec. 2 payment Processor (1) • Division P-card Coordinator (1) • Statewide P-card Coordinator (1)

Plant Management

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Plant Management		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> G10 Administration Building 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
Metropass contracts	Contracts entered into by individuals in Plant Management's Metropass program	Public Private	MS 13.43 MS 13.37 MS 13.355	All PMD Parking, Financial Services and Office Services staff (19 employees), on an as needed basis as part of specific work assignments
Bike locker rentals and security deposit refunds	Data on individuals who have contracts in Plant Management's bike locker program	Public Private	MS 13.43 MS 13.37 MS 13.355	All PMD Parking, Financial Services and Office Services staff (19 employees), on an as needed basis as part of specific work assignments
State employee parking contract and refund data	Data on state employees who have parking contracts or apply for parking through Plant Management	Public Private	MS 13.43	All PMD Parking, Financial Services and Office Services staff (19 employees), on an as needed basis as part of specific work assignments

Parking contract and refund data about individuals who are not state employees	Data on other individuals who have parking contracts or apply for parking through Plant Management	Public Private	MS 13.37	All PMD Parking, Financial Services and Office Services staff (19 employees), on an as needed basis as part of specific work assignments
Government services transactions data	Electronic transaction information (name of cardholder and last 4 digits of a credit card, charge card, or debit card)	Public Private	MS 16A.626	• Parking Staff (4 employees) • Account Clerk Senior (2 employees) • Accounting Officer Principal

Real Estate and Construction Services

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Real Estate and Construction Services		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 309 Administration Building 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
Real property appraisal data (a)	Estimated or appraised values of individual parcels of real property that are made by personnel of the state or a political subdivision or by independent appraisers for the purpose of selling or acquiring land through purchase or condemnation	Confidential Public	MS 13.44, Subd. 3 (a), 3(c)	• Land (1 employee) • Support staff (1 employee) • Senior Director, Lease Supervisor
Real property appraisal data (b)	Appraised values of individual parcels of real property that are made by appraisers working for fee owners or contract purchasers who have received an offer to purchase their property from the state or a political subdivision	Private Public	MS 13.44, Subd. 3 (b). 3(c)	• Land (1 employee) • Support staff (1 employee) • Senior Director, Lease Supervisor
Responses to Requests for Proposals (RFPs) and requests for bids for Construction Manager and Design-Build projects	Any responses received to a RFP or request for bid	Public Private	MS 13.591	• Contracting Staff (2 employees) • Project Managers and Business Operations manager on an as need basis as part

				of specific work assignments; • Construction Operations Manager, Senior Director • Leasing (3 employees) • Support (1 employee) • Space Management (2 employees) • Lease Supervisor
Security features of building plans	Security features of building plans, building specifications, and building drawings of state-owned facilities and non-state-owned facilities leased by the state	Nonpublic	MS 13.64, subd. 2(a)	• Project managers assigned to project • Construction Operations Manager, Senior Director

Risk Management

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Risk Management		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 310 Centennial Office Building 658 Cedar Street, St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (Understandable to General Public)	Data Classification	Citation for Classification	Employee Work Access
Responses to Requests for Proposals (RFPs) and requests for bids	Responses to Requests for Proposals (RFPs) and requests for bids	Public Private	MS 13.591	RMD staff involved in RFP process
Personnel Data	Personnel data of state employees disclosed for the purpose of administration of the workers' compensation program as provided in chapter 176.	Private	MS 13.43, subd. 18	All RMD staff (under 42 employees) on an as needed basis as part of specific work assignments
Medical Data	Medical data of state employees disclosed for the purposes of administering claims	Private	MS 13.384 subd. 3	All RMD staff (under 42 employees) on an as needed basis as part of specific work assignments
Labor Relations Data	Management positions on economic and non-economic items that have not been presented during the collective bargaining process or interest arbitration, including information specifically collected or created to prepare the management position.	Private	MS 13.37, subd. 1(a)	All RMD staff (under 42 employees) on an as needed basis as part of specific work assignments

Rehabilitation Data	Data collected and sent Admin to the Department of Labor and Industry that pertain to individuals applying for or receiving rehabilitation services	Private	MS 13.791	All RMD staff (under 42 employees) on an as needed basis as part of specific work assignments

STAR

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> STAR		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 358 Centennial Office Building 658 Cedar Street, St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
AT Equipment Exchange data	Data on individuals collected via www.mnstarte.org website.	Private Public	MS 13.43	• Program Coordinator • Office & Admin Specialist
Data on individuals with disabilities	Data that identify an individual with a disability or a family member of an individual with a disability	Private	MS 13.64, subd. 2	All STAR staff (3 employees) on an as needed basis as part of specific work assignments

Office of Grants Management

<i>Responsible Authority (Name and Title)</i> Matthew Massman, Acting Commissioner	<i>Data Practices Compliance Official (DPCO)</i> Curt Yoakum	<i>Reporting Division/Office</i> Office of Grants Management		
<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 200 Administration Building, 50 Sherburne Ave., St. Paul, MN 55155	<i>Address:</i> 201 Administration Building 50 Sherburne Ave., St. Paul, MN 55155		
Name of Record, File, Process, Form or Data Type	Description (<i>Understandable to General Public</i>)	Data Classification	Citation for Classification	Employee Work Access
Data on individuals	Data that would identify an individual reporting allegations of grants waste and fraud or a violation of statewide grants governance policies	Private	MS 181.932 subd. 2 MS 16B.97, subd. 5	• OGM Director • Director of Community Services
Responses to requests for proposal	Responses submitted are private until the responses are opened. All other data on individuals are private until completion of the evaluation process. If all responses are rejected prior to completion of the evaluation process, all data, other than that made public at the opening, are private until resolicitation or abandonment of the grant.	Private Public	MS 13.599	• All OGM staff (3 employees) • Director of Community Services

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972
Revised September 2014

Prepared by:

KNUTSON, FLYNN & DEANS-COUNSEL
MINNESOTA SCHOOL BOARDS ASSOCIATION

Title IX of the Education Amendments of 1972

I. INTRODUCTION: In order to aid compliance with Title IX and its implementing regulations, this bulletin will review selected regulations, examine the compliance requirements and offer, for school district adoption, a model non-discrimination policy and a model grievance procedure.

A. Title IX is a broadly drawn statutory scheme whose singular goal is found in its opening paragraph:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ." 20 U.S.C. § 1681(a)."

B. The regulations **promulgated by the former Department of Health, Education and Welfare ("HEW")**, under Title IX forbid sex discrimination against the beneficiaries of federal financial assistance. According to the regulations, the beneficiaries include employees as well as students. The United States Supreme Court has held that employment discrimination and sexual harassment come within Title IX's prohibition, and that the regulations promulgated thereunder, which include employees as well as students, are also valid.

C. The remedy for violating Title IX is significantly different than remedies provided for violating Title VII of the Civil Rights Act of 1964, as amended, or the Minnesota Human Rights Act, M.S. 363A.01, et seq. In the case of Title IX violations, the Department of Education has the authority to terminate federal financial aid to an entire school district if any program violates the requirements of Title IX. See Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687. This remedy is similar to that available under other federal funding statutes, such as Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

II. COMPLIANCE REQUIREMENTS: Title IX required individual school districts to have the following completed by July 21, 1976:

- A. Appoint compliance officer to coordinate Title IX requirements.
- B. Notify persons in the school district of the district's policy of non-discrimination.
- C. Establish a grievance procedure within the district to handle Title IX complaints.

D. Evaluate the district's policies and practices in light of the Title IX requirements.

1. Any policy or practice identified as discriminatory must be modified.
2. Steps must be taken to eliminate the effects of past discrimination.

III. 1976 AMENDMENTS TO TITLE IX: Title IX was amended in 1976 to address father-son, mother-daughter functions and, among other amendments, provides:

20 U.S.C.A., Sec. 1681(a)(8)

"(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance, except that:

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex"; (Emphasis added.)

IV. REGULATIONS: The following regulations were selected from the body of regulations promulgated by the Department of Education because of their unique and immediate impact on the operation of school districts. This list is not intended to be exhaustive. To insure the district's compliance with all regulations, the Title IX compliance officer should work to become thoroughly conversant with all regulations. The regulations are codified at 34 C.F.R. Part 106.

A. Maintenance of Files:

"Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c) (ii) of this section and of any remedial steps taken pursuant to paragraph (c) (iii) of this section." 34 C.F.R. § 106.3(d) (Emphasis added).

1. Paragraph (c) provides:

"(c) Self-evaluation. Each recipient education institution shall, within one year of the effective date of this part:

(i) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices." 34 C.F.R. § 106.3 (Emphasis added).

A school district should always follow a practice, when working with programs or statutes dealing with discrimination, of keeping detailed files of district activities. This task is one

that should be handled by the Title IX compliance officer.

B. Compliance Statement: 34 C.F.R. Sec. 106.4 obligates a school district applying for federal assistance to prepare a statement to the effect that the district does not discriminate on the basis of sex and is in full compliance with Title IX and its regulations. Specifically, this regulation provides:

"Every application for federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with Sec. 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance." 34 C.F.R. § 106.4(a).

C. Separate Sex Courses:

1. 34 C.F.R. § 106.34(a) provides:

"Except as provided in this section or otherwise in this part, a recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students **on the basis of sex.**"

2. This regulation does not prohibit a school district from separating students by sex in physical education classes or activities during participation in sports involving bodily contact such as wrestling, boxing, rugby, ice hockey, football and basketball. See 34 C.F.R. § 106.34(a)(1).

In addition, elementary and secondary classes dealing exclusively with human sexuality may be conducted in separate sessions for males and females. See 34 C.F.R. § 106.34(a)(3).

3. Schools that operate a nonvocational coeducational elementary or secondary school may provide nonvocational single sex classes or extracurricular activities if:

(a) each single-sex class or extracurricular activity is based on the school's objective:

(1) to improve educational achievement of its students, through a policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(2) to meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(b) the school implements its objective in an evenhanded manner;

(c) student enrollment is completely voluntary; and

(d) the school provides to all other students, including those of the excluded sex, a

substantially equal coeducational class or extracurricular activity in the same subject or activity. Substantially equal factors include admission criteria, educational benefits, qualifications of faculty and staff, geographic accessibility and other factors

Periodic evaluations **must be conducted** at least every two years **to ensure that single-sex classes or extracurricular activities are based upon genuine justifications.** See 34 C.F.R. § 106.34(b).

D. Student Employment:

1. 34 C.F.R. § 106.38 governs any school district that assists any agency, organization or person in obtaining employment for students outside of the school.

2. The regulation sets up a two step test to determine an employment program's compliance with Title IX. The district must:

"(1) . . . assure itself that such employment is made available without discrimination on the basis of sex; and

"(2) . . . not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices." 34 C.F.R. § 106.38(a).

Thus, it is not enough that the district not discriminate on the basis of sex in its own hiring practices; it must also take steps to ensure that none of the employers involved in a student work program discriminate on the basis of sex.

E. Marital or Parental Status:

1. 34 C.F.R. § 106.40 prohibits discrimination against students based upon the student's marital or parental status. This section provides:

(a) Status generally. A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

- (b) (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.
- (2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.
- (3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b) (1) of this section shall insure that the separate portion is comparable to that offered to non-pregnant students.
- (4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination

of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

- (5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

2. In Pfeiffer by Pfeiffer v. Marion Center Area School District, 917 F.2d 779 (3d Cir. 1990), a female student was dismissed from the National Honor Society after she became pregnant. She sued the district for violation of Title IX. The court decided that compensatory damages were available for intentional discrimination in violation of Title IX. The United States Supreme Court further clarified that Title IX is not an exclusive mechanism for addressing gender discrimination because claims can also be brought under 42 U.S.C. § 1983. See Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 129 S.Ct. 788 (2009).

3. Pursuant to 34 C.F.R. 106.40, a school district shall not discriminate against any student on the basis of pregnancy and must allow pregnant students to participate in programs and activities on the same basis as other students. For an example of a policy satisfying the pregnancy non-discrimination requirements see MSBA/MASA Policy Services Manual Model Policy 528---Student Parental, Family and Marital Status Nondiscrimination.

F. Athletics:

1. 34 C.F.R. § 106.41 provides as follows:

"(a) General. No person shall on the basis of sex be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both

sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

(d) Three-prong test for equal opportunity. The Department of Education uses a three-prong test for determining compliance with Title IX in the area of athletics. The test provides that an institution is in compliance if: 1) the participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full-time enrollments, 2) the institution has a "history and continuing practice of program expansion" for the under-represented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the under-represented sex. The test has been applied primarily in the intercollegiate context but federal courts have consistently utilized the "three-prong test" when analyzing high school athletic programs.

On July 11, 2003, the Office for Civil Rights provided further clarification regarding the "Three-Prong Test" noting that each of the three prongs is a valid, alternative way for schools to comply with Title IX. The 2003 Clarification also provides that, "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas." Further, "nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX" and, moreover, "the elimination of teams is a disfavored practice."

2. In many respects, these regulations are similar to the requirements of M.S. 121A.04 and its corresponding rules, Minn. R. 3535.3000-.3700. However, there are specific differences in Minnesota law that should be reviewed with legal counsel before taking any action that could impact equal opportunity in athletics. For example, the state provisions more closely scrutinize the individual budgets of sports where teams are offered for both boys and girls, the state provisions are more detailed concerning opposite-sex team tryouts, and the state provisions contain additional team offering restrictions based on the age of the students.

3. Congress has made clear that Title IX applies district-wide if any of the school district's programs or activities receives federal funds. See 20 U.S.C. § 1687.

4. The District Court for the Southern District of New York interpreted 34 C.F.R. § 106.41 as requiring a girl to be allowed the opportunity to try out for the boys' football team. In Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985), the court was faced with a suit under 42 U.S.C. § 1983 claiming that a regulation of the New York Public High School Athletic Association violated Title IX of 20 U.S.C. § 1681 et seq., and the girl's right to equal protection under the Fourteenth Amendment to the United States Constitution. The regulation provided as follows:

There shall be no mixed competition in the following sports: basketball, boxing, football, ice hockey, rugby and wrestling.

The student sought a declaratory judgment that the regulation as written violated the Fourteenth Amendment and an injunction requiring the high school association to delete the regulation and permit her to try out for the junior varsity football squad.

The Court held that Title IX requires the opportunity for female students to try out for male teams where there is no team for their own sex, but that it did not apply to contact sports such as football. The court cited 34 C.F.R. 106.41(b). The court then denied the girl's request for Title IX relief.

The court went on, however, to reject the association's argument that it made no difference that there might be a few girls who wish to play football who are more physically fit than some of the boys.

The court held that to the extent that the challenged regulation deprived the girl of the opportunity to try out for the junior varsity football squad it operated to abridge her rights under the Fourteenth Amendment and enjoined the defendants from complying with or enforcing it.

Note that while the operation of the high school league's rule was found to violate the Fourteenth Amendment, it did not violate Title IX with respect to contact sports such as football. It is unclear what practical difference it will make if the courts enjoin such regulations on the basis of equal protection arguments but deny relief on the basis of Title IX arguments. The result appears to be the same both in its practical effect on the district's programs as well as in potential awards of damages and attorney's fees.

A federal district court held that field hockey is not a contact sport and, therefore, a school district's policy of banning boys from the field hockey team was a violation of Title IX. Williams v. School Dist. of Bethlehem, PA, 799 F. Supp. 513 (E.D. Pa. 1992). The Third Circuit Court of Appeals reversed and remanded the case for more factual development of two issues: whether field hockey is a contact sport and whether opportunities for boys in the school district's athletics program had previously been limited. The court stated that the relevant inquiry was whether athletic opportunities for boys had been limited institution-wide rather than limited with respect to a particular sport such as field hockey. Williams v. School Dist. of Bethlehem, PA, 998 F.2d 168 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994). If the answer to this question was "no", then the school district could prevent the boy from trying out for the girls' team.

G. Discrimination in Employment Under Title IX:

1. Subpart E of 34 C.F.R., §§ 106.51-106.61, addresses discrimination on the basis of sex in employment. 34 C.F.R. Sec. 106.51 provides in part as follows:

"Sec. 106.51 Employment. (a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

2. As discussed below, the United States Supreme Court decided North Haven Board of Education v. Bell, 456 U.S. 512, 102 S.Ct. 1912 (1982), in which it held that Title IX does extend its coverage to employment discrimination. The court's decision is discussed in detail below.

V. COURT INTERPRETATIONS OF TITLE IX AND TITLE IX REGULATIONS:

A. Several cases have been decided by federal courts involving the scope and interpretation of Title IX and the regulations promulgated thereunder by the Department of HEW. One significant line of cases involves the validity of Title IX regulations that deal with discriminatory practices; another line of cases discusses whether Title IX implies a private cause-of-action; finally, there is case law regarding the standards of liability for sexual harassment under Title IX.

1. Title IX and Employment Discrimination. Despite the Department of Education's regulation prohibiting discrimination in employment, various United States Courts of Appeals had decided in 1979 and 1980 that the Department of Education did not have authority, under Title IX, to regulate employment discrimination. See Islesboro School Comm. v. HEW, 593 F.2d 424 (1st Cir. 1979); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir. 1979); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir. 1980). These cases were all appealed by the federal government to the United States Supreme Court, which refused to take certiorari. See 444 U.S. 972, 100 S.Ct. 467 (1979). It appeared, therefore, at the time, that the United States Supreme Court agreed with the interpretation of these courts that Title IX did not extend its coverage to employment discrimination.

The United States Court of Appeals for the Second Circuit in North Haven Bd. of Educ. v. Hufstедler, 629 F.2d 773 (1980), however, ruled that Title IX does extend its coverage to employment discrimination and that the regulations issued by HEW concerning sex discrimination in educational employment were valid. Because there was a split of opinion between the circuit courts, the United States Supreme Court accepted certiorari on the North Haven case to resolve the issue.

In 1982, the United States Supreme Court decided North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 102 S.Ct. 1912 (1982). The court held, in part, as follows:

1. Employment discrimination comes within Title IX's prohibition.
 - (a) While Sec. 901(a) [of the statute] does not expressly include employees within its scope or expressly exclude them, its broad directive that "no person" may be discriminated against on the basis of gender, on its face, includes employees as well as students.
 - (b) Title IX's legislative history corroborates the conclusion that employment discrimination was intended to come within its prohibition.
 - (c) Title IX's postenactment history provides additional evidence of Congress' desire to ban employment discrimination in federally financed education programs.
2. The Subpart E regulations (34 C.F.R. Secs. 106.51 to 106.61) are valid.

Further amendments to Title IX have clarified that the Department of Education may cut federal aid for an entire institution if any part of the organization discriminates against women, minorities, elderly or disabled individuals. See Civil Rights Restoration Act of 1987. The laws affected by the Civil Rights Restoration Act in addition to Title IX are: Title VI of the Civil Rights Act of 1964, which bans racial discrimination; the Age Discrimination Act of 1975; and, Section 504 of the Rehabilitation Act of 1973, which bans discrimination on the basis of disability. The 1987 legislation, as amended, created a new provision in Title IX that provides as follows:

Section 1687. "INTERPRETATION OF 'PROGRAM OR ACTIVITY'. For the purposes of this Chapter, the term 'program or activity' and 'program' mean all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization." . . . 20 U.S.C. Sec. 1687.

NOTE: Sex discrimination in employment is also prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq., and the Minnesota Human Rights Act, Minn. Stat. Ch. 363A.

2. Private Cause-of-Action Under Title IX.

a. Private Cause of Action for Students.

The issue of whether an individual student has the right to maintain an action to privately enforce sex discrimination under Title IX was decided in the affirmative by the United States Supreme Court. Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1446 (1979).

Note also that acts of discrimination may give rise to claims under several different theories. See, Lantz by Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) where the court disallowed relief under Title IX for an alleged act of discrimination in refusing to allow a girl to try out for the boys' football team. As noted above, Title IX regulations do not apply to contact sports. See 34 C.F.R. § 106.41. The court, however, allowed injunctive relief under 42 U.S.C. § 1983 and the equal protection clause of the Fourteenth Amendment to the federal Constitution. Thus, the fact that Title IX regulations do not apply does not necessarily insulate a school district from liability for alleged acts of discrimination.

In Franklin v. Gwinnett County Schools, 503 U.S. 60, 112 S.Ct. 1028 (1992), the Supreme Court ruled that under Title IX a student could seek money damages from a school for a teacher's sexual harassment. In Kinman v. Omaha Public School Dist., 94 F.3d 463 (8th Cir. 1996), the Eighth Circuit Court of Appeals (which includes Minnesota) recognized a student's claim under Title IX for hostile environment sexual harassment by her teacher. However, in a later appeal, the Court took notice of the heightened standard of actual notice necessary for liability to attach. See Kinman v. Omaha Public School Dist., 171 F.3d 607 (8th Cir. 1999).

In 1999, the United States Supreme Court resolved a split among the circuit courts of appeal about whether a private cause of action can exist for sexual harassment by another student. In Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 119 S.Ct. 1661 (1999), the Supreme Court ruled that such an implied cause of action can exist under specified circumstances (see discussion of liability standards below).

b. Private Cause of Action for Employees.

In the past, courts were divided as to whether Title IX provides a private cause of action for damages for sex-based employment discrimination under Title IX. See, e.g. O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986) (stating that Title IX employment discrimination claim was duplicative of plaintiff's Title VII claim); Cooper v. Gustavus Adolphus College, 957 F. Supp. 191, 193 (D. Minn. 1997) (declining to create private cause of action under Title IX where Title VII provides a mechanism for redress); Lakoski v. James, 66 F.3d 751 (5th Cir. 1995) (Title VII is the exclusive remedy); Storey v. Board of Regents, 604 F. Supp. 1200 (W.D. Wis. 1985) (no direct remedy available under Title IX where employment discrimination claim is clearly viable under Title VII); Howard v. Bd. of Educ. Sycamore Community Unit, 893 F. Supp. 808 (N.D. Ill. 1995) (no Title IX private cause of action where Title VII available); Burrell v. City University of New York, 995 F. Supp. 398 (S.D. N.Y. 1998) (no Title IX cause of action for employment discrimination); Contra Arceneaux v. Vanderbilt Univ., 25 Fed. Appx. 345 (6th Cir. 2001); Preston v. Com. of Va. ex rel New River Community College, 31 F.3d 203 (4th Cir. 1994) (holding that implied private right of action under Title IX extends to employment discrimination); Henschke v. New York Hospital - Cornell Medical Center, 821 F. Supp. 166 (S.D. N.Y. 1993) (Title IX is an additional remedy regardless of the availability of Title VII); Bedard v. Roger Williams University, 989 F. Supp. 94, 97 (D.R.I. 1997) (next logical step of the Supreme Court is to recognize an employment discrimination private cause of action under Title IX).

However, the Supreme Court recently recognized retaliation as a viable claim under Title IX. See, Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497 (U.S. Mar. 29, 2005) on remand to 416 F.3d 1280 (11th Cir. (Ala.) Jul. 12, 2005).

c. Individual Liability.

The vast majority of courts that have directly addressed the issue of individual liability under Title IX have concluded that only the recipient of the federal funds (i.e. the school district, and not individual employees) can be held liable under Title IX. See, e.g., Kinman v. Omaha Public Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999); Schultzen v. Woodbury Cent. Community School Dist., 250 F.Supp. 2d 1047 (N.D. Iowa, Feb. 19, 2003) (“The fact that Title IX was enacted pursuant to Congress’s spending power is evidence that it prohibits discriminatory acts only by grant recipients”); Cox v. Sugg, 484 F.3d 1062 (8th Cir. 2007) (Supervisory school official cannot be sued in individual capacity); Klemencic v. Ohio State Univ., 263 F.3d 504, 510 (6th Cir. 2001) (“only recipients of federal funds may be liable for damages under Title IX”); Floyd v. Waiters, 133 F.3d 786, 789 (11th Cir. 1998) (“[A] Title IX claim can only be brought against a grant recipient – that is, a local school district – and not an individual”). See also Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640-41, 119 S.Ct. 1661 (1999) (noting that a recipient of federal funds may be liable in damages under Title IX for its own misconduct, not that of its agents, and that damages liability under Title IX is not extended to parties outside the scope of the government’s power to place limitations on fund recipients); Shrum ex rel. Kelly v. Kluck, 249 F.3d 773, 781-82 (8th Cir. 2001) (recognizing recipient of federal funding can only be held liable under Title IX for its own misconduct). See generally Schultzen v. Woodbury Central Comm. Sch. Dist., 187 F. Supp. 1099 (N.D. Iowa 2002) (collecting cases).

3. Standard of School District Liability for Sexual Harassment under Title IX.

a. Teacher-to-Student Sexual Harassment.

In Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 118 S.Ct. 1989 (1998), the Court held that damages may not be recovered under Title IX for the sexual harassment of a student by one of the district’s teachers unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to the teacher’s misconduct.

The Court rejected arguments made by the student and by the U.S. Department of Education in its “Policy Guidance” that a school district should be held liable in damages on principles of constructive notice (i.e., knew or should have known about the harassment but failed to uncover and eliminate it) or *respondeat superior* (i.e., vicarious or imputed liability whenever a teacher’s authority over a student facilitates the harassment). It found such principles would allow a damages recovery in a broader range of situations but would frustrate the purposes of Title IX. Such principles would allow unlimited recovery in damages against a school district where the school district is unaware of discrimination in its programs and is willing to institute prompt corrective measures, thereby diverting education funding from beneficial uses. Note that this decision did not invalidate the constructive notice standard for use in the U.S. Department of Education’s own investigations (through its Office for Civil Rights; in such investigations, damages are not an available remedy).

In Plamp v. Mitchell School Dist. No. 17-2, 565 F.3d 450 (8th Cir. 2009), the Eighth Circuit Court of Appeals further clarified that various persons in schools have sufficient authority and control for purposes of Title IX liability, including school principals, See also Doe v. Flaherty, 623 F.3d 577 (8th Cir. 2010).

In J.F.K. v. Troup County Sch. Dist., 678 F.3d 1254 (11th Cir. 2012), the Court held a school principal, who was aware a teacher sent text messages and bought a student presents, did not have actual notice sufficient to alert him to the possibility of the teacher’s sexual harassment of the student as required for liability under Title IX.

b. Peer Sexual Harassment

In Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 119 S.Ct. 1661 (1999), the Court held that the same standard applied to teacher-student situations in Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 188 S.Ct. 1989 (1998) applies to student-on-student sexual harassment. In other words, an implied cause of action against a school district under Title IX for student-to-student sexual harassment may exist, but only where the school district has actual knowledge of the harassment, acts with deliberate indifference to it, and the harassment is so severe, pervasive, and objectively offensive as to effectively bar the victim's access to an educational opportunity or benefit provided by the school. The Court noted that school district liability for damages is limited to circumstances where the school district exercises substantial control over the harasser (i.e., disciplinary authority) and the context in which the known harassment occurs (e.g., during school hours on school grounds). The U.S. Supreme Court also has found harassment by members of the same sex actionable under Title VII, see Oncale v. Sundowner Offshore Svces, Inc., 523 U.S. 75 (1998), and courts have held that this theory is transferable to Title IX cases. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002). See also Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996) overruled on other grounds by Geloster v. Lago Vista, Supra (reaching same conclusion before Oncale was decided).

Recently, in a case of first impression, the Eighth Circuit Court of Appeals held that a high school student, who alleged he was the victim of sexual harassment by other students, had to prove the harassment amounted to more than the use of name calling. The Court, in conjunction with the U.S. Supreme Court's decisions in Oncale and Davis, ruled that the student was required to show the harassers intended to discriminate against him "on the basis of sex," meaning the harassment was motivated by the student's gender or failure to conform with gender stereotypes. Wolfe v. Fayetteville Arkansas Sch. Dist., 648 F.3d 860 (8th Cir. 2011).

Moreover, the U.S. Supreme Court has clarified that Title IX does not preclude action under section 1983 with respect to unlawful gender discrimination in schools. See Fitzgerald v. Barnstable School Comm., 129 S.Ct. 788 (U.S. 2009).

4. Other Bases of Liability for Sexual Harassment.

While the Court in Gebser narrowed the scope of potential school district liability under Title IX for sexual harassment, broader avenues of recovery still may exist under state law provisions such as the Minnesota Human Rights Act, Minn. Stat. Ch. 363A. The United States Supreme Court in Gebser noted that "[o]ur decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983."

Since the law under Title IX in many respects remains unsettled and there are other laws that can make school districts liable for sexual harassment, it is advisable for a school district to aggressively attempt to prevent it from occurring and to take prompt and appropriate remedial action whenever sexual harassment is discovered.

VI. MODEL POLICY AND GRIEVANCE PROCEDURE: See MSBA/MASA Policy Services Reference Manual Model Policy 522 -- Student Sex Nondiscrimination; MSBA/MASA Policy Services Reference Manual Model Policy 528 -- Student Parental, Family and Marital Status nondiscrimination; see also MSBA/MASA Policy Services Manual Model Policy 413 -- Harassment and Violence.

(Revised from 2014 Session)

School Law Bulletin
for
School Board Members and Administrators

PERSONAL LIABILITY OF INDIVIDUAL SCHOOL BOARD MEMBERS
FOR DOLLAR DAMAGES FOR VIOLATION OF
STUDENTS CIVIL RIGHTS UNDER THE CIVIL RIGHTS ACT OF 1871
Revised September 2014

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I. INTRODUCTION: The United States Supreme Court has articulated a standard for determining whether individual school board members shall be *personally liable* for dollar damages for violating the federal civil rights of a student under the Civil Rights Act of 1871. Such liability is commonly referred to as Section 1983 liability, based on the section number in the United States code where the Civil Rights Act of 1871 was codified.

The Section 1983 liability standard was first set out in a decision reviewing the semester-long expulsion of three tenth-grade girls from an Arkansas High School for "spiking" punch at an extracurricular school activity. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975), rehearing denied, 421 U.S. 921, 95 S.Ct. 1589 (1975)

While the court in Wood was unanimous in upholding the exclusive authority of school boards to make evidentiary findings in school disciplinary proceedings, and in acknowledging the necessary discretion that school boards must be allowed in making findings, the court was split 5-4 on the question of the standard for determining liability of board members for damages. This standard was subsequently revised to a certain degree in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982).

This bulletin analyzes federal court decisions concerning the liability of school board members for damages for civil rights violations.

II. CITATIONS:

A. Statutes: Section 1 of the Civil Rights Act of 1871:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

III. HISTORICAL BACKGROUND: The Civil Rights Act of 1871 (42 U.S.C. § 1983) was for many years narrowly construed and rarely applied except in cases where there were allegations of deprivation of voting rights. The application of the statute was greatly expanded by the Supreme Court in the case of Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502 (1980), which held that it provides a basis for a lawsuit alleging violation of any federal law and not just claimed violations of civil rights and equal protection laws.

Section 1983 is now one of the most heavily litigated sections in the entire United States Code.

One of the remedies available in Section 1983 actions is money damages to be paid to the person injured by the party causing the injury.

Since the statute requires the injuring party to be acting "under color of law," public entities and their governing members have been frequent defendants in Section 1983 suits.

For a seventeen year period, the Supreme Court of the United States held that a municipal corporation was not a person within the meaning of the Act, and thus, the public entity itself was not liable for damages. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961). In the case of Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978), however, the Supreme Court overruled Monroe and held that local government bodies (including school districts) may be held liable for unconstitutional actions taken pursuant to an official municipal policy.

The courts recognize a distinction between personal and official capacity lawsuits. The former seek to impose personal liability upon a government official for actions he takes under state law. In the latter actions, the lawsuit is, in reality, directed toward the entity of which the officer is an agent. Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985). An award of damages against an official in his personal capacity can be executed only against the official's personal assets. An award of damages against an official in his official capacity can be recovered only from the government entity. Id.

In order to establish personal liability in a Section 1983 action, it is sufficient to show that the official, acting under color of state law, caused the deprivation of a federal right. In an official capacity action, however, it is necessary to establish that the government entity itself was behind the deprivation in order to recover. The "first inquiry in any case alleging liability [of a government entity itself] under § 1983 is the question of whether there is a direct causal link between a [government entity's] policy or custom, and the alleged constitutional deprivation." City of Canton Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989).

While legislators and judges have been recognized as having absolute immunity from Section 1983 damage suits, other public officials have been recognized as having a qualified or limited immunity from such suits; that is, they have been deemed immune when they have been found to have acted "in good faith" as defined by the courts, even if acting in a manner that is subsequently found to be in violation of a person's civil rights. The reason for the qualified immunity is so school "officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." See Wood at 321.

The "good faith" immunity that is available to public officials is not available to the municipal corporation, however. Owen v. City of Independence, Mo., 445 U.S. 622, 100 S.Ct. 1398 (1980); Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985). Thus, if a violation of 42 U.S.C. Sec. 1983 is found to have occurred, a school district may be found liable even though individual board members escape liability because they acted "in good faith." While school districts do not have qualified immunity, they may have a defense to liability if there is no district practice or custom that caused the alleged constitutional injury.

Note that the analysis for state law claims is slightly different. Under state law, an entity can receive the benefit of an individual employee's official immunity (that is, receive vicarious immunity), if the nature of the employee's conduct was within the confines of an assigned duty. See, e.g., S.W. and J.W. v. Spring Lake Park Sch. Dist., 592 N.W.2d 870, 874 (Minn. Ct. App. 1999) (citation omitted).

IV. STANDARD TO BE APPLIED TO SCHOOL BOARD MEMBERS: What is the appropriate standard governing school board member immunity from liability for compensatory damages under 42 U.S.C. § 1983?

Under federal law claims for violation of constitutional rights, public officials (such as school district employees) have immunity against civil actions unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). The standard is one of objective reasonableness. Id. The inquiry encompasses “not only the currently applicable law, but whether the law was clearly established at the time an action occurred[.]” Siegert v. Gilley, 500 U.S. 226, 231, 111 S.Ct. 1789 (1991) (quoting Harlow at 818). Rights are “clearly established” if “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3934, 640 (1987). If there is any possibility that officials of reasonable competence could disagree on whether or not particular actions were reasonable, immunity applies. See Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092 (1986). The Eighth Circuit Court of Appeals (which includes Minnesota) has determined that, under this standard, “all public officials are protected except the ‘plainly incompetent’ and those who are deemed to have ‘knowingly violate[d] the law.’” Gorra v. Hanson, 880 F.2d 95, 97 (8th Cir. 1989) (citations omitted).

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.

Note that an official does not forfeit his or her constitutional immunity because the official violated a state statutory or administrative provision. Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012 (1984).

V. FACTORS SUPPORTING QUALIFIED IMMUNITY:

A. Common law tradition: “Although there have been differing emphasis and formulations of the common-law immunity of public school officials in cases of student expulsion or suspension, state courts have generally recognized that such officers should be protected from tort liability under state law for all good-faith, non-malicious action taken to fulfill their official duties.” Wood v. Strickland, 420 U.S. 308, 318, 95 S.Ct. 992, 999.

B. Similarities to legislative, judicial, and executive officer immunity:

“[S]chool board members function at different times in the nature of legislators and adjudicators in the school disciplinary process. Each of these functions necessarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy. ‘Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act.’ Scheuer v. Rhodes, 416 U.S. 232, 246, 94 S.Ct. 1683, 1691 (1974). As with executive officers faced with instances of civil disorder, school officials, confronted with student behavior causing or threatening disruption, also have an ‘obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others.’” Wood at 319.

C. Public policy:

"Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decision-maker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties. School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances 'would contribute not to principled and fearless decision-making but to intimidation.' Pierson v. Ray, 386 U.S. 547, 554, (1967). The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." Wood at 319.

D. Why not absolute immunity for school board members?

"But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." Wood at 320.

VI. THE COURTS' EXPLANATION OF QUALIFIED IMMUNITY FOR SCHOOL BOARD MEMBERS ACTING IN GOOD FAITH:

A. Board action cannot be justified by ignorance or disregard of the law.

"The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice." Wood at 321.

B. Board must know basic constitutional rights.

"To be entitled to a special exemption from the categorical remedial language of Section 1983 in a case in which his action violated a student's constitution rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." Wood at 322.

However, "the lack of intent to violate the plaintiffs' constitutional rights would not necessarily be a defense if the defendants should have known their conduct would have that effect." Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975).

C. Value of civil rights outweighs burden to board.

"Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser

standard would deny much of the promise of Section 1983." Wood at 322.

D. Immunity for reasonable good faith action in circumstances.

"We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." Wood at 321.

A board's "mere mistake in judgment or in weighing the evidence does not demonstrate any violation of substantive due process" and does not demonstrate, by itself, a lack of good-faith. Sullivan v. Meade Indep. Sch. Dist. No. 101, 530 F.2d 799, 808 (8th Cir. 1976).

E. Board need not predict the law.

"[Our holding] is not to say that school board members are 'charged with predicting the future course of constitutional law.'" Wood, at 322. See also O'Connor v. Donaldson, 422 U.S. 563, 577, (1975).

Board members are, however, charged with knowledge of the state of the law at the time they act. Failure to consult with counsel or failure of counsel to know the law is not a basis for a "good faith" defense. Hoffman v. McNamara, 630 F.Supp. 1257 (D. Conn. 1986).

F. Liability only for bad motive or clear disregard of rights.

"A compensatory award will be appropriate only if the school board member has acted with...such disregard of the student's clearly established constitutional rights that this action cannot reasonably be characterized as being in good faith." Wood at 322.

G. Liability for a single, one-time decision.

"[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances ... whether or not that body had taken similar action in the past or intended to do so in the future..." Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292 (1986).

H. Liability for decision by employee not having final policymaking authority.

1. School district liability.

School districts and other government entities are only liable under Section 1983 for decisions made by officials who have authority under state law to speak as final decision makers. Jett v. Dallas Indep. Sch. Dist. 491 U.S. 701, 109 S.Ct. 2702 (1989). The "identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the judge" and is based on "relevant legal materials, including state and local positive law," as well as "custom and usage." Id. at 737. Generally, the actions of the school board alone, which in Minnesota is given general charge of the business of the school district, See M.S. §§ 123B.02 and 123B.09, will be the basis for civil rights liability. See cases discussed below.

In Jett, the plaintiff, a white high school teacher and football coach, was transferred to another school

as a result of a recommendation from the high school principal, who was black. The superintendent officially affirmed the principal's recommendation. The coach sued the school district, alleging racial discrimination. Jett v. Dallas, Indep. Sch. Dist., 7 F.3d 1241 (5th Cir. 1993)

The Supreme Court held that school district liability could only be predicated on finding that the official making the decision had final policymaking authority or that the decision represented official policy. Whether a particular official has final policymaking authority is a question of state law, the court said. The court remanded the case to the Court of Appeals to determine whether the superintendent possessed final policymaking authority in the area of employee transfers. On remand, the Fifth Circuit Court of Appeals concluded that the superintendent did not have such authority that would subject the school district to liability. Id.

Similarly, where every alleged action was attributed specifically to the school district superintendent and unnamed persons under the superintendent's direction and control, the Eighth Circuit Court of Appeals held that the plaintiff failed to state a valid claim against the school district under section 1983. Springdale Educ. Ass'n v. Springdale Sch. Dist., 133 F.3d 649 (8th Cir. 1998). The decision was based on the fact that, under the state law of Arkansas, the superintendent was not the authorized policymaker for the school district. Id. Thus, the school district could not be held liable under section 1983 for the superintendent's allegedly anti-union statements and acts. Id. However, the superintendent himself was subject to individual liability, regardless of whether he was an authorized policymaker, if he directly participated in the constitutional violation. Id.

Note, however, that a school board can be held liable if it lawfully delegates final decision-making authority to an employee such as a principal. See Howlett by and through Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, n.2 (1990) (dicta).

2. Individual liability.

Supervisors (including board members) may be individually liable for their own acts or acts of their employees in limited circumstances, including:

1. Supervisor adopted deliberate policies to harass. See Hague v. Committee for Indus. Org., 307 U.S. 496, 59 S.Ct. 954 (1939).
2. Supervisor committed a constitutional violation by causing his or her employees to enforce an unconstitutional law. Id.
3. Supervisor actively directed or participated in concerted action with employee. See Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191 (1974); See also Springdale at 653.
4. Supervisor implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the employee. Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982).
5. Supervisor may be liable for "deliberate indifference" even if he/she did not have subjective knowledge. City of Canton Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989); Wilks v. Young, 897 F.2d 896 (7th Cir. 1990).

On the other hand, where a supervisor's actions amount to "mere inaction or insensitivity" and not a practice or custom, the supervisor may be entitled to qualified immunity even if lower-ranked employees are not. See Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989), cert. denied, 493 U.S.

1044, 110 S.Ct. 840 (1990) (principal and assistant principal – but not superintendent – were denied immunity where they established and maintained, with alleged deliberate indifference to the consequences, a policy, practice, or custom of failing to take action with respect to complaints of sexual misconduct of a teacher, which allegedly directly caused a former student constitutional harm).

I. Liability resulting from failure to train employees.

In City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989) the U.S. Supreme Court held that under certain circumstances a municipality could be held liable under Section 1983 for violations resulting from its failure to train municipal employees. The plaintiff in this case sued the city because she failed to receive medical attention while in police custody, even though she fell down several times and was incoherent following her arrest. However, the court pointed out:

"Only where a failure to train reflects a 'deliberate' or 'conscious' choice by the municipality can the failure be properly thought of as an actionable city 'policy.' . . . Moreover, the identified deficiency in the training program must be closely related to the ultimate injury." Id. at 379.

In Thelma D. v. Board of Educ. of St. Louis, 934 F.2d 929 (8th Cir. 1991), the Eighth Circuit held that the school board was not liable to elementary school students sexually abused by a teacher, even though the board failed to act when the teacher previously had been accused of misconduct. Prior isolated acts of misconduct could not be deemed to constitute widespread misconduct such that knowledge of lower level officials could be imputed to the board. In order for the board to be liable under § 1983 for failure to train its employees in detection and investigation of abuse, the plaintiffs would be required to establish that the board's failure was a "deliberate indifference" to the rights of students (citing City of Canton v. Harris).

In DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989), the U.S. Supreme Court held that a state's failure to protect an individual against private violence does not constitute a constitutional violation under 42 U.S.C. § 1983. Plaintiff, a four-year-old child, was beaten by his father and suffered severe brain damage. The child's mother sued the county's social workers and local officials who had previously investigated complaints that the boy was abused by his father but did not remove him from his father's custody. She claimed that the state had an affirmative duty to protect her child from his father's violence.

The court held that the purpose of the Due Process Clause was to protect the people from the state, not to ensure that the state protected them from each other. Id. at 195-96. "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Id. at 197.

J. Liability for denial of special education services, diploma.

School board members were not liable under Section 1983 for alleged violation of student's constitutional rights for denial of special education services and issuance of high school diploma; members were protected by doctrine of qualified immunity, as they acted in good faith. Puffer v. Reynolds, 761 F. Supp. 838 (D. Mass. 1988).

K. There must be causal connection for liability to ensue.

There is no Section 1983 liability when there is no showing that actions of the government official

proximately caused damages. Ritter v. Johnson, 465 N.W.2d 196 (S.D. 1991).

VII. PUNITIVE DAMAGES UNDER 42 U.S.C. § 1983: In addition to compensatory damages, the Civil Rights Act of 1871 also provides authority for the award of punitive damages. "Punitive damages by definition are not intended to compensate the injured party but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748 (1981). Punitive damages may be awarded when the defendant's conduct involves reckless or callous indifference to a plaintiff's federally protected rights, as well as when it is motivated by evil motive or intent. Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625 (1983).

The Supreme Court has held, however, that punitive damages may not be awarded against a municipal corporation. See City of Newport v. Fact Concerts, Inc. Thus, a plaintiff who seeks punitive damages for the actions of a school district will have no alternative but to include school board members, administrators or employees as individually named defendants. That is, since the municipal entity is not liable for punitive damages punitive damages cannot be recovered from officers in their official capacities. Gregory v. Chehi, 843 F.2d 111 (3rd Cir. 1988).

VIII. INDEMNITY: Violations of civil rights are considered constitutional torts and as such are subject to the indemnification provisions of the Minnesota Tort Liability Act.

M.S. 466.07 provides in relevant part as follows:

Subd. 1. Indemnification required. Subject to the limitations in section 466.04, a municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee:

- (1) was acting in the performance of the duties of the position; and
- (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

Notwithstanding any provisions to the contrary in section 123B.25, paragraph (b), or 466.12, this section applies to all school districts, however organized.

(Emphasis added).

The provisions of this section require the governing body of a school district to defend and indemnify its officers and employees against any tort claim arising from an alleged act or omission occurring in the performance of duty. This includes mandatory indemnification for punitive damages.

School districts may also procure insurance for punitive damages in addition to compensatory damages. See M.S. 466.06. The statute provides as follows:

466.06 LIABILITY INSURANCE.

The governing body of any municipality may procure insurance against liability of the municipality and its officers, employees, and agents for damages, including punitive damages, resulting from its torts and those of its officers, employees, and agents, including torts specified in section 466.03 for which the municipality is immune from liability. The insurance may provide protection in excess of the limit of liability imposed by section 466.04. If a municipality other than a school district has the authority to levy taxes, the premium costs for such insurance may be levied in excess of any per capita or local tax rate tax limitation imposed by statute or charter. Any independent board or

commission in the municipality having authority to disburse funds for a particular municipal function without approval of the governing body may similarly procure liability insurance with respect to the field of its operation. The procurement of such insurance constitutes a waiver of the limits of governmental liability under section 466.04 only to the extent that valid and collectible insurance, including where applicable, proceeds from the Minnesota Guarantee Fund, exceeds those limits and covers the claim. The purchase of insurance has no other effect on the liability of the municipality or its employees. Procurement of commercial insurance, participation in a self-insurance pool pursuant to section 471.981, or provision for an individual self-insurance plan with or without a reserve fund or reinsurance shall not constitute a waiver of any governmental immunities or exclusions. (Emphasis added).

Under current law, therefore, a school district has no discretion whether to defend and indemnify its employees or officers for damages resulting from their torts. However, a district owes no duty to indemnify an official guilty of malfeasance or willful or wanton neglect of duty. See Horace Mann Ins. Co. v. Independent School District No. 656, 355 N.W.2d 413 (Minn. 1984). (M.S. 466.07, Subd. 1).

A school district also has no obligation to provide legal counsel where an official is guilty of malfeasance. Queen v. Minneapolis Pub. Sch., Spec. Sch. Dist. No. 1, 481 N.W.2d 66 (Minn. Ct. App. 1992).

IX. CONCLUSION. The Legislature has made it clear that school districts are required to defend and indemnify their officers and employees for claims and damages, including punitive damages arising from alleged civil rights violations.

School officials are advised to consult with their districts' insurers to determine the extent of coverage and the advisability of expanding coverage to include punitive damages. Moreover, school officials should consult competent counsel prior to taking any action that may have civil rights implications.

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

RIGHTS AND OBLIGATIONS OF SCHOOL DISTRICTS
UNDER THE
MINNESOTA UNEMPLOYMENT INSURANCE PROGRAM
Revised October 2014

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I. UNEMPLOYMENT BENEFITS FOR APPLICANTS: Eligible unemployed persons receive weekly benefits in an amount calculated on the basis of the total amount of wages earned during either the first four quarters or the last four quarters of the most recent five completed calendar quarters preceding the effective date of an applicant's unemployment benefit account depending on the effective date of the application for benefits. This is also known as the "base period." (Minn. Stat. § 268.035, Subd. 4).

If an employee has received workers' compensation benefits by reason of temporary total disability or compensation for loss of wages from some source due to his own serious illness for more than seven weeks during the **applicable "base period"**, the "base period" may be lengthened. (Minn. Stat. § 268.035, Subd. 4).

A. The calculation of benefits for applicants is as follows:

1. Base Period: Minn. Stat. § 268.035, Subd. 4. "Base period" means the most recent four **completed calendar quarters, or the first four of the most recent five completed calendar quarters**. If the **effective date of the application occurs** after the month following the most recent completed calendar quarter, **the base period is most recent four completed calendar quarters before the effective date of the application for benefits** means the first four of the most recent five completed calendar quarters **if** the effective date of an applicant's application for unemployment benefits. If the application has an effective date during the month following the most recent completed quarter, **the base period is the first four of the most recent five completed calendar quarters before the effective date of the application for benefits**. See statute for schedule. If an employee has received workers' compensation benefits by reason of temporary total disability or compensation from some other source due to the applicant's own serious illness, the base period may be lengthened **if requested by the applicant**.
2. Benefit Year: Minn. Stat. § 268.035, Subd. 6. "Benefit year" with respect to any applicant means the period of 52 calendar weeks beginning the date a benefit account is effective. For a benefit account established effective any January 1, April 1, July 1, October 1, or January 2, 2000, or October 2, 2011, the benefit year will be a period of 53 calendar weeks.
3. Wage Credits and Wages Paid: Minn. Stat. § 268.035, Subds. 27 and 30. "Wage credits" mean the amount of wages paid within the applicant's base period for covered employment. "Wages paid" means the amount of wages that have been actually paid or that have been credited to or set apart so that payment and disposition is under the control of the employee. Wage payments delayed beyond the regularly scheduled pay date are considered "wages paid" on the missed pay date. Back pay is considered "wages paid" on the date of actual payment. Wages earned but not

paid with no scheduled date of payment is considered “wages paid” on the last day of employment.

4. High Quarter: Minn. Stat. § 268.035, Subd. 19. "High quarter" means the calendar quarter in a applicant's base period with the highest amount of wage credits.
5. Requirements to Establish Benefit Account: Minn. Stat. § 268.07, Subd. 2(a), provides:

“To establish a benefit account using the primary base period..., an applicant must have:

- (1) wage credits in the high quarter of \$1,000 or more; and
- (2) wage credits, in other than the high quarter, of \$250 or more.”

To establish a benefit account using the secondary base period...“an applicant must have wage credits in the high quarter of \$1,000 or more.”

Effective October 28, 2012, to establish a benefit account, an applicant must have:

- (a) total wage credits in the applicant's four quarter base period of at least
 - (1) \$2400, or
 - (2) 5.3 percent of the state's average annual wage rounded down to the next lower \$100, whichever is less.

To establish a new benefit account within 52 calendar weeks following the expiration of the benefit year on a prior benefit account, an applicant must have performed services in covered employment in a calendar quarter that started after the effective date of the prior benefit account. The wages paid for those service's must be at least enough to meet the requirements above and have been reported on wage detail.

6. Maximum Amount of Benefits: Minn. Stat. § 268.07, Subd. 2a.
 - (a) If an applicant has established a benefit account, the weekly unemployment benefit amount available during the applicant's benefit year is the higher of:
 - (1) 50 percent of the applicant's average weekly wage during the base period, to a maximum of 66-2/3 percent of the state's average weekly wage; or
 - (2) 50 percent of the applicant's average weekly wage during the high quarter, to a maximum of 43 percent of the state's average weekly wage.

The applicant's average weekly wage under clause (1) is computed by dividing the total wage credits by 52. The applicant's average weekly wage under clause (2) is be computed by dividing the high quarter wage credits by 13.
 - (b) The state's maximum weekly benefit amount, computed in accordance with section 268.035, subdivision 23, applies to a benefit account established effective on or after the last Sunday in October. Once established, an applicant's weekly unemployment benefit amount is not affected by the last Sunday in October change in the state's maximum weekly unemployment benefit amount.
 - (c) The maximum amount of unemployment benefits available on any benefit account is the lower of: (1) 33 1/3 percent of the applicant's total wage credits; or (2) 26 times the applicant's weekly unemployment benefit amount.

Example: An applicant establishes an unemployment benefit account on January 3, 2004. The base period for this individual is October 1, 2002 through September 30, 2003, and is thus the first four of the last five calendar quarters. The applicant earned \$20,000 during the base period in insured work and had wage credits in at least two of the four quarters in the base period. The individual also had minimum wage credits of \$1,000 and the applicant's total base period wages equal or exceed the high quarter wage credits multiplied by 1.25. If this individual worked in all four quarters and earned \$5,000 in each of those quarters he or she would qualify since the total wages, \$20,000, exceeds the high quarter wages, \$5,000, multiplied by 1.25, or \$6,250.

The weekly benefit is calculated as follows: $1/26$ th times high quarter wage credits equals weekly benefit amount. $1/26$ th times \$5,000 equals \$192.

The total amount that this individual may collect in one benefit year in this situation is the lesser of $1/3$ of the total base period wage credits or 26 times the weekly benefit amount.

$1/3$ times \$20,000 equals \$6,666.

26 times \$192 equals \$4,992.

Thus, the individual may collect \$4,992 in the benefit year following January 3, 2004.

Note that the example assumes that this applicant would not otherwise be disqualified from benefits under other sections of the unemployment insurance program. For discussion of such conditions, see below.

- B. Extended Benefits: "Extended unemployment benefit" or benefits of longer duration than noted above, are available during periods of high unemployment to persons who have exhausted their unemployment benefits but remain unemployed (Minn. Stat. § 268.115). The determination that such a period exists is made on the basis of the rate of unemployment determined by the United States Secretary of Labor. Once a determination is made applicants may receive extended benefits is 50 percent of the maximum amount of regular benefits available in the benefit year. If the total rate of unemployment equals or exceeds eight percent, the maximum amount of extended unemployment benefits available is 80 percent of the maximum amount of regular unemployment benefits available in the benefit year.

II. EMPLOYER PAYMENTS TO THE UNEMPLOYMENT INSURANCE TRUST FUND:

- A. Private Employers: Unemployment benefits are paid by the state out of a special state trust fund administered by the Commissioner of the Department of Employment and Economic Development. (Minn. Stat. § 268.194, Subd. 1). Private employers are assessed a yearly tax, and any additional assessments, fees, or surcharges, payable quarterly, on taxable wages paid to employees. (Minn. Stat. § 268.051, Subds. 1 and 2).
- B. Computation of Tax Rates: "Minimum tax rate" is added to the taxpaying employer's "experience rating" to compute the tax rate for each employer. (Minn. Stat. § 268.051, Subds. 2 and 3). This rating reflects the employer's compliance with the policy of encouraging employment and is intended to penalize employers whose records show large benefit claims.
- C. Political Subdivisions: Each school district of the state maybe a reimbursing employer or a taxpaying employer. If a reimbursing employer, the school district makes quarterly payments to the fund in the amount of the benefits charged to its account for the calendar quarter as billed by the Department.

Benefits paid out to its employees during the period are repaid fully on a dollar for dollar basis. (Minn. Stat. § 268.052, Subd. 1). If a school district elects to be a taxpaying employer a notice of election is filed. The election is effective at the beginning of the next calendar quarter. The election must be made for a minimum period of 24 calendar month's. Upon election the school district must be assigned a new employer tax rate for the calendar year of election and until it qualifies for an experience rating.

- D. Revenues for Repaying Benefits: School districts are authorized to make their contributions to the fund from moneys collected from taxes or from other revenues. Minn. Stat. § 268.052, Subd. 4, provides; in part, as follows:

“School districts may levy according to section 126C.43, subdivision 2. If the taxes authorized to be levied cause the total amount of taxes levied to exceed any limitation upon the power of a political subdivision to levy taxes, the political subdivision may levy taxes in excess of the limitations in the amounts necessary to meet its liability.”

III. ELIGIBILITY FOR UNEMPLOYMENT BENEFITS:

- A. Eligibility Conditions (Minn. Stat. § 268.085, Subd. 1): An applicant may be eligible to receive unemployment benefits for any week if the applicant:
1. Has filed a continued request for benefits for that week;
 2. The week for which unemployment benefits are requested is in the applicant's benefit year;
 3. The applicant has unemployed as defined in the statute;
 4. Was available for suitable employment as defined in the statute;
 5. The applicant was actively seeking employment as defined in the statute;
 6. Has served a nonpayable period of one week that the applicant is otherwise entitled to some amount of benefits; and
 7. Has been participating in reemployment assistance services such as job search and resume writing classes if the applicant has been determined in need of reemployment assistance services as determined by the commissioner, unless the applicant has good cause for failing to participate.
- B. “Available For Suitable Employment”: Weekly benefits are reduced by one-fifth for each day an applicant is unavailable for suitable employment. However, benefits shall not be denied to an individual who is in reemployment assistance training or is serving as a juror or an election judge. [Minn. Stat. § 268.085, Subd. 1(4)]. The term “available for suitable employment” means an applicant is ready, willing and able* to accept suitable employment as defined by statute is further defined in the following court decisions:

In Swanson v. Minneapolis Honeywell Regulator Co., [240 Minn. 449, 61 N.W.2d 526 (1953)], the Minnesota Supreme Court noted that the social policy behind the act is met only if an applicant is ready and willing to accept suitable work. Thus, “a person is not available for work...unless he is accessible or attainable for work when suitable work is offered at such hours as are customary in the type of employment to which he is suited.” See also, Preiss v. Commissioner of Economic Security, 347 N.W.2d 74 (Minn. App. 1984).

In the Swanson case, a woman had been laid off from a job that began at 8:00 a.m. and was offered jobs beginning at 7:00 and 7:30 a.m. at another plant of the same employer. She turned down the offer because it would not allow her to drop off her child at a nursery school prior to work. Applying the above quoted rule, the court found that the applicant had made herself unavailable for work of a character that she was qualified to perform. Accord, Levens v. Co-Rect Bar & Restaurant Supply, 356 N.W.2d 774 (Minn. App. 1984).

* “able” was added during the 2012 legislative session.

In a 1993 decision, however, the Minnesota Court of Appeals rejected the rule established in Swanson, describing it as “ill suited to modern child-care realities.” Prickett v. Circuit Science, Inc., 499 N.W.2d 506 (Minn. App. 1993). The Minnesota Supreme Court affirmed the decision, overruling Swanson and held that a daytime employee’s failure to report to a new nighttime shift assignment (on a Monday following a Friday) because of his inability to obtain adequate child care did not constitute “misconduct” justifying denial of benefits. 518 N.W.2d 602 (Minn. 1994).

In Preiss v. Commissioner of Economic Security, 347 N.W.2d 74 (Minn. App. 1984), the Minnesota Court of Appeals held that the failure to take a job requiring a 22-mile drive from home, which would have required some evening and weekend hours, disqualified an applicant from benefits. The court noted that “a drive of 22 miles does not render an available position unsuitable and does not constitute good cause to justify relators refusal to apply.”

Thus, an applicant must be ready, willing and able to accept suitable employment. There must be no restrictions, either self-imposed or created by circumstances that prevent applicant from accepting full-time work. Decker v. City Pages, Inc., 540 N.W.2d 544 (Minn. App. 1995).

An employee is not disqualified from receiving reemployment insurance benefits based on a determination that the employee rejected an offer of suitable employment that predated the employee’s right to make a claim for benefits. Johnson v. Dolphin Staffing, 614 N.W.2d 252 (Minn. App. 2000).

Part-time employment during unemployment from principal employer: An individual may take part-time employment with a second employer and then discontinue that position to search for a principal job without total loss of benefits. The Supreme Court in Sticka v. Holiday Village South, 348 N.W.2d 761 (Minn. 1984), reversed a determination that the employee was disqualified from benefits after she quit part-time positions following the layoff from her primary employer. The Court held that events occurring after separation from the primary employer did not disqualify her from benefits in that situation. See Minn. Stat. § 268.095, Subd. 1(5). See also, Holman v. Olsten Corp., Olsten Health Care, 389 N.W.2d 236 (Minn. App. 1986).

A former dental assistant who had been receiving unemployment benefits took a new, lower paying job involving light manufacturing work, but quit on the first day. The Supreme Court extended the Sticka holding and ruled that benefits should be reinstated because the new job was not suitable, and the employee quit within a reasonable time. The court stated that it is sound public policy to extend a trial period to those attempting unsuitable jobs. Valenty v. Medical Concepts Dev., Inc., 503 N.W.2d 131 (Minn. 1993).

Consistent with the Valenty decision, the 1993 legislature added an exception to disqualification from benefits: if an individual accepts employment that is a substantial departure from the individual’s customary occupation and experience, and would not be deemed suitable work, and the individual voluntarily quits within 30 days, the individual is not disqualified from benefits. [Minn. Stat. § 268.095, Subd. 1(3)].

For purposes of the 30-day unsuitability exception, an employee who gives notice of quitting to an employer in advance of separating from employment is deemed to have quit at the time of notice even though the employee did not actually stop working until two weeks later. See, Wiley v. Dolphin Staffin--Dolpin Clerical Group, 825 N.W.2d 121, 125 (Minn. App. 2012), review denied (Jan. 29, 2013).

In Monson v. Department of Economic Services, 262 N.W.2d 171 (Minn. 1978), the applicant was held to be ineligible for benefits because he was not actively seeking work. After Monson was terminated from his job as a college librarian, he enrolled in an auto mechanic course. The applicant had only applied for two or three library positions and had not explored other positions because he thought they didn't pay enough. The court upheld the Commissioner's determination that Monson had improperly employed self-imposed and unreasonable criteria to limit employment opportunities and was therefore ineligible for benefits.

An applicant may, however, so improve his skills by education or training during a period of unemployment that employment offered by a prior employer may no longer be suitable. In the case of Hendrickson v Northfield Cleaners, 295 N.W.2d 384 (Minn. 1980), an applicant had her compensation benefits terminated when she turned down an offer of reemployment from a prior employer for which she had worked pressing clothes in a dry cleaning store. In the meantime, however, applicant had made considerable progress toward completing a nursing degree and was seeking work in a related field. It was held that employment as a clothes presser was no longer so reasonably related to her qualifications so as to make it suitable employment.

There is, in any event, no hard and fast rule to determine unavailability for employment. The court has held that the Department must base its judgment on the particular facts of each case. Semanko v. Department of Employment Services, 309 Minn. 425, 244 N.W.2d 663 (1976).

Reduced work hours due to disability. The Minnesota Court of Appeals found that an unemployment compensation claimant was not reasonably available to work, and thus was not entitled to benefits, where the claimant was able to work only three hours per day because of disability. Mueller v. Commr. of Econ. Security, 633 N.W.2d 91 (Minn. App. 2001).

C. Payments that Delay or Reduce Unemployment Benefits:

1. Delay: Minn. Stat. § 268.085, Subd. 3, provides that applicants are ineligible for unemployment benefits for weeks in which the applicant is receiving, has received, or **will receive vacation pay, sick pay, or personal time off pay, also known as "PTO."** This applies only upon temporary, indefinite, or seasonal separation and does not apply (1) upon a permanent separation from employment; or (2) to payments from a vacation fund administered by a union or a third party not under the control of the employer. These payments apply only to the period immediately following the temporary, indefinite, or seasonal separation.

An applicant is also not eligible to receive unemployment benefits for any week the applicant is receiving, has received or will receive severance pay, bonus pay, or any other payments paid by an employer because of, upon, or after separation from employment. The payment must be:

- (1) considered wages as defined by statute or
- (2) subject to the FICA tax imposed to fund social security and Medicare.

These payment are applied to the period immediately following the later of the date of separation from employment or the date the applicant first becomes aware that the employer will be making a payment. The date the payment is actually made or received, or that an applicant must agree to release of claims, does not affect these times frames. Earnings, back pay or vacation pay, sick pay or personal time off pay are not affected.

2. Reduce: If the payment **with respect to a week** is less than the claimant's weekly unemployment benefit amount, unemployment benefits are reduced by the amount of the payment. If the computation of reduced unemployment benefits is not a whole dollar, it is rounded down to the

next lower whole dollar. **If the payment with respect to a week is equal to or more than the applicant's weekly unemployment benefit amount, the applicant is ineligible for benefits for that week.**

An applicant is not eligible to receive unemployment benefits for any week the applicant is receiving, has received, will receive, or has applied for pension, retirement, or annuity payments from any plan contributed to by a base employer, including the United States government.

If the pension, retirement, or annuity payment is paid in a lump sum, an applicant is not considered to receive the payment if the applicant immediately deposits that payment in a qualified pension plan or account or that payment is an early distribution for which the applicant paid an early distribution under the Internal Revenue Code. **This does not apply to social security benefits.** (Minn. Stat. § 268.085, Subd. 3(c)).

3. Social Security benefits. Social Security old age benefits and disability benefits may affect unemployment benefits. However, social security survivor benefits are not affected.

An employee who is asked to resign and who negotiates payment in exchange for his resignation receives severance pay in lieu of notice, regardless of whether it is referred to as "settlement payment", where the evidence shows that the employee received payments, at regular intervals, equal to his salary. These severance payments are deductible from the employee's reemployment insurance benefits. Carlson v. Augsburg College, 604 N.W.2d 392 (Minn. App. 2000).

Reserve Mining Co. v. Vanderveer, 368 N.W.2d 361 (Minn. App. 1985); Martinson v. University of Minnesota, 370 N.W.2d 462 (Minn. App. 1985). An employer may constructively allocate lump sum termination or dismissal payments over an equivalent number of weeks of regular pay and, in this way, extend ineligibility. If, however, any of the above-listed forms of remuneration are in an amount which is less, when calculated on a weekly basis, than the benefits to which the applicant would be otherwise eligible, the applicant is entitled to benefits in the amount of the difference between the two. (Minn. Stat. § 268.085, Subd. 3). The result is to prevent double recovery for employees receiving other income. Talberg v. Commissioner of Economic Security, 370 N.W.2d 686, 689 (Minn. App. 1986).

When an applicant for unemployment benefits receives severance pay, it is error to apply severance-pay ineligibility to the period immediately following the applicant's last day of employment if the applicant was not then receiving severance pay. See, Van de Werken v. Bell & Howell, LLC, 834 N.W.2d 220 (Minn. App. 2013).

- D. Receipt of Back Pay: Where an employee has been awarded back pay within 24 months of the establishment of the benefit account with respect to any week occurring during the benefit year must be deducted from benefits paid for that week. (Minn. Stat. § 268.085, Subd. 6). If the benefits received by the employee were deducted from the back pay award, the employer must make reimbursement to the fund. If benefits were not deducted from the back pay award, repayment of the benefits paid during the back pay period must be sought from the employee. Mrkonjich v. Erie Mining Co., 334 N.W.2d 378 (Minn. 1983); Robertson v. Special School District No. 1, 347 N.W.2d 265 (Minn. 1984) (approving offset of continuation pay to employee under Veteran's Preference Act for the period between proposed discharge and suspension and final discharge after hearing); Young v. City of Duluth, 415 N.W.2d 20 (Minn. 1987). Settlement payment received in employment discrimination dispute that compensated former employee for lost wages as a result of the allegedly wrongful discharge constituted back pay and must be deducted from unemployment benefits. Peterson v. Northeast Bank-Minneapolis, 805 N.W.2d 878, (Minn. App. 2011).

E. School Employees; Eligibility During Summer Months:

1. General Rule: Employees of an educational institution are specifically excluded from receiving benefits for summertime unemployment or during a period of paid sabbatical leave. An employee who has an agreement for a definite period of employment in other than an instructional, research, or principal administrative capacity, between academic years or terms is eligible for any weeks within that period the educational institution fails to provide employment. (Minn. Stat. § 268.085, Subd. 7).
 - a. "Educational Institution" means an educational entity operated by Minnesota or a political subdivision or an instrumentality thereof or an educational organization under federal law. (Minn. Stat. § 268.085, Subd. 7 (e)).
 - (1) School contractor who operated health clinics in the public high schools was an "educational institution" and clinical social worker employed by contractor was ineligible for unemployment benefits during three-month summer period when clinics were closed, where social worker had employment during academic year in which she applied for benefits and had a reasonable assurance of returning to employment in the following academic year. Lewis v. West Side Community Health Services, Inc., 802 N.W.2d 853 (Minn. App. 2011).
2. Termination Prior to End of School Year: The ban on summer benefits does not, however, apply to school district employees who have been terminated prior to the end of the normal school year unless the individual has obtained employment with the same or another public or private school commencing the beginning of the next school year or "there is a reasonable assurance" that the applicant will be employed in a not "substantially less favorable" instructional, research, or principal administrative capacity in the second of such academic years or terms. (Minn. Stat. § 268.085, Subd. 7). See also Olson v. Special School District No. 1, 309 N.W.2d 325 (Minn. 1981) for interpretation of this provision for school districts in Cities of the First Class. Accordingly, in Swanson v. I.S.D. No. 625, 484 N.W.2d 432 (Minn. App. 1992), the court held that a school employee is ineligible to receive unemployment benefits for any week that commences during a period between two successive academic years if the employee has received a reasonable assurance of reemployment for the upcoming school year. Swanson's employment was terminated on June 7. On June 14, the school district notified Swanson she would be rehired effective July 1. The court held that Swanson was ineligible to receive benefits from June 14, when she was notified of her reemployment, through July 1.

The Court of Appeals in Sparrow v. I.S.D. No. 272, 534 N.W.2d 551 (Minn. App. 1995), held that an employee who was permanently discharged from a full-time custodian position with the school district and who continued to work as a part-time bus driver for another school district nevertheless was eligible to receive summertime unemployment benefits. In deciding the employee was eligible to receive benefits "between two successive school years" as a result of his base period wages earned in his prior school employment as a custodian, the court ruled that the employee's service as a part-time bus driver was the only service for which there was "reasonable assurance of reemployment in the upcoming academic year." 534 N.W.2d at 554. Because his full-time employment as a custodian therefore was "substantially different" from his part-time bus driver's work, he was eligible for benefits based on the custodian work. Id.

If a non-licensed employee is given reasonable assurance of employment in the second academic year or term, but subsequently is not re-employed, the individual is entitled to a retroactive payment of benefits during the summer for weeks in which the individual filed a claim for

benefits. The provision applies to instructional assistants. Note: An individual who has an agreement for a definite period of employment between academic years or terms shall be eligible for any weeks within that period the educational institution fails to provide employment. (Minn. Stat. § 268.085, Subd. 7(b)).

3. The Date of Employment is Determinative of Eligibility:

- a. Generally: Even before enactment of the statute disqualifying eligible school employees whose employment was terminated prior to the end of the school year and who obtained employment with the same or a different school for the next school year, the Commissioner held:

“...unemployed school teachers claiming benefits based upon wage credits earned in the employment of a school district, and whose employments were voluntarily or involuntarily and indefinitely terminated prior to the end of the school year, shall cease to be eligible for benefits based upon such credits during the time between successive school years after those persons have entered into fully binding contracts with schools or school districts for substantially similar employment for the term of the succeeding school year.” Appeal No. 7661-208-B-(75) decided 6-16-76.

- b. Substantially Similar Employment: Where, however, a teacher placed on an unrequested leave of absence was offered and accepted a part-time teaching position for the succeeding school year with the same employer, the Commissioner held that there had not been unemployment terminating eligibility for benefits:

“...(W)e reject the date on which the contract for part-time work was entered into...as the date on which the applicant became ineligible for benefits based on these wages credits for we do not conclude that half-time and half-pay work is substantially similar employment.” Appeal No. 5638-1086-B-75 (A0170) decided 4-23-76, decision amended 5-14-76.

See also Sparrow v. I.S.D. No. 272, 534 N.W.2d. 551 (Minn. App. 1995)

The terms and conditions of an applicant’s employment and not the label determine whether an offer of reemployment to a teacher is substantially similar to that of prior years. Thus, long-term substitute teachers who were not offered similar contracts for a succeeding year but who were, instead, placed on the district’s active substitute list to be contacted if any long-term substitute contracts for which they were qualified developed, were found to be eligible for unemployment benefits during the summer months. Johnson v. Independent School District No. 535, 291 N.W.2d 699 (Minn. 1980). Stated another way, the Johnson court concluded that if the character of a teacher’s employment in the second academic year does not “approximate or approach” the terms of employment in the first academic year, a teacher is eligible to receive unemployment benefits during the intervening summer. Id. at 701. See also Sparrow, 534 N.W.2d at 554.

- c. Reasonable Time to Accept: Because the date of reemployment is controlling as to eligibility, a school board must act quickly to execute a contract already accepted and signed by a teacher.

The Commissioner has recognized, however, that a board cannot act until the teacher has accepted and returned the contract:

“...(W)e would not be blind to considering the continuing eligibility of a claimant who would fail to respond to such an offer of employment...beyond a reasonable period of time.” Appeal No. 5590-1134-B-75 decided 3-24-76.

It could certainly be argued in an appropriate appeal with the Department that 10 days after receipt of the contract by the teacher is a reasonable period for purposes of terminating eligibility for unemployment benefits.

4. Substitute Teachers: Substitute teachers who place their names on an “on call” lists are also subject to the statutory exclusion from receiving summertime benefits. Ykovchick v. Public Schools of Minneapolis, Richfield and Bloomington, 312 Minn. 139, 251 N.W.2d 626 (1977).

The Supreme Court in Johnson v. Independent School District No. 535, *supra*, 291 N.W.2d at 701, held that school teachers are ineligible for benefits between two academic years when they have received reasonable assurance of reemployment in the second year on terms that approximate those of the first year. The Court also held that long-term substitutes in year one who were offered positions as on-call substitutes for the second year were entitled to benefits because the terms of their reemployment in the second year did not approximate closely enough those of the first year.

However, (see section IV.B.(l)(a) below), it now appears that short-term or casual substitutes who otherwise qualify for unemployment compensation benefits will be eligible to receive such benefits if, during the school year, they are laid off or simply not called to work.

5. Other Teachers: Teacher at Pines School, operated as part of East Central Regional Juvenile Center, a maximum-security facility for juvenile delinquents was employed with a state educational institution. As a result, teacher’s reduced summer schedule was between academic terms and not entitled to unemployment benefits. Halvorson v. County of Anoka, 780 N.W.2d 385 (Minn. App. 2010).
6. Athletic Coach: A coach employed by an educational institution whose employment is only as a coach is not eligible to receive unemployment benefits during any period between two successive sport seasons or similar periods, if: (1) the coach was so employed in the prior season or similar period, and (2) there is a reasonable assurance that the coach will be so employed in the following season or similar period. (Minn. Stat. § 268.085, Subd. 11). Employment with multiple educational institutions or in multiple sports must be aggregated for the purpose of applying this section. (A coach who has other employment at the educational institution in addition to coaching falls under Minn. Stat. § 268.085, Subd. 7.)
7. Employment of Aliens: Minn. Stat. § 268.085, Subd. 12 provides:

Unemployment benefits shall not be paid on the basis of wage credits earned by an alien unless the alien was: (1) lawfully admitted for permanent residence at the time of the employment; (2) was lawfully present for the purposes of the employment; or (3) was permanently residing in the United States under color of law at the time of the employment.

Illegal aliens are, therefore, not entitled to unemployment benefits.

The Minnesota Supreme Court construed this statute in Flores v. Department of Jobs and Training, 411 N.W.2d 499 (Minn. 1987). Flores, a Mexican national, worked as a cook while on voluntary departure status from the Immigration and Naturalization Service (INS). She was

cleared to work during the time she was employed and during her base period for purposes of unemployment insurance. Due to problems with INS she was not, however, cleared to work while she was unemployed.

She was initially denied unemployment benefits on as “unavailable for work during unemployment” because the terms of her parole from INS did not allow her to work.

The Flores court granted her compensation based upon the terms of the statute, Minn. Stat. § 268.085, Subd. 12, and declared invalid a rule requiring aliens to present proof of authorization to work during their period of unemployment, holding that Flores was in a “position to accept suitable work” even though her INS parole did not authorize specifically employment.

Subsequently, in Rasidescu v. Comm’r of Econ. Security, 644 N.W.2d 504 (Minn. App. 2002), the Minnesota Court of Appeals applied the statute to a temporary worker who was a nonimmigrant alien. According to the INS, when the employee was terminated the employee became “out of status” and no longer eligible to work in the United States. Because the employee was no longer authorized to work in the United States he was not eligible for unemployment benefits.

In 2004, the statute was amended to permit Canadians to continue to receive unemployment. Although aliens are ineligible for any week the alien is not authorized to work under federal law, this statutory provision goes on to state:

“Under the existing agreement between the United States and Canada, this paragraph does not apply to any applicant who is a Canadian citizen and has returned to and is living in Canada each week unemployment benefits are requested.” Minn. Stat. § 268.085, Subd. 12(a).

IV. DISQUALIFICATION FOR BENEFITS:

- A. Generally: Because unemployment benefits are designed to assist those who are involuntarily unemployed through no fault of their own, the ineligibility provisions of the statute (Minn. Stat. § 268.095) are narrowly construed by the courts. See Smith v. Employers’ Overload Co., 314 N.W.2d 220 (Minn. 1982); Johnson v. Ford Motor Co., 184 N.W.2d 786 (Minn. 1971). An otherwise eligible applicant will be denied unemployment benefits for a number of reasons, including if the employee voluntarily quits without good reason caused by the employer; is terminated for employment misconduct or “aggravated employment” misconduct; fails to apply for or accept suitable work; refuses reemployment; or engages in a strike. See Minn. Stat. § 268.095, Subds. 1, 4 and § 268.085, Subd. 13b
- B. Disqualifying Conditions (Minn. Stat. § 268.095): The application of the following disqualifying conditions to otherwise qualified and eligible applicants is the greatest source of controversy under the act. This is largely due to the failure of the act to provide clear definitions of disqualifying conditions.
 1. Voluntarily Quit/Good Reason Caused by the Employer: Generally, an employee who quits employment is disqualified from receiving unemployment benefits except when the applicant quit employment “because of a good reason caused by the employer as defined in subdivision 3.” Minn. Stat. § 268.095, Subd. 1(1).

Employees who are disqualified from benefits as a result of a voluntary quit without good reason caused by the employer or a discharge for misconduct are disqualified for the duration specified in Minn. Stat. § 268.095, Subd. 10.

In addressing whether a applicant is disqualified under Subd. 1, the employer has the initial burden of proving that the employee has voluntarily quit employment. “A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee’s.” Minn. Stat. § 268.095, Subd. 2. See Marz v. Department of Employment Security, 256 N.W.2d 287 (Minn. 1977); Lopez v. Owatonna Manufacturing Co., 304 N.W.2d 647 (Minn. 1981).

Once voluntariness is established, the employee then has the burden of proving that he or she voluntarily terminated “because of a good reason caused by the employer.” Minn. Stat. § 268.095, Subd. 3: See Shanahan v. District Memorial Hosp., 495 N.W.2d 894 (Minn. App. 1993).

The Minnesota courts have defined “good cause attributable to the employer” as a reason that is “real, not imaginary, substantial, not trifling, and reasonable, not whimsical. There must be some compulsion produced by extraneous and necessitous circumstances.” Haskins v. Choice Auto Rental, Inc., 558 N.W.2d 507 (Minn. App. 1997). Moreover, “for determining good cause,” the standard “is reasonableness as applied to the average man or woman, and not to the supersensitive.” Id.; see also Cook v. Playworks, 541 N.W.2d 336 (Minn. App. 1996).

a. Adverse Working Conditions as “Good Reason Caused By The Employer”:

- (1) “Good reason caused by the employer” for quitting is defined in Minn. Stat. § 268.095 Subd. 3(a) as a reason:
 - (1) “that is directly related to the employment and for which the employer is responsible;
 - (2) that is adverse to the worker; and
 - (3) that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment.”
- (2) Minn. Stat. § 268.095, Subds. 3(b) and 3(c) provide that “the analysis... must be applied to the specific facts of each case” and, “[i]f an applicant was subjected to adverse working conditions by the employer, the applicant must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions before that may be considered a good reason caused by the employer for quitting.”

Consequently, before “good cause attributable to the employer” can be found, an employee, prior to quitting, must first attempt to resolve the underlying problem or issue and place the employer on notice of the alleged improper employer conduct. Parnell v. River Bend Carriers, Inc., 484 N.W.2d 442 (Minn. App. 1992). Consequently, if an employee quits without giving an employer a meaningful opportunity to resolve the issue, the employee likely will be found to have quit without “good cause.” See, e.g., Prescott v. Moorhead State University, 457 N.W.2d 270 (Minn. App. 1990) (no “good cause attributable to employer” where university professor who resigned because of alleged harassment by a co-worker failed to take reasonable steps to seek redress from his employer before resigning); Larson v. Department of Economic Security, 281 N.W.2d 667 (Minn. 1979) (no “good cause” to quit where employee failed to report alleged continuing harassment as employer had directed). Moreover, “good cause attributable to the employer” generally is not found where an employee expresses mere personal

dissatisfaction with working conditions or has poor working relationships with co-workers or supervisors. See, e.g., Ryks v. Nieuwsma Livestock Equipment, 410 N.W.2d 380 (Minn. App. 1987) (neither employee's irreconcilable differences nor dissatisfaction with working conditions constituted good cause to quit); Port v. Pipestone Skelgas, 397 N.W.2d 12 (Minn. App. 1986) (same).

Consequently, fear of potential termination does not justify an award of unemployment benefits. Erb v. Commissioner of Economic Security, 601 N.W.2d 716 (Minn. App. 1999).

In contrast, in Wetterhahn v. The Kimm Company, Commissioner of Jobs and Training, 430 N.W.2d 4 (Minn. App. 1988), the court held that the employee was entitled to unemployment benefits because she quit her job with good cause due to a co-worker's verbal harassment, which the employer had notice of and failed to take timely and appropriate measures to stop it.

- (3) Abuse or Maltreatment By Employer or Co-Worker: "Where a applicant quits his employment because of abuse or maltreatment he does so with good cause attributable to the employer and he is not subject to disqualification." Nyberg v. R.N. Cardozo & Brother, Inc., 243 Minn. 361, 67 N.W.2d 821 (1954).

The court did, however, hold in that particular case that the applicant left because of the nature of the employment and not because of the employer's conduct. Accordingly, the court upheld the determination that the individual employee had voluntarily quit. See also, Ryks v. Nieuwsma Livestock Co., 410 N.W.2d 380 (Minn. App. 1987) and cases cited therein.

- (4) Sexual Harassment: Minn. Stat. § 268.095, Subds. 3(f) explicitly provides that a "claimant has a good reason caused by the employer for quitting if it results from sexual harassment of which the employer was aware, or should have been aware, and the employer failed to take timely and appropriate action." Sexual harassment is statutorily defined as follows:

Sexual harassment means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other conduct or communication of a sexual nature when: (1) the applicant's submission to such conduct or communication is made a term or condition of the employment; (2) the applicant's submission to or rejection of such conduct or communication is the basis for decisions affecting employment; or (3) the conduct or communication has the purpose or effect of substantially interfering with an applicant's work performance or creating an intimidating, hostile, or offensive working environment. (Minn. Stat. § 268.095, Subd. 3(f)(1)-(3)).

Prior to the 1982 amendments relating to sexual harassment, the Minnesota Supreme Court had reached basically the same result. In Continental Can Co., Inc. v. State of Minnesota, 297 N.W.2d 241 (Minn. 1980), the court held that when an employer took no action in response to an employee's complaints that she was being verbally and physically sexually harassed by co-workers, the employer discriminated against the employee by reason of sex and constructively discharged her when she resigned to escape intolerable working conditions.

In McNabb v. Cub Foods, 352 N.W.2d 378 (Minn. 1984), a meat cutter who quit as a result of alleged sexual harassment was held to be entitled to unemployment benefits because the employer either knew or should have known that the employee was being harassed and failed to take corrective action. See also, Clark v. K-Mart Store, 372 N.W.2d 847 (Minn. App. 1985); Dura Supreme v. Kienholz, 381 N.W.2d 92 (Minn. App. 1986). An employer is required to take remedial steps even where notice of alleged harassment occurs only three weeks prior to the employee's termination date.

When an employee resigns because of sexual harassment by a firm's highest ranked local official, knowledge of the harassment is imputed to the employer and the employee does not have a duty to report the harassment to higher company officials in another state in order to qualify for benefits. Heaser v. Lerch, Bates & Associates, Inc. (unpub. opinion, Minn. App. April 19, 1991). See also, Munro Holding, LLC v. Cook, 695 N.W.2d 379 (Minn. App. 2005).

When an employer takes appropriate and timely remedial action and the sexual harassment stops, an employee who quits claiming sexual harassment may not be entitled to unemployment benefits. See Biegner v. Bloomington Chrysler/Plymouth, Inc., 426 N.W.2d 483 (Minn. App. 1988).

Employee quit her job for good reason caused by her employer, when employee properly complained to the appropriate person of sexual harassment in the workplace, and where employer left the decision on whether to investigate the complaint to the employee. Peppi v. Phyllis Wheatley Community, 614 N.W.2d 750 (Minn. App. 2000).

An employee who resigns because of sexual harassment without reporting that abuse to a company official is disqualified from unemployment benefits where the employer has a written policy regarding sexual harassment and a designated official to receive reports. See Weaver v. Minnesota Valley Laboratories, Inc., 470 N.W.2d 131 (Minn. App. 1991).

In Hanke v. Safari Hair Adventure, 512 N.W.2d 614 (Minn. App. 1994), the Minnesota Court of Appeals drew an analogy between sexual harassment and other types of harassment and concluded that harassment based on an employee's sexual orientation provides good cause to quit.

Harassment in the form of yelling and swearing, even though not related to a protected characteristic such as gender or sexual orientation, constituted good cause to quit in Wetterhan v. Kimm Co., 430 N.W.2d 4 (Minn. App. 1988).

- (5) Unsafe Working Conditions: An employee who is discharged after refusing to work in an area which he or she believes to be unsafe has not voluntarily quit employment. Ferguson v. Department of Employment Services, 311 Minn. 34, 247 N.W.2d 895 (1976). Ferguson was assigned to work in a room where one of the three exits had been sealed and another partially obstructed. Gasoline fumes were claimed to be present in the room where smoking was allowed. The employee refused to work in the room but stated a willingness to work elsewhere in the plant. See generally, Haskins v. Choice Auto Rental, Inc., 558 N.W.2d 507 (Minn. App. 1987).
- (6) Discrimination By Employer: Racial discrimination against an employee by his or her employer constitutes a good cause attributable to the employer for leaving the employment. Marz v. Department of Employment Services, 256 N.W.2d 287 (Minn. 1977).

- (7) Unreasonable Demands By Employer: Increasing the duties for which an employee is responsible to an unreasonable level may constitute good cause attributable to the employer for resignation. Zepp v. Arthur Treacher Fish and Chips, 272 N.W.2d 262 (Minn. 1978). For example, requiring a teacher's aide to ride the school bus to and from work with handicapped children without increasing her salary constituted good cause attributable to the employer for her resignation. Nelson v. Bemidji Regional Interdistrict Council, 359 N.W.2d 38 (Minn. App. 1984). See also Pomazzo v. Nabisco, Inc., 360 N.W.2d 662 (Minn. App. 1985).

Where the doubling of the locations for which a repairman was required to provide maintenance in a two-year period, causing his work hours to also double, it was held that the employer had made unreasonable demands that no person could be expected to meet. Zepp v. Arthur Treacher Fish and Chips, Inc., 272 N.W.2d 262 (Minn. 1978).

An employee who quit when her employer relocated resulting in a 17-mile increase to her one-way commute did not have good cause. Werner v. Medical Professionals LLC, 782 N.W.2d 840 (Minn. App. 2010).

- (8) Substantial Pay Reduction/Demotion/Failure to Give A Raise: If the reduction in benefits and wages or hours is greater than 15%, "good cause attributable to the employer" generally may be found. See Sunstar Foods v. Uhlendorf, 310 N.W.2d 80 (Minn. 1980) (20-25% pay reduction was significant, but less than 15% decrease was not sufficient to show good cause). A reduction in actual rate of pay standing alone does not determine entitlement to benefits. Rather, the total compensation, including holiday pay, overtime pay, and profit sharing must be considered to determine if the reduction is "substantial." Wood v. Menard, Inc., 490 N.W.2d 441 (Minn. App. 1992). See also Cook v. Playworks, 541 N.W.2d 366 (Minn. App. 1996) (identifying wage reduction and other factors related to demotion to be weighed in determining whether there is good cause attributable to the employer). See also, Rootes v. Wal-Mart Assoc., Inc., 669 N.W.2d 416 (Minn. App. 2003). Even a failure to grant a raise can constitute good cause to quit if an oral promise to do so is breached. See Hayes v. K-Mart, 665 N.W.2d 550 (Minn. App.) Rev. Denied (2003).
- (9) Quitting Rather than Face Disciplinary Proceedings: When an employee chooses to resign rather than face disciplinary proceedings that would adversely affect his or her work record, it constitutes a voluntary termination disqualifying him or her from receiving unemployment benefits. Seacrist v. City of Cottage Grove, 344 N.W.2d 889 (Minn. App. 1984); Ramirez v. Metro Waste Control Commission, 340 N.W.2d 355 (Minn. App. 1983); Powell v. I.S.D. 2859, 2003 WL 21006150 (Minn. App. 2003); Chappelear v. Zale Delaware, Inc., 2006 WL 1673397 (Minn. App. 2006). However, when an employee is offered the opportunity to resign or be discharged and the employee does not return to work because he or she reasonably thinks he or she has been discharged, the employee has not voluntarily quit. Dahl v. Del Dee Foods, Inc., 378 N.W.2d 656 (Minn. App. 1985).
- (10) Refusing to Return to Light Duty Work: An injured employee's refusal to return to work in a lighter duty position despite medical authorization constitutes voluntary termination. Hirt v. Lakeland Bakeries, 348 N.W.2d 400 (Minn. App. 1984).
- (11) Changes of Hours by Employer: An employee who was promised no weekend work when hired was entitled to benefits even though he voluntarily quit after the employer imposed weekend work. Krantz v. Loxtercamp Transport, 410 N.W.2d 24 (Minn. App.

1987). However, where the employee's scheduling preferences contribute to the reduction in hours, the employee is not entitled to benefits because she did not quit for good cause. Burnett v. Intrepid-New Horizons, C8-01-262, 2001 WL 881451, (Minn. App. August 7, 2001)(unpublished decision).

- (12) Quitting When Reassigned to Another Position: An employee has "good cause" for voluntarily terminating employment when she is unilaterally assigned to a different position for which she is overqualified. Holbrook v. Minnesota Museum of Art, 405 N.W.2d 537 (Minn. App. 1987). However, where employee fails to rebut evidence that a position is not comparable and does not therefore establish good cause for voluntarily quitting, employee could not receive unemployment insurance benefits, where employee claimed too few skills for the job and there is evidence employer would have trained her for the new position. Williams v. Right Step Academy, 607 N.W.2d 482 (Minn. App. 2000). Where school district provided a legitimate reason for reserving the right to exercise flexibility in adjusting staff assignments, the employee fails to dispute the school district's right to change her position, and only argues that the change was stressful and unpleasant is not good cause for employee to quit. Parson v. St. Louis Park Public Schools, C6-01-406, 2001 WL 988000, (Minn. App. August 28, 2001)(unpublished decisions).
- (13) Employee Request for Reduction in Hours: An employee's request to work part time rather than full time constitutes a voluntary termination of the full time position rather than a transfer. Honeywell, Inc. v. Hoyhtya, 400 N.W.2d 818 (Minn. App. 1987). An employee does not have good cause to quit where an employer reduces an employee's hours and reassigns the employee to a different position, due to the employee's excessive absenteeism. Hein v. Precision Associates, Inc., 609 N.W.2d 916 (Minn. App. 2000).
- (14) Quitting Due to Disputed Accrued Sick Leave: An employer's decision not to pay an employee for days missed while a dispute concerning his accrued sick leave was being investigated does not constitute good cause attributable to the employer for the employee quitting. Jaakola v. Duluth/Superior Area Educational Television Corporation, 374 N.W.2d 215 (Minn. App. 1985).
- (15) Domestic Abuse Directed at Employee or Child: An applicant who quits employment because of domestic abuse of the applicant or the applicant's minor child is not disqualified from benefits. Domestic abuse must be shown by documentation referenced in the statute. See, Minn. Stat. § 268.095, Subd. 1(8).
- (16) Loss of Child Care for Minor Child. The applicant's loss of child care for the applicant's minor child caused the applicant to quit the employment, provided the applicant made reasonable effort to obtain other child care and requested time off or other accommodation from the employer and no reasonable accommodation is available.

This exception raises an issue of the applicant's availability for suitable employment under section 268.085, subdivision 1, that the commissioner shall determine.
- (17) Withdrawal of Resignation: An employee who attempts to withdraw a previously submitted resignation is considered to have quit employment if the employer does not allow the withdrawal. See also, Stassen v. Lone Mountain Truck Leasing, 814 N.W.2d 25 (Minn. App. 2012).

- (18) Quilting to Accept Substantially Better Position. An applicant who quits employment in order to accept other covered employment that provides substantially better terms and conditions but does not work long enough at the second employer to have sufficient subsequent earnings to satisfy the period of ineligibility that would otherwise be imposed may be eligible for benefits. Minn. Stat. § 268.095, Subd. 1(2). Whether the new employment is substantially better is based on an objective comparison of the position terms and conditions and not based on more suitable or personal needs of an individual employee. Grunow v. Walser Automotive Group LLC, 779 N.W.2d 577 (Minn. App. 2010).
2. Discharge for “Employment Misconduct” (Minn. Stat. § 268.095, Subd. 4): Employees may be disqualified by reason of misconduct. Employers have the burden of proof of disqualification for misconduct. Booher v. Transport Clearings, Inc., 260 N.W.2d 181 (Minn. 1977). Misconduct is defined as “any intentional, negligent, or indifferent conduct on the job or off the job displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee or (2) a substantial lack of concern for the employment.” Minn. Stat. § 268.095, Subd. 6. If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct. Minn. Stat. § 268.095, Subd. 6 (d).

Employment misconduct does not include:

1. conduct that was a consequence of the applicant’s mental illness or impairment;
2. conduct that was a consequence of inefficiency or inadvertence;
3. simple unsatisfactory conduct;
4. conduct an average reasonable employee would have engaged in under the circumstances;
5. conduct that was a consequence of inability or incapacity;
6. good faith errors in judgment if judgment was required;
7. absence because of illness or injury of the applicant with proper notice to the employer;
8. Absence, with proper notice to the employer, in order to provide necessary care because of the illness, injury, or disability of an immediate family member of the applicant;
9. conduct that was a consequence of the applicant’s chemical dependency, unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency and since that diagnosis or treatment has failed to make consistent efforts to control the chemical dependency; and
10. conduct that was a consequence of the applicant, or an immediate family member of the applicant, being a victim of domestic abuse, **sexual assault, or stalking as defined in the statute**.

Minn. Stat. § 268.095, Subd. 6. See also Ress v. Abbott Northwestern Hospital, 448 N.W.2d 519 (Minn. 1989) (summarizing case law on misconduct.)

Employers most often demonstrate misconduct by arguing the second and third components of the statutory definition. Areas that are frequently addressed include: absenteeism and tardiness problems, disobedience of orders or work rules, violations of company policy, falsification of records, and theft. An employee’s action need not be deliberate to constitute misconduct. Barstow v. Honeywell, Inc., 396 N.W.2d 714 (Minn. App. 1986) (employee terminated for a variety of behaviors, including unexcused tardiness, leaving work without punching out, and unsatisfactory performance, was held to have committed misconduct even though no proof that conduct was deliberate).

The case law, as well as the statute itself, recognizes that “misconduct” does not include actions such as inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or

incapacity, inadvertencies, ordinary negligence in isolated instances, and good faith errors in judgment or discretion. Tilseth v. Midwest Lumber Company, 204 N.W.2d 644, 646 (Minn. 1973). See also, Cook v. Playworks, *supra*, 541 N.W.2d 366. Legitimate problems with childcare may also excuse an employee's actions. For example, the Minnesota Court of Appeals has held that an employee's frequent absences, or an employee's failure to report to a new shift, due to the inability to obtain child care does not constitute misconduct justifying the denial of benefits. Prickett v. Circuit Science, Inc., 499 N.W.2d 506 (Minn. App. 1993) (employee who was discharged for failing to report to a new shift assignment because of his inability to care for a dependent child did not commit misconduct justifying the denial of reemployment compensation).

Generally, the penalty for disqualification due to misconduct is the same as that applied for voluntary quitting without good cause attributable to the employer -- disqualification for the duration of unemployment and until the end of the calendar week that the applicant had total wages paid in subsequent covered employment. Minn. Stat. § 268.095, Subd. 10.

Effective October 28, 2012, the period of disqualification will be for the duration of unemployment and until the end of the calendar week that the applicant had total wages paid in subsequent covered employment sufficient to meet one-half of the total wage credits in the applicant's four quarter base period of at least: (1) \$2,400; or (2) 5.3 percent of the state's average annual wage rounded down to the next lower \$100, whichever is higher.

- a. Repeated Acts of Negligence and/or Unrelated Behaviors as Misconduct: A school bus driver's involvement in three accidents in a 47-day period, resulting in his discharge by his employer, was held not to constitute misconduct in the case of Swanson v. Columbia Transit Corp., 311 Minn. 538, 248 N.W.2d 732 (1976). The court commented: Taken separately, employee's accidents only represent incidents of inadvertence or negligence. While we do not rule out the possibility of a series of negligent or inadvertent acts amounting to misconduct, the evidence does not support such a conclusion in this case. See also, Eddins v. Chippewa Springs Corp., 388 N.W.2d 434 (Minn. App. 1986).

In Monyoro v. Marriott Corp., 403 N.W.2d 325 (Minn. App. 1987), a series of unrelated acts rose to the level of misconduct. There, the employee violated rules on eight occasions within a ten-month period; received four verbal warnings; received a three-day suspension; and then missed a mandatory employee meeting. The court held that, while individually, the incidents might be minor infractions, when considered as a whole, they "demonstrate not only a lack of concern for the job but also that type of intentional and substantial disregard of the employer's interests encompassed by the Tilseth definition of misconduct."

- b. Refusal to Follow Employer's Orders as Misconduct: In Ferguson v. Department of Employment Services, 247 N.W.2d 895 (Minn. 1976), it was argued that the refusal of an employee to accept an assignment to work in an area that the employee considered to be unsafe was misconduct. The court held, however, that misconduct could be found only if it was unreasonable for the employee to believe he had valid grounds for concern over his personal safety. However, in Daniels v. Gnan Trucking, 352 N.W.2d 815 (Minn. App. 1984), the Minnesota Court of Appeals held that a truck driver's refusal to unload a truck was, in itself, misconduct disqualifying him from benefits. In Snodgrass v. Oxford Properties, Inc., 354 N.W.2d 79 (Minn. App. 1984), a security guard's insubordination in refusing to cooperate with her supervisor or take direction from him was deemed to be misconduct sufficient to disqualify her from benefits. In Fresonke v. St. Mary's Hospital, 363 N.W.2d 328 (Minn. App. 1985), failure to return to work after expiration of a medical leave and in direct contravention of employer's directive to return to work constituted misconduct. The

general rule is that if an employer's request is reasonable, an employee's refusal to comply with the request will constitute misconduct. Daniels.

- c. Suspension as Misconduct: Disciplinary suspension is a form of misconduct. Where an employee was suspended for thirty days without pay by the Civil Service Commission because of a lengthy period of criticism and complaints against his employer, the court agreed with the Commissioner that benefits could not be paid for a period of suspension. Sarja v. Iron Range Resource and Rehabilitation, 274 Minn. 458, 144 N.W.2d 377 (1966). See also, City of Melrose v. Klosen, 392 N.W.2d 733 (Minn. App. 1986). Disciplinary suspensions of more than 30 days statutorily constitute a discharge from employment. Minn. Stat. § 268.095, Subd. 5.
- d. Excessive Absenteeism as Misconduct: Pattern of persistent absence despite repeated warnings demonstrated a lack of concern by the employee for her job and constitutes misconduct. Jones v. Rosemount, Inc., 361 N.W.2d 118 (Minn. App. 1985) see also, Williams v. Old Chicago of Colorado, Inc., 2006 WL 2405875 (Minn. App. 2006) (unpublished), but see, St. Williams Nursing Home v. Koep, 369 N.W.2d 33 (Minn. App. 1985), where the applicant's absenteeism was held not to show sufficient culpability to come within the definition of misconduct, and Reddmann v. Kokesch Trucking, Inc., 412 N.W.2d 828 (Minn. App. 1987), where court noted that "last straw" doctrine, for unemployment benefits eligibility purposes, requires an employee's final infraction demonstrate conclusively the employee's utter disregard for the employer's interests. Also, an employee's absences from work due to illness did not constitute misconduct, especially since the employee had expressly followed her employer's directions to verify each absence with a doctor's statement. Gerr v. Target - Fridley, 382 N.W.2d 231 (Minn. App. 1986). An employee's frequent absences from work to care for a sick baby did not constitute misconduct when no other viable alternatives were available to her. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991). An employee's absence to care for an immediate family member did not display clearly a substantial lack of concern for employment and therefore did not constitute employment misconduct. Hanson v. Crestliner Inc., 772 N.W.2d 539 (Minn. App. 2009).
- e. Violation of Employer's Policy on Absenteeism as Misconduct: Repeated failure to notify employer of absences or tardiness constitutes misconduct, even if the employee was incarcerated on the day he failed to notify his employer. Duc VanLuu v. Carley Foundry Co., 374 N.W.2d 582 (Minn. App. 1985); Gustafson v. IRC Industries, 374 N.W.2d 594 (Minn. App. 1985); Peksa v. Fairview-Southdale Hosp., 512 N.W.2d 913 (Minn. App. 1994). Violation of the employer's policy on two occasions constituted misconduct where the employee did not show up to work and failed to call in her absence one hour before a scheduled start time, as required by the employer's policy. Nutall v. Associates in Women's Health, P.A., 2006 WL 2405709 (Minn. App. 2006) (unpublished).

However, when store employee failed to report to work or call in his absence for five consecutive days following a final warning issued in a meeting about his unsatisfactory performance because employee did not believe there were any reasonable steps he could take to correct his performance problems which were the result of four mini-strokes of which the employer was aware, the employee's failure to follow the report his absence in violation of policy did not constitute "employee misconduct." See, Cunningham v. Wal-Mart Associates, Inc., 809 N.W.2d 231 (Minn. App. 2011).

- f. No Single "Hot-Head" Incident Exception to Misconduct: Common law exception from the definition of "misconduct" for isolated hotheaded incident which did not interfere with the

employer's business was eliminated when the legislature did not include "isolated instances" language in formulating definition of misconduct in unemployment insurance statute. Isse v. Alamo Rent-A-Car, 590 N.W.2d 137 (Minn. App. 1999) (employee who violated employer's policy by angrily grabbing and pushing another employee in the workplace was guilty of "misconduct" disqualifying him from reemployment insurance benefits).

Violence in the workplace, however minor, is a serious violation of an employer's reasonable expectations. The former single-incident or hothead-incident exception to the definition of employment misconduct no longer exists. An employee who intentionally physically contacted another by poking him in the ribcage with his finger in anger engages in employment misconduct and is ineligible to receive unemployment benefits. Potter v. Northern Empire Pizza, Inc., 805 N.W.2d 872, 2011 WL 3903200 (Minn. 2011).

- g. Failure to Respond to Memos as Misconduct: Failure to respond to several memoranda and to meet with employer as requested was misconduct. Woodward v. Interstate Office Systems, 379 N.W.2d 177 (Minn. App. 1985).
- h. Customer Complaints: Receipt of three independent complaints from customers regarding the same employee's offensive behavior was sufficient evidence of employee misconduct. Holtan v. Gnan Trucking, Inc., 379 N.W.2d 571 (Minn. App. 1985).
- i. Falsifying Information on Employment Application as Misconduct: Whether misrepresentation on employment application constitutes misconduct depends on whether the misrepresentation is material to the position for which the employee was applying. Heitman v. Cronstroms Manufacturing, 401 N.W.2d 425 (Minn. App. 1987). See also, Independent School District No. 709 v. Hansen, 412 N.W.2d 320 (Minn. App. 1987).
- j. Loss of Driver's License: Where the employee's job required that he maintain a valid driver's license, the employee's loss of that license as a result of driving while intoxicated constituted misconduct. Markel v. City of Circle Pines, 479 N.W.2d 382 (Minn. 1992).

An employee's loss of driver's license required for job because employee failed to pay child support constituted employment misconduct.

- k. Violation of Company Policy as Misconduct: An unknowing violation of an unstated company policy is not misconduct for unemployment benefits purposes. Riley v. Transport Corp. of Am., 462 N.W.2d 604 (Minn. App. 1990). However, an airline pilot who consumed alcohol while on flight reserve status in violation of employer's policy prohibiting alcohol consumption commits employment misconduct. Peterson v. Northwest Airlines, 753 NW2d 771 (Minn. App. 2008).
- l. Misrepresentation as misconduct: An employee who knowingly misrepresents his status as a qualified licensed teacher engages in misconduct and is thereby disqualified from receiving unemployment compensation benefits if he is discharged for the misconduct. Anderson v. I.S.D. No. 743, Unpublished opinion (Minn. App. 1991).

A material misrepresentation made during the hiring process related to the applicant's reason for leaving her former employer constituted employment misconduct where the information she supplied implied that she voluntarily left her previous employment when, in actuality, she was discharged for theft. Santillana v. Central Minnesota Council on Aging, 791 N.W.2d 303 (Minn. 2010).

- m. Refusal to Participate in Reasonable Employment-Performance Plan: Employee was given a performance improvement plan containing requirements and deadlines he needed to complete in order to remain employed. Employer representatives met with employee and reviewed the plan with him. The first part of the plan was to be completed within seven days. At the end of seven days the employee had not fulfilled any of the requirements of the plan and when asked if he intended to complete the plan responded “no”. Employee was terminated. The court found that the employee’s conduct constituted “employment misconduct.” But see, Bray v. Dogs & Cats Ltd. (1997), 679 N.W.2d 182 (Minn. App. 2004) (simple unsatisfactory performance because of inability or incapacity did not demonstrate a substantial lack of concern for the employment).
 - n. Absence Due to Incarceration: Employee’s misconduct that led to her incarceration caused her to fail to report to work constituted misconduct sufficient to disqualify her from receiving benefits. Note that the court reiterated that the employer was under no duty to call to verify incarcerated employee’s employment for purposes of work release under Minn. Stat. § 631.425. Jenkins v. American Express Financial Corp. 702 N.W.2d 908 (Minn. App. 2005).
 - o. Act of Dishonesty: The Court of Appeals upheld the denial of unemployment benefits to fast food cashier for undercharging herself \$3.30 on a meal she ate on the premises as “misconduct.” The cashier claimed that her conduct was inadvertent, but the undercharge reflected “dishonesty” that made her employer reluctant to “entrust” her with any responsibilities. Sharhus v. Davanni’s, Inc., 721 N.W.2d 340 (Minn. App. 2006).
 - p. Viewing Pornography. A city employee who used his employer’s computer to open pornographic email attachments and access pornographic websites seriously violated a standard of behavior that the employer had a right to reasonably expect of the employee, even though the employer had not adopted a policy prohibiting the viewing of pornographic material on the employer’s computers. The Court of Appeals found that the number of images and the way in which they were accessed demonstrated that they were not accessed inadvertently and, therefore, the employee’s conduct constituted employment misconduct. Brisson v. City of Hewitt, 789 N.W.2d 694 (Minn. App. 2010).
 - q. Inadvertence is not Employment Misconduct. Substantial evidence in the record supported the conclusion that the applicant’s conduct involved an unintentional lack of care and, therefore, inadvertent. Conduct that is inadvertent does not support a finding of employment misconduct. Dourney v. CMAK Corp., 796 N.W.2d 537, (Minn. App. 2011).
 - r. Employer’s failure to Follow Progressive Discipline Policy Does Not Affect Employment Misconduct. An employee can be denied unemployment benefits for engaging in employment misconduct, even though the employer failed to follow its progressive discipline policy when it terminated the employee. Stagg v. Vintage Place, Inc., 796 N.W.2d 312 (Minn. 2011); *overruling* Hoemberg v. Watco Publishers, Inc., 343 N.W.2d 676.
3. Statutory Exceptions to Disqualification by Reason of Quitting or Misconduct (Minn. Stat. § 268.095, Subd. 1: one of the following conditions may be considered to be voluntary quitting or discharge due to misconduct.

Subd. 1. Quit. An applicant who quit employment is ineligible for all unemployment benefits according to subdivision 10 except when:

- (1) the applicant quit the employment because of a good reason caused by the employer as defined in subdivision 3;

- (2) the applicant quit the employment to accept other covered employment that provided substantially better terms and conditions of employment, but the applicant did not work long enough at the second employment to have sufficient subsequent earnings to satisfy the period of ineligibility that would otherwise be imposed under subdivision 10 for quitting the first employment;
- (3) the applicant quit the employment within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant;
- (4) the employment was unsuitable for the applicant and the applicant quit to enter reemployment assistance training;
- (5) the employment was part-time and the applicant also had full-time employment in the base period from which full-time employment the applicant separated because of reasons for which the applicant was held not to be ineligible, and the wage credits from the full-time employment are sufficient to meet the minimum requirements to establish a benefit account under section 268.07;
- (6) the applicant quit because the employer notified the applicant that the applicant was going to be laid off because of lack of work within 30 calendar days. An applicant who quit employment within 30 calendar days of a notified date of layoff because of lack of work is ineligible for unemployment benefits through the end of the week that includes the scheduled date of layoff;
- (7) the applicant quit the employment because the applicant's serious illness or injury made it medically necessary that the applicant quit, provided that the applicant inform the employer of the serious illness or injury and request accommodation and no reasonable accommodation is made available. If the applicant's serious illness is chemical dependency, this exception does not apply if the applicant was previously diagnosed as chemically dependent or had treatment for chemical dependency, and since that diagnosis or treatment has failed to make consistent efforts to control the chemical dependency; This exception raises an issue of the applicant's being available for suitable employment under section 268.085, subdivision 1, that the commissioner must determine;
- (8) the applicant's loss of child care for the applicant's minor child caused the applicant to quit the employment, provided the applicant made reasonable effort to obtain other child care and requested time off or other accommodation from the employer and no reasonable accommodation is available.

This exception raises an issue of the applicant's being available for suitable employment under section 268.085, subdivision 1, that the commissioner must determine; or

- (9) **the applicant quit because of domestic abuse, sexual assault or stalking of the applicant or an immediate family member of the applicant**

Domestic abuse is defined under Minn. Stat. § 518B.01. **Sexual assault is defined as an act that violates 609.432 to 609.3453 or 609.353. Stalking means an act that violates section 609.749; or**

- (10) **the applicant quit in order to relocate to accompany a spouse whose job location changed making it impractical for the applicant to commute.**

- a. Unsuitable Employment. A teacher who quit employment with one school district in order to accept a teaching position in another school district and who quit 29 days later cannot rely on the argument that the second teaching position was unsuitable in order to qualify for unemployment benefits. Powell v. I.S.D. No. 2859, 2003 WL 21006150 (Minn. App. 2003).

- b. Serious Illness or Injury. In a recent decision, the Court of Appeals found employment misconduct where an employee repeatedly used abusive language in arguments with supervisors and threatened co-workers with bodily harm. The court noted that the employee engaged in intentional conduct that disregarded the standard of behavior that the employer had a right to expect. Thomas v. St. Paul's Church Home, 2003 WL 21499917.

The Supreme Court has noted that "This exception [the predecessor to Subd. 1(7)] indicates a legislative intent to include as misconduct behavior which results from illness, even though the employee has no control over the illness." Moeller v. Department of Transportation, 281 N.W.2d 879 (Minn. 1979). See also, Flahave v. Lang Meat Packing, 343 N.W.2d 683 (Minn. App. 1984); Gustafson v. IRC Industries, 374 N.W.2d 594 (Minn. App. 1985); Winkler v. Park Refuse Services, Inc., 361 N.W.2d 120 (Minn. App. 1985); Torgerson v. Goodwill Industries, Inc., 391 N.W.2d 35 (Minn. App. 1986).

In the Torgerson case, the court held that failure to report to work, even though resulting from alcoholism, constituted misconduct because the employee did not make reasonable efforts to treat his alcoholism. Commenting upon the employee's attempts to regain employment, the court stated; "Given the nature of the disease, it is unreasonable to require the employee to maintain total abstinence even after he enters treatment."

The commissioner's office has further interpreted the predecessor section to Subd. 1(7) to require substantial efforts by the employee to retain employment. In Yourczek v. Eldridge Chiropractic Clinic, Appeal No. 2005-UC-86, the department held that an employee had voluntarily quit after suffering from stomach disorders and depressive symptoms. The employee left employment because of the illness and was in contact with the employer over a period of several months. She did not ask for a formal leave of absence since the employer had no formal procedure for such leaves. Despite repeated contact with the employer regarding the position, the claim's referee denied benefits because of the failure to make reasonable effort to keep her job.

The appellate courts have held that individuals who do not make reasonable efforts to treat their chemical dependency are guilty of misconduct and are not eligible for benefits. See, e.g., Umlauf v. Gresen Mfg., 393 N.W.2d 198 (Minn. App. 1986). On the other hand, an individual who seeks treatment, regularly attends AA meetings, or otherwise attempts to achieve sobriety is eligible for benefits. See, e.g., Peksa v. Fairview-Southdale Hosp., 512 N.W.2d 913 (Minn. App. 1994); Independent School District No. 709 v. Hansen, 412 N.W.2d 320 (Minn. App. 1987).

- c. Quit for a Better Job Exception (Minn. Stat. § 268.096, Subd. 1(2)). Whether new employment is "substantially better" is based upon an objective comparison of the positions' terms and conditions, including wages, benefits (i.e., advancement opportunities, union representation), and group health, life and disability insurance coverage. Grunow v. Walser Auto, Group LLC, 779 N.W.2d 577 (Minn. App. 2010). A net annual compensation increase in the new position of less than five percent (5%) did not offer substantially better terms than the former employment and, therefore, the applicant was ineligible to receive unemployment benefits. Sykes v. Northwest Airlines, Inc., 789 N.W.2d 253 (Minn. App. 2010).
4. Aggravated Employment Misconduct (Minn. Stat. § 268.095, Subd. 6a). Aggravated employment misconduct, or "gross misconduct," includes the commission of any act on the job or off the job, that would amount to a felony or gross misdemeanor if the act substantially interfered with the employment or had a significantly adverse effect on the employment. For employees of a health care facility, gross misconduct includes patient or resident abuse.

The standard of proof in determining whether an employee has committed gross misconduct is preponderance of the evidence. Manos v. First Bank Minnehaha, 357 N.W.2d 372 (Minn. App. 1984). In Manos, the Court held that an employee's failure to report overpayments in her paycheck constituted gross misconduct. See also, Waara v. Mesabi Regional Medical Center, 415 N.W.2d 362 (Minn. App. 1987).

In Pechacek v. Minnesota State Lottery, 497 N.W.2d 243 (Minn. 1993), an employee discharged because of conviction of a felony, even though for off-duty and off-site conduct, was disqualified from benefits. The supreme court reasoned that the conviction of a felony affected the credibility of and reduced public confidence in the integrity of the employer.

"[I]f the applicant was discharged from employment because of aggravated employment misconduct, wage credits from that employer shall be canceled." (Minn. Stat. § 268.095, Subd. 10(c).

An employee cannot be discharged for aggravated employment misconduct based upon an act or conduct that would amount to a gross misdemeanor or a felony if the act or conduct occurred before the employment at issue. Santillana v. Central Minnesota Council on Aging, 791 N.W.2d 303 (Minn. 2010).

5. Separation to Assume Family Obligations: The U.S. Supreme Court in Wimberly v. Missouri Labor and Industrial Relations Commission, 107 S.Ct. 821 (1987), upheld a Missouri unemployment compensation statute as it related to the federal unemployment tax act, 26 U.S.C. 3304. The Missouri statute, similar to Minnesota's, disqualified applicants who voluntarily left work without good cause attributable to the employer. In that case, the applicant left because of pregnancy. The court held that 26 U.S.C. 3304(a)(12) prohibited discrimination against pregnant workers but did not require preferential treatment for them. It is unclear at this time whether workers who quit as a result of being pregnant would be disqualified from benefits in all cases in Minnesota. The U.S. Supreme Court, as well as the Minnesota Supreme Court, have reasoned that, under those circumstances, the worker's pregnancy was not "good cause attributable to the employer" and that accordingly benefits could be denied in such cases. (Note that Minnesota now requires up to a six-week parental leave for employees employed by employers, including school districts, employing more than 21 people.) Minn. Stat. § 181.941 et seq. A federal statute, the Family and Medical Leave Act of 1993, requires employers to provide up to 12 weeks of parental leave. 29 U.S.C. § 2611 et seq.

A applicant had good cause to quit her job and was not disqualified from receiving benefits when her employer demoted her upon her return from maternity leave in violation of the Parenting Leave Act. Polley v. Gopher Bearing Co., 478 N.W.2d 775 (Minn. App. 1991).

6. Failure to Apply For or Accept Suitable Employment or Reemployment: If the commissioner finds that a applicant has, without good cause, "failed to apply for available, suitable employment of which the applicant was advised by the commissioner or an employer; failed to accept suitable employment when offered; or avoided an offer of suitable employment," the applicant shall be ineligible for all benefits for eight calendar weeks. Minn. Stat. § 268.095, Subd. 8.

"Suitable employment" is defined in Minn. Stat. § 268.035, Subd. 23a. The policy behind the suitable work provision is to recognize a worker's skills and abilities but not provide a haven for those who do not wish to work.

Subd. 23a. Suitable employment. (a) Suitable employment means employment in the applicant's labor market area that is reasonably related to the applicant's qualifications. In determining

whether any employment is suitable for a applicant, the degree of risk involved to the health and safety, physical fitness, prior training, experience, length of unemployment, prospects for securing employment in the applicant's customary occupation, and the distance of the employment from the applicant's residence is considered.

* * *

(g) Employment is not considered suitable if:

- (1) the position offered is vacant because of a labor dispute;
- (2) the wages, hours, or other conditions of employment are substantially less favorable than those prevailing for similar employment in the labor market area;
- (3) as a condition of becoming employed, the applicant would be required to join a company union or to resign from or refrain from joining any bona fide labor organization, or
- (4) the employment is with a staffing service and less than 25 percent of the applicant's wage credits are from a job assignment with the client of a staffing service.

Employment agency's temporary, one-day nursing assignments that could be canceled by clients without warning and without compensation were not "suitable employment", where applicant sought temporary work because she was separated from full-time permanent employment for non-disqualifying reasons, applicant wanted something stable and permanent, and, even though applicant had worked for three temporary agencies during her base period, these positions were long term assignments. Mbong v. New Horizons Nursing, 608 N.W.2d 890 (Minn. App. 2000).

7. Labor Disputes as a Disqualifying Factor (Minn. Stat. § 268.085, Subd. 13b):

- a. Generally: An applicant is ineligible for unemployment benefits if the applicant "has stopped working because of a labor dispute at the establishment where the applicant is employed." (Minn. Stat. § 268.085, Subd. 13b).

The legislative purpose behind this disqualifying condition is to protect employers from having to finance strikes against themselves. Kitchen v. Herberger's, Inc., 262 Minn. 135, 114 N.W.2d 64 (1964).

Where such an ineligibility is found to exist it lasts for the duration of the labor dispute at the establishment where the employee worked. (Minn. Stat. § 268.085 Subd. 13b(a)(1)). If, however, an employee does not participate in or is not directly interested in a labor dispute that causes him or her to leave or to lose employment, the period of disqualification runs only until the end of the calendar week that the labor dispute began. Minn. Stat. § 268.085 Subd. 13b(a)(2); see Mortel v. I.S.D. #831, 334 N.W.2d 408 (Minn. 1983).

Also, if an employee is not reemployed upon conclusion of a strike, he or she is entitled to receive benefits unless he or she is disqualified on another basis, such as misconduct. Christianson v. Geo. A. Hormel & Company, 404 N.W.2d 334 (Minn. App. 1987).

The U.S. Supreme Court has upheld an Ohio statute disqualifying a worker for unemployment benefits if his or her unemployment was due to a labor dispute other than a lockout at any factory owned or operated by the employer by which he or she is or was last employed. No exception was provided for non-striking employees. In Ohio Bureau of Employment Services v. Hodory, 97 S.Ct. 1898 (1977), the court held that the statute was not in conflict with or preempted by the Social Security Act of the Federal Unemployment Tax Act and was constitutional because it had a rational relation to a legitimate state interest.

Therefore, the more limited Minnesota disqualification for striking employees should be similarly upheld if challenged.

- b. Strikes Due to Unsafe Working Conditions: On the other hand, where a applicant stops working because of an employer's intentional failure to comply with health and safety requirements of a union contract or the terms of an official citation for violation of federal or state health or occupational safety laws, the policy does not apply. Benefits are not denied employees who strike because of such violation. (Minn. Stat. § 268.085, Subd. 13b(c)(1)).
- c. Lockouts and Dismissal Prior to Strike: Benefits are not denied an employee who stops working because of a lockout or who is dismissed prior to the beginning of a labor dispute but before commencement of the strike. Minn. Stat. § 268.085, Subd. 13b(c)(2) and (3). See Sunstar Foods, Inc. v. Uhlendorf, 310 N.W.2d 80 (Minn. 1981). Whether the employer's actions constituted a constructive lockout is a question of fact to be determined by the Commissioner. Moore v. Allied Aviation Fueling Company of Minnesota, 385 N.W.2d 41 (Minn. App. 1986).
- d. Jurisdictional Disputes: Benefits are denied an employee who stops working because of a jurisdictional dispute between two or more labor organizations for the duration of the dispute. (Minn. Stat. § 268.085, Subd. 13b(b)).
- e. Effect of Strike Upon Subsequent Employment: The occurrence of a strike does not normally terminate the employee-employer relationship. Upon the termination of a strike, an employee who is not re-hired becomes eligible to receive benefits unless it can be established that he or she has voluntarily and without good cause attributable to the employer discontinued the employment. Ayers v. E.S. Johnson Company, 244 Minn. 375, 70 N.W.2d 296 (1965).

In Ayers, the employer hired replacements for employees who were out on strike. The disputed issues were subsequently submitted to binding arbitration. When the arbitrator held that the strikers were not, under the National Labor Relations Act, entitled to have their jobs back, the employer argued that agreeing to binding arbitration constituted voluntary termination by the strikers. The court disagreed and held that neither engaging in the strike nor submitting the matter to binding arbitration constituted voluntary quitting.

Similarly, in Taraldson v. Daily Printing, Inc., 361 N.W.2d 179 (Minn. App. 1985), striking workers who were replaced and not recalled after the strike due to decertification of the union, were held to be entitled to benefits.

- C. Effect of Disqualification Upon Fund Reimbursement: Contributing employers have an extra incentive to establish the disqualification of applying applicants. Disqualification of applicants keeps the employer's experience ratio and tax rate lower.

However, most school districts are reimbursing employers and are required to repay the fund for claims attributable to their employment. There is not as great an economic incentive for reimbursing employers to contest an individual applicant's disqualification.

V. NO EMPLOYEE WAIVER OF RIGHT TO UNEMPLOYMENT BENEFITS OR EMPLOYER AGREEMENT TO NOT CONTEST:

- A. Minn. Stat. § 268.192, Subd. 1 states, in relevant part:

"Any agreement by an individual to waive, release, or commute rights to unemployment benefits or any other rights under the Minnesota unemployment insurance law is void...[and] [a]ny employer or

officer or agent of any employer who violates any portion of this subdivision is, for each offense, guilty of a misdemeanor.”

Thus, an employee’s agreement to waive his or her right to file a claim for unemployment benefits is not enforceable. Moreover, an employer that solicits such an agreement as part of a resignation agreement, or otherwise, is subject to criminal prosecution of a misdemeanor, which carries a sentence of a maximum of 90 days imprisonment and/or a \$1000.00 fine.

- B. An employer also may not make an agreement to not contest the payment of unemployment benefits, including agreeing to not provide information to the department in exchange for the employee quitting, taking a leave of absence, leaving the employment temporarily or permanently, or withdrawing a grievance or appeal of a termination. (Minn. Stat. § 268.192, Subd. 1a). An agreement that violates this provision has no effect.

VI. APPEALS AND PROTESTS:

- A. Notification: Each employee applying for unemployment benefits is required to furnish the reasons for separation from all employers and the identity of all such employers during the applicant’s last six (6) calendar months prior to the date of application. [Minn. Stat. § 268.101, Subd. 1(a)]. An applicant must report any offers of employment refused during the eight calendar weeks before the date of the application for unemployment benefits and the name of the employer that made the offer. Once an account is established, the commissioner notifies the applicable employers.

- B. Response to Notification of Filing of Claim: Minn. Stat. § 268.101, Subd. 1(b) provides that the commissioner gives notice of the claim to all employers the applicant was required to report on the application and all in the base period for whom the applicant worked. The employers may raise an issue of ineligibility or disqualification. [Minn. Stat. § 268.101, Subd. 1(b).]

If the employer fails to provide wage information for the applicant, the commissioner accepts the information provided by the applicant. Any determination of validity may be modified based upon corrected information subsequently received from the employer or other sources. Employers who fail to report or who submit false or misleading information may be penalized, including the monetary and other penalties provided for in Minn. Stat. § 268.044, Subd. 2, 3 and 4; Minn. Stat. § 268.057; Minn. Stat. § 268.058; Minn. Stat. § 268.059 and Minn. Stat. § 268.184.

- C. Ineligibility Determinations: The commissioner is directed to make determinations relating to issues of ineligibility “timely raised” by an employer, or based on information obtained from a applicant, and to notify the applicable parties of such determinations. [Minn. Stat. § 268.101, Subd. 2(a)-(g) and Subd. 3(a)-(f).]
- D. Subsequent Determinations: In situations where an employer has not been notified and given an opportunity to protest, the commissioner makes determinations up to 24 months after the establishment of a benefit account. Such subsequent determinations are conditioned on a finding by the commissioner that a applicant failed to report information that the applicant has a duty to report, including employment or loss of employment. [Minn. Stat. § 268.101, Subd. 2(c) and Subd. 3(c).]
- E. Appeal Procedure:
1. Thirty Days to Appeal: a determination of eligibility or ineligibility is final, “unless a written appeal is filed by the applicant or notified employer within 20 calendar days after sending.” [Minn. Stat. § 268.101, Subd. 2(f)]

2. Right to a Hearing: Upon appeal the Department will set a time and place for an evidentiary hearing and provide notice by mail at least 10 calendar days prior to the date of the hearing. An unemployment law judge will hear and decide the appeal. The hearing is “de novo,” i.e., the judge makes a new determination of eligibility based upon evidence and testimony at the hearing. The hearing also is required to be an “evidence gathering inquiry and not an adversarial proceeding.” (Minn. Stat. § 268.105, Subd. 1).
3. Request for Reconsideration: Within 20 calendar days after sending of the unemployment law judge’s decision, any involved applicant or employer may file a request for reconsideration asking the unemployment law judge to reconsider that decision. The unemployment law judge shall issue an order: (1) modifying the findings of fact, **reasons for decision** and decision; (2) setting aside the **findings of fact, reasons for decision and decision** and **ordering** an additional evidentiary hearing be conducted; or (3) affirming the findings of fact and decision. In the event that the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony in the decision.
4. Oaths; Subpoenas: An unemployment law judge has authority to administer oaths and affirmations, take depositions, and issue subpoenas for witnesses and production of documents and other necessary evidence. The unemployment law judge must give full consideration to a request for a subpoena and must not unreasonably deny a request for a subpoena. (Minn. Stat. § 268.105, Subd. 4). Testimony at the hearing must be recorded. (Minn. Stat. § 268.105, Subd. 5). Any agent may represent a party. (Minn. Stat. § 268.105, Subd. 6).
5. Use of Evidence: All testimony at any hearing before an unemployment law judge must be recorded. During the time for filing a request for reconsideration; **while a request for reconsideration is pending; during the time for filing a petition for writ of certiorari; or while a petition for writ of certiorari is pending** a copy of any recorded testimony and exhibits offered at the hearing will be provided upon request to a party at no cost. If not requested during the time period **set forth herein testimony and other** evidence will later be available only by a district court order. A subpoena will not be sufficient.
6. Judicial Review: The Minnesota Court of Appeals shall review the final decision of the unemployment law judge challenged by a timely writ of certiorari. (Minn. Stat. § 268.105, Subd. 7). A petition must be filed and served on the unemployment review judge or the commissioner and any involved party within 30 calendar days of the sending of the unemployment law judge’s decision. (Minn. Stat. § 268.105, Subd. 7; Rules 103.01, 115, and Forms 115A and B of the Rules of Civil Appellate Procedure).

Finally, any party may petition the Supreme Court to review the decision of the Court of Appeals. The petition must be filed within 30 days of the filing of the Court of Appeals’ decision. Review of the Court of Appeals decision is discretionary with the Supreme Court. Rule 117, Rules of Civil Appellate Procedure.

7. Scope of Review: The scope of review by the Court is limited. The Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because of the findings, inferences, conclusions or decision are: in violation of constitutional provisions; in excess of the statutory authority or jurisdiction of the department; made upon unlawful procedure; affected by other error of law; unsupported by substantial evidence in view of the entire record as submitted; or arbitrary or capricious. According to the case law, the court cannot “...disturb the Commission’s determination because it does not agree with it. It can only

interfere when it appears that the Commissioner has not kept within his jurisdiction, or has proceeded upon an erroneous theory of the law, or unless his action is arbitrary and oppressive and unreasonable so that it represents his will and not his judgment or is without evidence to support it.” Bucko v. J.F. Quest Foundry Company, 229 Minn. 131, 38 N.W.2d 223 (1949). See also, Stream v. Continental Machines, Inc., 111 N.W.2d 785 (Minn. 1961)(“The findings of the Commissioner will not be disturbed if there is any evidence reasonably tending to sustain them”); Sarja v. Iron Range Resources and Rehabilitation, 274 Minn. 438, 144 N.W.2d 377 (1966); White v. Metropolitan Medical Center, 332 N.W.2d 25, 26 (Minn. 1983)(“Findings are to be viewed in the light most favorable to the decision and if there is evidence reasonably to sustain them they will not be disturbed”).

The Court of Appeals, however, is entitled to exercise independent judgement when reviewing the Commissioner’s legal conclusions. Stottler v. Meyers Printing Co., 602 N.W.2d 916 (Minn. App. 1999).

VII. CONCLUSION: A school district can best minimize its exposure to pay unemployment benefits by, immediately after receiving notification of filing of a claim by a former employee, (1) documenting in as much detail as possible any disqualifying conditions and (2) promptly bringing to the attention of the Department any information later obtained that would indicate a applicant’s disqualification or ineligibility.

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

LICENSED AND NONLICENSED SCHOOL DISTRICT EMPLOYEE LEAVE

Revised April 2015

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- I. INTRODUCTION: School districts, like most other employers, are subject to the provisions of state and federal law which create rights to and restrictions regarding various types of employee leave. The purpose of this bulletin is to inform school board members and administrators of the general requirements relating to the following types of employee leave:

- A. **Pregnancy and Parenting Leave**
- B. School Conference and Activities Leave
- C. Sick or Injured Child Care Leave
- D. Leave for Religious Observances
- E. Leave for Court Service
- F. Extended Leave of Absence
- G. Military Leave
- H. Military Related Leaves
- I. Athletic Leave of Absence
- J. Time off for Public Office Meetings
- K. Leave for Bone Marrow Donations
- L. Leave for Blood Donations
- M. Leave for Organ Donations
- N. Sabbatical Leave
- O. Leave to Teach in a Charter School
- P. Time Off for Political Activities and Voting
- Q. Time Off to Elected Officers or Appointed Representatives of Exclusive Representative
- R. Part-time teachers TRA continuation
- S. Family and Medical Leave Act
- T. Early Retirement Incentive Program

II. LEAVE RIGHTS AND RESTRICTIONS:

- A. **PREGNANCY AND PARENTING LEAVE**. Both Minnesota and federal law grant an employee the right to an unpaid leave of absence for the birth or adoption of a child.
 - 1. State law. The Minnesota Parental Leave Act (MPLA) provides that an employer must grant an unpaid leave of absence to an employee who is a **biological** or adoptive parent in the conjunction with the birth or adoption of a child, **or a female employee for prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions**. Minn. Stat. §181.941. An employee need not expressly request leave under the MPLA to invoke the projections of the Act and need only state a qualifying reason for needing leave. Hanson v. Robert Half Int'l, 813 N.W.2d 906 (Minn. 2012).

- a. Who applies to:
 - (1) Employer: A person or entity, which includes a school district, that employs 21 or more employees. Minn. Stat. §181.940, Subd. 2.
 - (2) Employee: A person who performs services for hire for an employer from whom the leave is requested for at least 12 months preceding the request, and works for an average number of hours per week equal to one-half of the full-time equivalent position in the employee's job classification as defined by the employer's personnel policies or practices or pursuant to the provisions of a collective bargaining agreement, during **the 12-month period immediately preceding the leave**. An independent contractor is not considered an employee. Minn. Stat. §181.940, Subd. 2.
- b. What applies to: An employee is entitled to unpaid leave in conjunction with the birth or adoption of a child. A child is defined as an individual under 18 years of age or an individual under age 20 who is still attending secondary school. Minn. Stat. §181.940, Subd. 4. **A female employee is also entitled to unpaid leave for prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions.**
- c. Length and timing of leave: The leave shall begin at a time requested by the employee, although the employer may adopt reasonable policies governing the timing of requests for unpaid leave **and may require an employee who plans to take a MPLA leave to give the employer reasonable notice of the date the leave shall commence and the estimated duration of the leave. For purposes of leave in conjunction with the birth or adoption of a child, the leave must begin within 12 weeks of the birth or adoption**, except that, in the case where the child must remain in the hospital longer than the mother, the leave **must** begin **within 12 months** after the child leaves the hospital. Minn. Stat. §181.941, Subd. 2. The length of the leave shall be determined by the employee, but **must** not exceed **12 weeks** unless agreed to by the employer. Minn. Stat. §181.941, Subd. 1(b). A physician cannot extend the leave beyond six weeks without the employer's approval. Gangnon v. Park Nicollet Methodist Hosp., 771 F.Supp.2d 1049 (D. Minn.) (Jan.27, 2011). **(In light of the 2014 amendment to the statute increasing the length of the leave from 6 to 12 weeks, the language in Gangon referring to a leave beyond six weeks would now be twelve.)** The length of leave may be reduced by any period of paid parental, disability, **personal, medical, or sick leave, or accrued vacation**, provided by the employer, so that the total leave does not exceed **12 weeks**, unless agreed to by the employer. Minn. Stat. §181.943. **The length of leave may also be reduced by any period of leave taken for the same purpose by the employee under Family and Medical Leave Act.**
- d. Compensation during leave: Minnesota law does not require that the leave be paid leave, but rather specifies that the leave is unpaid. Minn. Stat. §181.941, Subd. 1. The employer must continue to make coverage available to the employee while on leave of absence under any group insurance policy, group subscriber contract, or health care plan for the employee and any dependents. The employer, however, is not required to pay the cost of insurance or health care while the employer is on leave. Minn. Stat. §181.941, Subd. 4.
- e. Reinstatement: An employee returning from **a pregnancy and parenting** leave is entitled to return to employment in the employee's former position or in a position of comparable duties, number of hours, and pay. Minn. Stat. §181.942, Subd. 1(a). The Minnesota Court of Appeals held that the reinstatement of a billing clerk to receptionist duties constituted a violation of the Parenting Leave statute because the duties were not "comparable." Polley v. Gopher Bearing Co., 478 N.W.2d 775 (Minn. App. 1991), review denied (1992). An employee returning from **a pregnancy and parenting** leave longer than one month in

duration must notify a supervisor at least two weeks prior to returning from leave. Minn. Stat. §181.942, Subd 1(a). If during **a pregnancy and parenting** time leave the employer experiences a layoff and the employee would have lost a position had the employee not been on leave, pursuant to the good faith operation of a bona fide layoff and recall system, including a system under a collective bargaining agreement, the employee is not entitled to reinstatement in the former or comparable position. Minn. Stat. §181.942, Subd. 1(b). In such circumstances, the employee retains all rights under the layoff and recall system, including a system under a collective bargaining agreement, as if the employee had not taken the leave. Minn. Stat. §181.942, Subd. 1(b). By agreement of the employer, an employee may return to work part-time during the period of leave without forfeiting the right to return to employment and the end of the leave period. Minn. Stat. §181.942, Subd. 3.

- f. Compensation and benefits upon return from leave: An employee returning from **pregnancy and parenting** leave is entitled to return to employment at the same rate of pay the employee had been receiving when the leave commenced, plus any automatic adjustments in the employee's pay scale that occurred during the leave period. Minn. Stat. §181.942, Subd. 2. The employee returning from **pregnancy and parenting** leave is entitled to retain all accrued pre-leave benefits of employment and seniority, as if there had been no interruption in service. Nothing in state statutes prevents the accrual of benefits or seniority during the **pregnancy and parenting** leave if provided for pursuant to a collective bargaining agreement or other agreement between the employer and the employees. Minn. Stat. §181.942, Subd. 2.

Before the end of the fiscal year during which **pregnancy and parenting** leave is granted, the employer must certify the leave to the Teachers Retirement Association. Notwithstanding any agreements to the contrary, employee and employer contributions may not be made to receive allowable service credit if the teacher does not retain the right to full reinstatement at the end of the leave.

- g. Retaliation prohibited: An employer is prohibited from retaliating against an employee for requesting or obtaining **pregnancy and parenting** leave. Minn. Stat. §181.941, Subd. 3.
- h. Breastfeeding of child: Minnesota law also requires that an employer provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The break time must, if possible, run concurrently with any break time already provided to the employee. An employer is not required to provide break time if to do so would unduly disrupt the operations of the employer. The employer must make reasonable efforts to provide a room or other location, in close proximity to the work area, other than a **bathroom or a toilet stall, that is shielded from view and free from intrusion from coworkers and the public and that includes access to an electrical outlet**, where the employee can express her milk in privacy. **An employer may not retaliate against an employee for asserting rights or remedies under the statute dealing with breastfeeding of a child.** This paragraph applies to any employer employing one or more employees, including school districts. Minn. Stat. §181.939.
- i. Pregnancy accommodations. Minnesota law further requires that an employer must provide reasonable accommodations to an employee for health conditions related to pregnancy or childbirth if she so requests, with the advice of her licensed health care provider or certified doula, unless the employer demonstrates that the accommodation would impose an undue hardship on the employer's business. A pregnant employee shall not be required to obtain the advice of her licensed health care provider or certified doula, nor may an employer claim undue hardship for the following

accommodations: (1) more frequent restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds. The employee and employer must engage in an interactive process with respect to an employee's request for a reasonable accommodation. A "reasonable accommodation" may include, but is not limited to, temporary transfer to a less strenuous or hazardous position, seating, frequent restroom breaks, and limits to heavy lifting. However, an employer shall not be required to create a new or additional position in order to accommodate an employee, and shall not be required to discharge an employee, transfer any other employee with greater seniority, or promote any employee. An employer may not retaliate against an employee for requesting or obtaining pregnancy accommodations under the statute, and an employer may not require an employee to take a leave or accept an accommodation.
M.S. 181.9414

- j. Additional leave benefits provided by employer: The statutory leave provisions set forth only the minimum benefits that must be provided to employees. The statute in no way prohibits employers from granting benefits in addition to those provided by the statute. Minn. Stat. §181.943 (b).
 - k. Posting of laws: The Minnesota Division of Labor Standards and Apprenticeship is required, with the assistance of interested businesses and community organizations, to develop an educational poster stating employees' rights under Minn. Stat. §181.940 to Minn. Stat. §181.9436. These posters are available, upon request, to employers for posting on the employee's premises. Minn. Stat. §181.9436.
 - l. Investigation of complaints: The Minnesota Division of Labor Standards and Apprenticeship is required to receive and investigate informally complaints or alleged violations of Minnesota law relating to this leave, and to attempt to resolve such complaints by informing employees and employers of the provisions of the law and directing employers to comply with the law. **For complaints related to the statute dealing with the breastfeeding of a child noted above, the division must contact the employer within two business days and investigate the complaint within ten days of receipt of the complaint.** Minn. Stat. §181.9435.
2. Federal law. Assuming the employer is a "covered employer" and the employee is an "eligible employee," the Family and Medical Leave Act (FMLA) provides that an employee may take leave for the birth of a child or placement of a child with the employee for adoption or foster care. 29 U.S.C. §2612. This includes the adoption of a stepchild. Covered employers must provide up to 12 work weeks of leave during any 12-month period. However, an employer can require an employee to substitute accrued paid vacation or personal or family leave in lieu of unpaid leave. The leave of a husband and wife employed by the same employer is limited to a combined total of 12 weeks, not 12 weeks per parent. The leave may begin before the actual date of birth of a child, or before the actual placement or adoption of a child if absence from employment is required for the foster care placement or adoption to proceed. An employee's entitlement for such leave expires 12 months after the birth, adoption, or foster care placement, unless the employer permits leave to be taken after a longer period, and the leave must be concluded within this one-year period. For a more in depth discussion of the FMLA, see Section II.R. "Family and Medical Leave Act" located at pages M-24 through M-45 herein.
 3. Payment of disability - sick leave benefits to employee on maternity leave. The Minnesota Human Rights Act provides that pregnancy-related disabilities must, for all employment-related purposes, be treated the same as other disabilities. Minn. Stat. §363A.08, Subd. 5. As a result, an employer is required to treat a pregnancy-related disability the same as other disabilities. It is

recognized that, except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer to treat women affected by pregnancy, child birth, or disabilities related to pregnancy or child birth, differently than other persons who are not so affected but who are similar in their ability or inability to work, including differential treatment with regard to the receipt of benefits under a fringe benefit program. Minn. Stat. §363A.08, Subd. 5. Accordingly, school district employees must be permitted to use accumulated sick leave when, as a result of pregnancy or childbirth, they are disabled or otherwise unable to work. The school district, may, however, limit the receipt of benefits to that period of time which a licensed physician reasonably determines a person is unable to work. Minn. Stat. §363A.20, Subd. 8(a)(4). Similarly, it is not an unfair employment practice for the school district to provide special safety considerations for pregnant women involved in tasks which are potentially hazardous to the health of the unborn child, as determined by medical criteria. Minn. Stat. §363A.20, Subd. 8(a)(5). In addition, a pregnant teacher must be permitted, if she chooses, to work up to the date of actual disability. Similarly, if she desires to be absent only for the period of actual disability (rather than taking an extended maternity leave), she must be permitted to return when the disability is over and she is physically able to return to work. Minn. Stat. §363A.08, Subd. 5.

Federal law also prohibits discrimination against employees on the basis of pregnancy, childbirth or related medical conditions. See 42 U.S.C. §2000 e(k), Pregnancy Discrimination Act of 1978. As with the Minnesota Human Rights Act (MHRA), federal law prohibits only discriminatory treatment. It does not require employers to treat pregnant women in any particular manner with respect to employment-related matters, nor does it compel the establishment of any new program where none currently exist. The federal law, as does the MHRA, simply requires that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

A number of cases have arisen under federal law. For example, one court held that under the federal law, an employment policy that expressly limited an employee's maternity leave to three months was discriminatory. Maddox v. Grandview Care Center, Inc., 780 F.2d 987 (11th Cir. 1986). The Seventh Circuit Court of Appeals has held that a school district's sick leave bank policy that excluded withdrawals from the sick leave bank for maternity leave violated Title VII. U.S. v. Board of Education of Consolidated High School District 230, 983 F.2d 790 (7th Cir. 1993). In addition, the Eighth Circuit Court of Appeals has held that an employer violated the Pregnancy Discrimination Act by placing a pregnant employee on unpaid medical leave, in response to the recommendation by the doctor of the employee that the employee refrain from pushing or lifting without assistance for the duration of the pregnancy, when the employee was willing and able to perform her job successfully. Carney v. Martin Luther Home, Inc., 824 F.2d 643 (8th Cir. 1987). More recently, the Eleventh Circuit Court of Appeals held that employees are protected from interference with their FMLA rights prior to the occurrence of a triggering event, such as the birth of a child. Therefore, a pre-eligible employee, who had not yet worked the requisite number of hours had a cause of action under the FMLA when her employer terminated her to avoid having to accommodate her FMLA leave rights after she became eligible. Pereda v. Brookdale Senior Living Communities, 666 F.3d 1269 (11th Cir. 2012).

4. Other related leave. An employee that does not qualify for **pregnancy and** parenting leave under the provisions set forth above may qualify for leave granted under an employment contract, rather than by statute, such as maternity or paternity leave. The terms of the employment contract would determine the terms of such leave. Minnesota law also provides that an employer who permits maternity or paternity time off to a biological mother or father shall, upon request, grant time off, with or without pay, to an adoptive mother or father. Minn. Stat. §181.92. The minimum period of this time off shall be four weeks, or if the employer has an established policy of time off for a biological parent which sets the period of time off of less than four weeks, that period of time shall be the minimum period for an adoptive parent. The period of time off shall, at the

direction of the adoptive parent, begin before, or at the time of, the child's placement in the adoptive parent's home, and shall be for the purpose of arranging the child's placement or caring for the child after placement. An employer shall not penalize an employee for requesting or obtaining this leave. Id.

B. SCHOOL CONFERENCE AND ACTIVITY LEAVE.

1. General provisions. Under Minnesota law, an employer must grant an employee leave of up to a total of 16 hours of any 12-month period to attend school conferences or classroom activities related to the employee's child, provided the conferences or classroom activities cannot be scheduled during non-work hours Minn. Stat. §181.9412. If the employee's child receives child care services as defined in Minn. Stat. §119B.011, Subd. 7, or attends a pre-kindergarten regular or special education program, the employee may use the leave time to attend a conference or activity related to the employee's child, or to observe and monitor the services or program, provided the conference, activity, or observation cannot be scheduled during non-work hours. When the leave cannot be scheduled during non-work hours and the need for leave is foreseeable, the employee must provide reasonable prior notice of the leave and make a reasonable effort to schedule the leave so as not to disrupt unduly the operations of the employer. Minn. Stat. §181.9412.
 - a. Who applies to:
 - (1) Employer: A person or entity, which includes a school district, that employs one or more employees. Minn. Stat. §181.940, Subd. 3.
 - (2) Employee: A person who performs services for hire for an employer from whom the leave is requested, and works for an average number of hours per week equal to one-half of the full-time equivalent position in the employee's job classification as defined by the employer's personnel policies or practices or pursuant to the provisions of a collective bargaining agreement. (Note that, unlike the definition of "employee" for purposes of **pregnancy and** parenting leave under Minnesota law, an employee requesting school conference and activity leave need not have worked for the employer for 12 consecutive months prior to requesting the leave. Minn. Stat. §181.9412, Subd. 1.) An independent contractor is not considered an employee. Minn. Stat. §181.940, Subd. 2.
 - b. What applies to: Attendance at school conferences or classroom activities relating to the employee's child, which cannot be scheduled during non-work hours. A child is defined as an individual under 18 years of age or an individual under age 20 who is still attending secondary school. Minn. Stat. §181.940, Subd. 4.
 - c. Length of leave: Up to a total of 16 hours during any 12-month period. Minn. Stat. §181.9412, Subd. 2.
 - d. Compensation: Minnesota law does not require that this leave be paid. However, an employee may substitute any accrued paid vacation leave or other appropriate paid leave for any part of this leave. Minn. Stat. §181.9412, Subd. 3.
 - e. Reinstatement: An employee returning from school conference or activity leave is entitled to return to employment in the employee's former position. Minn. Stat. §181.942, Subd. 1(a). If during school conference or activity leave the employer experiences a layoff and the employee would have lost a position had the employee not been on leave, pursuant to the good faith operation of a bona fide layoff and recall system, including a system under a collective bargaining agreement, the employee is not entitled to reinstatement in the former or comparable position. In such circumstances, the employee retains all rights under the layoff

and recall system, including a system under a collective bargaining agreement, as if the employee had not taken the leave. Minn. Stat. §181.942, Subd. 1(b). An employee may return to part-time during the leave without forfeiting the right to return to the employee's full position at the end of the leave, provided the employer agrees. Minn. Stat. §181.942, Subd. 3.

- f. Compensation and benefits upon return from leave: An employee returning from school conference or activity leave is entitled to return to employment at the same rate of pay the employee had been receiving when the leave commenced, plus any automatic adjustments in the employee's pay scale that occurred during the leave period. The employee returning from school conference or activity leave is entitled to retain all accrued pre-leave benefits of employment and seniority, as if there had been no interruption in service. Nothing in state statutes prevents the accrual of benefits or seniority during the school conference or activity leave if provided for pursuant to a collective bargaining agreement or other agreement between the employer and the employees. Minn. Stat. §181.942, Subd. 2.
- g. The Minnesota Division of Labor Standards and Apprenticeship is required, with the assistance of interested businesses and community organizations, to develop an educational poster stating employees' rights under Minn. Stat. §181.940 to Minn. Stat. §181.9436. These posters are available, upon request, to employers for posting on the employee's premises. Minn. Stat. §181.9436.
- h. The Minnesota Division of Labor Standards and Apprenticeship is required to receive and investigate formally complaints or alleged violations of Minnesota law relating to this leave, and to attempt to resolve such complaints by informing employees and employers of the law and directing employers to comply with the law. Minn. Stat. §181.9435.

C. SICK LEAVE BENEFITS; CARE OF RELATIVES.

1. State law. An employee may use personal sick leave benefits provided by the employer for absences due to an illness or injury to the employee's child as defined by Minn. Stat. § 181.940, Subd. 4, adult child, spouse, sibling, parent, **mother-in law, father-in-law, grandchild**, grandparent or stepparent for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury. **An employee may also use personal sick leave benefits provided by the employer for safety leave, whether or not the employer allows use of sick leave for that purpose, for such reasonable periods of time as may be necessary.** Minn. Stat. §181.9413.
 - a. Who applies to:
 - (1) Employer: A person or entity, which includes a school district, that employs 21 or more employees. Minn. Stat. §181.940, Subd. 3.
 - (2) Employee: A person who performs services for hire for an employer from whom the leave is requested for at least 12 consecutive months immediately preceding the request, and works for an average number of hours per week equal to one-half of the full-time equivalent position in the employee's job classification as defined by the employer's personnel policies or practices or pursuant to the provisions of a collective bargaining agreement, during those 12 months. An independent contractor is not considered an employee. Minn. Stat. §181.940, Subd. 2.
 - b. What applies to: An illness of or injury to the employee's child, adult child, spouse, sibling, parent, **mother-in-law, father-in-law, grand child** grandparent or stepparent. A child is defined as an individual under 18 years of age or an individual under 20 years of age who is

still attending secondary school and includes a stepchild, biological, adopted and foster child. Minn. Stat. §181.940, Subd. 4; Minn. Stat. § 181.9413(e). **A “grandchild” includes a step-grandchild and a biological, adopted and foster grandchild. M.S. 181.9413(e).**

Also applies to safety leave for assistance to employees or assistance to the employee’s child, adult child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent or stepparent. A safety leave is for the purpose of providing or receiving assistance because of sexual assault, domestic abuse or stalking. M.S. 181.9413(b).

“Sexual assault” is defined as an act that constitutes a violation under M.S. 609.342 to 609.3453 (criminal sexual conduct or criminal sexual predatory conduct) or M.S. 609.352 (solicitation of children to engage in sexual conduct or communication of sexually explicit materials to children). “Domestic abuse” is defined in the Domestic Abuse Act. M.S. 518B.01. “Stalking” is defined as engaging in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim. M.S. 609.749, Subd. 1.

- c. Length of leave: The length of the leave may be for such reasonable periods as the employee’s attendance may be necessary. Minn. Stat. §181.9413(a) **and (b)**. The length of leave available to an employee is further limited to the amount of personal sick leave benefits payable to the employee. Id. “Personal sick leave benefits” means time accrued and available to an employee to be used as a result of absence from work due to personal illness or injury, but does not include short-term or long-term disability or other salary continuation benefits. An employer may limit the length of leave to no less than 160 hours in any 12 month period, except for absences due to the illness or injury to a child. Minn. Stat. § 181.9413(c).
- d. Compensation: The employee is to be compensated for this leave in the same manner as he or she is compensated for personal sick leave. Minn. Stat. §181.9413(a) **and (b)**.
- e. Reinstatement: An employee returning from sick leave is entitled to return to employment in the employee’s former position. Minn. Stat. §181.942, Subd. 1(a). If during sick leave the employer experiences a layoff and the employee would have lost a position had the employee not been on leave, pursuant to the good faith operation of a bona fide layoff and recall system, including a system under a collective bargaining agreement, the employee is not entitled to reinstatement in the former or comparable position. In such circumstances, the employee retains all rights under the layoff and recall system, including a system under a collective bargaining agreement, as if the employee had not taken the leave. Minn. Stat. §181.942, Subd. 1(b). An employee may return to work part-time during the leave without forfeiting the right to return to the employee’s full position at the end of the leave, provided the employer agrees. Minn. Stat. §181.942, Subd. 3.
- f. Compensation and benefits upon return from leave: An employee returning from sick leave is entitled to return to employment at the same rate of pay the employee had been receiving when the leave commenced, plus any automatic adjustments in the employee’s pay scale that occurred during the leave period. See, Minn. Stat. §181.942, Subd. 2. The employee returning from sick leave is entitled to retain all accrued pre-leave benefits of employment and seniority, as if there had been no interruption in service. Nothing in state statutes prevents the accrual of benefits or seniority during the sick leave if provided for pursuant to a collective bargaining agreement or other agreement between the employer and the employees.

- g. Posting of laws: The Minnesota Division of Labor Standards and Apprenticeship is required, with the assistance of interested businesses and community organizations, to develop an educational poster stating employees' rights under Minn. Stat. §181.940 to Minn. Stat. §181.9436. These posters are available, upon request, to employers for posting on the employee's premises. Minn. Stat. §181.9436.
 - h. Investigation of complaints: The Minnesota Division of Labor Standards and Apprenticeship is required to receive and investigate informally complaints or alleged violations of Minnesota law relating to this leave, and to attempt to resolve such complaints by informing employees and employers of the provisions of the law and directing employers to comply with the law. Minn. Stat. §181.9435.
2. Federal Law. Assuming the employer is a "covered employer" and the employee is an "eligible employee," the Family and Medical Leave Act (FMLA) provides that an employee may take leave for the care of a child who has a "serious health condition." 29 U.S.C. §2612. An employer is required to provide up to 12 workweeks of such leave during any 12-month period. "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves: (a) inpatient care in a hospital, hospice, or residential medical care facility; or (b) continuing treatment by a health care provider. 29 U.S.C. §2611(11). The terms "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is: (a) under 18 years of age; or (b) 18 years of age or older and incapable of self-care because of a mental or physical disability. FMLA leave is unpaid. However, an employee can elect or the employer can require an employee, to substitute accrued paid vacation leave, personal or family leave, otherwise available to the employee as a benefit under the employer's plan. For a more in depth discussion of the FMLA, see Section II.R. "Family and Medical Leave Act" located at pages M-24 through M-45 herein.
- D. LEAVE FOR RELIGIOUS OBSERVANCES. Both Minnesota and federal law grant certain employees various rights relating to leave for religious observances. Minnesota law provides that any employee of the State, its political subdivisions, (which would include school districts), or a municipality therein who observes a religious holiday on days which do not fall on a Sunday or a legal holiday, shall be entitled to such days off from employment for such observance. Minn. Stat. §15A.22. This leave or time off shall be without pay, except where the employee has accumulated annual leave, and in that case such leave or time off shall be charged against the accumulated annual leave of the employee or unless the employee is able to work an equivalent number of days at some other time during the fiscal year to compensate for the days lost. Minn. Stat. §15A.22. This suggests that an employee has a right to time off for religious observance that is restricted only by the tenets of that religion. However, a somewhat similar statute has been found to be unconstitutional as it does not take into account the convenience or interests of the employer or other employees, and therefore has the impermissible effect of advancing a particular religious practice. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 105 S.Ct. 2914 (1985) (finding Connecticut statute unconstitutional). Thus, if ever challenged, this Minnesota law may be found to be unconstitutional.

The Minnesota Human Rights Act (MHRA) and its federal counterpart, Title VII, prohibit religious discrimination in employment. See Minn. Stat. §363A.08, Subd. 2; and 42 U.S.C. §2000e-2(a)(1) and (2). The principal difference between the rights and obligations of employers and employees under these two laws is that Title VII also requires "reasonable accommodation" based upon religion, while MHRA does not. See 42 U.S.C. §2000e(j). Thus, Minnesota employers covered by Title VII, which would include school districts having fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, are subject to both the non-discrimination and reasonable accommodation requirements of Title VII. See 42 U.S.C. §2000e(b) and 42 U.S.C. §2000e(h). While MHRA prohibits discrimination in employment based upon an

employee's religious beliefs or practices, it does not explicitly require employers to reasonably accommodate an employee's religious beliefs or observances.

Title VII requires that employers reasonably accommodate an employee's religious beliefs, observances, and practices, unless the employer demonstrates that doing so would create an "undue hardship" on the conduct of the employer's business. 42 U.S.C. §2000e(j). Thus, if subject to Title VII, a school district must reasonably accommodate an employee's religious observance or practice provided such accommodation does not cause undue hardship in the conduct of the school district's business. The burden of proving the hardship exists rests with the employer, as well as the duty to attempt to accommodate the employee. Hardison v. Trans World Airlines, 375 F.Supp. 877 (D.C. Mo. 1974), rev'd on other grounds 432 U.S. 63, 97 S.Ct. 2264 (1977). In general, accommodation causes "undue hardship" whenever that accommodation results in more than de minimus cost to the school district or where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices. See generally Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986); Gibson v. Missouri Pacific R.R., 620 F.Supp. 85 (E.D. Ark. 1985); Sturgill v. United Parcel Service, 512 F.3d. 1024 (8th Cir. 2008). Undue hardship is also shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. See 29 C.F.R. §1605.2(e)(2). While Title VII does not discuss an employee's ability to obtain compensation for time off taken for religious observances, the granting of unpaid leave has been found to be a reasonable accommodation, provided the employer does not provide paid leave for all purposes except religious observance. See Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986). However, minimal burdens associated with an employee's request for such leave, such as locating a qualified substitute, rest with the school board, as such burdens would fall within the reasonable accommodation requirement.

- E. LEAVE FOR COURT SERVICE. Under Minnesota law, an employer is prohibited from depriving an employee of employment, or threatening or otherwise coercing an employee with respect to employment, as a result of the employee's receipt and response to a summons to appear in court, or based upon an employee's service as a juror. Minn. Stat. §593.50.
 1. Who applies to: Any employee.
 2. What applies to: Appearance in court in response to a summons or to serve as a potential or actual juror. Minn. Stat. §593.50, Subd. 1.
 3. Length of leave: No duration is specified by statute. However, it is implicit that the duration would be for the length of time necessary to respond to the summons or serve as a juror.
 4. Compensation: The statute does not require the employer to compensate the employee during this leave. The employee is eligible for various forms of compensation, which may include an attendance fee, mileage reimbursement, parking expense reimbursement, and daycare expense reimbursement, which compensation shall be paid by the court. Minn. Stat. §593.48. Correspondingly, the school district is not obligated to pay an employee during this leave, unless it is obligated to pay pursuant to the terms of a contract or agreement entered into by the school district.
 5. Penalty for violation: An employer who violates these provisions is guilty of criminal contempt and upon conviction may be fined not more than \$700 or imprisoned not more than 6 months, or both. Minn. Stat. §593.50, Subd. 2. In addition, in the event an employer discharges an employee in violation of the statute, the employee may, within thirty days, bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the

employee. Damages recoverable may not exceed lost wages for six weeks. A prevailing employee shall also be allowed a reasonable attorney's fee fixed by the court. Minn. Stat. §593.50, Subd. 3.

Minnesota law also prohibits an employer from discharging or disciplining a victim or witness, or threatening to do the same, as a result of the victim or witness being subpoenaed or requested by the prosecutor to attend court for purposes of giving testimony. Any employer violating this prohibition is guilty of a misdemeanor and may be punished for contempt of court. In addition, the court shall order the employer to offer job reinstatement to any victim or witness discharged from employment in violation of this prohibition, and pay the victim or witness back wages as appropriate. Minn. Stat. §611A.036.

F. EXTENDED LEAVE OF ABSENCE.

1. Generally: Minnesota law provides that the board of any district may grant an extended leave of absence without salary to any full- or part-time elementary or secondary teacher who has been employed by the district for at least 5 years and has at least 10 years of allowable service as defined in Minn. Stat. §354.05, Subd. 13, or the bylaws of TRA, or has 10 years of full-time teaching service in Minnesota public elementary and secondary schools. Minn. Stat. §122A.46, Subd. 3. The duration of this leave of absence must be determined by mutual agreement of the board and the teacher at the time the leave is granted and shall be at least 3 but no more than 5 years. If the school board denies a teacher's request, it must provide reasonable justification for the denial. For purposes of this leave, the term "teacher" has the meaning given it in Minn. Stat. §122A.15, Subd. 1, which includes all persons employed by the school as members of the instructional, supervisory, and support staff, including superintendents, principals, supervisors, secondary vocational and other classroom teachers, librarians, counselors, school psychologists, school nurses, school social workers, audio-visual directors and coordinators, recreation personnel, media generalists, media supervisors, and speech therapists. Minn. Stat. §122A.46; Minn. Stat. §354.094; Minn. Stat. §354A.091.
2. Reinstatement: A teacher on an extended leave of absence has the right to be reinstated to a position for which the teacher is licensed at the beginning of any school year which immediately follows the year of the extended leave of absence, unless the teacher fails to give the requisite notice of intent to return before February 1 in the school year preceding the school year in which the teacher wishes to return; or by February 1 in the calendar year in which the leave is scheduled to terminate; or the teacher is discharged or placed on unrequested leave of absence or the contract is terminated pursuant to Minn. Stat. §122A.40 or .41 while the teacher is on the extended leave. A school board shall not be obligated to reinstate a teacher who takes a full-time or part-time position as a teacher in another Minnesota school district while on an extended leave of absence, unless that teacher's full-time or part-time employment is as a substitute teacher. See Dokmo v. Independent School District No. 11, 443 N.W.2d 231 (Minn. App. 1989), reversed on other grounds 459 N.W.2d 671 (Minn. 1990). Likewise, school boards shall not be obligated to reinstate a superintendent taking an extended leave. A teacher returning from leave retains seniority and continuing contract rights as if the teacher had not been on leave, but the board is not required to reinstate the teacher to any particular position. Continuous service is not broken and seniority is preserved when a teacher is granted an extended leave of absence under the law. Berger v. Independent School District No. 706, 362 N.W.2d 369 (Minn. App. 1985); See Urdahl v. Independent School District No. 181, 396 N.W.2d 244 (Minn. App. 1986). (Negotiated unrequested leave of absence plan cannot modify the provision of Minn. Stat. §122A.46 to deny seniority credit to teachers on an extended leave of absence).
3. Benefits while on leave: The leave shall be without pay. Further, the years spent by a teacher on an extended leave of absence shall not be included in the determination of salary upon return to

teaching in the district. Likewise, the credits earned by a teacher on an extended leave of absence shall not be included in the determination of salary upon returning to teaching in the district for a period equal to the time of the extended leave of absence.

A teacher on an extended leave of absence shall receive all of the health, accident, medical, surgical and hospitalization insurance or benefits, for both the teacher and the teacher's dependents, for which the teacher would otherwise be eligible if not on an extended leave. A teacher shall receive the coverage if such coverage is available from the school district's insurer, if the teacher requests the coverage, and the teacher either: (a) reimburses the district for the full amount of the premium necessary to maintain the coverage within one month preceding the district's payment of the premium; or (b) if the district is wholly or partially self-insured, pays the district, according to a schedule agreed upon by the teacher and the school board, an amount determined by the school board to be the amount that would be charged for the coverage chosen by the teacher if the school board purchased such insurance. Minn. Stat. §122A.46, Subd. 9. A school district may enter into an agreement with the exclusive bargaining representative of the teachers in the district where the district agrees, for an individual teacher, to pay all or a portion of the premium for such coverage. If a school district chooses to enter into such an agreement -- and it is not required to do so -- the agreement must include a sunset of eligibility to qualify for the payment. See Minn. Stat. §122A.46, Subd. 9. Service benefit contributions of the TRA are similarly affected, as discussed further below. These provisions override a 2002 Opinion of the Attorney General concluding that a school district did not have the authority to agree to make such payment. See Op. Atty. Gen. 174 (Mar. 29, 2002).

A member granted an extended leave of absence shall receive allowable and formula service credit toward annuities and other TRA benefits for each year of the leave, provided that payment is made as specified below. Minn. Stat. §354.094, Subd. 1. A school district may enter into an agreement with the exclusive bargaining representative of the teachers in the district under which, for an individual teacher, all or a portion of the employee's contribution is paid by the employer. Any such agreement must include a sunset of eligibility to qualify for the payment and must not be a part of the collective bargaining agreement. Minn. Stat. §354.094, Subd. 1. A school district electing to pay the employee's TRA contributions pursuant to such an agreement must forward an executed copy of the agreement to the applicable retirement association or retirement fund. Id. As noted above, this provision overrides a 2002 Opinion of the Attorney General concluding that a school district did not have the authority to agree to make such payments. A member may not receive more than 5 years of allowable or formula service credit while on such leave. Employee contribution payments, without interest, must be made on or before the later of June 30 of each fiscal year for which service credit is received or within 30 days after first notification of the amount due, if requested by the member, is given by the association. Payment is authorized after June 30 in accordance with Minn. Stat. 354.72. Notwithstanding the provisions of any agreements to the contrary, payments may not be made to receive allowable and formula service credit if the member does not have full reinstatement rights both during and at the end of the extended leave, with the exception of superintendents. A TRA member on an extended leave shall retain membership in the association. Minn. Stat. §354.72, 354.094 and Minn. Stat. §354A.091.

4. Other considerations: The school board retains the right to grant any teacher a leave of absence upon terms that are different than the terms that are discussed above. Minn. Stat. §122A.46, Subd. 6.

- G. MILITARY LEAVE. Both Minnesota and federal law grant an employee various rights relating to leave for military purposes. Minn. Stat. §192.26, Minn. Stat. §192.261 and 38 U.S.C. §4301-33. It is recognized that in regards to military leave, federal law supersedes state law. 38 U.S.C. §4302(b).

However, state law is enforceable to the extent that it is more “generous” to the employee than federal law.

1. State law. Minnesota law contains provisions for both paid and unpaid leave relating to military service. Minn. Stat. §192.26 and Minn. Stat. §192.261.
 - a. Paid leave. Under Minnesota law, any employee of the state or any political subdivision thereof, which includes school districts, who is a member of the National Guard, or any other component of the militia of the state, or who is a member of the Reserve Corps, shall be entitled to leave of absence from employment without loss of pay, seniority status, efficiency rating, vacation, sick leave, or other benefits when engaged with such organization in training or active service, whether for state or federal purposes, but not exceeding a total of 15 days in any calendar year. See Op. Atty. Gen. 310 -h- 1(a) (Dec. 6, 1972). The school district shall allow the employee to choose when during the calendar year to take the 15 days of paid military leave. The employee may choose to use all of the 15 days of paid military leave at one time or, in the alternative, the 15 days of paid military leave may be divided and taken throughout the year at the discretion of the employee. Such leave shall be allowed only in case the required military or naval service is satisfactorily performed, which shall be presumed unless the contrary is established. Such leave shall not be allowed unless the employee either returns to employment on being relieved from such service and not later than the expiration of the time herein limited for such leave, or is prevented from so returning by physical or mental disability or other cause not due to the employee’s own fault, or is required by proper authority to continue in such military or a naval service beyond the time limited for such leave. Minn. Stat. §192.26, Subd. 1.
 - (1) Who applies to: Any school district employee who is a member of the National Guard, or any other component of the militia of the state, or who is a member of a reserve component of the military or naval forces of the United States. According to the Attorney General, this includes teachers as well as maintenance and operation personnel. See Op. Atty. Gen. 310 -H- 1A (April 7, 1971).
 - (2) What applies to: Training or active service the employee participates in, which is ordered or authorized by the proper military authority.
 - (3) Length of leave: Up to 15 days in any calendar year. The Minnesota Attorney General has opined that the 15 day leave provisions apply to “teaching days” or “working days” rather than calendar days. See Op. Atty. Gen. 310 -H- 1A (April 7, 1971).
 - (4) Compensation: The employee’s leave shall be paid and without any loss of seniority status, efficiency rating, vacation, sick leave, or other benefits accruing during the period of leave. In the case of a leave for active duty beyond the 15 day period during a period of war or other emergency, or for any amount of time necessary to complete any military training in excess of 15 days, the provisions of Minn. Stat. §192.261 would apply. See Byrne v. Independent School District No. 237, 305 Minn. 49, 232 N.W.2d 432 (1975).
 - (5) Conditions placed on leave: Such leave shall not be allowed unless the employee either returns to employment immediately on being relieved from such military or naval service and not later than the expiration of the time limited for such leave, or is prevented from so returning by physical or mental disability or other cause not due to the employee’s own fault, or is required by proper authority to continue in such military or naval service beyond the time limited for such leave. The leave shall be allowed only in the event the military or naval service is satisfactorily performed, which shall be presumed unless otherwise established.
 - (6) Reinstatement: An officer or employee who takes a military leave under Minn. Stat. §192.26 is entitled to reinstatement in the same position held prior to beginning such leave.

- b. Unpaid leave (leave of absence). In addition to allowing paid military leave as described above, Minn. Stat. §192.261 allows an employee to take an unpaid military leave or leave of absence where the employee:
- 1) Engages in active service in time of war or other properly declared emergency;
 - 2) During convalescence for an injury or disease incurred during active service;
 - 3) Is ordered to an initial period of active duty for training of not less than 3 consecutive months; or
 - 4) Is required to perform active duty for training or inactive duty for training in the military forces.
- (1) Unpaid leave/leave of absence for active service in time of war or other properly declared emergency:
- (a) Who applies to: Any employee of the school district.
 - (b) What applies to: Absence from employment due to the employee's need to engage in active service in any military or naval forces of the state or United States, in time of war or other emergency declared by the property authority. Minn. Stat. §192.261, Subd. 1.
 - (c) Length of leave: Up to 4 years plus such additional time in each case as the employee may be required to serve by law. Minn. Stat. §192.261, Subd. 1.
 - (d) Compensation: Leave is unpaid. Minn. Stat. §192.261, Subd. 1. Provided, however, that the employee may still qualify for paid leave in accordance with Minn. Stat. §192.26 as described in Section G.1.a. above. A school district must continue the employee's enrollment in health and dental coverage and the employer contribution toward that coverage, until the employee is covered by health and dental coverage provided by the armed forces. If the employee elected dependent coverage at the time he/she reported for active service, the employee may continue coverage at his/her own expense. Minn. Stat. §471.975.
 - (e) Wage Differential: Minn. Stat. §471.975 mandates a wage differential payment for certain qualifying school district employees deployed to active duty. [Contact your legal counsel or the MSBA office for further information regarding qualifications and the wage differential calculation.]
 - (f) Reinstatement: Upon returning from military leave, the employee shall be reinstated in the position which the employee held at the time such leave began, or a position of like seniority, status, and pay if such is available at the same salary which the employee would have received if the leave had not been taken, upon the following conditions: (i) That the position has not been abolished, or that the term thereof, if limited, has not expired; (ii) That the employee is not physically or mentally disabled from performing the duties of the position; (iii) That the employee makes written application for reinstatement to the appointing authority within 90 days after termination of service, or 90 days after discharge from hospitalization or medical treatment which immediately follows the termination, and results from such service; provided such application shall be made within 1 year and 90 days after termination of such service notwithstanding such hospitalization or medical treatment; and (iv) That the employee submits an honorable discharge or other form of release by the proper authority indicating that the employee's military or naval service was satisfactory.

Upon such reinstatement, the employee shall have the same rights with respect to accrued and future seniority, efficiency rating, vacation, sick leave, and other benefits as if that employee had been actually employed during the time of such leave. No employee so

reinstated shall be removed or discharged within 1 year thereafter except for cause, after notice and hearing; but this shall not operate to extend a term of service limited by law. Minn. Stat. §192.261, Subd. 2.

- (2) Unpaid leave/leave of absence for an employee during convalescence for an injury or disease incurred during active service:
- (a) Who applies to: Any employee of the school district.
 - (b) What applies to: Absence from employment due to employee's convalescence for an injury or disease incurred during active service as documented by a line-of-duty determination form signed by proper military authority, and any other documentation as reasonably requested by the school district. Minn. Stat. §192.261, Subd. 1.
 - (c) Length of leave: Up to 4 years plus such additional time in each case as the employee may be required to serve by law. Minn. Stat. §192.261, Subd. 1.
 - (d) Compensation: Leave is unpaid. Minn. Stat. §192.261, Subd. 1. Provided, however, that the employee may still qualify for paid leave in accordance with Minn. Stat. §192.26 as described in Section G.1.a. above. A school district must continue the employee's enrollment in health and dental coverage and the employer contribution toward that coverage, until the employee is covered by health and dental coverage provided by the armed forces. If the employee elected dependent coverage at the time he/she reported for active service, a school district must offer the employee the option to continue the dependent coverage at the employee's own expense. Minn. Stat. §471.975.
 - (e) Wage Differential: Minn. Stat. §471.975 mandates a wage differential payment for certain qualifying school district employees deployed to active duty. [Contact your legal counsel or the MSBA office for further information regarding qualifications and the wage differential calculation].
 - (f) Reinstatement: Upon returning from military leave, the employee shall be reinstated in the position which the employee held at the time such leave began, or a position of like seniority, status, and pay if such is available at the same salary which the employee would have received if the leave had not been taken, upon the following conditions: (i) That the position has not been abolished, or that the term thereof, if limited, has not expired; (ii) That the employee is not physically or mentally disabled from performing the duties of the position; (iii) That the employee makes written application for reinstatement to the appointing authority within 90 days after termination of service, or 90 days after discharge from hospitalization or medical treatment which immediately follows the termination, and results from such service; provided such application shall be made within 1 year and 90 days after termination of such service notwithstanding such hospitalization or medical treatment; and (iv) That the employee submits an honorable discharge or other form of release by the proper authority indicating that the employee's military or naval service was satisfactory.

Upon such reinstatement, the employee shall have the same rights with respect to accrued and future seniority, efficiency rating, vacation, sick leave, and other benefits as if that employee had been actually employed during the time of such leave. No employee so reinstated shall be removed or discharged within 1 year thereafter except for cause, after notice and hearing; but this shall not operate to extend a term of service limited by law. Minn. Stat. §192.261, Subd. 2.

- (3) Unpaid leave or leave of absence for an initial period of active duty for training of not less than 3 consecutive months:
- (a) Who applies to: Any employee of the school district who is a member of the military forces.

- (b) What applies to: Absence from employment due to the employee being ordered to an initial period of active duty for training of not less than 3 consecutive months. Minn. Stat. §192.261, Subd. 5(a).
- (c) Length of leave: From the commencement of active duty for training until 31 days after the employee's: (i) release from active duty for training; or (ii) discharge from hospitalization incident to active duty for training, or one year after a scheduled release from that training, whichever is earlier. Minn. Stat. §192.261, Subd. 5(a).
- (d) Compensation: Leave is unpaid. Minn. Stat. §192.261, Subd. 1. Provided, however, that the employee may still qualify for paid leave in accordance with Minn. Stat. §192.26 as described in Section G.1.a. above, or a wage differential payment noted in G. 1. b. (1) (e). Health and dental coverage remain available as noted in G.1.b.(1)(e).
- (e) Reinstatement/Restoration: Upon returning from military leave, the employee shall be reemployed/restored in the position which the employee held at the time such leave began, or a position of like seniority, status, and pay if such is available at the same salary which the employee would have received if the leave had not been taken, upon the following conditions: (i) That the position has not been abolished, or that the term thereof, if limited, has not expired; (ii) That the employee is not physically or mentally disabled from performing the duties of the position; (iii) That the employee makes an application for reemployment within 31 days after the employee's:
 - (a) release from that active duty for training after satisfactory service; or
 - (b) discharged from hospitalization incident to that active duty for training, or one year after a scheduled release from that training, whichever is earlier.

Upon being restored to such a position, the employee shall have the same rights with respect to accrued and future seniority, efficiency rating, vacation, sick leave, and other benefits as if that employee had been actually employed during the time of such leave. No employee restored to a position as provided herein shall be discharged from the position without cause within six months after that restoration. Minn. Stat. §192.261, Subd. 5(a) and Minn. Stat. §192.261, Subd. 2.

- (3) Leave for active duty for training or inactive duty training in the military forces:
 - (a) Who applies to: Any employee of the school district who is a member of the military forces.
 - (b) What applies to: Absence from employment due to the employee's need to perform active duty for training or inactive duty training. Minn. Stat. §192.261, Subd. 5(b).
 - (c) Length of leave: From the period the employee is required to perform active duty for training or inactive duty for training until the employee is released from such training, or upon discharge from hospitalization incident to that training. Minn. Stat. §192.261, Subd. 5(b).
 - (d) Compensation: Leave is unpaid. Minn. Stat. §192.261, Subd. 1. Provided, however, that the employee may still qualify for paid leave in accordance with Minn. Stat. §192.26 as described in Section G.1.a. above or a wage differential payment noted in G.1.b.(1)(e). Health and dental coverage remain available as noted in G.1.b.(1)(d).
 - (e) Return: Upon release from such training, or upon discharge from hospitalization incident to that training, the employee shall be permitted to return to the previously held position with the same seniority, status, rate of pay, and vacation as if the employee had not been absent for those purposes.

The employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following release from active duty, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at the next regularly scheduled

working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If that employee is hospitalized incident to such training, that employee shall be required to report for work: (i) at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment; (ii) within a reasonable time thereafter if delayed return is due to factors beyond the employee's control; or (iii) within 1 year after the release from training, whichever is earlier. If an employee covered by this leave is not qualified to perform the position's duties by reason of disability sustained during such training, but is qualified to perform the duties of any other position in the employ of the employer or a successor in interest, that employee shall be restored by that employer or a successor in interest to another position, the duties of which that employee is qualified to perform and which will provide like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in the particular case. Minn. Stat. §192.261, Subd. 5(b).

2. Federal Law. Federal law also grants employees who serve in the uniformed services certain rights of reemployment upon the completion of their period of service. Federal law does not grant an employee paid leave, but does impose various requirements relating to the reemployment of the employee following completion of the period of service.
 - a. Who applies to: Any employee.
 - b. What applies to: An employee's performance of duty on a voluntary or involuntary basis in a uniformed service, including active duty, active duty for training, initial active duty for training, inactive duty training, and full-time National Guard training. "Uniformed service" includes the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.
 - c. Length of leave: The reemployment rights provided shall be available to any employee whose cumulative period of service in the uniformed services, while employed, does not exceed 5 years. 38 U.S.C. §4312(c).
 - d. Compensation: Federal law does not require that an employee be paid during his or her period of leave. An employee shall be permitted to use accrued vacation time or other similar leave with pay for such military service, but shall not be required to use such leave by the employer. 38 U.S.C. §4316(d). Rather, in general, the rights granted under federal law include the right to return to their pre-service position, the right to receive a similar or greater wage, the right to continue health insurance coverage, the right to continue participation in a pension plan, and the right to various other benefits.
 - e. Reemployment: The rights granted under federal law relate, primarily, to the issues of reemployment rights and the right to other employment benefits.
 - (1) Reemployment rights: Upon completion of a period of service in the uniformed services, an employer who complies with the reemployment prerequisites (see Section G.2.f. below) is granted the following reemployment rights:
 - (a) If the employee's period of service in the uniformed services was less than 91 days, the employee is entitled to the position of employment to which the employee would have been employed if employment had not been interrupted by such service; or, if

the employee is not qualified for such a position after reasonable efforts to qualify the employee, to the position of employment which the employee held at the time employment was interrupted by such service. 38 U.S.C. §4313(a)(1).

- (b) If the employee's period of service in the uniformed services was more than 90 days, to the position of employment which the employee held at the time employment was interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or if the employee is not qualified for such a position after reasonable efforts to qualify the employee, to a position of like seniority, status, and pay, the duties of which the person is qualified to perform. 38 U.S.C. §4313(a)(2).
- (c) If the employee becomes disabled as a result of such service, and is not qualified to return to the position the employee would have held but for such service, the employee shall be entitled to any other position which is equivalent in seniority, status, and pay, the duties of which the employee is qualified to perform or can become qualified with reasonable efforts; or a position which is the nearest approximation to such a position in terms of seniority, status, and pay consistent with the employee's circumstances. 38 U.S.C. §4313(a)(3).
- (d) There are, however, certain limited exceptions to an employer's reemployment obligation. 38 U.S.C. §4312(d). Exceptions include when an employer's circumstances have so changed as to make reemployment impossible or unreasonable, and when such reemployment would impose an undue hardship on the employer. However, it is the employer that has the burden of proving these circumstances.

(2) Other benefits:

- (a) An employee who is reemployed is entitled to the seniority and other rights and benefits determined by seniority that person had on the date on the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed. 38 U.S.C. §4316(a).
- (b) An employee who is absent from employment by reason of such service shall be deemed to be on furlough or leave of absence from such employment, and shall be entitled to such other rights and benefits not determined by seniority as are generally provided by the employer to employees having similar seniority, status, and pay who are granted a furlough or leave of absence, unless the employee provides the employer with a notice of intent not to return to employment. 38 U.S.C. §4316(b)(1). While deemed to be on furlough or leave of absence, the employee is not entitled to any benefits to which the employee would not otherwise be entitled if the employment had not been interrupted. 38 U.S.C. §4316(b)(3).

While on furlough or leave of absence, the employee may be required to pay the employee cost of any benefit continued during the furlough or leave. The employee may elect to continue coverage under the employer's health plan for a period of up to 24 months, and be responsible for the employee's portion of the cost for this coverage. 38 U.S.C. §4317. An employee's participation in the employer's pension plan shall be treated as not having incurred a break in service, and the employer shall be responsible for the funding of the pension. 38 U.S.C. §4318.

- f. Prerequisites for leave benefits eligibility: An employee is entitled to the reemployment rights and benefits noted above if:

- (1) The employee gives advance written or verbal notice of such service to the employer;

- (2) The cumulative length of service absence and all previous service absences from a position of employment with that employer does not exceed 5 years; and
- (3) The employee submits an application for reemployment to the employer:
 - (a) Not later than the first regularly scheduled work period on the day following the completion of the period of service for an employee whose period of service was less than 31 days;
 - (b) Not later than 14 days after the completion of the period of service for an employee whose period of service was more than 30 days but less than 181 days; and not later than 90 days after the completion of the period of service for an employee whose period of service was for more than 180 days. 38 U.S.C. §4312(e).
- g. Exceptions to eligibility for leave: An employee's eligibility for leave benefits terminates if the employee receives a dishonorable or bad conduct discharge, is separated from service for other than honorable conditions, or is dismissed or dropped from the military rolls. 38 U.S.C. §4304.
- h. Prohibition on termination: A person who is reemployed following his or her period of service shall not be discharged from such reemployment, except for cause:
 - (1) Within one year after the date of reemployment if the employee's period of military service was more than 180 days;
 - (2) Within 180 days after the date of such reemployment, if the employee's period of military service was more than 30 days but less than 181 days. 38 U.S.C. §4316(c).
- i. Posting Requirement. All employers must post a notice regarding employees' rights under USERRA. A copy of the posting is attached to this bulletin.

H. MILITARY RELATED LEAVES. Minnesota law grants employees the right to unpaid military-related leaves in the following situations:

1. Leave for Civil Air Patrol. Minnesota law provides that, unless the leave would unduly disrupt the operations of the employer, an employer shall grant a leave of absence without pay to an employee for time spent rendering service as a member of the civil air patrol on the request and under the authority of the State or any of its political subdivisions. Minn. Stat. §181.946, Subd. 2. For purposes of this leave, "employer" is defined as including a school district that employs 20 or more employees at at least one site. Minn. Stat. §181.945, Subd. 1(c). "Employee" is defined as a person who performs services for hire for an employer, for an average of 20 or more hours per week, and includes all individuals employed at any site owned or operated by an employer, but does not include independent contractors. Minn. Stat. §181.945, Subd. 1(b).
2. Leave to Attend Military Ceremonies. Minnesota law provides that, unless the leave would unduly disrupt the operations of an employer, an employer shall grant a leave of absence, without pay, to an employee whose immediate family member, as a member of the United States Armed Forces, has been ordered into active service in support of a war or national emergency. Minn. Stat. §181.948, Subd. 2. The employer may limit the leave to the actual time necessary to attend a send-off or a homecoming ceremony for a mobilized service member, not to exceed one day's duration in any calendar year. For purposes of this leave, "employer" is defined as a person or entity having one or more employees and includes school districts. Minn. Stat. §181.948, Subd. 1(d). "Employee" is defined as a person who performs services for compensation, in whatever form, for an employer but does not include an independent contractor. Minn. Stat. §181.948,

Subd. 1(c). "Immediate family member" means a person's grandparent, parent, legal guardian, sibling, child, grandchild, spouse, fiancé, or fiancée. Minn. Stat. §181.948, Subd. 1(e).

3. Leave for Immediate Family Members of Military Personnel Injured or Killed in Active Service. Minnesota law provides that an employer must grant up to ten working days of leave, without pay, to an employee whose immediate family member, as a member of the United States Armed Forces, had been injured or killed while engaged in active service. Minn. Stat. §181.947, Subd. 2. An employee must give as much notice to the employee's employer as practicable of the employee's intent to exercise the leave. Minn. Stat. §181.947, Subd. 3. The length of leave may be reduced by any period of paid leave provided by the employer, and an employer may provide leave benefits in addition to those provided by this section. Minn. Stat. §181.947, Subd. 4. For purposes of this leave, "employer" is defined as a person or entity having one or more employees and includes school districts. Minn. Stat. §181.947, Subd. 1(d). "Employee" means a person, independent contractor or person working for an independent contractor who performs services for compensation in whatever form, for an employee. Minn. Stat. §181.947, Subd. 1(c). Immediate family member includes a person's parent, child, grandparents, siblings or spouse. Minn. Stat. §181.947, Subd. 1(e).

I. ATHLETIC LEAVE OF ABSENCE.

1. Generally: A "public employee" who qualifies as a member of the United States team for athletic competition on the World Championship, Pan-American, or Olympic team in a sport sanctioned by the International Olympic Committee, may be granted a leave of absence without loss of pay or other benefits or rights for the purpose of preparing for and engaging in the competition. See Minn. Stat. §15.62, Subd. 2.
2. Who applies to: A "public employee" who qualifies as a member of the United States team for athletic competition on the World Championship, Pan-American or Olympic team in a sport sanctioned by the International Olympic Committee. Minn. Stat. §15.62. A "public employee" is as defined in Minn. Stat. §179A.03, Subd. 14.
3. What applies to: The leave of absence must be for the purpose of preparing for and engaging in the competition.
4. Length of leave: In no event may the paid leave exceed the period of the official training camp and competition combined or 90 calendar days in a year, whichever is less.
5. Compensation: The leave of absence must be without loss of pay or other benefits or rights. The school district is responsible for the actual cost of employing a substitute. Minn. Stat. 15.62, Subd. 3.

J. TIME OFF FOR PUBLIC OFFICE MEETINGS.

1. Generally: Minnesota law provides that a person elected to a public office must be permitted time off from regular employment to attend meetings required by reason of the public office. Minn. Stat. §211B.10, Subd. 2.
2. Who applies to: Any person elected to a public office.
3. What applies to: Any person elected to a public office must be permitted time off from regular employment to attend meetings required by reason of the public office.

4. Amount of time off: That time necessary to attend meetings required by reason of a public office.
5. Compensation: Time off may be with or without pay, or made up with other hours, as agreed between the school district and the employee. However, when an employee takes time off without pay, the school district must make an effort to allow the employee to make up the time with other hours when the employee is available.
6. Retaliation prohibited: No retaliatory action may be taken by the school district for absences to attend meetings necessitated by reason of the employee's public office.

K. LEAVE FOR BONE MARROW.

1. Generally: Under Minnesota law, an employer must grant a paid leave of absence to an employee who seeks to undergo a medical procedure to donate bone marrow. Minn. Stat. §181.945.
2. Who applies to:
 - a. Employer: Any person or entity that employs 20 or more employees at at least one site, and includes a school district. Minn. Stat. §181.945, Subd. 1(c).
 - b. Employee: A person who performs services for hire for an employer, for an average of 20 or more hours per week, and includes all individuals employed at any site owned or operated by an employer. An employee does not include an independent contractor Minn. Stat. §181.945, Subd. 1(b).
3. What applies to: An employee is entitled to a paid leave to undergo a procedure to donate bone marrow. Minn. Stat. §181.945, Subd. 2.
4. Length of leave: The combined length of the leaves shall be determined by the employee, but may not exceed 40 work hours, unless agreed to by the employer. Minn. Stat. §181.945, Subd. 2.
5. Compensation: The leave must be paid. Minn. Stat. §181.945, Subd. 2.
6. Medical verification: The employer may require verification by a physician of the purpose and length of each leave requested by the employee to donate bone marrow. If there is a medical determination that the employee does not qualify as a bone marrow donor, the paid leave of absence granted to the employee prior to that medical determination is not forfeited. Minn. Stat. §181.945, Subd. 2.
7. Retaliation prohibited: An employer may not retaliate against an employee for requesting or obtaining such a leave of absence. Minn. Stat. §181.945, Subd. 3.
8. Other leave benefits: The statute does not prevent an employer from providing leave for bone marrow donations in addition to the mandatory leave required. In addition, the statute does not affect an employee's rights with respect to any other employment benefit. Minn. Stat. §181.945, Subd. 4.

L. LEAVE FOR BLOOD DONATION.

Under Minnesota law, an employer may grant paid leave from work to an employee to allow the employee to donate blood. Minn. Stat. §181.9458.

M. LEAVE FOR ORGAN DONATION.

1. Generally: Under Minnesota law, an employer must grant a paid leave of absence to an employee who seeks to undergo a medical procedure to donate an organ or partial organ to another person. Minn. Stat. §181.9456, Subd. 2.
2. Who applies to:
 - a. Employer: A state, county, city, town, school district, or other governmental subdivision that employs 20 or more employees. Minn. Stat. §181.9456, Subd. 1(c).
 - b. Employee: A person who performs services for hire for an employer, for an average of 20 or more hours per week, and includes all individuals employed at any site or owned or operated by an employer. An employee does not include an independent contractor. Minn. Stat. §181.9456, Subd. 1(b).
3. What applies to: An employee is entitled to a paid leave to undergo a procedure to donate an organ or partial organ. Minn. Stat. §181.9456, Subd. 2.
4. Length of leave: The combined length of the leaves shall be determined by the employee, but may not exceed 40 work hours for each donation, unless agreed to by the employer. Minn. Stat. §181.9456, Subd. 2.
5. Compensation: The leave must be paid. Minn. Stat. §181.9456, Subd. 2.
6. Medical verification: The employer may require verification by a physician of the purpose and length of each leave requested by the employee to donate an organ or partial organ. If there is a medical determination that the employee does not qualify as an organ or partial organ donor, the paid leave of absence granted to the employee prior to that medical determination is not forfeited. Minn. Stat. §181.9456, Subd. 2.
7. Retaliation prohibited: An employer may not retaliate against an employee for requesting or obtaining such a leave of absence. Minn. Stat. §181.9456, Subd. 3.
8. Other leave benefits: The statute does not prevent an employer from providing leave for organ or partial organ donations in addition to the mandatory leave required. In addition, the statute does not affect an employee's rights with respect to any other employment benefit. Minn. Stat. §181.9456, Subd. 4.

N. SABBATICAL LEAVE FOR TEACHERS.

1. Generally: A teacher who holds a license and a contract for employment by a school district or other organization providing public education may be granted a sabbatical leave by the board employing the teacher under rules promulgated by the board. Minn. Stat. §122A.49.
2. Who applies to: A teacher who holds a license according to Minn. Stat. Ch. 122A and a contract for employment by a school district or other organization providing public education may be granted a sabbatical leave by the board employing the teacher. Such leave may be granted under rules promulgated by the employing board. Minn. Stat. §122A.49, Subd. 1.
3. What applies to: A "sabbatical leave" means a compensated leave of absence granted for purposes of professional improvement or service. Minn. Stat. §122A.49, Subd. 4.

4. Length of leave: Implicit in the statute is that the school district and the teacher mutually agree to the length of the leave before the leave is granted. Minn. Stat. §122A.49, Subd. 2.
5. Compensation: The teacher is compensated during the term of the leave as agreed between the school district and the teacher. A teacher who applies for and accepts sabbatical leave shall agree that upon the conclusion of the sabbatical leave, the teacher shall return to the teacher's position for a period determined by the board before the leave is granted, or repay the district the portion of salary received while on sabbatical leave. Minn. Stat. §122A.49, Subd. 2.
6. Rights in employing district: Any teacher who has been granted a sabbatical leave shall retain all rights in the employing district as though teaching in that district. Minn. Stat. §122A.49, Subd. 3.
7. Contributions to TRA: Employee and employer contribution to TRA during the period of a sabbatical leave may not be made to receive allowable service credit if the teacher does not retain the right to full reinstatement both during and at the end of a sabbatical leave. Minn. Stat. §354.092, Subd. 4.

O. LEAVE TO TEACH IN A CHARTER SCHOOL.

1. Generally: A school district must grant a teacher's written request for an extended leave of absence to teach at a charter school. Minn. Stat. §124D.10, Subd. 20.
2. Who applies to: Any teacher employed by a school district who makes a written request for an extended leave of absence to teach at a charter school. Minn. Stat. §124D.10, Subd. 20.
3. What applies to: An extended leave of absence to start up or teach at a charter school. Minn. Stat. §124D.10, Subd. 20.
4. Length of leave: A school district must grant a leave not to exceed a total of five years. Any request to extend the leave shall be granted only at the discretion of the school board. The school district may require that the request for a leave or extension before February 1 in the school year preceding the school year in which the teacher intends to leave, or February 1 of the calendar year in which the teacher's leave is scheduled to terminate. Minn. Stat. §124D.10, Subd. 20.
5. Compensation and benefits: The leave is without compensation. Minn. Stat. §124D.10, Subd. 20 and Minn. Stat. §122A.46, Subd. 2. The teacher is entitled to continue in the school district's group insurance plan under the same terms as provided in Minn. Stat. §122A.46. (See Section F.3. above).
6. Reinstatement: A teacher on such a leave has the same reinstatement rights as teachers on an extended leave of absence under Minn. Stat. §122A.46. (See Section F.2. above).
7. TRA benefits and credits during leave: During such a leave, a teacher may continue to aggregate benefits and credits in TRA under chapters 354 and 354A. Minn. Stat. §124D.10, Subd. 20.

P. TIME OFF FOR POLITICAL ACTIVITIES AND VOTING. Minnesota law permits an employee to be absent from work to attend certain political activities. Minn. Stat. §202A.19 and Minn. Stat. §202A.135.

1. Absence for party officers and delegates to party conventions. Minnesota law provides that if an employee gives at least 10 days written notice to an employer, the employee may be absent from work to attend any meeting of the state central committee or executive committee of a major

political party if the employee is a member of the committee, or to attend any convention of major political party delegates including meetings of official convention committees if the employee is a delegate or alternate delegate to that convention. Minn. Stat. §202A.135. A “major political party” is defined in Minn. Stat. §200.02, Subd. 7. An employee who provides this proper notice shall incur no penalty or deduction from salary or wages on account of absence other than a deduction in salary or wages for the actual time of absence from employment. An employer’s violation of these provisions is a misdemeanor level offense. Minn. Stat. §202A.135.

2. Absence to attend precinct caucus. An employee who is entitled to attend a major political party precinct caucus is entitled, after giving the employer at least 10 days written notice, to be absent from work for the purpose of attending the caucus during the time for which the caucus is scheduled without penalty or deduction from salary or wages on account of the absence other than a deduction in salary for the time of absence from employment. Minn. Stat. §202A.19, Subd. 2.
3. Voting leave. Minnesota law provides that every employee who is eligible to vote in an election has the right to be absent from work for the time necessary to appear at the employee’s polling place, cast a ballot, and return to work on the day of a regularly-scheduled state primary or general election, an election to fill a vacancy in the office of a United States senator or United States representative, or an election to fill a vacancy in the office of state senator or state representative, without penalty or deduction from salary or wages because of the absence. An employer who violates this section is guilty of a misdemeanor. Minn. Stat. §204C.04.

- Q. TIME OFF TO ELECTED OFFICERS OR APPOINTED REPRESENTATIVES OF THE EXCLUSIVE REPRESENTATIVE. A public employer, which includes school districts, must allow reasonable time off to elected officers or appointed representatives of the exclusive representative to conduct the duties of the exclusive representative and must, upon request, provide for leaves of absence to elected or appointed officials of the exclusive representative or to a full-time appointed official of an exclusive representative of teachers in another Minnesota school district. Minn. Stat. §179A.07, Subd. 6. There is no requirement that such a leave of absence or time off be paid.

The Minnesota Court of Appeals has held that a school district was not required to grant a leave of absence to a teacher who accepted a position as a field representative with Education Minnesota, because the “exclusive representative” is the local unit of the district, not the statewide union Blumhardt v. Indep. Sch. Dist. No. 361, 814 N.W.2d 72 (Minn. App. 2012).

R. PART-TIME TEACHERS TRA CONTINUATION:

1. Generally: Under Minnesota law, certain teachers can teach part-time while continuing to receive TRA service credit as if they were teaching full-time. Minn. Stat. §354.66 and Minn. Stat. §354.094.
2. Who applies to: Applies to teachers as defined in Minn. Stat. §122A.15, Subd. 1, but specifically excludes superintendents. In addition, a teacher must have at least 3 years of allowable service as defined in TRA, or 3 years or more of full-time teaching service in Minnesota public elementary, secondary and technical colleges. A teacher can qualify for part-time employment under this program in only one district and is disqualified from the program if he or she accepts full-time or part-time employment in another district, except as a substitute, during any year of the program. Finally, the teacher must have been a member of the teacher’s unit under PELRA during the year preceding the first part-time service. (For purposes of PELRA, teachers who become part-time under this program remain unit members notwithstanding the provisions of Minn. Stat. §179A.03, Subd. 14(e) and (f)).

3. Limit on continuation on program: A teacher cannot continue on a program for more than ten years.
 4. Board procedure:
 - a. A request is first made by a teacher.
 - b. School boards entering into an agreement under this law must provide such teachers with insurance benefits identical to those offered to full-time teachers, the cost of the benefit to be shared by the district and the teacher as if he were full-time, unless a contrary provision is negotiated as a part of the collective bargaining agreement. A copy of any agreement entered into must be provided to TRA before October 1 of the year for which the teacher requests to make retirement contributions under Minn. Stat. §354.66, Subd. 4. If the copy of the executed agreement is filed with the association after October 1 of the year for which the teacher requests to make retirement contributions under subdivision 4, the employing unit shall pay the fine specified in Minn. Stat. §354.52, Subd. 6, for each calendar day that elapsed since the October 1 due date. The association may not accept an executed agreement that is received by the association more than 15 months late. Minn. Stat. §354.66, Subd. 2.
 5. Nature of position: A position under this statute means a teaching position within the school district in which the teacher is compensated for an amount of at least 30 percent, but not exceeding 80 percent of the compensation established by the board for a full-time teacher with identical education and experience in the district. Minn. Stat. §354.66, Subd. 3a.
 6. Compensation: The salary to be paid a part-time teacher is negotiable within the limits set by the statute. However, the compensation of a teacher cannot exceed 80 percent of the compensation paid to a full-time teacher with the same license, education and experience within the school district. Minn. Stat. §354.66, Subd. 3a.
 7. Participation: Participation in the part-time mobility program must be based on a full fiscal year and the employment pattern of the teacher during the most recent fiscal year. Minn. Stat. §354.66, Subd. 1c.
 8. Payment of contributions: A teacher who qualifies as a part-time teacher under the statute shall make the employee contributions in the same amounts as if the teacher were teaching full-time. The school district shall make employer contributions based on the compensation received by the part-time teacher for services actually rendered. Finally, the difference between the employer contribution that would have been paid had the teacher been employed full-time and the actual employer contribution based on the part-time teachers' actual salary shall be paid by the teacher unless the school district agrees otherwise.
 9. Other considerations: It should be noted that the school board is not prevented or limited from creating part-time positions that are not governed by these programs.
- S. FAMILY AND MEDICAL LEAVE ACT (FMLA). The most significant federal law relating to leave for family and health care reasons is the Family and Medical Leave Act (FMLA). 29 U.S.C. §2601 et seq. FMLA allows eligible employees of a covered employer up to 12 weeks of unpaid leave for certain family or medical purposes. During this leave, an employee is entitled to a continuation of certain benefits and to reinstatement of employment.
1. Who applies to: FMLA applies to an "eligible employee" who is employed by a "covered employer."

a. Eligible employee: An eligible employee is a person who:

- (1) has been employed by the employer for at least 12 months on the date on which FMLA leave is to commence;
- (2) has worked for the employer at least 1,250 hours during the previous 12-month period; and
- (3) is employed at a work site where 50 or more employees are employed (within 75 miles of that work site).

In determining whether an employee has at least 1,250 hours of service during the previous 12-month period, the following principles apply:

- (a) The 12 months an employee must have been employed by the employer need not be consecutive months;
- (b) Whether the employee has worked the minimum 1,250 hours of service is determined in accordance with the principles of the Fair Labor Standards Act. The employer bears the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden, the employee is deemed to have met this test, and
- (c) The determination of whether the employee **meets the service requirement** must be made as of the date the leave commences, not the date on which the employee requests the leave. In the event that an employee notifies the employer of the need for a FMLA leave before the employee meets the requisite hours standard, the employer may either: (i) confirm the employee's eligibility based upon a projection that the employee will be eligible on the date the leave would commence. (However, the employer may not then subsequently challenge the employee's eligibility, even if not eligible for FMLA benefits); or (ii) Advise the employee when the eligibility requirement is met. 29 C.F.R. §825.110(b)(c)(d)(e). An employee is not entitled to leave if the 12 month/1,250 hour criteria cannot be satisfied. Evanoff v. Minneapolis Public Schools, Special School Dist. No. 1, 11 Fed. Appx. 670 (8th Cir. 2001); Gangnon v. Park Nicollet Methodist Hospital, 771 F.Supp.2d 1049 (D. Minn.) (Jan. 27, 2011).

Full-time teachers in an elementary or secondary school system, or institution of higher education, or other educational establishment or institution, are deemed to meet the 1,250 hour test. 29 C.F.R. §825.110(c).

In cases where an employee is returning from military leave, USERRA provides that the employee retains eligibility for FML if the employee would have satisfied the 12 month/1,250 hour requirements "but for" the military leave. 29 C.F.R. §825.110(c)(2).

Special rules apply to employees of local educational agencies. See below - Q. 7.

b. Covered employer: Includes any person or entity:

- (1) engaged in commerce or in any industry or activity affecting commerce; and
- (2) who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

A school district is an employer for purposes of FMLA. 29 C.F.R. §825.104.

2. What provides for: FMLA provides for leave for the following purposes:

- a. The birth of a son or daughter of the employee and in order to care for **the newborn child**;
- b. The placement of a son or daughter with the employee for adoption or foster care;
- c. In order to care for the spouse, or a son, daughter, or parent, of the employee, who has a serious health condition;
- d. For an employee's serious health condition that makes the employee unable to perform the functions of his or her job. 29 C.F.R. §825.123(a). (An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans With Disabilities Act. 29 C.F.R. §825.115.)
- e. Any qualifying exigency arising from the employee's spouse, son, daughter, or parent being on active duty, or notified of an impending call or order to active duty, in the reserve component of the Armed Forces or a retired member of the regular Armed Forces or reserve component in support of a contingency operation. 29 C.F. R. §825.112(a)(5).
- f. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the servicemember. 29 C.F. R. §825.112(a)(6).

"Son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age or is 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 C.F.R. §825.102(c).

"Spouse" means a husband or wife. **Also included within the definition of "spouse" is an eligible employee in a legal same-sex marriage who resides in a state that recognizes the employee's marriage.** 29 C.F.R. §825.102(a).

"Parent" means the biological, **adoptive, step or foster father or mother** who stood in loco parentis to an employee when the employee was a son or daughter, not including parents "in law." 29 C.F.R. §825.102(b).

In general, "health care provider" is defined as a doctor of medicine or osteopathy who is authorized by the state to practice medicine or surgery, or other persons determined by the Secretary of Labor to be capable of providing health care services (including podiatrists, dentists, clinical psychologists, optometrists, nurse practitioners, midwives, clinical social workers, listed Christian Science practitioners, and, to a limited extent, chiropractors). 29 C.F.R. §825.102 **and 29 C.F.R. §825.125.**

"Serious health condition" includes an illness, injury, impairment, or physical or mental condition that involves any of the following:

- a. In-patient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (i.e. inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with such in-patient care. 29 C.F.R. §825.114.
- b. Continuing treatment by a health care provider, including any one or more of the following:
 - (1) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (a) treatment two or more times **within thirty days of the first day of incapacity**, by a health care provider, by a nurse or a physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (b) treatment by a health care provider on at

least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. §825.115(a).

- (2) Any period of incapacity due to pregnancy, or for pre-natal care. 29 C.F.R. §825.115(b).
- (3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A “chronic serious health condition” is one which: (a) requires periodic visits **(defined as at least twice a year)** for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider; (b) continues over an extended period of time (including recurring episodes of a single underlying condition); and (c) may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.). 29 C.F.R. §825.115(c).
- (4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider (e.g., Alzheimer’s, a severe stroke, or the terminal stages of a disease). 29 C.F.R. §825.115(d).
- (5) Any period of absence to receive multiple treatments **(including any period of recovery there from)** by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery (after an accident or other injury), or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation), severe arthritis (physical therapy), kidney disease (dialysis). 29 C.F.R. §825.115(e).
- (6) “Treatment,” for purposes of FMLA, includes, but is not limited to, examinations to determine if a serious health condition exists and evaluation of the condition. A “regimen of continuing treatment” includes a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). It does not, however, include the taking of over-the-counter medications such as aspirin or antihistamines. 29 C.F.R. §825.113(c).

Examples of “serious health conditions” include, but are not limited to:

- a. Cosmetic treatments involving in-patient hospital care;
- b. Restorative dental or plastic surgery after an injury or removal of cancerous growths;
- c. Mental illness resulting from stress or allergies;
- d. Substance abuse. FMLA leave may only be taken for treatment of substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. However, absence simply based on the employee’s use of the substance, without treatment, does not qualify for FMLA leave;
- e. Asthma (even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, or even if the absence does not last more than three days); and
- f. Pregnancy.

Examples of conditions that do not constitute “serious health conditions” include, but are not limited to:

- a. Routine preventative physical examinations;
- b. Voluntary or cosmetic treatments (such as most treatments for orthodontia or acne) which are not medically necessary and do not require in-patient hospital care; and
- c. Short-term conditions including cold, the flu, earaches, upset stomachs, minor ulcers, headaches other than migraine, etc.

The FMLA provides that an eligible employee may take leave in order to care for the employee's spouse, child or parent with a serious health condition. The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. The phrase also includes psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving in-patient or home care. See 29 C.F.R. §825.124(a).

3. Length of leave: Except for leave to care for a member of the armed forces with a serious illness or injury (as set forth in S.2.f. above), which permits up to 26 work weeks of leave, an employee is entitled to a maximum of 12 work weeks of leave during any 12-month period.

- a. Determination of 12-month period: An employer is allowed to choose one of the following methods for determining the 12-month period:

- (1) The calendar year;
- (2) Any fixed 12-month leave year, such as fiscal year, a year required by state law, or a year starting on an employee's anniversary date;
- (3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or
- (4) A rolling 12-month period measured backward from the date an employee uses any FMLA leave. 29 C.F.R. §825.200(b)(1)-(4).

The method chosen by the employer must be applied consistently and uniformly to all employees. An employer may change its method of calculating the 12-month period, by providing 60 days notice to all employees, provided that the transition must take place in a way that all employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the leave requirements. If an employer fails to select a method, the method that provides the most beneficial outcome for the employee will be used. 29 C.F.R. §825.200(d)(1) and 29 C.F.R. §825.200(e).

- b. Intermittent or reduced schedule leave: Under certain circumstances, leave may be taken intermittently or on a reduced leave schedule. (Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason and reduced leave schedule is a leave schedule that reduces an employee's usual number of work hours per week or per day.) 29 C.F.R. §825.202.

- (1) Intermittent or reduced schedule leave may be taken after the birth or placement of a child for adoption or foster care only if the employer agrees. However, the employer's agreement is not required for leave during which the mother has a serious health condition in connection with the birth of a child or if the newborn child has a serious health condition. 29 C.F.R. §825.202(c).
- (2) Leave may be taken intermittently or on a reduced schedule when medically necessary for planned and/or **un**anticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition. 29 C.F.R. §825.202(b).
 - (a) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave for periods from one hour or more to several

weeks (such as for periodic medical appointments, chemotherapy treatments, prenatal examinations, or severe morning sickness). 29 C.F.R. §825.202(b).

- (b) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider. 29 C.F.R. §825.202(b).
 - (3) For intermittent or reduced schedule leave, there must be a medical need for the leave, and it must be such that the medical need can be best accommodated through an intermittent or reduced leave schedule. 29 C.F.R. §825.202(b). Only the time actually taken as leave may be charged against the employee's entitlement when leave is taken intermittently or on a reduced schedule. 29 C.F.R. §825.205(a).
 - (4) Under the FMLA, there is no limit on the size of an increment when an employee takes intermittent leave or leave on a reduced leave schedule. The regulations, however, provide that an employer may limit leave increments to the shortest period of time (one hour or less) that the employee's payroll system uses to account for absences or use of leave. 29 C.F.R. §825.205(a).
 - (5) In the event an employee requests intermittent leave or leave on reduced leave schedule that is foreseeable based on planned medical treatment of the employee or the employee's spouse, son, daughter or parent, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or placement of a child in adoption or foster care, the FMLA permits the employer to temporarily transfer the employee to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. 29 C.F.R. §825.204.
 - (a) The alternative position must have equivalent pay and benefits. An alternative position, however, does not have to have equivalent duties. 29 C.F.R. §825.204(c).
 - (b) In transferring an employee to an alternative position, the employer must comply with the provisions in any applicable collective bargaining agreement, as well as federal or state law. 29 C.F.R. §825.204(b).
 - (c) Transfer to an alternative position may also include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. 29 C.F.R. §825.204(b).
- c. Length when both parents are employees: A husband and wife who are eligible for FMLA leave and are employed by the same employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken:
- (1) for the birth of a child or to care for the child after birth;
 - (2) for placement of a child with the employee for adoption or foster care or to care for the child after placement; or
 - (3) to care for the employee's parent with a serious health condition. 29 C.F.R. §825.121(a)(3).

A husband or wife using a portion of his or her 12 week leave for one of the above purposes remains entitled to take the remaining balance of his or her 12 weeks of FMLA leave for other FMLA purposes. 29 C.F.R. §825.121(a)(3).

- d. Expiration of entitlement to leave: The entitlement to leave because of the birth or placement of a child for adoption or foster care expires at the end of the 12-month period beginning on the date of such birth or placement, unless state law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. §825.121(a)(2).

- e. Reduction for other leave available: The length of FMLA leave may be reduced by other leave available to the employee through the employer's benefit plan or a collective bargaining agreement. 29 C.F.R. §825.207(a).
- (1) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. **An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. 29 C.F.R. §825.207(a).**
 - (2) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. **An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. 29 C.F.R. §825.207(a).**
 - (a) Thus, employees have a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. 29 C.F.R. §825.207(c).
 - (b) In addition, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan. 29 C.F.R. §825.207(c).
 - (3) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave under FMLA. Because a leave pursuant to a temporary disability plan is not unpaid, the provision under FMLA for substitution of paid leave is inapplicable. **However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary. 29 C.F.R. §825.207(d).**
 - (4) Since FMLA applies to a serious health condition resulting from injury to an employee either "on or off" the job, for employee injuries occurring on the job, either the employee or the employer may choose to have the employee's FMLA 12-week leave entitlement run concurrently with a workers' compensation absence when the injury is one that satisfies the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the FMLA provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job." As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date the workers' compensation benefits cease, the substitution provision under FMLA applies and either the employee may elect or the employer may require the use of accrued paid leave. 29 C.F.R. §825.207(e).
 - (a) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. 29 C.F.R. §825.210(f).
 - (b) The regulations also provide that if an employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer enjoys the protections of the FMLA and must, instead look to the workers' compensation statute or ADA for any relief or protections. 29 C.F.R. §825.216(c).

- (c) While employees cannot waive, nor may employers induce employees to waive, their rights under FMLA, this does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition. In such a circumstance, the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty." 29 C.F.R. §825.220(d).
 - (5) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under any of the above circumstances, the employee remains entitled to all paid leave which is earned or accrued under the terms of the employer's plan. 29 C.F.R. §825.207(b).
 - (6) In accordance with the regulations, if an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave may not count against the 12 weeks of FMLA leave to which the employee is entitled. 29 C.F.R. §825.207(c).
 - (7) **An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. 29 C.F.R. §825.302(d) and §825.303(c).**
- f. Leave qualifying for both FMLA leave and leave under state statute: If leave qualifies for both FMLA leave and leave under state statute, the leave counts against the employee's entitlement under both laws. 29 C.F.R. §825.701(a).
4. Compensation during leave: Generally, FMLA leave is unpaid. However, the employee may be compensated for all or a portion of the FMLA leave period, if the employer requires or the employee requests to substitute other earned or accrued paid vacation or leave available to the employee. 29 C.F.R. §825.207(a).

Employers are required, during FMLA leave, to maintain the employee's coverage under any group health and hospitalization plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. 29 C.F.R. §825.209. Any share of group health plan premiums which were required to be paid by the employee prior to FMLA leave must continue to be paid by the employee. If premiums are raised or lowered, the employee is required to pay the new premium rates. 29 C.F.R. §825.210(a).

If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave. 29 C.F.R. §825.210(b). If FMLA is unpaid, the employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. 29 C.F.R. §825.210(c). The regulations provide that an employer may require employees to pay their share of premium payments in any of the following ways:

- a. Payment due at the same time as it would be if made by payroll deduction;
- b. Payment due on the same schedule as payments made under COBRA;
- c. Payment prepaid pursuant to a cafeteria plan at the employee's option;
- d. The employer's existing rules for payment by employees on "leave without pay" would be followed, provided that such rules do not require prepayment (i.e. prior to commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

- e. Any other system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g. through increased payroll deduction when the need for the FMLA leave is foreseeable).

The employer must provide the employee with advanced written notice of the terms and conditions under which the employee is to pay his or her share of the health plan premiums. 29 C.F.R. §825.210(d). Employers may not require more of an employee using FMLA leave than required of other employees on “leave without pay”. 29 C.F.R. §825.210(e). An employee who is receiving payments as a result of a workers’ compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. 29 C.F.R. §825.210(f).

In the absence of a policy providing for a longer period, an employer’s obligation to maintain an employee’s health insurance coverage under FMLA ceases if an employee’s premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Said notice must be mailed to the employee at least 15 days before coverage is to cease, advising the employee that coverage will be dropped on a specified date at least 15 days after the date of the notice unless the premium payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice is given. However, in the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been given. 29 C.F.R. §825.212(a)(1). Even if coverage lapses due to an employee’s failure to make required premium payments, all other obligations of an employer under the FMLA continue (e.g., reinstatement of an employee upon return from leave). 29 C.F.R. §825.212(a)(3).

In the event that coverage lapses due to the failure of the employee to make timely premium payments, the employer must, upon the employee’s return from FMLA leave, restore the employee to coverage/benefits equivalent to those the employee would have had if FMLA had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. In such a case, an employee may not be required to meet any qualification requirements imposed by the health plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. 29 C.F.R. §825.212(c).

An employer may recover the employee’s share of any premium payments missed by the employee for any FMLA leave period during which the employer continues to maintain health insurance coverage for the employee by paying the employee’s share after the premium payment is missed. 29 C.F.R. §825.212(b). An employer may also recover its share of its health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee’s FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to: (a) the continuation, recurrence or onset of a serious health condition which would entitle the employee to leave under the FMLA; or (b) other circumstances beyond the employee’s control. 29 C.F.R. §825.213(a)(1) and (2).

- a. When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, **thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee’s behalf during a period of unpaid FMLA leave**, the employer may require medical certification of the employee’s or the family member’s serious health condition. Such a certification is not required unless

requested by the employer. Upon request by the employer, an employee is required to provide medical certification in a timely manner which, for purposes of the FMLA, is within 30 days of the employer's request. In the event the employee fails to provide certification within the 30-day period or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave. 29 C.F.R. §825.213(a)(3).

- b. The regulations set forth a number of examples of "other circumstances beyond the employee's control." Examples of such circumstances include, but are not limited to: Where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a "key employee" who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. 29 C.F.R. §825.213(a)(2).
- c. When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its share of health insurance premiums or other non-health benefit premium for any period of FMLA leave covered by paid leave. 29 C.F.R. §825.213(d).
- d. The amount that self-insured employers may recover is limited to only the employer's share of allowable "premiums" as would be calculated under COBRA, excluding the two percent fee for administrative costs. 29 C.F.R. §825.213(e).
- e. When an employee fails to return to work, any health and non-health benefit premiums which the employer is permitted to recover constitute a debt owed by the non-returning employee to the employer. The existence of such a debt, however, does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (e.g. unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the regulations provide that an employer may institute legal action against the employee to recover such costs. 29 C.F.R. §825.213(f).
- f. An employee who returns to work for at least 30 calendar days is considered to have "returned to work" for purposes of the FMLA. In addition, an employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work. 29 C.F.R. §825.213(c).

Under some circumstances an employer may elect to maintain other benefits beyond health insurance (e.g., life insurance, disability insurance, etc.) by paying the employee's share of premiums during periods of unpaid FMLA leave. If an employer elects to maintain such benefits during the leave, at the conclusion of the leave, the employer is entitled to recover only the costs for paying the employee's share of any premiums whether or not the employee returns to work. 29 C.F.R. §825.213(b).

5. Responsibility for designation of leave:

- a. Under the present regulation, it is the responsibility of the employer to designate leave, whether paid or unpaid, as FMLA-qualifying, based on information provided by the employee or the employee's spokesperson. Therefore, when an employer lacks sufficient information to make such a determination, the employer should make further inquiries to ascertain whether the leave is potentially FMLA-qualifying. 29 C.F.R. §825.301(a).
 - (1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under FMLA. If the employee fails to explain the reasons, leave may be denied. 29 C.F.R. §825.301(b).
 - (2) An employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under FMLA or even mention FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such a right either. However, if an employee requesting to use paid leave for a FMLA-qualifying purpose does not explain the reason for the leave -- consistent with the employer's established policy or practice -- and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e. that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against the employee's 12-week FMLA entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement. 29 C.F.R. §825.301(b).
 - (3) Certain federal jurisdictions have held that an employer's failure to give notice to an employee that his/her leave will not be counted as their FMLA leave, does not require that the employee is automatically entitled to additional leave or FMLA protection. See Donahoo v. Master Data Center, 282 F.Supp.2d 540, 555 (E.D. Mich. 2003) citing Summers v. Middleton & Reutlinger, P.S.C., 214 F.Supp.2d 751, 757 (W.D. Ky. 2002) and Roberson v. Cendant Travel Services, Inc., 252 F.Supp.2d 573, 577 (M.D. Tenn. 2002). Instead, an employee denied leave in such cases, must also show actual prejudice as a result of the employer's failure to provide the notice that the leave was a FMLA leave. See Id.
- b. Once the employer has acquired knowledge that the leave is being taken for a FMLA required reason, the employer must promptly (within five business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. 29 C.F.R. §825.300(d)(1). In the event a dispute arises between an employer and employee as to whether paid leave qualifies as FMLA leave, the regulations suggest that such disputes "should be resolved through discussions between the employee and the employer." These discussions and the decision must be documented. 29 C.F.R. §825.301(c). However, as noted in the discussion above at 5. a. (3) federal courts have called into question the validity of this regulation.
 - (1) The employer's notice to the employee that the leave has been designated as FMLA leave **must be in writing.** 29 C.F.R. §825.300(d)(4).
 - (2) **Notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If the notice is oral, it must be confirmed in writing no later than the following payday (unless the payday is less than one week after the**

oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub. 29 C.F.R. §825.300(d)(6).

- c. If an employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, **the employer must inform the employee of this designation at the time of designating the FMLA leave. 29 C.F.R. §825.300(d)(1). If an employer does not designate leave as required by the regulations, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by the regulations provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. 29 C.F.R. §825.301(d).**
 - d. **In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave. 29 C.F.R. §825.301(d).**
6. Notice and certification requirements:
- a. An employee must provide the employer notice at least 30 days in advance of when FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. 29 C.F.R. §825.302(a).
 - (1) For purposes of FMLA, "as soon as practicable" means "as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case." **When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. 29 C.F.R. §825.302(b).**
 - (2) An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. However, the employee need not expressly assert rights under FMLA or even mention FMLA. Consequently, the employer should inquire further to obtain more information about whether FMLA leave is being sought and the necessary details of such leave. 29 C.F.R. §825.302(c).
 - (3) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice. 29 C.F.R. §825.302(d)
 - (4) When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to make such arrangements, subject to the approval of the health care provider. 29 C.F.R. §825.302(e)

- (5) The regulations also provide that in the case of intermittent leave (see Section 3.b. of this Bulletin) or leave on a reduced leave schedule which is medically necessary, an employee must advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and the employer must then attempt to work out a schedule which meets the employee's needs without unduly disrupting the employee's operations, subject to the approval of the health care provider. 29 C.F.R. §825.302(f).
- b. When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. 29 C.F.R. §825.303(a).
- (1) **It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.**
- (2) Notice may be given by the employee's spokesperson (e.g. spouse, adult family member or other responsible party) if the employee is unable to do so personally. 29 C.F.R. §825.303(b).
- c. In the event an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may deny the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave. 29 C.F.R. §825.304(b).
- (1) The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. 29 C.F.R. §825.304(c).
- d. In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. 29 C.F.R. §825.304(a).
- (1) The notice requirement can be satisfied by the employer's proper posting of the required notice at the work site where the employee is employed. The required notice is found in the appendix to this Bulletin. 29 C.F.R. §825.304(a).
- e. An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. 29 C.F.R. §825.304(e). See 29 C.F.R. §825.302(e).
- f. An employer may require that an employee's request for leave to care for the employee's seriously ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform the functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification. 29 C.F.R. §825.305(a).
- (1) The employee must provide the requested certification within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. 29 C.F.R. §825.305(b).

- g. At the time the employer requests certification, which in most cases should be at the time the employee **gives notice of the need for leave or within five business days thereafter, or in the case of unforeseen leave, within five business days after the leave commences**, the employer must also advise the employee of the anticipated consequences of the employee's failure to provide adequate certification. In addition, the employer must advise the employee whenever the employer finds a certification incomplete **or insufficient, and must state in writing what additional information is necessary to make the certification complete and sufficient. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's good faith efforts) to cure any such deficiency.** 29 C.F.R. §825.305(c).
- h. A certification requested by an employer is deemed sufficient under FMLA if the certification states:
 - (1) **The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;**
 - (2) Which part of the definition of "serious health condition," if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition;
 - (3) The **approximate** date on which the serious health condition commenced;
 - (4) The probable duration of the condition;
 - (5) **If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job, as well as the nature of any other work restrictions, and the likely duration of any such inability;**
 - (6) For family leave to care for a covered family member, a statement that the employee is needed to care for the family member and an estimate of the amount of time that the employee is needed to care for the family member;
 - (7) In the case of certification for intermittent leave or leave on a reduced leave schedule for planned medical treatment, **a statement of the medical necessity for such leave**, the dates on which such treatment is expected to be given and the duration of such treatment **and any periods of recovery;**
 - (8) In the case of certification for intermittent leave or leave on a reduced leave schedule because of the employee's own serious health condition, **including pregnancy**, a statement of the medical necessity for such leave and **an estimate of the frequency and duration of the episodes of incapacity; and**
 - (9) In the case of certification for intermittent leave or leave on a reduced leave schedule to care for a covered family member, a statement that the employee's intermittent leave or leave on a reduced leave schedule is **medically** necessary for the care of the family member who has a serious health condition or will assist in their recovery, and **an estimate of the frequency and** expected duration of the intermittent leave or reduced leave schedule.

(Note: The United States Department of Labor has developed a form to use in obtaining medical certification for employees from health care providers which meets FMLA certification requirements. See 29 C.F.R. §825.306; 29 U.S.C. §2613. This form is attached in the appendix to Bulletin M.)

- i. In the event an employee submits a completed certification signed by a health care provider, the employer may not request additional information from the employee's health care provider. **However, the employer may contact the health care provider for purposes of clarification and authentication of the medical condition.** Any employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. 29 C.F.R. §825.307(a) **and (b)(1).**

- (1) FMLA, while permitting the employer to designate the health care provider to furnish the second opinion, prohibits the employer from designating a health care provider who is employed on a regular basis by the employer, except where the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity). 29 C.F.R. §825.307(b)(2).
- j. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, at the employer's expense. 29 C.F.R. §825.307(c).
 - (1) The third health care provider must be designated or approved jointly by the employer and the employee. According to the regulations, the employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. By the same token, if the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. 29 C.F.R. §825.307(c).
 - (2) In the event that the employee and the employer jointly designate or approve a third health care provider, the opinion of this third health care provider is final and binding on the employee and the employer. 29 C.F.R. §825.307(c).
- k. FMLA provides that an employer may require an employee obtain recertifications on "a reasonable basis." 29 U.S.C. §2613.
 - (1) Although FMLA does not define what constitutes "a reasonable basis," the regulations provide some guidelines. In this respect, the regulations provide that an employer may request recertification at any reasonable interval, but not more often than 30 days, unless: (a) the employee requests an extension of leave; (b) circumstances described by the original certification have changed significantly (e.g. the duration **or frequency** of the **absence**, the nature of the illness or complications); or (c) the employer receives information that casts doubt upon the continuing validity of the certification. 29 C.F.R. §825.308(c).
 - (2) The employee must provide the requested recertification to the employer within the time frame requested by the employer which must allow at least 15 calendar days after the request unless not practicable despite a diligent, good faith effort by the employee. Any recertification is at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required. 29 C.F.R. §825.308(d) & (f).
- l. In the event an employee requests leave because of a qualifying exigency arising out of the **covered** active duty or call to **covered** active duty status of a military member, an employer may require the military member **to provide the employee's** active duty orders or other documentation issued by the military which indicates that the military member is on **covered** active duty or a call to **covered** active duty status in support of a contingency operation, and the dates of the covered military members's active duty status. This information needs only to be provided to the employer once. **29 C.F.R. §825.309(a).**

(NOTE: The United States Department of Labor has developed a form for employees to use in obtaining a certification to support a request for leave because of a qualifying exigency. This form is attached in the appendix to Bulletin M.) 29 C.F.R. §825.309.

- m. In the event an employee requests leave to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of such leave, any one of the following health care providers may complete such a certification:

- (1) A United States Department of Defense (“DOD”) health care provider;
- (2) A United States Department of Veterans Affairs (“VA”) health care provider;
- (3) A DOD TRICARE network authorized private health care provider;
- (4) A DOD non-network TRICARE authorized private health care provider; **or**
- (5) Any health care provider as defined in Section 2 of this bulletin.**

(NOTE: The United States Department of Labor has developed a form for employees to use in obtaining certification that meets FMLA requirements. This form is attached in the appendix to Bulletin M.) 29 C.F.R. §825.310.

- n. An employer may also require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. 29 C.F.R. §825.311(a).
- (1) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations cease under FMLA to maintain health benefits (subject to COBRA) and to restore the employee. These obligations continue, however, if the employee indicates that he or she may be unable to return to work but expresses a continuing desire to do so. 29 C.F.R. §825.311(b).
- o. An employer may have a uniformly applied policy or practice that requires all employees whose FMLA leave was occasioned by the employee's own serious health condition to obtain and present certification from the health care provider that the employee is able to resume work. 29 C.F.R. §825.312(a).
- (1) If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act that any return-to-work physical be job-related and consistent with business necessity apply. 29 C.F.R. §825.312(g) **and (h)**.
 - (2) An employer may seek fitness-for-duty certification only with regard to the particular health condition that occasioned the FMLA leave. **The certification from the employee's health care provider must certify that the employee is able to resume work. An employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job, provided the employer provides the employee with a list of the essential functions of the employee's job. Such a list must be provided no later than with the designation notice, and must indicate on the designation notice that the certification must address the employee's ability to perform those essential functions.** 29 C.F.R. §825.312(b).
 - (3) The cost of the certification is to be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. 29 C.F.R. §825.312(c).
 - (4) An employer may deny an employee restoration to employment until the employee submits a required fitness-for-duty certification unless the employer has failed to provide the required notices. (See Section 9 of this Bulletin.) 29 C.F.R. §825.312(e).
 - (5) An employer is not entitled to certification of fitness to return to duty **for each absence taken** when the employee takes intermittent leave. 29 C.F.R. §825.312(f).

- p. In the case of foreseeable leave, an employee who fails to provide timely certification after being requested by the employer to furnish such certification (e.g. within 15 calendar days, if practicable), may be denied the taking of leave until the required certification is provided. 29 C.F.R. §825.313(a).
 - q. In situations where the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification or recertification within the time-frame requested by the employer (which must allow at least 15 days after the employer's request) or as soon as reasonably possible under the particular facts and circumstances. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may deny the employee's continuation of leave. 29 C.F.R. §825.313(b) **and (c)**.
 - r. In the event an employee on FMLA leave due to the employee's serious health condition fails to provide medical certification at the time reinstatement is sought that the employee is fit for duty and able to return to work after being requested to do so by the employer pursuant to a uniformly applied policy for similarly-situated employees **and the employer has provided the required notices**, the employee may be denied reinstatement until such certification is provided. **Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated.** 29 C.F.R. §825.313(d).
 - s. When the necessity for FMLA leave is foreseeable based upon planned medical treatment, the employee is required to make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer (subject to the approval of the health care provider). **If an employee who provides notice of the need for FMLA leave on an intermittent basis for planned medical treatments neglects to consult with the employer to make reasonable efforts to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.** See 29 C.F.R. §825.302(e).
7. Special provisions regarding educational personnel: Additional rules or restrictions apply when FMLA leave is taken by employees of "local educational agencies," which include public school boards and elementary and secondary schools. These rules affect the taking of intermittent leave or leave on a reduced schedule or leave near the end of an academic term, by instructional employees. 29 C.F.R. §825.600.
- a. "Instructional employees," for purposes of FMLA, means those employees whose principal function is to teach and instruct students in a class, a small group or an individual setting. This includes not only teachers, but also athletic coaches, driving instructors and special education assistants. It does not include teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists or curriculum specialists. **It also does not include cafeteria workers, maintenance workers, or bus drivers.** 29 C.F.R. §825.600(c).
 - b. If an instructional employee requests intermittent leave or leave on a reduced leave schedule to care for a family member, **to care for a covered service member**, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the school district may require the employee to choose either to: (1) take a leave for a period or periods of a particular duration, not greater than the planned treatment; or (2) transfer temporarily to an available alternative position for

which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position. 29 C.F.R. §825.601(a)(1).

- (1) If an instructional employee does not give required notice of foreseeable FMLA leave to be taken intermittently or on a reduced leave schedule, (See Section 3.b. of this Bulletin) the school district may require the employee to take leave of a particular duration, transfer temporarily to an alternative position, or delay the taking of leave until proper notice is given. 29 C.F.R. §825.601(b).
 - c. Different rules also exist for instructional employees who begin FMLA leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of an academic term. An "academic term," for purposes of FMLA, means the "school semester," which, according to the regulations, "typically ends near the end of the calendar year and the end of spring each school year." However, "[i]n no case may a school have more than two academic terms or semesters each year for purposes of the FMLA." 29 C.F.R. §825.602(b).
 - (1) A school district may require an instructional employee who begins a FMLA leave more than five weeks before the end of an academic term to continue taking leave until the end of the term if: (a) the leave will last at least three weeks; and (b) the employee would return to work during the **three**-week period before the end of the term. 29 C.F.R. §825.602(a)(1).
 - (2) A school district may require an instructional employee who begins a FMLA leave for any purpose other than the employee's own serious health condition, during the five-week period before the end of an academic term, to continue taking leave until the end of the term if: (a) the leave will last more than two weeks; and (b) the employee would return to work during the two-week period before the end of the term. 29 C.F.R. §825.602(a)(2).
 - (3) A school district may require an instructional employee who begins a FMLA leave for any purpose other than the employee's own serious health condition, during the three-week period before the end of an academic term, to continue taking leave until the end of the term if the leave will last more than five working days. 29 C.F.R. §825.602(a)(3).
 - d. If an instructional employee chooses to take leaves for "periods of a particular duration" in the case of intermittent or reduced schedule leave, the entire period of leave is counted as FMLA leave for purposes of the 12-week entitlement. 29 C.F.R. §825.603(a).
 - e. In situations where the employee is required to take leave until the end of the academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the term is not counted as FMLA leave; however, the school district is required to maintain health benefits during the entire leave period and reinstate the employee and provide other FMLA benefits when the period of leave ends. 29 C.F.R. §825.603(b).
8. Employee's rights upon returning to work following leave:
- a. On returning from FMLA leave, an employee is entitled to be returned to the same position the employee held when the leave commenced, or to an "equivalent position." 29 C.F.R. §825.214. An "equivalent position" is **one that is virtually identical to the employee's**

former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. 29 C.F.R. §825.215(a).

- (1) FMLA contains special provisions applicable to school districts in regard to restoring any school district employee (not only instructional employees) to an “equivalent position.” The determination of how an employee is to be restored to an “equivalent position” is to be made on the basis of “established school board policies and practices...and collective bargaining agreements.” 29 C.F.R. §825.604.
 - (a) According to the regulations, the “established policies” and “collective bargaining agreements” used as a basis for restoration must be: (i) in writing; (ii) made known to the employee prior to the taking of FMLA leave; and (iii) must clearly explain the employee’s restoration rights upon return from leave.
 - (b) Any “established policy” which is used as the basis for restoration of an employee to an “equivalent position” must also provide substantially the same protections as provided in FMLA for reinstated employees. 29 C.F.R. §825.604. See 29 C.F.R. §825.215.
- b. Under FMLA, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Consequently, in order to deny restoration, an employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested. 29 C.F.R. §825.216(a).
- c. If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may deny restoration until the employee submits the required certification. 29 C.F.R. §825.312(e). See Section 6.o. of this Bulletin.
- d. If an employee unequivocally advises the employer that the employee does not intend to return to work, the employee’s employment relationship is deemed terminated and the employee’s entitlement to reinstatement, continued leave, and health benefits ceases. 29 C.F.R. §825.311(b).
- e. An employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA’s job restoration or maintenance of health benefits provisions. 29 C.F.R. §825.216(d).
- f. An employer may also deny job restoration but not the taking of FMLA leave and the maintenance of health benefits to a “key employee” if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. §825.218(a).
 - (1) A “key employee,” for purposes of FMLA, is a salaried employee who is among the highest paid 10% of all the employees employed by the employer within 75 miles of the employee’s work site. 29 C.F.R. §825.217(a).
 - (a) The determination of whether a salaried employee is among the highest paid 10% must be made at the time of the request for leave. 29 C.F.R. §825.217(c)(2). An employer who believes that reinstatement may be denied to a key employee must give written notice to the employee at the time FMLA is requested or commences, whichever is earlier, notifying the employee: (i) that the employee qualifies as a key employee; and (ii) of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and

grievous injury to the employer's operations will result if the employee is reinstated. 29 C.F.R. §825.219(a).

- (2) While a precise test cannot be established for determining whether a "substantial and grievous economic injury" exists, if the reinstatement threatens the economic viability of the employer substantial and grievous economic injury would exist. "A lesser injury which causes substantial long-term economic injury" would also be sufficient. However, "[m]inor inconveniences and costs that the employer would experience in the normal course of doing business" would not be sufficient. 29 C.F.R. §825.218(c).
- (3) As soon as an employer makes a good faith determination that substantial and grievous economic injury to its operations will result if a key employee who has requested or is using FMLA leave is reinstated, the employer must notify the employee in writing: (a) of the employer's determination; (b) that the employer cannot deny FMLA leave; and (c) that it intends to deny restoration to employment on completion of the FMLA leave. This notice must be served on the employee either personally or by certified mail, and must explain the basis for the employer's finding that substantial and grievous economic injury will result **and, if leave has commenced, must provide** the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return. 29 C.F.R. §825.219(b).
- (4) If a key employee does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period. 29 C.F.R. §825.219(c).
- (5) After notice to a key employee has been given that substantial and grievous economic injury will result if the employee is reinstated, the employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. Upon receipt of such a request by the employee, the employer must then make a determination of whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that such injury will result, the employer must notify the employee in writing (personally or by certified mail) of the denial of restoration. 29 C.F.R. §825.219(d).

9. Notification and posting of FMLA rights.

- a. Employers subject to FMLA are required to post and keep posted on their premises, in conspicuous places where employees are employed, a notice explaining the provisions of FMLA and providing information concerning the procedures for filing complaints of violations of FMLA with the Wage and Hour Division of the Department of Labor. 29 C.F.R. §825.300(a). Two federal appellate courts have held that the self-care provisions of the FMLA, namely taking FMLA **leave** for an employee's own serious medical condition, enforced against states as employers, do not constitute a valid abrogation of state sovereign immunity and are therefore unconstitutional. See Brockman v. Wyoming Department of Family Services, 342 F.3d 1159, (10th Cir. 2003); Touvell v. Ohio Department of Mental Retardation and Developmental Disabilities, 422 F.3d 392 (6th Cir. 2005); and Quinnet v. Iowa Department of Administrative Services, 644 F.3d 630 (8th Cir. 2011).
- (1) A notice prepared by the Department of Labor is set out in the appendix to this Bulletin. This notice may be duplicated, but any such duplication must contain fully legible text. **Electronic posting is sufficient to meet the posting requirement as long as it otherwise meets the requirements of the regulations.** 29 C.F.R. §825.300(a)(1).
- (2) Any employer that willfully violates the posting requirement may be assessed a penalty not to exceed \$110.00 for each separate offense. 29 C.F.R. §825.300(a)(1).

- (3) Where any employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer is responsible for providing the information required by the notice provisions in a language in which the employees are literate. 29 C.F.R. §825.300(a)(4).
- b. If an employer has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlement and employee obligations under FMLA must be included in such handbook or other document. 29 C.F.R. §825.301(a)(3). Informational publications are available from local Wage and Hour Division offices which may be incorporated in such handbooks or other document.
- c. If an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer must provide written guidance to an employee concerning all the employee's rights and obligations under FMLA whenever an employee is hired. 29 C.F.R. §825.300(a)(3). Copies of the FMLA Fact Sheet, which can be used for this purpose, may be obtained from local offices of the Wage and Hour Division. (See the appendix to Bulletin M.)
- d. When an employee provides notice of the need for FMLA leave, the employer must provide the employee with notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. 29 C.F.R. §825.300(c)(1). Such a notice should include, as appropriate:
- (1) That the leave **may be designated and** counted against the employee's annual FMLA leave entitlement **if qualifying and the applicable 12-month period for FMLA entitlement**;
 - (2) Any requirements for the employee to furnish certification of a serious health condition, serious illness or injury, or qualifying exigency arising out of **covered** active duty or call to active duty status, and the consequences of failing to do so. (See Section 6 of this Bulletin);
 - (3) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employees entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave. (See Sections 3.e., 4, and 5 of this Bulletin);
 - (4) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis. (See Section 4 of this Bulletin);
 - (5) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment. (See Sections 6.o., 6.p., and 8.c. of this Bulletin);
 - (6) The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, as well as explaining the conditions required for such denial. (See Section 8.f. of this Bulletin);
 - (7) The employee's right to **maintenance of benefits during the FMLA leave and** restoration to the same or an equivalent job upon return from leave. (See Section 8.a. of this Bulletin); and
 - (8) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave. (See Section 4 of this Bulletin.)

(Note: A prototype notice is available from any local office of the Wage and Hour Division, which employers may adapt for their optional use. See the appendix to Bulletin M.)

T. EARLY RETIREMENT INCENTIVE PROGRAM.

1. Generally: Minnesota law provides that a teacher may apply to the school board of the employing district for a contract for termination of services, withdrawal from acting teaching service, and payment of an early retirement incentive. Minn Stat. §122A.48.
2. Who applies to: Applies to “teachers” as defined in Minn. Stat. §122A.15, Subd. 1 who:
 - a. Are employed in a public elementary or secondary school in the state and either:
 - (1) Have at least 15 total years of full-time teaching service in elementary, secondary, and technical colleges, or at least 15 years of allowable service for retirement purposes, and are at least 55 but not yet 65 years of age (as of June 30 in the school year during which an application is made); or
 - (2) Have at least 30 total years of full-time teaching service in elementary, secondary, and technical colleges, or at least 30 years of allowable service for retirement purposes, regardless of age.
3. What applies to: Teachers who retire, submit a written resignation and submit a timely application for early retirement if approved by the school board. “Retirement”, for purposes of the statute, means termination of services in the employing district and withdrawal from active teaching service, although a teacher may be employed as a substitute after retirement.
4. Application process:
 - a. To be eligible for the early retirement incentive the teacher must submit a written resignation.
 - b. The teacher must submit an application for an early retirement incentive to the school board on or before February 1 of the school year at the end of which the teacher wishes to retire.
5. School board approval or denial: The school board must approve or deny an application for an early retirement incentive within 30 days after it is received by the board.
6. Amount of incentive and payment schedule:
 - a. The amount of the early retirement incentive shall be agreed upon by the teacher and the school board.
 - b. The incentive will be paid at the time and in the manner mutually agreed upon by the teacher and the board.
 - c. The school board may deduct any amount of unemployment insurance that the teacher receives for which the school district is required to pay into the unemployment compensation fund from the amount of the early retirement incentive, or such amounts may be recovered by the district up to the amount of the teacher’s early retirement incentive.

Fact Sheet #28: The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. This fact sheet provides general information about which employers are covered by the FMLA, when employees are eligible and entitled to take FMLA leave, and what rules apply when employees take FMLA leave.

COVERED EMPLOYERS

The FMLA only applies to employers that meet certain criteria. A **covered employer** is a:

- Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;
- Public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs; or
- Public or private elementary or secondary school, regardless of the number of employees it employs.

ELIGIBLE EMPLOYEES

Only eligible employees are entitled to take FMLA leave. An **eligible employee** is one who:

- Works for a *covered employer*;
- Has worked for the employer for at least *12 months*;
- Has at least *1,250 hours* of service for the employer during the 12 month period immediately preceding the leave*; and
- Works at a location where the employer has at least *50 employees within 75 miles*.

* Special hours of service eligibility requirements apply to airline flight crew employees. See Fact Sheet 28J: Special Rules for Airline Flight Crew Employees under the Family and Medical Leave Act.

The 12 months of employment do not have to be consecutive. That means any time previously worked for the same employer (including seasonal work) could, in most cases, be used to meet the 12-month requirement. If the employee has a break in service that lasted seven years or more, the time worked prior to the break will not count *unless* the break is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), or there is a written agreement, including a collective bargaining agreement, outlining the employer's intention to rehire the employee after the break in service. See "FMLA Special Rules for Returning Reservists".

LEAVE ENTITLEMENT

Eligible employees may take up to **12 workweeks** of leave in a 12-month period for one or more of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
- To care for a spouse, son, daughter, or parent who has a serious health condition;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

An eligible employee may also take up to **26 workweeks** of leave during a "single 12-month period" to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. The "single 12-month period" for military caregiver leave is different from the 12-month period used for other FMLA leave reasons. See Fact Sheets 28F: Qualifying Reasons under the FMLA and 28M: The Military Family Leave Provisions under the FMLA.

Under some circumstances, employees may take FMLA leave on an intermittent or reduced schedule basis. That means an employee may take leave in separate blocks of time or by reducing the time he or she works each day or week for a single qualifying reason. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operations. If FMLA leave is for the birth, adoption, or foster placement of a child, use of intermittent or reduced schedule leave requires the employer's approval.

Under certain conditions, employees may choose, or employers may require employees, to "substitute" (run concurrently) accrued paid leave, such as sick or vacation leave, to cover some or all of the FMLA leave period. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.

NOTICE

Employees must comply with their employer's usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request. Employees generally must request leave 30 days in advance when the need for leave is foreseeable. When the need for leave is foreseeable less than 30 days in advance or is unforeseeable, employees must provide notice as soon as possible and practicable under the circumstances.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. If an employee later requests additional leave for the same qualifying condition, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. See Fact Sheet 28E: Employee Notice Requirements under the FMLA .

Covered employers must:

- (1) Post a notice explaining rights and responsibilities under the FMLA (and may be subject to a civil money penalty of up to \$110 for willful failure to post);
- (2) Include information about the FMLA in their employee handbooks or provide information to new employees upon hire;

- (3) When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA-qualifying reason, provide the employee with notice concerning his or her eligibility for FMLA leave and his or her rights and responsibilities under the FMLA; and
- (4) Notify employees whether leave is designated as FMLA leave and the amount of leave that will be deducted from the employee's FMLA entitlement.

See Fact Sheet 28D: Employer Notice Requirements under the FMLA.

CERTIFICATION

When an employee requests FMLA leave due to his or her own serious health condition or a covered family member's serious health condition, the employer may require certification in support of the leave from a health care provider. An employer may also require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition. See Fact Sheet 28G: Certification of a Serious Health Condition under the FMLA. For information on certification requirements for military family leave, See Fact Sheet 28M(c): Qualifying Exigency Leave under the FMLA; Fact Sheet 28M(a): Military Caregiver Leave for a Current Servicemember under the FMLA; and Fact Sheet 28M(b): Military Caregiver Leave for a Veteran under the FMLA.

JOB RESTORATION AND HEALTH BENEFITS

Upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. An employee's use of FMLA leave cannot be counted against the employee under a "no-fault" attendance policy. Employers are also required to continue group health insurance coverage for an employee on FMLA leave under the same terms and conditions as if the employee had not taken leave. See Fact Sheet 28A: Employee Protections under the Family and Medical Leave Act .

OTHER PROVISIONS

Special rules apply to employees of local education agencies. Generally, these rules apply to intermittent or reduced schedule FMLA leave or the taking of FMLA leave near the end of a school term.

Salaried executive, administrative, and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under the FLSA regulations, 29 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for FLSA's exemption extends only to an eligible employee's use of FMLA leave.

ENFORCEMENT

It is unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any

proceeding, related to the FMLA. See Fact Sheet 77B: Protections for Individuals under the FMLA. The Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress. If you believe that your rights under the FMLA have been violated, you may file a complaint with the Wage and Hour Division or file a private lawsuit against your employer in court.

For additional information, visit our Wage and Hour Division Website:

<http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
[Contact Us](#)

Certification for Serious Injury or
Illness of a Current
Servicemember - -for Military Family Leave
(Family and Medical Leave Act)

U.S. Department of Labor

Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 2/28/2015

Notice to the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a current servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave

INSTRUCTIONS to the EMPLOYEE or CURRENT SERVICEMEMBER: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a current member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a current servicemember's serious injury or illness includes written documentation confirming that the servicemember's injury or illness was incurred in the line of duty on active duty or if not, that the current servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that the current servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the servicemember's condition for which the employee is seeking leave.

SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave:

(This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for the current servicemember):

Name of Employee Requesting Leave to Care for the Current Servicemember:

First	Middle	Last

Name of the Current Servicemember (for whom employee is requesting leave to care):

First	Middle	Last

Relationship of Employee to the Current Servicemember:

Spouse ☐ Parent ☐ Son ☐ Daughter ☐ Next of Kin ☐

Part B: SERVICEMEMBER INFORMATION

- (1) Is the Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves?
Yes ☐ No ☐

If yes, please provide the servicemember's military branch, rank and unit currently assigned to:

Is the servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)?

Yes ☐ No ☐

If yes, please provide the name of the medical treatment facility or unit:

- (2) Is the Servicemember on the Temporary Disability Retired List (TDRL)?
Yes ☐ No ☐

Part C: CARE TO BE PROVIDED TO THE SERVICEMEMBER

Describe the Care to Be Provided to the Current Servicemember and an Estimate of the Leave Needed to Provide the Care:

SECTION II: For Completion by a United States Department of Defense (“DOD”) Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs (“VA”) health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator).

(Please ensure that Section I above has been completed before completing this section. Please be sure to sign the form on the last page.)

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider’s Name and Business Address:

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider, or (5) a health care provider as defined in 29 CFR 825.125:

Telephone: () _____ Fax: () _____ Email: _____

PART B: MEDICAL STATUS

(1) The current Servicemember’s medical condition is classified as (Check One of the Appropriate Boxes):

☐ **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.

☐ **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a “serious health condition” under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380-F or an employer-provided form seeking the same information.)

(2) Is the current Servicemember being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? Yes ☐ No ☐

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

- (5) Is the servicemember undergoing medical treatment, recuperation, or therapy for this condition? Yes ☐ No ☐

If yes, please describe medical treatment, recuperation or therapy:

PART C: SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

- (1) Will the servicemember need care for a single continuous period of time, including any time for treatment and recovery? Yes ☐ No ☐

If yes, estimate the beginning and ending dates for this period of time: _____

- (2) Will the servicemember require periodic follow-up treatment appointments? Yes ☐ No ☐

If yes, estimate the treatment schedule: _____

- (3) Is there a medical necessity for the servicemember to have periodic care for these follow-up treatment appointments? Yes ☐ No ☐

- (4) Is there a medical necessity for the servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)?

Yes ☐ No ☐

If yes, please estimate the frequency and duration of the periodic care:

Signature of Health Care Provider: _____ **Date:** _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

Certification of Qualifying Exigency
For Military Family Leave
(Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 2/ 28/2015

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.309.

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 CFR 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

Name of military member on covered active duty or call to covered active duty status:

First Middle Last

Relationship of military member to you: _____

Period of military member's covered active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a military member's covered active duty or call to covered active duty status. Please check one of the following and attach the indicated document to support that the military member is on covered active duty or call to covered active duty status.

- ☐ A copy of the military member's covered active duty orders is attached.
- ☐ Other documentation from the military certifying that the military member is on covered active duty (or has been notified of an impending call to covered active duty) is attached.
- ☐ I have previously provided my employer with sufficient written documentation confirming the military member's covered active duty or call to covered active duty status.

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military; a document confirming the military member's Rest and Recuperation leave; a document confirming an appointment with a third party, such as a counselor or school official, or staff at a care facility; or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached.

Yes ☐ No ☐ None Available ☐

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency?

Yes ☐ No ☐

If so, estimate the beginning and ending dates for the period of absence:

3. Will you need to be absent from work periodically to address this qualifying exigency? Yes ☐ No ☐

Estimate schedule of leave, including the dates of any scheduled meetings or appointments:

Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

Frequency: _____ times per _____ week(s) _____ month(s)

Duration: _____ hours _____ day(s) per event.

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare or parental care, to attend counseling, to attend meetings with school, childcare or parental care providers, to make financial or legal arrangements, to act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

PART D:

I certify that the information I provided above is true and correct.

Signature of Employee _____ Date _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

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Notice of Eligibility and Rights & Responsibilities
(Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 2/28/2015

In general, to be eligible an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

- ☐ The birth of a child, or placement of a child with you for adoption or foster care;
- ☐ Your own serious health condition;
- ☐ Because you are needed to care for your _____ spouse; _____ child; _____ parent due to his/her serious health condition.
- ☐ Because of a qualifying exigency arising out of the fact that your _____ spouse; _____ son or daughter; _____ parent is on covered active duty or call to covered active duty status with the Armed Forces.
- ☐ Because you are the _____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

- ☐ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)
- ☐ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):
- ☐ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately _____ months towards this requirement.
- ☐ You have not met the FMLA's hours of service requirement.
- ☐ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the
FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

- ☐ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request _____ is/ _____ is not enclosed.
- ☐ Sufficient documentation to establish the required relationship between you and your family member.
- ☐ Other information needed (such as documentation for military family leave): _____
- _____
- _____

☐ No additional information requested

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

- _____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.
- _____ You will be required to use your available paid _____ **sick**, _____ **vacation**, and/or _____ **other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.
- _____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We _____ **have**/_____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.
- _____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
 - _____ the calendar year (January – December).
 - _____ a fixed leave year based on _____.
 - _____ the 12-month period measured forward from the date of your first FMLA leave usage.
 - _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.
- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have _____ **sick**, _____ **vacation**, and/or _____ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

_____ For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

_____ Applicable conditions for use of paid leave: _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____ at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Designation Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 2/28/2015

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided.
We received your most recent information on _____ and decided:

☐ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

☐ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

☐ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

☐ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

☐ We are requiring you to substitute or use paid leave during your FMLA leave.

☐ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ☐ **is** ☐ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

Additional information is needed to determine if your FMLA leave request can be approved:

☐ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.
(Provide at least seven calendar days)

(Specify information needed to make the certification complete and sufficient)

☐ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

☐ Your FMLA Leave request is Not Approved.

☐ The FMLA does not apply to your leave request.

☐ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Certification of Health Care Provider for
Family Member's Serious Health Condition
(Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 2/28/2015

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care: _____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth: _____

Describe care you will provide to your family member and estimate leave needed to provide care:

Employee Signature _____ Date _____

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax: (_____) _____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

Probable duration of condition: _____

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?

☐ No ☐ Yes. If so, dates of admission: _____

Date(s) you treated the patient for condition: _____

Was medication, other than over-the-counter medication, prescribed? ☐ No ☐ Yes.

Will the patient need to have treatment visits at least twice per year due to the condition? ☐ No ☐ Yes

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?

☐ No ☐ Yes. If so, state the nature of such treatments and expected duration of treatment:

2. Is the medical condition pregnancy? ☐ No ☐ Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ☐ No ☐ Yes.

Estimate the beginning and ending dates for the period of incapacity: _____

During this time, will the patient need care? ☐ No ☐ Yes.

Explain the care needed by the patient and why such care is medically necessary:

5. Will the patient require follow-up treatments, including any time for recovery? ☐ No ☐ Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

Explain the care needed by the patient, and why such care is medically necessary: _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? ☐ No ☐ Yes.

Estimate the hours the patient needs care on an intermittent basis, if any:

_____ hour(s) per day; _____ days per week from _____ through _____

Explain the care needed by the patient, and why such care is medically necessary:

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____ No ____ Yes.

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: ____ times per ____ week(s) ____ month(s)

Duration: ____ hours or ____ day(s) per episode

Does the patient need care during these flare-ups? ____ No ____ Yes.

Explain the care needed by the patient, and why such care is medically necessary: _____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

Signature of Health Care Provider

Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

Certification of Health Care Provider for
Employee's Serious Health Condition
(Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 2/28/2015

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax: (_____) _____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

Probable duration of condition: _____

Mark below as applicable:

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?

___ No ___ Yes. If so, dates of admission:

Date(s) you treated the patient for condition:

Will the patient need to have treatment visits at least twice per year due to the condition? ___ No ___ Yes.

Was medication, other than over-the-counter medication, prescribed? ___ No ___ Yes.

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?

___ No ___ Yes. If so, state the nature of such treatments and expected duration of treatment:

2. Is the medical condition pregnancy? ___ No ___ Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: ___ No ___ Yes.

If so, identify the job functions the employee is unable to perform:

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___ No ___ Yes.

If so, estimate the beginning and ending dates for the period of incapacity: _____

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___ No ___ Yes.

If so, are the treatments or the reduced number of hours of work medically necessary?
___ No ___ Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

Estimate the part-time or reduced work schedule the employee needs, if any:

_____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ___ No ___ Yes.

Is it medically necessary for the employee to be absent from work during the flare-ups?
___ No ___ Yes. If so, explain:

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency : _____ times per _____ week(s) _____ month(s)

Duration: _____ hours or _____ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

[illegible]

Signature of Health Care Provider

Date _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- for incapacity due to pregnancy, prenatal medical care or child birth;
- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son, daughter or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements

Eligible employees whose spouse, son, daughter or parent is on covered active duty or call to covered active duty status may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is: (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness*; or (2) a veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran, and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.*

***The FMLA definitions of "serious injury or illness" for current servicemembers and veterans are distinct from the FMLA definition of "serious health condition".**

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least 12 months, have 1,250 hours of service in the previous 12 months*, and if at least 50 employees are employed by the employer within 75 miles.

***Special hours of service eligibility requirements apply to airline flight crew employees.**

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and

a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA; and
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulation 29 C.F.R. § 825.300(a) may require additional disclosures.



For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Wage and Hour Division



WHD Publication 1420 · Revised February 2013

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

**PLACEMENT OF TEACHERS ON UNREQUESTED LEAVE
AND NON-RENEWAL OF PROBATIONARY TEACHER CONTRACTS**

Revised October 2014

Prepared by:

KNUTSON, FLYNN & DEANS-COUNSEL
MINNESOTA SCHOOL BOARDS ASSOCIATION

This bulletin does not purport to advise those school boards that have negotiated an "unrequested leave of absence plan" under M.S. 122A.40, Subd. 10. Those school boards who have negotiated a local plan must be guided by the provisions of their own negotiated plans in determining what forms and procedures, if any, are required when placing teachers on unrequested leave of absence.

INTRODUCTION:

A. Attorney General Opinions:

The statutory unrequested leave plan set forth in M.S. 122A.40, Subd. 11 is complex and ambiguous. Both the courts and the Attorney General have interpreted the law. It is important to be familiar with these interpretations because failure to accord teachers their procedural and seniority rights under the law can result in the school district being ordered to reinstate them with back pay.

1. On November 20, 1975, the Attorney General issued a lengthy opinion interpreting M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11], in response to a number of questions propounded on behalf of the MSBA by its counsel. The opinion clarified several issues about which the unrequested leave statute was silent or ambiguous. The Attorney General later issued an opinion on the order of reinstatement under M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11]. Op. Att'y Gen. (Aug. 12, 1985). The effects of these decisions are discussed below.

2. Since opinions of the Attorney General are controlling on school districts until overruled by a court, (M.S. 8.07 and 120A.10) a school district should follow an applicable opinion, unless it receives competent legal advice that a different position is legally justifiable and likely to withstand court challenge.

3. To the extent the Attorney General's conclusions differ from the practice in a school district, it is advised that the school district give consideration to altering the practice to conform with the Attorney General's conclusions.

B. Seniority:

1. The following hypothetical list of teachers with their dates of employment illustrates the effects of the Attorney General's opinion in determining seniority.

TEACHER A. Signed contract July 1, 1955, began work September 1, 1955, as a full-time teacher, continuously served since.

- TEACHER B. Signed contract August 1, 1955, began work September 1, 1955, as a full-time teacher, served continuously since.
- TEACHER C. Began work September 1, 1955, served continuously as half-time full-year teacher since.
- TEACHER D. Began work September 1, 1955, taught full-time the first semester of each year since.
- TEACHER E. Began work September 1, 1955, taught continuously since except for one-year maternity leave in 1960-61 school year.
- TEACHER F. Began work September 1, 1955, taught continuously since except for one-year's sabbatical leave in 1965-66.
- TEACHER G. Began work September 1, 1955, taught continuously since except for two-year military leave in 1960-62.
- TEACHER H. Began work September 1, 1955, has taught continuously since except for the 1963-64 school year during which H received an approved leave of absence without pay.
- TEACHER I. Began work September 1, 1955, as a long-term substitute for a teacher on maternity leave for the 1955-56 school year; at the end of the 1955-56 school year, I was offered a regular contract for the next school year and has taught continuously since.
- TEACHER J. Began service September 1, 1955, and has taught continuously since except for the 1974-75 school year during which J was on unrequested leave of absence. J was reinstated at the beginning of the 1975-76 school year.
- TEACHER K. Began service September 1, 1955, and was terminated as a probationary teacher on March 30, 1957, effective at the end of the school year. On May 30 the school district offered K a contract for the next school year as a new position became available and K has taught continuously since.
- TEACHER L. Signed a contract June 15, 1955, to teach full-time the second semester of each year, and thus began service on January 15, 1956, and has taught the second semester only continuously since that time.
- TEACHER M. Began service September 1, 1950, and taught continuously until the end of the 1959-60 school year at which time M resigned to go into business. After 2 years in business he returned to the school district at the beginning of the 1962-63 school year on September 1, 1962, and has taught continuously since.

2. Based on the Attorney General's opinion teachers A through K have equal seniority dating from September 1, 1955. Teacher L has less seniority dating from January 15, 1956 and Teacher M has the least seniority dating from September 1, 1962.

C. No Opinion:

The Attorney General refused to rule on:

1. The seniority of a teacher who voluntarily resigned but was returned without a break in service.

2. Whether the school district could set a cutoff date in advance of June 1 after which it would not recognize new licenses, although the Attorney General acknowledged that school districts have the right to adopt reasonable regulations.

3. Whether a school district would be required to notify a teacher of succeeding vacancies if the teacher indicated an intention not to teach again for the district. The Attorney General said this involved a question of fact and depended on whether the waiver of rights was knowingly and voluntarily made.

4. The Attorney General declined to rule as to what salary would be applicable to the classroom teacher who "bumped" a principal, or a principal who "bumped" a classroom teacher. As will be discussed below, legislative changes now preclude a teacher from bumping a principal or any other supervisor on the basis of seniority. M.S. 122A.40, Subd. 4.

D. Non-Seniority Matters Discussed By The Attorney General:

1. Hearings for teachers proposed for placement on leave only. Only teachers who are proposed for unrequested leave placement are entitled to a statutory hearing if they so request. Thus, if one teacher's position is discontinued but that teacher's seniority permits that teacher to "bump" another teacher, a hearing must only be given to the bumped teacher, if requested.

2. Teachers licenses. A school district need only recognize the teaching licenses that have been verified pursuant to M.S. 122A.22.

3. Breaking ties in seniority. The school district acting unilaterally cannot arbitrarily break ties in equal seniority by such means as a flip of a coin.

Note: The Attorney General also indicated that the school district and the exclusive representative acting by negotiated agreement cannot arbitrarily break ties by, for example, a flip of a coin. School districts with such negotiated agreements are advised to seek competent counsel regarding the ramification of such a negotiated agreement.

4. Notice of available position. A school district must notify a teacher who is on unrequested leave of each succeeding available position for which the teacher is qualified, as evidenced by licenses on file, including new licenses acquired since the leave placement, until the five year reinstatement period is over, even though the teacher may have declined or refused to respond to previously offered positions.

5. Order of Reinstatement. Although M.S. 122A.40, Subd. 11(e) states, in part, that "Reinstatement must be in the inverse order of placement on leave of absence," the Attorney General has ruled that, based on his interpretation of the statutes as a whole, reinstatement is to be based on licensure and seniority with the district, regardless of the date the teacher was placed on unrequested leave. Op. Att'y Gen. (Aug. 12, 1985).

6. An alternative to the statutory provisions of M.S. 122A.40, Subd. 11 is negotiable by statute (M.S. 122A.40, Subd. 10).

Note: School districts with such negotiated plans should seek competent counsel regarding the ramifications of such agreements.

E. Application of M.S. 122A.40 to Teachers Employed by Charter Schools Discussed by the Attorney General:

1. The Minnesota Attorney General opined that "nothing in section 120.064 [currently codified at 124D.10] provides charter school teachers with statutory tenure and seniority protection generally afforded public school teachers in Minnesota." Op. Att'y Gen. (March 11, 1994).

F. Court Cases:

Minnesota courts have addressed several issues under both the statutory and negotiated unrequested leave of absence plans.

1. Right to a Hearing. In Jerviss v. Independent School District No. 294, 273 N.W.2d 638 (Minn. 1978), a continuing contract teacher placed on unrequested leave in accordance with a local plan negotiated pursuant to M.S. 125.12, Subd. 6a [predecessor to M.S. 122A.40, Subd. 10], was ordered to be reinstated and paid back wages because of a violation of her continuing contract rights under M.S. 125.12 [predecessor to M.S. 122A.40].

The negotiated plan did not include a right to a hearing before placement on unrequested leave. An opportunity for a hearing was not offered to the teacher. The teacher appealed her placement on unrequested leave to the district court. The court held that the teacher was entitled to notice and a hearing pursuant to M.S. 125.12, Subd. 4 [predecessor to M.S. 122A.40, subd. 7], even though the negotiated plan was silent on the right to a hearing.

However, once a teacher has received notice and an opportunity for a hearing, the teacher must timely submit a written request for a hearing or the teacher will be deemed to have acquiesced to the proposed placement on unrequested leave. Pinkney v. Independent School District No. 691, 366 N.W.2d 362 (Minn. App. 1985). According to the statute, a teacher must make a written request for a hearing "[w]ithin 14 days after receipt" of the notice of proposed placement on unrequested leave of absence. M.S. 122A.40, Subd. 7. In computing this 14 day period, the day of receipt is not counted. Vizenor v. Independent School District No. 25, No. C6-90-1221 (Minn. App. Jan. 22, 1991) (unpublished decision).

But in Roseville Education Association v. Independent School District No. 623, 391 N.W.2d 846 (Minn. 1986), the Court held that teachers who did not request a hearing could appeal their actual placement on unrequested leave of absence provided there had been a change in circumstances. This change of circumstances took place after the expiration of the time for requesting a hearing and prior to their actual placement on unrequested leave. As a result, the teachers' seniority and bumping rights were altered. In Roseville the School Board initially proposed to place 35 teachers on unrequested leave. Of these 35 teachers, 23 requested a hearing while 12 did not. Immediately prior to the start of the hearing, one of the teachers who had originally requested a hearing withdrew that request. The School Board then passed a resolution rescinding the proposed unrequested leaves of all the teachers requesting a hearing, with the exception of one. Thereafter, a hearing was held for the one remaining teacher proposed for placement on unrequested leave who had requested a hearing. Three days later the School Board adopted resolutions placing the 13 teachers who had not requested a hearing on unrequested leave of absence. According to the Court, the rescission of some, but not all, leaves could conceivably alter the seniority ranking and affect the bumping rights of those placed on unrequested leave. Thus, the Court concluded that a "change in circumstances" did exist that was sufficient to defeat the claim of acquiescence.

2. Challenge to Seniority Ranking at the Hearing. A school board's refusal to adjust a teacher's seniority number in connection with her proposed placement on unrequested leave was upheld in Ellerbrock v. Board of Education, Special School District No. 6, 269 N.W.2d 858 (Minn. 1978).

The union and the school district negotiated an unrequested leave plan pursuant to M.S. 125.12, Subd. 6a, [predecessor to M.S. 122A.40, Subd. 10] which established a method for adjusting the seniority of women teachers with a breach in continuous service in the past due to maternity reasons. Ellerbrock was not considered to be entitled to a new seniority number because her breach in service lasted thirteen years, which was not solely for maternity reasons.

Similarly, the Minnesota Court of Appeals held in an unpublished decision that a principal's failure to file a grievance challenging the accuracy of the seniority list constituted a waiver of his right to challenge his seniority ranking. Abeln v. School Board of Independent School District No. 276, 2001 WL 243202 (Minn. App. 2001).

In addition, the Minnesota Supreme Court has held that a teacher's failure to challenge the seniority list under the terms of the Master Agreement precluded her from challenging the School Board's decision placing her on unrequested leave of absence in Blank v. Independent School District No. 16, 393 N.W.2d 648 (Minn. 1986), reh'g denied, (1986). See Holmquist v. Joint Vocational Technical District No. 2204, No. C8-93-1493, (unpublished decision) reported in *Finance and Commerce*, Jan. 7, 1994.

In Blank the Master Agreement between the parties contained a negotiated unrequested leave of absence plan pursuant to M.S. 125.12, Subd. 6a [predecessor to M.S. 122A.40, Subd. 10]. This negotiated plan required the school district to prepare a seniority list and also set out a grievance procedure which could be invoked by any teacher challenging the accuracy of the list. Such a challenge must have been made within 20 days after the posting of the seniority list. Blank failed to challenge the accuracy of the seniority list within the required 20 days and, therefore, was precluded from challenging the school board's decision on those grounds. In so holding, the Court emphasized the importance of having a seniority list that provides accurate information on which to rely in determining the status of each teacher with certainty and finality.

In contrast, a teacher's challenge to his seniority ranking was upheld in Berger v. Independent School District No. 706, 362 N.W.2d 369 (Minn. Ct. App. 1985). First, the court held that a seniority list established pursuant to M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11] is not arbitrable, and therefore, a teacher may challenge his seniority at the unrequested leave hearing. Second, the court held that a teacher who had taken a five-year extended leave of absence pursuant to M.S. 125.60 [predecessor to M.S. 122A.46], and was subsequently granted a consecutive one-year general leave of absence, lost his seniority rights when he did not return at the end of the extended leave. See also Urdahl v. Independent School District No. 181, 396 N.W.2d 244 (Minn. Ct. App. 1986) (teacher was not precluded from challenging his placement on the seniority list at the unrequested leave of absence hearing, even though he failed to follow the grievance procedure set out in the negotiated plan, where the teacher's claim did not challenge the proper application of a contract term but, rather, asserted that the extended leave of absence statute, M.S. 125.60 [predecessor to M.S. 122A.46], controlled.).

A teacher is not barred from relitigating a seniority dispute even though the same dispute (i.e. teacher's seniority rights vis-a-vis another teacher) has been determined in a previous hearing, provided the teacher was not a party to the prior hearing, did not have any controlling participation in the prior hearing, and was not a successor in interest to any derivative claim of a party to the prior hearing, and the teacher's interests were not adequately represented by the school district in the prior hearing. Pirrotta v. Independent School District No. 347, 396 N.W.2d 20 (Minn. 1986). In order to avoid such problems in the future, the Court held that where there are conflicting seniority claims the school district should give notice to all teachers involved in the conflict so they may intervene to protect their seniority rights. Failure to intervene after receiving notice is deemed acquiescence to the school district's action. See Chopp v. Independent School District No. 706, Nos. C7-90-2068 and C8-90-1351 (Minn. Ct. App. Feb. 5, 1991) (unpublished opinion) (notice was not given to teacher with conflicting seniority claim; jury ultimately found that teacher had reasonably relied on superintendent's promise of seniority rights, and teacher recovered monetary damages).

3. Public Health Nurses Acquire Seniority and Continuing Contract Rights. The Supreme Court held that a public health nurse met the definition of a "teacher" under M.S. 125.12 [predecessor to M.S. 122A.40] and was entitled to the job protection afforded by the negotiated unrequested leave of absence plan. In Krug v. Independent School District No. 16, 293 N.W.2d 26 (Minn. 1980), the school district placed the only public health nurse on unrequested leave while less senior registered nurses were retained. The court held that it was improper to distinguish between public health nurses and registered nurses because both are school nurses and perform the same services. The senior public health nurse could not be placed on unrequested leave until all of the other nurses in the district were placed on unrequested leave. Note that during the 1993 legislative

session, the Minnesota legislature repealed the Minnesota Department of Education's licensure rules for school nurses. 1993 Minn. Laws, Ch. 224, Art. 12, §39(a). However, during the 1998 legislative session, "school nurses" were added to the definition of teachers for purposes of licensure under M.S. 122A.15, Subd. 1.

4. Termination of Right to Reinstatement for Failure to Timely File a Request for Reinstatement. The statutory unrequested leave plan, M.S. 125.12, Subd. 6b(h) [predecessor to M.S. 122A.40, Subd. 11(i)], provides, in part, that a "teacher's right to reinstatement shall also terminate if the teacher fails to file with the board by April 1 of any year a written statement requesting reinstatement." Judge Warren A. Sactre of Pennington County District Court strictly enforced the filing requirement and held that the school district was not required to reinstate a teacher who failed to comply with the statute when a vacancy for which he was qualified occurred. Strauss v. Independent School District No. 561 (Nov. 27, 1979).

However, in Biwabik Federation of Teachers v. Independent School District No. 693, 464 N.W.2d 728 (Minn. 1990), the Minnesota Supreme Court held that a teacher who failed to comply strictly with the filing requirement retained reinstatement rights to the remainder of a full-time position. In Biwabik, a tenured teacher was placed on ULA to the extent of 1.0 FTE effective at the end of the 1987-88 school year. The teacher in question grieved this placement claiming that she was entitled to a .4 FTE English position. Subsequently, the teacher and the school district reached a settlement agreement dated May 30, 1989, whereby the teacher was reinstated to a .2 FTE position for the 1989-90 school year. The teacher then received an additional reinstatement of .5 FTE for the 1989-90 school year, bringing her total reinstatement to .7 FTE. In ruling that the teacher's failure to comply with the filing requirement prior to the 1989-90 school year did not terminate her right to reinstatement for the remainder of a full-time position, the trial court alluded to the purpose of the filing requirement. According to the trial court, the purpose of the filing requirement was to alleviate the time-consuming and "almost impossible administrative procedures" which the School District must undertake to keep track of its teachers placed on ULA. The court reasoned, however, that after a teacher had been reinstated even partially and therefore was working within the District, it was not a "burden on the School District to walk down the hall, so to speak, to inquire as to the teacher's intentions and desire to request further reinstatement to the position previously held prior to ULA."

The Court of Appeals has also held that the filing of a declaratory judgment action satisfies the statutory requirements of a demand for reinstatement, Mohn v. Independent School District No. 697, 416 N.W.2d 494 (Minn. Ct. App. 1991), rev. denied.

5. Grievance and Arbitration of Placement on Unrequested Leave. Judge Glenn Kelley of the Winona County District Court held that if a district provided in the master contract that the provisions of M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11] were applicable in cases of unrequested leave, then the Board's decision under Subd. 6b [predecessor to Subd. 11] might be both grievable and arbitrable. The decision as to whether it was the intent of the parties to have such a dispute be subject to arbitration was to be resolved by the arbitrator. St. Charles Education Association v. Independent School District No. 858 (December 31, 1980).

After this decision, if a district does not choose to or fails to negotiate an unrequested leave provision pursuant to M.S. 122A.40, Subd. 10, it should not make any reference in the contract to Subd. 11, even for informational purposes, since this may make the Board's decision to place a teacher on unrequested leave subject to grievance and arbitration.

In another case, however, Judge David E. Christensen of the Rock County District Court denied a teacher's motion to compel arbitration. Luverne Education Association v. Independent School District No. 670, File No. C-87-236 (Jan. 19, 1988). In Luverne, the school district proposed to place the teacher on unrequested leave of absence. The teacher requested a hearing that was subsequently held in accordance with the law. After the hearing, the independent hearing examiner recommended that the teacher be placed on ULA. The school district adopted the hearing examiner's recommendation, and the teacher did not appeal. Subsequently, after the time to appeal had expired, the teacher filed a grievance challenging her placement on

ULA. When the school district refused to arbitrate the grievance, the teacher brought a motion to compel arbitration. The court, in denying the motion, held that under the parties' negotiated ULA (or 10) plan, the sole relief available was a hearing pursuant to the statutes.

6. Entitlement to Reinstatement. In Walter v. Independent School District No. 457, 323 N.W.2d 37 (Minn. 1982), the Minnesota Supreme Court ruled that a full-time teacher who has been placed on unrequested leave of absence pursuant to M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11], and who then accepts a part-time position remains on unrequested leave to the extent of the remainder of the full-time position. See Sherek v. Independent School District No. 699, 464 N.W.2d 582 (Minn. Ct. App. 1991), rev. denied (Feb. 20, 1991). Such a teacher is entitled to reinstatement to any position for which he or she is licensed. A school district cannot require "special qualifications" in addition to license in reinstating teachers.

In Renstrom v. Independent School District No. 261, 390 N.W.2d 25 (Minn. Ct. App. 1986), the Minnesota Court of Appeals held that a teacher who was placed on unrequested leave of absence when the school district canceled business courses previously taught by the teacher was not entitled to reinstatement where the school district arranged for its students to attend such courses in another school district pursuant to a joint powers agreement, even though a less senior teacher taught the courses in the other school district.

In another case, the Minnesota Supreme Court held that when a school district must add teaching positions in certain grades to accommodate an increased pupil load due to the implementation of an Interdistrict Cooperation Agreement pursuant to M.S. 122.541 [predecessor to M.S. 123A.33], the teaching positions created are "available positions" within that district for purposes of M.S. 125.12, Subd. 6b(e) [predecessor to M.S. 122A.40, Subd. 11(e)]. Sherek v. Independent School District No. 699, 449 N.W.2d 434 (Minn. 1990). Thus, the Court concluded, teachers on unrequested leave of absence must be reinstated to such positions in accordance with a combined seniority list of teachers required pursuant to M.S. 122.54, Subd. 5 [predecessor to M.S. 123A.32, Subd. 4]. The school board then granted partial reinstatement and the teacher appealed. The Court of Appeals held that the teacher was entitled to reinstatement equivalent to his maximum hours of employment within the previous five-year period. Sherek v. Independent School District No. 699, 464 N.W.2d 582 (Minn. Ct. App. 1991), rev. denied (Feb. 20, 1991).

Additionally, a school district is not required to hold an open position for an unavailable teacher on an unrequested leave of absence. In Shaner v. Independent School District No. 2884, 604 N.W.2d 803 (Minn. Ct. App. 2000), rev. denied (March 28, 2000), a teacher on unrequested leave of absence obtained employment elsewhere. In the middle of the school year, the school district offered to recall the teacher. The teacher declined because she was under contract in another school district. The school district offered the position to a less senior teacher. The Minnesota Court of Appeals found that the Teacher Tenure Act provides teachers with the right of first refusal to open positions, but does compel a school district to delay filling a position if the most senior teacher declines the position when it is available.

The Minnesota Court of Appeals addressed the reinstatement rights of a principal who, after being placed on unrequested leave of absence from his principal position and subsequently accepting a teaching assignment in the school district for the next school year, resigned from that teaching position in Mohn v. Independent School District No. 697, 416 N.W.2d 494 (Minn. Ct. App. 1991), rev. denied. According to the court, the principal retained reinstatement rights to a principal position in the district. In so holding, the Court stated that "[t]he school district had an obligation to reinstate Mohn to a principal position whether or not he had a teaching job. His resignation from the teaching job did not extinguish that obligation."

The Minnesota Court of Appeals dealt with the reinstatement rights of a continuing contract superintendent who was placed on unrequested leave of absence in Jurkovich v. Independent School District No. 708, 478 N.W.2d 232 (Minn. Ct. App. 1991). In Jurkovich the superintendent entered into an employment contract that was subject to the continuing contract law. No modifications to this contract were made after the change in the law effectively removing superintendents from continuing contract status. Thus, the superintendent's continuing contract rights remained after the change in the law. The school district proposed to place the superintendent on unrequested leave of absence at the end of the 1990-91 school year

with the intent of reinstating the superintendent to a combined superintendent/principal position. The superintendent requested a hearing on his proposed placement on unrequested leave of absence. At the hearing the superintendent did not contest his placement on unrequested leave of absence, instead arguing that he had a right to be reinstated to a fully tenured full-time position. The hearing officer rendered a decision recommending that the superintendent be placed on unrequested leave of absence and offered reinstatement to a .5 FTE superintendent and .5 FTE principal position for the 1991-92 school year. The superintendent appealed the decision of the school board to the Court of Appeals. The Court of Appeals, noting the language in M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11] that provides that unrequested leave of absence may not impair the continuing contract rights of a teacher, held that the reinstatement of the superintendent to a combined nontenured/tenured position violated M.S. 125.12, Subd. 6b(h) [predecessor to M.S. 122A.40, Subd. 11(h)]. Thus, the Court concluded that a continuing contract superintendent could not be reinstated to a position with fewer continuing contract rights than the fully tenured 1.0 FTE position occupied prior to placement on unrequested leave of absence.

7. Duty to Realign Positions. In Strand v. Special School District No. 1, 392 N.W.2d 881 (Minn. 1986), the Minnesota Supreme Court held that the statutory unrequested leave of absence plan for cities of the first class, M.S. 125.17 [predecessor to M.S. 122A.41], requires realignment of senior teachers to accommodate seniority rights of less senior teachers when such realignment is both "practical and reasonable." Although the Court did not give a precise definition of what is meant by "practical and reasonable," it did set forth several factors that must be considered in each case. These factors are: the teacher's length of service; the scope and duration of the teacher's license; the school district's needs reflecting the welfare of the students and the public; and the ease of realignment.

Subsequently, in Brandhorst v. Special School District No. 1, 392 N.W.2d 888 (Minn. 1986), the Minnesota Supreme Court reaffirmed the realignment principles set forth in Strand. In doing so, the Court held that the length of the work year was not a sufficient basis on which to retain a junior teacher where the positions were essentially similar despite a proportional increase in the total wages for the longer position.

In Westgard v. Independent School District No. 745, 400 N.W.2d 341 (Minn. Ct. App. 1987), pet. for reh'g den. (Minn. 1987), the Minnesota Court of Appeals extended the requirement of reasonable and practical realignment set out in Strand to school districts governed by M.S. 125.12 [predecessor to M.S. 122A.40]. See Collins v. Independent School District No. 745, 416 N.W.2d 174 (Minn. Ct. App. 1987).

The Court of Appeals, however, has held that realignment was not required under a negotiated unrequested leave of absence plan that provided that teachers were "qualified" to hold a position only if they possessed the proper licensure and had completed a major in the particular subject. Matter of Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987). According to the Court, realignment under Strand was not required where there were no senior teachers "qualified" under the terms of the parties' collective bargaining agreement for the proposed area of assignment. The Court of Appeals subsequently extended Nelson to allow parties to eliminate their duty to realign positions through a negotiated plan in Destache v. Independent School District No. 832, 434 N.W.2d 270 (Minn. Ct. App. 1989). In Destache the Court, noting the absence of express language eliminating the duty to realign, focused on the bargaining history of the parties. According to the Court, the record contained evidence of bargaining history that the parties intended to preclude realignment. But see Heruth v. Independent School District No. 11, 434 N.W.2d 470 (Minn. Ct. App. 1989).

In Craig v. Independent School District No. 361, 2006 WL 1461079 (Minn. Ct. App. May 30, 2006), an unpublished case, the Court addressed the school district's failure to realign a senior Title I teacher to accommodate the seniority rights of a less senior Title I teacher. In doing so, the Court rejected the appellant's argument that the only factors a school district may consider when determining whether realignment is practical are licensure and seniority. Rather, the Court stated that all four factors set out by the Minnesota Supreme Court in Strand must be considered and that "each case is to be decided on its own merits." After considering all four Strand factors, the Court held that the realignment of a more senior full-time Title I teacher to a full-time elementary teaching position to accommodate the seniority rights of a less

senior part-time Title I teacher was not practicable for a number of reasons, including the following: (a) the applicable collective bargaining agreement established different seniority lists for regular teachers and Title I teachers and did not include any requirement for realignment across lists; (b) realignment would require the severing of the more senior full-time Title I teacher's position (position included a teaching component and a coordinating component) which was not practical; and (c) the more senior full-time Title I teacher had not taught as a regular classroom teacher because of her longtime service in Title I, she had many invaluable and seemingly irreplaceable duties dealing with families and the public, and the proposed realignment would be confusing and difficult for the Title I program.

The Minnesota Supreme Court extended the duty to realign when reinstating teachers who are on unrequested leave of absence in Harms v. Independent School District No. 300, 450 N.W.2d 571 (Minn. 1990). In so holding the Court opined that, although the legislature used the term "inverse order" regarding placement on ULA under M.S. 125.12, Subd. 6b(e) [predecessor to M.S. 122A.40, Subd. 11(e)], it intended "seniority." The Court then reasoned that, since districts were already required to protect seniority when reducing positions under both Strand and Westgard, coupled with the Court's previous pronouncement in Berland v. Special School District No. 1, 314 N.W.2d 809 (Minn. 1981), "seniority is the primary consideration when reinstating teachers" and seniority should be paramount in reinstatement cases. Thus, the Court held that reasonable realignment should be extended to reinstatement situations.

The Court then endeavored to define "reasonable realignment" in reinstatement cases. The Court, in noting that "realignment on recall often will not be significantly different in form from layoff realignment," not only extended the applications of the factors set forth in Strand as outlined above to reinstatement cases, but added four additional factors. The Court held that these additional four factors apply only in reinstatement cases: (1) the time of the school year when an opening occurs; (2) the amount of disruption of classes related to a position other than for the position to be recalled; (3) the number of teachers moved as a result of the realignment; (4) whether the realignment returned all teachers to their long-held positions, as opposed to placing them in new positions; and (5) whether the realignment protects the laid off teacher's seniority rights. See Petition of Dallman, 470 N.W.2d 148 (Minn. Ct. App. 1991). Utilizing these factors, the Court found the realignment in Harms was reasonable. The Minnesota Court of Appeals, however, suggested that a school board does not have to split related subjects into separate courses to allow the realignment or recall of a teacher licensed to teach only one of the subjects. In re Petition of Dallman, 470 N.W.2d 148 (Minn. Ct. App. 1991).

In Henderson v. Independent School District 706, 2002 WL 857886 (Minn. Ct. App. May 7, 2002), an unpublished case, the Court held that a school board is not required to consider every possible realignment configuration when making staffing decisions while a senior teacher is on ULA. Instead, the Court noted that the duty to realign teachers is limited to where practical and reasonable. Henderson v. I.S.D. 706, citing Harms v. Independent School District No. 300, 450 N.W.2d 571, 575 (Minn. 1990).

In Henderson, the senior teacher demanded that the school board undergo extensive realignment rather than hiring two less senior teachers. In one case, the less senior teacher was hired for a temporary, part-time position. In the other, the proposal was to bump one teacher into subject matter (life science) in which he did not hold a proper license, so that Henderson could then teach his class. The Court held that neither proposal was reasonable, stating, "The school board *** is vested with the management, supervision, and control of the school system; and the unrequested leave of absence provisions of the tenure act do not eliminate the board's flexibility," citing Laird v. Independent School District No. 317, 346 N.W.2d 153, 155 (Minn. 1984). See also Hinckley v. Indep. Sch. Dist. No. 2167, 678 N.W.2d 485 (Minn. Ct. App. 2004) (holding that school district not required to change job duties of remaining supervisory positions to accommodate more senior principal's licensure, and thus ULA was appropriate for principal).

It should also be noted that the Harms court held that "[t]he appropriate procedure to challenge a school board reinstatement and realignment decision . . . is by a writ of certiorari." See Dokmo v. Independent School District No. 11, 459 N.W.2d 671 (Minn. 1990), rev. denied (Oct. 12, 1990). Thus, it is incumbent upon the school board to create a sufficient record in determining whether realignment for purposes of reinstatement is not reasonable, upon which an appeal to the Court of Appeals would be based. Such a

record must include: (1) any notice of the vacancy or position to be filled and any material relating to the determination of what position is to be filled; (2) all teacher correspondence requesting recall and realignment; (3) any realignment proposals considered; (4) reasons for adoption or rejection of each such proposal; (5) any recommendation of the school administration to the school board; and (6) any school board action taken, together with reasons for the selection made.

It is advisable for a school district faced with a potential reinstatement and realignment situation to notify affected teachers on unrequested leave of absence of the district's proposed action and to give those teachers the opportunity to challenge the proposed action in a hearing. (See Form No. 16 for such notice.) By doing so, the school district would be in compliance with the law and would minimize potential exposure. In addition, the school district would substantially reduce the possibility of having to retain two teachers that would result from reinstating the wrong teacher. The hearing procedures utilized should generally be similar to those used in placing teachers on unrequested leave of absence. (See Notice and Hearing Procedures for Placement on Unrequested Leave). A school district would not be required to give notice and an opportunity for a hearing if the most senior teacher on unrequested leave was reinstated. However, if a school district did not reinstate the most senior teacher on unrequested leave, notice of the proposed action must be sent to all teachers on unrequested leave of absence who are more senior to the teacher proposed for reinstatement. In the event a school district hired a new teacher to fill the vacancy instead of reinstating a teacher on unrequested leave, notice of the proposed action must be sent to all teachers on unrequested leave. If you have any questions regarding these procedures, you are advised to contact your legal counsel.

8. Entitlement to a Position for Which the Teacher is Not Licensed or No License is Required. In Liimatta v. I.S.D. #691, an industrial arts electronics teacher objected to his placement on unrequested leave because a junior teacher was being retained in vocational electronics. Although the teacher was not licensed in vocational electronics, he claimed he was entitled to the position because the content of the two courses was identical. The Court held that the fact the district would receive additional funds for a vocational course was a legitimate reason to require a vocational license. Therefore, the teacher was properly placed on unrequested leave.

In Liimatta, the Court also rejected a teacher's claim that he could bump into a portion of a position held by a less senior teacher for which no license is required. Similarly, in Petition of Dallman, the Court also found a teacher's argument unpersuasive that a school board should be required to split related subjects into separate courses to allow the realignment or recall of the teacher who was licensed to teach only one of the subjects.

Similarly, in Kvernmo v. Independent School District No. 403, 541 N.W.2d 620 (Minn. Ct. App. 1996), a home economics teacher was placed on unrequested leave of absence when the school district eliminated several of her courses from the curriculum and then recalled to a .67 position to teach three classes and supervise one study hall. The teacher claimed that the school district could not retain less senior teachers as study hall supervisors while placing her on unrequested leave.

The Court rejected the teacher's claim finding that seniority rights attach for positions for which teachers are licensed and since there is no license required to supervise study hall, seniority rights do not attach to study hall supervision.

However, in Moe v. Independent School District No. 696, 623 N.W.2d 899 (Minn. Ct. App. 2001), the court held that whether seniority rights attach to a particular position, including supervision of study hall and lunch supervision, turns on the past practice of the school district. The court, after finding that such a past practice did exist in Moe, stated that a teacher is entitled to bump into an existing supervisory position held by a less senior teacher provided the bump did not require scheduling adverse to the interests of the school district's students. Finally, in rejecting the teacher's claim of entitlement to bump into certain supervisory positions, the court held that a school district need not reschedule the school curriculum in a manner that compromises the students' educational needs or the school district's supervisory responsibilities in order to accommodate the seniority rights afforded a teacher under M.S. 122A.40, Subd. 11.

In Bye v. Special Intermediate School District No. 916, 379 N.W.2d 653 (Minn. Ct. App. 1986); pet. for

rev. den. (Minn. 1986) the Court held that vocational teachers' seniority rights were not violated when their students were assigned to a junior teacher's course to learn some components of the senior teachers' program. Because the senior teachers were not licensed to teach the course, even though they had taught the same material in their program, they had no claim to the position in question. Accord Matter of Meyer v. Intermediate School District No. 287, 381 N.W.2d 476 (Minn. Ct. App. 1986); pet. for rev. den. (Minn. 1986).

Similarly, the Minnesota Court of Appeals also has held that a business education teacher whose position was discontinued could not bump into a business math position because the business math position required a math license that the teacher did not possess. DeGeorgeo v. Independent School District No. 833, 563 N.W.2d 755 (Minn. Ct. App. 1997) rev. denied (Minn. 1997).

In a recent unpublished decision, the Minnesota Court of Appeals held that an employee, whose position with a community college did not require her to be licensed, was not a "teacher" for purposes of M.S. 122A.40 and, therefore, did not complete the initial three-year probationary period during her community college employment. Wilson v. Independent School District No. 720, 2009 WL 1920051 (Minn. Ct. App. July 7, 2009) (unpublished decision).

9. Superintendents and Principals are Entitled to a Hearing. M.S. 123B.143, Subd. 1 provides that individuals employed as superintendents shall have initial employment contracts for no more than three years from the date of employment. Thereafter, any subsequent employment contract with the same individual to serve as superintendent must not exceed a period of three years. The statute also provides that "[a] board, at its discretion, may or may not renew an employment contract" and that "[a] board may terminate a superintendent during the term of an employment contract for any of the grounds specified in section 122A.40, subdivision 9 or 13." The statute further provides that "[a] superintendent shall not rely upon an employment contract with a board to assert any other continuing contract rights in the position of superintendent under section 122A.40." The Legislature also amended M.S. 123.34 [predecessor to M.S. 123B.143, Subd. 1] in 1993 prohibiting automatic rollover clauses in superintendent contracts. 1993 Minn. Laws, Ch. 224, Art. 9, § 22. In this respect, the statute now provides that "[a] board must not, by action or inaction, extend the duration of an existing employment contract." In addition, M.S. 122A.40, Subd. 1 has been amended to provide that a superintendent is a "teacher" only for purposes of M.S. 122A.40, Subds. 3 (hiring, dismissing) and 19 (access and expungement of records). These amendments, however, only apply to employment contracts entered into or modified after July 1, 1990. 1990 Minn. Laws, Ch. 562, Art. 8, § 47. Thus, under any such contracts a superintendent is not entitled to be placed on unrequested leave of absence and, therefore, is not entitled to a hearing. However, any superintendent employed pursuant to a contract entered into prior to July 1, 1990 and not modified after that date may not be terminated or reassigned to another position without granting the superintendent a hearing. Grinolds v. Independent School District No. 597, 346 N.W.2d 123 (Minn. 1984), reh'g denied (Minn. 1984).

Similarly, M.S. 125.17 [predecessor to M.S. 122A.41], the statutory unrequested leave plan for cities of the first class, entitles principals to notice and an opportunity for a hearing prior to being demoted. Sweeney v. Special School District No. 1, 368 N.W.2d 288 (Minn. Ct. App. 1985).

10. Establishment of the Grounds for Placing a Teacher on Unrequested Leave. The existence of a single statutory ground affords an adequate basis to place a teacher on unrequested leave. A gradual decline in enrollment over several years constitutes "lack of pupils" justifying placement of a teacher on unrequested leave. A school district need not show an absolute necessity before placing a teacher on unrequested leave. Laird v. Independent School District No. 317, 346 N.W.2d 153 (Minn. 1984).

A school district must establish the existence of a statutory ground for placement of a teacher on unrequested leave by competent and substantial evidence. A school board's informal telephone survey to project future enrollment was not competent evidence to establish the ground of lack of pupils. Pinkney v. Independent School District No. 691, 366 N.W.2d 362 (Minn. Ct. App. 1985).

The Minnesota Court of Appeals dealt with the placement of a teacher on unrequested leave of absence

due to the discontinuance of position in Nemanick v. Independent School District No. 2020, No. C4-93-1426, unpublished decision; reported in *Finance and Commerce*, Dec. 24, 1993. In Nemanick, the school district proposed to place two teachers on unrequested leave of absence, one from a .5 FTE equity coordinator position and the other one from a .3 FTE equity coordinator position effective the end of the 1992-93 school year. One of the grounds asserted by the school district for the proposed placement on unrequested leave of absence was the discontinuance of the equity coordinator position. The school district, however, intended to employ a .8 FTE equity coordinator for the following school year, although the district's intent was to petition the BMS for the removal of the equity coordinator position from the teachers' bargaining unit prior to the start of school for the next school year. One teacher requested a hearing on her proposed placement on unrequested leave of absence, which resulted in an independent hearing officer finding that since the school district had not completed the process of removing the equity coordinator position from the teachers' bargaining unit by the time of the hearing, coupled with the district's intent to employ a .8 FTE equity coordinator for the following school year, the school district had failed to establish the discontinuance of the position. The school district subsequently rejected the hearing officer's recommendation and placed the teacher on unrequested leave of absence effective the end of the 1992-93 school year. The school district eventually completed the removal process and the BMS removed the equity coordinator position from the teachers' bargaining unit on August 6, 1993. The Court of Appeals ultimately reversed the school district and reinstated the teacher to the .8 FTE equity coordinator position. In doing so the court held that the school district failed to meet its burden of showing that the equity coordinator position was discontinued before placing the teacher on unrequested leave of absence. Consequently, the court concluded that the BMS's removal of the position from the teachers' bargaining unit on August 3, 1993, which was more than two months after the statutory deadline for placing teachers on unrequested leave of absence, did not affect the teacher's employment rights for the 1993-94 school year.

In another case, the Minnesota Court of Appeals found that the school district established that it had discontinued the position of an elementary principal in spite of the fact that the duties of that discontinued position were reassigned to the superintendent and various people in other positions. Quiring v. Board of Education of Independent School District No. 173, 623 N.W.2d 634 (Minn. Ct. App. 2001). In so doing, the court concluded that the elimination /discontinuance of a position did not legally require that all of the duties of that position cease to exist.

Once a school district has established the ground of financial limitations for placing teachers on unrequested leave, it does not need to prove financial limitations specific to each position. Bye v. Special Intermediate School District No. 916, 379 N.W.2d 653 (Minn. Ct. App. 1986); pet. for rev. den. (Minn. 1986).

11. Negotiated Plan May Waive Rights Afforded to Teachers Under Subd. 11. The terms of M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11] do not apply where the parties have negotiated a plan under Subd. 6a [predecessor to Subd. 10]. The parties can agree that a teacher must have successfully taught the subject matter in order to exercise seniority rights. Peck v. Independent School District No. 16, 348 N.W.2d 100 (Minn. Ct. App. 1984).

Teachers are precluded from disputing what subjects they have successfully taught at the unrequested leave hearing when such information is contained in the seniority list and they have failed to challenge the accuracy of the seniority list under the terms of the Master Agreement. Blank v. Independent School District No. 16, 393 N.W.2d 648 (Minn. 1986), reh'g den. (1986).

The parties can also agree that, in order for a teacher to be "qualified" to hold a particular position, the teacher must have completed a major in the subject matter involved in addition to possessing the proper licensure. Matter of Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987). According to the court, where additional requirements are the result of negotiations between the parties, courts should not attempt this negotiated approach. Id.

Also, if the negotiated unrequested leave plan is silent on a procedure or seniority right authorized by the statutory unrequested leave plan, it may be incorporated into the local plan by implication. Ruter v.

Independent School District No. 347, 364 N.W.2d 823 (Minn. Ct. App. 1985).

12. Deadlines Under a Subd. 10 Plan. If a teacher is notified of his or her proposed placement on unrequested leave pursuant to a plan negotiated pursuant to M.S. 125.12, Subd. 6a [predecessor to M.S. 122A.40, Subd. 10], and subsequently requests a hearing, then deadlines negotiated under the Subd. 6a [predecessor to Subd. 10] plan are waived. In such cases school boards are required only to observe the procedural requirements under M.S. 125.12 [predecessor to 122A.40] unless some prejudice is established by the teacher. Atwood v. Independent School District No. 51, 354 N.W.2d 9 (Minn. 1984).

However, in Lunde v. Independent School District No. 255, 543 N.W.2d 703 (Minn. Ct. App. 1996) the Court determined that the statutory deadline of June 1, the date by which teachers must be notified they are being placed on unrequested leave of absence, cannot be altered by a collective bargaining agreement to a date beyond June 1. [Note: during the 1999 legislative session the statutory deadline was changed from June 1 to July 1]. In Lunde the negotiated date was July 15. The Court distinguished Atwood, where the negotiated date was April 1, stating an earlier deadline is not prohibited by M.S. 125.12, Subd. 4 [predecessor to M.S. 122A.40, Subd. 7].

13. Past Practice May Support Refusal to Reschedule Assignments. In Kvernmo v. Independent School District No. 403, 541 N.W.2d 620 (Minn. Ct. App. 1996), the Court found the school district established a past practice that a teaching assignment should not include more than one hour per day of study hall supervision. Kvernmo proposed that she take the study hall assignments of two junior teachers, in addition to her one study hall assignment, in order to create a full-time teaching schedule. The court determined that the school district was entitled to uphold the term of employment by refusing to reschedule teachers' assignments so that Kvernmo supervised three study halls and other teachers supervised none.

14. Obligation to Create a New Position to Accommodate a Teacher Placed on Unrequested Leave of Absence. Neither a teacher's statutory bumping rights under M.S. 125.12, Subd. 6b [predecessor to M.S. 122A.40, Subd. 11], nor negotiated contract rights under M.S. 125.12, Subd. 6a [predecessor to M.S. 122A.40, Subd. 10], compel a school district to create a new position adverse to the best interests of the students. In re Independent School District No. 318 Hearing, 435 N.W.2d 81 (Minn. Ct. App. 1989). In this case, the school district proposed to place a full-time elementary teacher, among several other teachers, on unrequested leave of absence effective the end of the 1987-88 school year. The full-time elementary teacher was subsequently recalled to a morning, half-time Title I position for the 1988-89 school year. The teacher in question requested a hearing to challenge her placement on ULA. After the hearing was conducted the Hearing Officer ruled that pursuant to the collective bargaining agreement, the teacher in question should be allowed to bump a less senior or probationary teacher from a similar morning, half-time Title I position. In so ruling the Hearing Officer ignored the fact that the teacher in question could not teach the two morning positions simultaneously. Consequently, the effect of the ruling would be to create an afternoon, half-time position so that the teacher in question could teach both positions and have a full-time position. The school board rejected the Hearing Officer's recommendation, arguing that it was in the best interests of the students to keep the Title I program in the morning. This was consistent with the rationale for conducting the Title I program in the morning in that the students were fresher and better able to assimilate in the morning. The Court of Appeals affirmed the School Board's action.

15. Recall Rights of Teachers Placed on Unrequested Leave of Absence as the Result of Multiple District Interdistrict Cooperation Agreement. The Minnesota Supreme Court has held that when a school district must add teaching positions in certain grades to accommodate an increased pupil load due to the implementation of an Interdistrict Cooperation Agreement pursuant to M.S. 122.541 [predecessor to M.S. 123A.32], the teaching positions created are "available positions" within that district for purposes of M.S. 125.12, Subd. 6b(e) [predecessor to M.S. 122A.40, Subd. 11(e)]. Sherek v. Independent School District No. 699, 449 N.W.2d 434 (Minn. 1990). Thus, the Court concluded, teachers on unrequested leave of absence

must be reinstated to such positions in accordance with a combined seniority list of teachers required pursuant to M.S. 122.541, Subd. 5 [predecessor to M.S. 123A.32, Subd. 4].

16. Use of a Combined Seniority List. While decisions regarding placement on unrequested leave of absence and reinstatement must be made using a combined seniority list in situations where two or more school districts have entered into an Interdistrict Cooperation Agreement (M.S. 122.541 [predecessor to M.S. 123A.32]), or an agreement under the Cooperative Secondary Facilities Grant Act (M.S. 124.491 et seq. [predecessor to M.S. 123A.44]), such is not the case, absent negotiated language to the contrary, in situations involving Joint Powers Agreements (See Renstron, supra), or Secondary Tuition Agreements pursuant to M.S. 122.535 [predecessor to M.S. 123A.30]. See In re Battaglia, unpublished opinion (Minn. Ct. App. Jan. 30, 1990); Askov-Bruno-Kerrich Education Association v. Independent School District No. 566, (August 31, 1989), Judicial District (Pine County), Judge James R. Clifford.

17. Rights of Teachers Employed by Education Districts, Cooperative Vocational Centers, Joint Powers Districts, Joint Vocational Technical Districts, Intermediate Districts, Educational Cooperative Service Units or School Districts Participating in an Agreement for the Cooperative Provision of Special Education Services to Children with Disabilities According to M.S. 125A.11, Who are Placed on Unrequested Leave of Absence Due to the Withdrawal of a Member District. The rights of such teachers are governed by M.S. 123A.33, Subd. 8. This statute provides that any such teacher must be appointed to an available teaching position which: (a) is in the field of licensure in which pupils enrolled in the withdrawing district received instruction from the cooperative; and (b) is within the teacher's field of licensure. A "withdrawal," for purposes of the statute, "means a district's removal of its students from a program of instruction, counseling, or evaluation provided by a cooperative in order to provide the same educational services by other means." M.S. 123A.33, Subd. 1(c). An "available teaching position" is "any position that is vacant or would otherwise be occupied by a probationary or provisionally licensed teacher."

In addition, a school board may not appoint a new teacher to an available teaching position unless no teacher holding the requisite license on unrequested leave of absence from the cooperative has filed a written request for appointment. Such a request must be filed with the board of the appointing district within 30 days of receipt of written notice from the appointing board regarding the availability of the teaching position. In the event that no teacher holding the requisite license files such a request, the district may fill the position as it sees fit. Any available teaching positions must be offered to teachers who file a request in order of their seniority on a combined seniority list of the teachers employed by the cooperative and the withdrawing member district.

Any teacher appointed in accordance with M.S. 123A.33, Subd. 8 is not required to serve a probationary period. Any such teacher shall also receive credit on the appointing district's salary schedule for the teacher's years of continuous service under contract with the cooperative and the member district and the teacher's educational attainment at the time of appointment or shall receive a comparable salary, whichever is less, as well as receiving credit for accumulations of sick leave and rights to severance benefits as if the teacher had been employed by the member district during the teacher's years of employment by the cooperative.

Finally, an amendment to the statute extends the application of the statute to situations where cooperatives merge. M.S. 123A.33, Subd. 11. In this respect, "[i]f a cooperative enters into an agreement to merge with another cooperative, the boards of the cooperatives and the exclusive representatives of the teachers in the cooperatives and the teachers in each member district may negotiate a plan to assign or employ in a member district or to place on unrequested leave of absence all teachers whose positions are discontinued as a result of the agreement." In the event compatible plans are negotiated by March 1 preceding the effective date of the merger, such plans must be included in the agreement. However, if compatible plans are not negotiated by March 1, the other provisions of M.S. 123A.33 "apply to teachers ... whose positions are terminated as a result of an agreement to merge cooperatives."

The Minnesota Court of Appeals dealt with the issue of reinstatement rights of a teacher under M.S. 122.895 [predecessor to M.S. 123A.33] when a school district merely stops participating in a special

education program provided by a cooperative but remains a member of the cooperative and continues receiving other services through the cooperative in Ullom v. Independent School District No. 112, 515 N.W.2d 615 (Minn. Ct. App. 1994). The Court of Appeals held that a teacher is entitled to reinstatement under M.S. 122.895, Subd. 7 [predecessor to M.S. 123A.33, Subd. 8] only if a school district withdraws entirely from a cooperative, and not when it withdraws partially from a cooperative by stopping its participation in a program offered through the cooperative. The Court of Appeals effectively overruled its decision in Ullom in the recent case of Doran v. Independent School District No. 720, 831 N.W.2d 1 (Minn. Ct. App. 2013). In Doran, the Court of Appeals, noting the 1995 amendment to M.S. 123A.33 which added the definition of “withdrawal,” held that a district “withdrawals” from a cooperative, thereby triggering a teacher’s right to claim a job in the district, when the district removes its students from even one of several learning programs provided by the cooperative so that the district can provide that service by some other means. The Court of Appeals also held that a teacher’s statutory right to claim an open teaching position under M.S. 123A.33, Subd. 8 “does not depend on the withdrawal having caused the leave.”

18. Effective Date of Placement on Unrequested Leave of Absence. M.S. 122A.40, Subd. 11 provides that a teacher may be placed on unrequested leave of absence effective the "close of the school year." The Minnesota Court of Appeals has held that the "close of the school year" means "the annual expiration date for the teacher's contract, namely June 30." In the Matter of the Placement of William Johnson on Unrequested Leave of Absence, 481 N.W.2d 882 (Minn. Ct. App. 1992).

19. Placement of Non-Indian Tenured Teachers on Unrequested Leave of Absence While Less Senior American Indian Teachers are Retained Pursuant to the American Indian Education Act. The American Indian Education Act, M.S. 124D.71 to 124D.82, provides, in relevant part, that notwithstanding the provisions of M.S. 122A.40, Subds. 7, 10 or 11 or 122A.41, Subds. 4 and 14, any other law to the contrary, "or any provision of a contract entered into after May 7, 1988, to the contrary, when placing a teacher on unrequested leave of absence, the board may retain a probationary teacher or a teacher with less seniority in order to retain an American Indian teacher." M.S. 124D.77. The Minnesota Court of Appeals upheld this statute [then M.S. 126.45 to 126.55] as not being violative of the equal protection or contract clauses of the United States Constitution in Krueth v. Independent School District No. 38, 496 N.W.2d 829 (Minn. Ct. App. 1993), rev. denied (Minn. 1993). The Court also held that the reference in the statute to a "contract entered into after May 7, 1988" referred to the teachers' collective bargaining agreement and that the statute did not limit the retention of American Indian teachers to one teacher per school district.

20. Authority of a School Board to, as a Cost-Saving Measure, Combine a Half-Time Elementary Principalship with the Superintendency When the Superintendent Has Less Seniority Than the Elementary Principal. The Minnesota Court of Appeals addressed the issue of whether a school board had the authority to reduce a full-time elementary principal position to half-time, and then combine the half-time principalship with the superintendency as a cost saving measure. Klein v. Board of Education of Independent School District No. 671, 497 N.W.2d 620 (Minn. Ct. App. 1993). In Klein the school board, in an attempt to reduce costs, discontinued a full-time elementary principal position, resulting in the proposed placement on unrequested leave of absence of the individual who had held that position for 25 years. Subsequently, the school board adopted a resolution reducing the elementary principal position to half-time and combine that position with the superintendency. The superintendent had less seniority in the school district than the elementary principal. After a hearing on the proposed placement on unrequested leave of absence of the elementary principal, the school board adopted a resolution placing the elementary principal on unrequested leave of absence. The elementary principal was then reinstated for the following school year as a full-time elementary teacher. The elementary principal challenged the school board's decision to assign the superintendent to the half-time elementary principal position, since the superintendent had less seniority.

The Court of Appeals held that the school board erred in placing the elementary principal on unrequested leave of absence in order to replace him with a less senior superintendent in a newly created

superintendent/elementary principal position. Thus, the Court concluded that the elementary principal was entitled to reinstatement into the half-time elementary principal position. In doing so the Court stated that "[u]nder the governing statutes, the board does not have the power, when assigning a less senior person to the half-time superintendent position, to abrogate . . . [the more senior elementary principal's] continuing contract rights." Id. at 623.

Note: Although the Minnesota Supreme Court granted review of Klein, an apparent settlement was reached and the appeal was dismissed before the Supreme Court could rule. Therefore, the principles set out in Klein are still valid law.

21. Bumping Between Classroom Teachers and Administrators. Since the definition of teacher under M.S. 125.12 [predecessor to M.S. 122A.40] includes all who are required to be licensed, the courts made no distinction for purposes of seniority between an administrator and a classroom teacher. Thus, if a teacher whose position is discontinued is properly certified for an administrative position and has greater seniority than the administrator in the position, the teacher can bump the administrator. Roseville Education Association v. Independent School District No. 623, 353 N.W.2d 691 (Minn. Ct. App. 1984).

After the Roseville case was decided, M.S. 122A.40 was amended to prohibit teachers, as defined in PELRA, M.S. 179A.03, from bumping into promotional positions on the basis of seniority. M.S. 122A.40, Subd. 4. A similar limitation was not placed on the bumping rights of principals or other "teachers" within the meaning of M.S. 122A.40.

However, in Haak v. Independent School District No. 625, 367 N.W.2d 461 (Minn. 1985), the Supreme Court indicated that administrators' assignment rights do not extend to promotional positions.

Note that M.S. 123.34, Subd. 9 [predecessor to M.S. 123B.143, Subd. 1] specifically exempts the position of superintendent from bumping by anyone under M.S. 125.12 [predecessor to M.S. 122A.40]. Grinolds v. Independent School District No. 597, 346 N.W.2d 123 (Minn. 1984). In addition, M.S. 125.12 [predecessor to M.S. 122A.40] was amended during the 1990 legislative session to provide that a superintendent is a "teacher" only for purposes of M.S. 125.12, Subds. 2 (hiring and dismissing) and 14 (individual's access to his/her records) [predecessor to M.S. 122A.40, Subds. 3 and 19]. M.S. 122A.40, Subd. 1.

G. Non-Renewal of Probationary Teacher Contracts.

1. M.S. 122A.40, Subd. 5 provides that during the probationary period any annual contract with any teacher may or may not be renewed as the school board shall see fit; provided the board must give any such teacher whose contract it declines to renew for the following school year written notice to that effect prior to July 1st. (See Form No. 8). The "probationary period," for all independent school districts for purposes of the statute, is defined as the first three consecutive years of a teacher's first teaching experience in Minnesota in a single public school district and, after completion thereof, the probationary period in each public school district in which the teacher is thereafter employed shall be one year. M.S. 122A.40, Subd. 5(a). (Note: Effective with the ratification of collective bargaining agreements after July 1, 2013, the phrase "after completion thereof" is deleted from M.S. 122A.40, Subd. 5(a). 2011 Minn. Laws, Ch. 11, Art. 2, Sec. 12.) **A probationary teacher whose first three years of consecutive employment are interrupted for maternity, paternity, or medical leave and who resumes teaching within 12 months of when the leave began is considered to have a consecutive teaching experience for purposes of M.S. 122A.40, Subd. 5(a) if the probationary teacher completes a combined total of three years of teaching service immediately before and after the leave. In addition, a probationary teacher whose first three years of consecutive employment are interrupted for active military service and who promptly resumes teaching consistent with federal reemployment timelines for uniformed personnel under U.S.C. title 38, sec. 4312(e), is considered to have a consecutive teaching experience for purpose of M.S. 112A.40, Subd. 5(a).** For substitute teachers, each "full year" that the teacher is employed constitutes one year of the teacher's

probationary period. M.S. 122A.44, Subd. 2(b). For regular teachers, a teacher must complete at least 60 days of teaching service each year during the probationary period. (Note: Effective with the ratification of collective bargaining agreements after July 1, 2013, for regular teachers, a teacher must complete at least 120 days of teaching each year during the probationary period. 2011 Minn. Laws, Ch. 11, Art. 2, Sec. 12.) Days devoted to parent-teacher conference, teachers' workshops, and other staff development opportunities and days on which a teacher is absent from school do not count as days of teaching service. M.S. 122A.40, Subd. 5(d). The Minnesota Court of Appeals has held that a teacher who has obtained continuing contract status is subject to the additional one-year probationary period set out in M.S. 122A.40, Subd. 5 if the teacher resigns his or her continuing-contract position, but later returns to the same school district in which he or she had already completed his or her initial three-year probationary period. Montplaisir v. Independent School District No. 23, 779 N.W.2d 880 (Minn. Ct. App. 2010). The Minnesota Supreme Court has held that an activities director is not a professional employee "required to hold a license from the state department" and, therefore, is not a "teacher" within the meaning of M.S. 122A.40. Emerson v. School Board of Independent School District No. 199, 809 N.W.2d 679 (Minn. 2012).

2. During the 2009 legislative session, the Minnesota Legislature amended the Veterans Preference Act (M.S. 197.46) ("VPA") by removing the exemption of teachers from the VPA effective July 1, 2009. See 2009 Minn. Laws Ch. 94, Art. 3, § 15. However, during the 2010 legislative session, the Minnesota Legislature again amended the VPA to provide that "[n]othing in this section shall be construed to apply to the position of teacher." See 2010 Minn. Laws Ch. 333, Art. 2, § 10. Therefore, teachers are once again exempt from the VPA.

3. If a teacher requests the reasons for his or her nonrenewal, the school board must give the teacher its reason or reasons in writing, including a statement that appropriate supervision was furnished describing the nature and extent of such supervision furnished the teacher during the employment by the board, within ten days after receiving such a request. M.S. 122A.40, Subd. 5. Therefore, it is important that the school district conduct the required number of written evaluations each year as provided in M.S. 122A.40, Subd. 5 which provides that a school board must adopt a plan for written evaluation of teachers during the probationary period. (Note: Effective with the ratification of collective bargaining agreements after July 1, 2013, the plan for written evaluation of teachers during the probationary period must be consistent with M.S. 122A.40, Subd. 8, as amended. 2011 Minn. Laws, Ch. 11, Art. 2, Sec. 12. The amendments to M.S. 122A.40, Subd. 8 apply beginning in the 2014-15 school year and thereafter. 2011 Minn. Laws, Ch. 11, Art. 2, Sec. 14.) The number of evaluations necessary is dependent on the number of school days the teacher performs services; at least three times each year for a teacher performing services on 120 or more school days; at least two times each year for a teacher performing services on 60 to 119 school days; and at least one time each year for a teacher performing services on fewer than 60 school days. M.S. 122A.40, Subd. 5(a). (Note: Effective with the ratification of collective bargaining agreements after July 1, 2013, the evaluation requirement only applies to probationary teachers who have completed at least 120 days of teaching service during the year. Such evaluation must occur at least three times periodically throughout each school year for teacher performing services during that school year, and the first evaluation must occur within the first 90 days of teaching service. 2011 Minn. Laws, Ch. 11, Art. 2, Sec. 12.) For purposes of making this calculation, days devoted to parent-teacher conferences, teachers' workshops, and other staff development opportunities and days on which a teacher is absent from school must not be included in determining the number of school days on which a teacher performs services. M.S. 122A.40, Subd. 5(a). However, the Minnesota Court of Appeals has held that a school district's failure to conduct the required number of written evaluations of a probationary teacher each year did not invalidate the school district's decision to not renew the teacher's contract for budgetary reasons. Savre v. Independent School District No. 283, 642 N.W.2d 467 (Minn. Ct. App. 2002). Subsequently, the Minnesota Court of Appeals addressed the issue of a school district's failure to conduct the required number of written evaluations of a probationary teacher when the teacher was not renewed for performance reasons in Kleinschrodt v. Independent School District No. 2886, 2006 WL

1984696 (Minn. Ct. App. July 18, 2006) (unpublished decision). In Kleinschrodt, the Court upheld a school district's nonrenewal of a probationary teacher for performance reasons even though it had provided no formal evaluation of the teacher within the two years she was employed. The Court justified its decision based on the fact that the evaluation provisions of the statute are directory, rather than mandatory. Additionally, the teacher in question was a part-time social worker, which the Court found factually significant in applying the evaluation process. In addition, the legislature amended M.S. 125.12 [predecessor to M.S. 122A.40], requiring school boards and the exclusive representative of the teachers in the school district to develop a probationary peer review process through joint agreement. M.S. 122A.40, Subd. 6. The Minnesota Court of Appeals again addressed the issue of a school district's failure to conduct the required number of written evaluations of a probationary teacher who was not renewed for performance reasons in Tchida v. Independent School District No. 31, 2009 WL 1919615 (Minn. Ct. App. July 7, 2009) (unpublished decision). In Tchida, the Court found that "administrative evaluations" which lacked the formality of a previous performance evaluation and which were narrower in scope did not constitute written evaluations for purposes of M.S. 122A.40, Subd. 5. The Court, however, noting that the statutory evaluation requirement was directory, held that the school district had substantially complied with M.S. 122A.40, Subd. 5 by having one full written evaluation of the teacher's performance and through the subsequent "administrative evaluations."

4. The Minnesota Supreme Court has held that M.S. 125.12, Subd. 3 [predecessor to M.S. 122A.40, Subd. 5] vests "total discretion in the board with respect to renewal or nonrenewal of a probationary teacher's contract." Pearson v. Independent School District No. 716, 290 Minn. 400, 188 N.W.2d 776 (1971). Recognizing this discretion, the Minnesota Court of Appeals has held that a school board must merely substantially comply with M.S. 125.12, Subd. 3 [predecessor to M.S. 122A.40, Subd. 5]. See Allen v. Board of Education of Independent School District No. 582, 435 N.W.2d 124 (Minn. Ct. App. 1989), *rev. den.* (Minn. 1989); See also Tornow v. Board of Education of Independent School District No. 118, 435 N.W.2d 142 (Minn. Ct. App. 1989), in which the Court upheld the nonrenewal of a probationary superintendent in spite of somewhat favorable evaluations.

5. It is important to emphasize that probationary teachers are not entitled to placement on unrequested leave of absence. See Columbia Heights Federation of Teachers Local 710 v. Independent School District No. 13, 457 N.W.2d 775 (Minn. Ct. App. 1990). Thus, school boards should terminate and nonrenew probationary teachers rather than placing them on unrequested leave of absence. In the event that a school board does place a probationary teacher on unrequested leave of absence, the teacher would retain reinstatement rights in the district.

6. The Minnesota Court of Appeals held that a school board's timely nonrenewal of a probationary teacher was valid in spite of the fact that the school board had previously offered, and executed, a teacher contract with the teacher in question for the following school year. Sheldon v. Independent School District No. 284, Wayzata, 2011 WL 1236167 (Minn. Ct. App. April 5, 2011) (unpublished decision). In doing so, the Court rejected the teacher's argument that where a contract is renewed prior to July 1 (June 1, effective the ratification of collective bargaining agreements after July 1, 2013), the school board is precluded from canceling the contract, even if the cancellation occurred before July 1 (June 1, effective the ratification of collective bargaining agreements after July 1, 2013). According to the Court, such an argument was inconsistent with the language of M.S. 122A.40, Subd. 5(a), which does not limit the school boards's authority not to renew so long as it does so prior to July 1 (June 1, effective the ratification of collective bargaining agreements after July 1, 2013). The Court also held, however, that as the school board had already entered into a binding contract with the teacher for the following academic year when it made its nonrenewal decision, the school board breached that contract without a valid legal basis. Consequently, while the teacher was not entitled to appointment to a teaching position for the following school year, the teacher was entitled to damages for breach of contract in the amount of salary and benefits the teacher would

have received under that contract.

PROCEDURES

A. Adoption and Promulgation of a Seniority List

1. Before a school board may place any teacher on unrequested leave of absence, it should adopt a seniority list since leave placements must be based upon inverse order of employment from among the licensed teachers. Once adopted, the seniority list should not be modified except for additions, deletions, and changes required by law or timely negotiated agreements. The school district has the responsibility to make certain that the seniority list is accurate. Vettleson v. Special School District No. 1, 361 N.W.2d 425 (Minn. Ct. App. 1985).

Note: The actual list may be assembled and promulgated by the administration, initially and annually thereafter, at the direction of the school board and according to the criteria established by the school board.

2. The statutory definition of "teacher" includes all classroom teachers, principals, supervisors, and professional employees required to hold a license from the state department. M.S. 122A.40, Subd. 1.

A superintendent is a "teacher" for purposes of M.S. 125.12, Subds. 2 and 14 [predecessor to M.S. 122A.40, Subd. 3 and 19] only if the superintendent is employed pursuant to an employment contract entered into or modified after July 1, 1990. 1990 Minn. Laws, Ch. 562, Art. 8, § 47. Any superintendent who is employed pursuant to an employment contract entered into prior to July 1, 1990, provided such contract is not modified after July 1, 1990, does fall within the definition of "teacher" in M.S. 122A.40, Subd. 1 for all purposes.

During the 1998 legislative session, school nurses were added to the definition of teacher under M.S. 122A.15, Subd. 1.

Under M.S. 125.17 [predecessor to M.S. 122A.41], the Supreme Court has held that seniority of a principal must be determined from the date of employment in the district and not from date of employment as a principal. McManus v. I.S.D. #625, 321 N.W.2d 891 (Minn. 1982) reh'g den. (1982); Sweeney v. Special School District No. 1, 368 N.W.2d 288 (Minn. Ct. App. 1985).

The seniority list shall include all continuing contract teachers as so defined. Thus, the seniority list should include all professional people required to be licensed. It should be noted that the board is not required to place probationary teachers on unrequested leave but may fail to renew their contracts which will result in permanent termination.

The statute limits the seniority rights of teachers holding provisional licenses, other than a vocational license. Teachers cannot exercise any seniority in areas in which they are provisionally licensed unless that exercise of seniority results in the placement on unrequested leave of another teacher who also holds only a provisional license in that subject. M.S. 122A.40, Subds. 10 and 11.

3. Equal Seniority. Teachers within the district may have equal seniority. The statute provides in subdivision 11(b) that, in such cases, the order of leave placement "is negotiable." If no negotiated agreement is reached on this point, the school board should take the initiative and make the choice in cases of equal seniority. It should have a reasonable rationale justifying such choices. The board should not differentiate equal seniority arbitrarily, as by a flip of the coin or alphabetically.

The basis for the board's differentiation may be adopted by resolution. A sample resolution, containing some possible, but by no means exclusive reasons for their choice is attached as Form No. 1.

4. Procedures. In adopting and promulgating a seniority list, the board and the administration should be guided by the following:

- a. The seniority list should contain all bits of information that may be relevant to unrequested leave placement, including all areas of licensure.
- b. The information on the seniority list should be frozen as of a date certain (January 1 may be most appropriate).

NOTE: While it may be necessary for the board and the administration to take account of information subsequent to the effective date of the information contained on the seniority list, freezing the effective date will provide a uniform reference point for all concerned. If the ranking of teachers having equal seniority might vary depending on the position discontinued, give all such teachers the same ranking on the seniority list.

- c. Date and post a tentative seniority list (not necessary once seniority list is final).
- d. The district also wish to distribute the list to the exclusive representative of all employee groups required to be licensed.
- e. The district should allow and give notice of a reasonable period of time during which individual teachers may contest the information about them on the seniority list. Ten days should be deemed reasonable (not necessary for those teachers who have already had a previous opportunity to challenge the seniority list). Any challenge by a teacher to his/her placement on the seniority roster should be handled through the grievance procedure contained in the Master Agreement.
- f. After receipt and evaluation of any additional information supplied or challenged, a final seniority list should be posted, which list shall be the basis for unrequested leave placement.

Note: See notes to c and e above.

- g. In order to assist in school district staff planning, a notice should be posted requiring all teachers to inform the district office of any pending licenses.

Suggested forms for notice regarding seniority and licenses, continuing contract teacher seniority list, probationary teacher list, and notice pending licensure are attached as Forms 2, 3, 4, 5, respectively.

B. Procedures for Staff Reduction

At the same time the school district is first developing a seniority list and annually thereafter, it should, if necessary, be taking the following action:

1. If it appears, based on the best information available to the administration at the time, that it may be necessary to reduce staff, because of discontinuance of position, lack of pupils, financial limitations, or merger of classes caused by consolidation of district, the administration should so inform the school board at the earliest possible date. The report should be documented to the extent possible, with reference to the source of the documentation within or outside the district, and the date of the documentation, and in any event with reference to the person inside the district responsible for the preparation of the documentation or the supervision of the preparation.

2. The school board should adopt a resolution requiring the administration to make recommendations for reductions in programs and discontinuance of positions. The resolution should include reasons justifying the need for the recommendations, and may include:

- a. To effectuate economies and reduce expenditures in the school district necessitated by financial limitations imposed on the district.
- b. To reduce staff because of a lack of pupils.

See Form No. 6 attached, for an example of such a resolution.

3. The recommendations of the administration may include such possibilities as a district-wide increase in student-staff ratios that would in turn necessitate discontinuance of positions in each department, or reductions in specific departments. The report should provide a specific reason for each recommendation, and should also relate the recommendation to the reasons set out by the school board. If any information has become available since the administration's initial report to the board that might change the need for reductions, this should be brought to the attention of the board and documented.

4. The school board should then act upon the report of the administration, and adopt a resolution reducing specific programs and discontinuing positions without reference to named individuals.

NOTE: It may be wise for both the administration's report and the board's resolution to indicate priorities in reductions and discontinuances, in the event circumstances change, before individual leave placements are proposed.

See Form 7, attached as an example of such a resolution discontinuing and reducing educational programs and positions.

5. Unless the Master Agreement between the parties provides otherwise, the administration must realign positions to accommodate the seniority rights of less senior teachers. The administration is required to realign positions only to the extent that such realignment is practical and reasonable. In determining whether realignment is practical and reasonable, the administration must consider the various factors set out in Strand.

6. Based upon the recommendations of the administration and its resolution, the board should then adopt individual resolutions of termination and non-renewal of probationary teachers or proposed unrequested leave placement of continuing contract teachers. Failure by the board to pass a resolution proposing a teacher for placement on unrequested leave can invalidate subsequent decision to place the teacher on unrequested leave. Finley v. Independent School District No. 566, 359 N.W.2d 749 (Minn. Ct. App. 1985). Probationary teachers may, but need not, also be placed on unrequested leave. Each such resolution should be supported by a chain of reasoning which links the individual action to the reduction in programs and discontinuance of position, which in turn is linked to the general reasoning contained in the board's initial resolution.

Resolutions proposing to place individual teachers on unrequested leave should specify the statutory grounds upon which the district intends to rely for the termination. But cf. Schmidt v. Independent School District No. 1, 349 N.W.2d 563 (Minn. Ct. App. 1984). In addition, any school district that has entered into an education district agreement pursuant to M.S. 123A.15, et seq., must make a determination whether the proposed placement on unrequested leave of absence is the result of implementing the education district agreement. See M.S. 123A.19, Subd. 5. This determination must then be included in the notice of proposed placement on unrequested leave of absence, as well as the notice of actual placement on unrequested leave of absence.

See Form 8 attached for an example of the resolution and notice for a probationary teacher.

NOTE: It is a necessary precondition to unrequested leave placement of a continuing contract teacher that no probationary teacher be retained in a position for which the continuing contract teacher is licensed.

Therefore, it is very important that the school district check the licenses of all teachers proposed for leave against the positions held by probationary teachers.

See Form 9 attached for an example of the resolution and notice of unrequested leave placement of a continuing contract teacher.

C. Notice and Hearing Procedures for Placement on Unrequested Leave

1. Notice. The notice of proposed placement on unrequested leave in the case of the continuing contract teacher and the notice of termination and nonrenewal in the case of the probationary teacher should be mailed by certified mail or preferably served personally upon such teacher.

In the case of the continuing contract teacher, the teacher has 14 days after receipt of the notice of proposed placement on unrequested leave to request a hearing. In computing this 14-day period, the day of receipt of the notice by the teacher may not be counted. Vizenor v. Independent School District No. 25, No. C6-90-1221 (Minn. Ct. App. Jan. 22, 1991) (unpublished opinion). If a request is not received within the 14 day period it constitutes acquiescence to the proposed placement on unrequested leave provided there has been no "change in circumstances" as referred to in Roseville. If no request for a hearing is received in writing within the 14 day period, a resolution should be adopted by the school board placing the teacher on unrequested leave as a result of acquiescence. See sample resolution attached as Form 10. A notice of placement on unrequested leave must then be served upon the teacher by certified mail or personally all before July 1. See a sample notice of placement on unrequested leave attached as Form 11.

Any person serving a notice or other paper upon a party should execute an affidavit of service and attach it to the copy of the document which is kept by the school district. A sample affidavit is attached as Form 12.

The Minnesota Legislature recently amended the Veterans Preference Act (M.S. 197.46) ("VPA") by removing the exemption of teachers from the VPA effective July 1, 2009. See 2009 Minn. Laws Ch. 94, Art. 3, § 15. However, during the 2010 legislative session, the Minnesota Legislature again amended the VPA to provide that "[n]othing in this section shall be construed to apply to the position of teacher." See 2010 Minn. Laws Ch. 333, Art. 2, § 10. Therefore, teachers are not entitled to the procedural protections of the VPA.

2. Hearing Procedure. Where a continuing contract teacher has not acquiesced and has requested a hearing, such continuing contract teacher must make such a request in writing to the school board within 14 days after receipt of the notice of proposed placement on unrequested leave. In the event a hearing is requested, the entire hearing process must be completed and the teacher must be served with a notice of placement on unrequested leave of absence, all prior to July 1, unless the teacher waives the statutory timelines. M.S. 122A.40, Subd. 7. The applicable teachers' collective bargaining agreement must be reviewed to ensure that an earlier notice date is not set out. Therefore, it is critical that school districts start the process and proceed in a timely manner. A suggested timetable is set out in paragraph E of these Procedures.

In setting the date for a hearing, if requested, the school board is only required to give "reasonable notice to the teacher of the date set for hearing. . ." Consequently, the school board may unilaterally establish the date and time for the hearing, provided "reasonable notice" is given. Should teachers request that a hearing be rescheduled, the school board should only grant such a request if: (1) sufficient time exists in which to complete the entire process prior to July 1, or earlier date set out in the applicable teachers' collective bargaining agreement; or (2) the teacher(s) waives the July 1 deadline, or earlier deadline if set out in the applicable teachers' collective bargaining agreement, should insufficient time exist to complete the process prior to July 1 in the event the hearing is rescheduled.

According to the statute, the school board may conduct the hearing with the chair presiding. In Schmidt v. Independent School District No. 1, 349 N.W.2d 563 (Minn. Ct. App. 1984) the Minnesota Court of Appeals reversed a decision to place a teacher on unrequested leave due to the school board's failure to hire an independent hearing officer to preside at the hearing and make written findings of fact and a

recommendation. In Schmidt the court suggested that retired judges, state hearing examiners and arbitrators are among those qualified to serve as the hearing examiner. In Pinkney v. Independent School District No. 691, 366 N.W.2d 362 (Minn. Ct. App. 1985) the court held that the appointment of a local attorney to serve as the hearing examiner was improper because he had a conflict of interest.

However, where there has not been an independent showing of bias or lack of skill, a local lawyer is qualified to serve as a hearing examiner. Bates v. Independent School District No. 842, 379 N.W.2d 239 (Minn. Ct. App. 1986). The mere fact that an attorney for a school district has appeared before a hearing officer in previous cases does not raise an inference of bias. Matter of Hahn, 386 N.W.2d 789 (Minn. Ct. App. 1986), pet. for rev. den. (Minn. 1986). In light of the complexity and intricacies of unrequested leave of absence hearings, school districts are encouraged to contact their legal counsel for guidance in selecting an independent hearing officer.

Unrequested leave of absence hearings are public. M.S. 122A.40, Subd. 14. The school board is required to provide a court reporter to record all testimony and to receive exhibits. The administration on behalf of the school district and the teacher must each be afforded the opportunity to introduce testimony in support of the unrequested leave placement and testimony in opposition thereto. In this respect, the school district must essentially establish two elements: (1) that it has met the grounds for placement on unrequested leave of absence (i.e. discontinuance of position, lack of pupils, financial limitations, or merger of classes caused by consolidation of districts); and (2) that the appropriate teachers have been proposed for placement on unrequested leave of absence.

In regard to the statutory grounds, the school district should be prepared to show that it has, in fact, discontinued the position(s) in question; that enrollment has declined using enrollment figures covering approximately the previous five years and projections for five years; and that the school district is experiencing financial limitations as evidenced by relevant financial information (i.e. fund balances and revenues).

In regard to showing that it has proposed to place the appropriate teachers on unrequested leave of absence, it is incumbent upon the school district to introduce evidence showing that it has realigned positions as required in Strand and Westgard. If realignment was neither practical or reasonable, evidence must be introduced which addresses the factors set out in Strand.

It is recommended that both parties retain competent legal counsel. Each party must also be afforded the opportunity of cross examination and the offering of rebuttal evidence. Only competent evidence should be received.

3. Decisions and Findings. After the hearing is concluded, the school board must, prior to July, render its written decision to either place the teacher on unrequested leave or dismiss the proceedings and serve the teacher with notice of that decision. In the event the school board determines to finally place the teacher on unrequested leave, it must adopt findings of fact based upon competent evidence as part of its decision. The decision of the school board, including the findings of fact, must be served upon the teacher prior to July 1, or possible earlier date if set out in the applicable teachers' collective bargaining agreement. Failure to make such findings invalidate the placement of the teacher on unrequested leave of absence. In re Iverson, No. C0-90-1683 (Minn. Ct. App. 1991) (unpublished opinion). Consequently, to ensure proper service within the required time-lines, it is recommended that the decision of the school board be served personally on the teacher.

4. Court Review. Teachers placed on unrequested leave may seek review of the school board's decision in the Court of Appeals. In re Pinkney, 353 N.W.2d 676 (Minn. Ct. App. 1984). If the Court finds that the record does not support placement of the teacher on unrequested leave, the case can be remanded to the school board for revised findings of fact but not a new evidentiary hearing. Herfindahl v. I.S.D. #126, 325 N.W.2d 36 (Minn. 1982); Ex rel. Dreyer v. Independent School District No. 542, 344 N.W.2d 411 (Minn. 1984); Schmidt v. Independent School District No. 1, 349 N.W.2d 563 (Minn. Ct. App. 1984).

D. Reinstatement of Teachers

1. Teachers placed on unrequested leave have prior reinstatement rights to available positions from which the teacher was placed on unrequested leave. In addition, they have priority to other available positions in the school district in the fields in which they are licensed. However, where the courses taught by the teacher are canceled by the school district with subsequent arrangements being made for students to attend the canceled courses in another school district pursuant to a joint powers agreement, a teacher is not entitled to reinstatement to the position in the other school district even though a less senior teacher is teaching the courses in the other school district. Renstrom v. Independent School District No. 261, 390 N.W.2d 25 (Minn. Ct. App. 1986). However, when a school district must add teaching positions in certain grades to accommodate an increased pupil load due to the implementation of an Interdistrict Cooperation Agreement pursuant to M.S. 122.541 [predecessor to M.S. 123A.32], reinstatement must be in accordance with a combined seniority list. Sherek v. Independent School District No. 699, 449 N.W.2d 434 (Minn. 1990).

A teacher who accepts reinstatement to a lesser position remains on unrequested leave to the extent of the remainder of the position he or she held prior to being placed on unrequested leave. Walter v. Independent School District No. 457, 323 N.W.2d 37 (Minn. 1982); See Sherek v. Independent School District No. 699, 464 N.W.2d 582 (Minn. Ct. App. 1991), rev. denied (Feb. 20, 1991). These reinstatement rights exist for five years for those placed on unrequested leave provided the teacher's right to reinstatement shall also terminate if he or she fails to file with the board by April 1 of any year a written statement requesting reinstatement. But see Biwabik Federation of Teachers v. Independent School District No. 693, 464 N.W.2d 728 (Minn. 1990), (filing of grievance satisfied filing requirement); Mohn v. Independent School District No. 697, 416 N.W.2d 494 (Minn. Ct. App. 1991), rev. denied (filing of a declaratory judgment action satisfied filing requirement).

No new teacher shall be hired "while there is available on unrequested leave, a teacher who is properly licensed to fill such vacancy." A teacher on unrequested leave is not entitled to reinstatement if he or she fails to advise the board of his or her desire to take the position within 30 days of notice. The board may not require "special qualifications" for reinstatement in addition to licensure. Walter v. Independent School District No. 457, 323 N.W.2d 37 (Minn. 1982). But see Matter of the Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987). (The parties may, through negotiations, impose additional requirements other than licensure.)

See Form 13 for example of a reinstatement list, Form 14 for resolution announcing availability of positions, and Form 15 for an example of the notice of available position to be given to a teacher on unrequested leave.

2. The statute also provides that order of reinstatement of teachers in cases of equal seniority shall be negotiable. Failing to arrive at a negotiated understanding, the board may make a choice with a reasonable rationale therefor.

3. Finally, absent language in the collective bargaining agreement precluding realignment when reinstating teachers who have been placed on unrequested leave of absence, school districts must reasonably realign staff prior to reinstatement. Harms v. Independent School District No. 300, 450 N.W.2d 571 (Minn. 1990). See Section E7 of this Bulletin.

See Form 17, for an example of such a resolution, and some possible bases for differentiation.

E. Suggested Time Table: The following dates are intended as realistic guideposts. A district has until July 1 of the school year prior to the commencement of the leave to complete the process, although the applicable teachers' collective bargaining agreement must be reviewed to ensure that it does not expressly provide for an earlier date (i.e., June 1). In the event that the applicable teachers' collective bargaining agreement does provide for an earlier date, the dates below will need to be adjusted accordingly. School

boards and administrators are urged to act early because the time-consuming notice of the procedure, plus having to schedule teacher hearings, may cause a board to run out of time, and failure to place sufficient teachers on unrequested leave may cause extreme fiscal impact on a district.

1. Administrative report to board on need for reduction.	January 10
2. Board directive to administration for recommended reductions (if necessary).	January 15
3. Adoption and promulgation of tentative seniority list (not necessary once seniority list is final).	January 15
4. Deadline for objections to tentative seniority list (not necessary once seniority list is final).	January 25
5. Promulgation of final seniority list (update annually for additions and deletions).	March 1
6. Administration reports and recommendations for reductions. Board action on administrative recommendations.	March 1
7. Board resolutions and notice of termination and nonrenewal of probationary teachers and board resolutions and notice including hearing date to individual teachers proposed for placement on unrequested leave.	March 1-15
8. Hearings, if any.	April 1-June 15
9. Service of board decision on teachers placed on unrequested leave.	June 15-30
10. Reserve time for additional notice, hearings and service if necessary.	June 1-30

NOTE NO. 1: School board unrequested leave hearings are quasi-judicial in nature. Morey v. Independent School District No. 492, 268 Minn. 110, 128 N.W.2d 302 (1964). Judicial proceedings are ordinarily not permitted on Sundays. M.S. 484.07. Accordingly, school boards are advised not to conduct such hearings on Sundays, and to adjust their hearing schedule accordingly. It is also advisable not to serve subpoenas and notices on Sundays. M.S. 624.04.

M.S. 122A.40, Subd. 14, specifically allows consolidation of unrequested leave hearings at the discretion of the school board.

IV. CONCLUSION:

If a school board and its administration carefully follow the procedures outlined in this bulletin, their decisions will better withstand subsequent court review. Teachers who are placed on unrequested leave and their respective teacher organizations scrutinize school board procedures in great detail. The burden is upon the school board to provide due process and to act reasonably. Any arbitrary or capricious action or unreasonable procedure may result in a court reversing the school board's endeavor to curtail expenditures.

It is not possible in this bulletin to anticipate or address all possible questions that may arise under

the unrequested leave subdivision of M.S. 122A.40 or other related subdivisions.

The purpose of the bulletin is to provide a practical outline and guidelines with which school districts may take necessary action. Consult the MSBA or competent legal counsel for advice based on particular circumstances that arise in your district.

If you should have further questions, please contact MSBA.

APPENDIX ACHECKLIST FOR PROPOSED PLACEMENT
ON UNREQUESTED LEAVE_____
(Name of Teacher)Prepared By:Date

1. Administration report on general need for staff reductions.
2. Board directive to administration for recommended reductions.
3. Reviewed master agreement.
4. Adoption of tentative seniority and licensure list. (not necessary once seniority list is final)
5. Notice of seniority list promulgation.
6. Objections to seniority and licensure which affect this teacher were resolved as follows: _____

7. Final seniority list status of this teacher:
 - a) Seniority of this teacher dates from _____
 - b) This teacher is licensed in
Major _____
Minor _____
 - c) Pending or intended licenses

8. Administrative recommendations to board for reductions in positions and programs.
9. Board resolution for reductions of positions and programs.
10. This teacher's individual contract and licenses reviewed.
11. Grounds for proposed unrequested leave placement of this teacher (check as many as are applicable, attach documentation support)
 - a) Discontinuance of position _____
 - b) Lack of pupils _____
 - c) Financial limitations _____
 - d) Merger of classes caused by consolidation
of districts _____

Prepared By:Date

e) Staff ratio change _____

f) Other _____

12. The placement of this teacher on unrequested leave is consistent with the board's resolution reducing staff, and the relation between the two actions can be explained as follows: (e.g. the board's resolution calls for a reduction of 3 secondary French and 3 secondary German sections throughout the district. This teacher is the least senior teacher teaching those subjects, and is not licensed to teach anything else.)
- _____
- _____
- _____

13. No probationary teacher has been retained in a position for which this teacher is licensed. If this statement is not true, explain (e.g. Teacher _____, a probationary teacher, hired pursuant to the district's affirmative action program, has been retained)
- _____
- _____
- _____

- 13a. No teacher holding only a provisional license has been retained in a position for which this teacher is fully licensed. This requirement does not apply to vocational education licenses. If this statement is not true, explain.
- _____
- _____
- _____

14. No continuing contract teacher having less seniority has been retained in a position for which the teacher is licensed. If this statement is not true, explain.
- _____
- _____
- _____

- 14a. The administration has realigned the teaching staff to accommodate the seniority rights of less senior teachers to the extent that such realignment is reasonable and practical. The following factors have been considered in making such realignment:

a) The teacher's length of service _____

b) The scope and duration of the teacher's license _____

Prepared By:Date

- c) The school district's needs reflecting the welfare of the students and the public _____
- d) The ease of realignment _____

15. The order of seniority among those equal in seniority to this teacher involves the following teachers:

and has been resolved in the following way for the reasons indicated below:

15a. If the school district has entered into an education district agreement pursuant to M.S. 123A.15, et seq., a determination has been made as to whether the proposed placement on unrequested leave of absence is the result of implementing that agreement.

16. Adoption of individual board resolution proposing to place this teacher on unrequested leave.

17. Preparation of notice.

18. Service of notice and copy of resolution served on teacher:

- a) Personally _____
- b) By certified mail _____
- c) Affidavit of service, executed and filed _____

19. Written request of teacher for hearing or acquiescence.

20. Setting hearing date and place.

21. Clerk's notice of board meeting and hearing.

22. Board resolution of unrequested leave placement by acquiescence of teacher and no hearing requested.

- a) Notice sent to teacher _____
- b) Copy sent to teacher _____
- c) Affidavit of service executed and filed _____

23. Where hearing is requested:

- a) Hearing officer and _____
- b) Court reporter hired who? _____
- c) Witnesses subpoenaed if any _____

Prepared By:Date

d) School board witnesses

Name and Position

e) The teacher witnesses

Name and Position

f) Preparation for hearing:

1) Seniority and licensure confirmation updated _____

2) Testimony of witnesses prepared _____

3) Exhibits and documents
assembled and numbered _____

24. The hearing itself and board decision:

a) Testimony received _____

b) Hearing officer submits findings
and conclusions _____c) Board's consideration of hearing
officer's report _____d) Preparation of resolution containing
findings of fact and decision _____e) Vote: "Majority Roll Call vote of the
entire membership of the board."1) Names of board members in favor of leave
placement:

2) Names of board members opposed to leave
placement:

f) Notice and copy of resolution served on teacher

1) Personally _____

2) Affidavit of Service prepared
and filed _____g) If teacher is not placed on unrequested leave an
appropriate decision is entered in board minutes.

FORM NO. 1

Member _____ introduced the following resolution and moved its adoption:

RESOLUTION PROVIDING BASIS FOR CHOICE
BETWEEN TEACHERS OF EQUAL SENIORITY FOR
THE PURPOSE OF DETERMINING ORDER OF
UNREQUESTED LEAVE PLACEMENT PURSUANT
TO M.S. SEC. 122A.40, SUBD. 11(b).

WHEREAS, the school board and the exclusive representative have been unable to reach a negotiated agreement as to order of leave placement pursuant to M.S. Sec. 122A.40, Subd. 11(b), and

WHEREAS, it is necessary to provide a basis for choice in such cases,

NOW THEREFORE, until further action of the board, or until a negotiated understanding on the matter is reached, the following basis in cases of equal seniority for purposes of unrequested leave placement may be applied in the school board's discretion:

1. Full-time is senior to part-time: A teacher who in the year of proposed leave placement occupies a full-time full school year position, including one who is on authorized requested leave of absence, shall be deemed senior to one placed on leave from a less than full-time, full year position.
2. Academic relationship to remaining staff positions: A teacher whose experience in the district in the year of proposed unrequested leave placement is more closely associated with a remaining position in the determination of the board, shall be deemed more senior than one whose experience is less closely associated with the remaining position.
3. Extra-duty is senior: A teacher who in the year of proposed leave placement has an extra-duty or extra-curricular or athletic or similar assignment, to which the board in its discretion, prefers to reassign him, shall be deemed more senior than one not so assigned.
4. Five year experience is senior: A teacher having experience for at least one full school term, in the district in more licensure classifications, within the five years including the year of proposed leave placement, shall be deemed more senior than one having experience in fewer licensure classifications. As between teachers, one having such experience in more licensure classifications in which he has a major license shall be deemed senior to one having such experience in fewer licensure classifications in which he has a major license.
5. School program competency and evaluation: A teacher whose retention in the determination of the board would result in a more efficient, economic or flexible school program or schedule, or because of competency and better evaluations, than retention of another teacher, shall be deemed more senior than the other.
6. School district needs: Any demonstrable basis having a reasonable relation to a legitimate educational interest of this school district, individually, case by case.
7. Other: _____

The motion for the adoption of the foregoing resolution was duly seconded by Member _____ and upon vote being taken thereon, the following voted in favor thereof:

and the following voted against:

whereupon said resolution was declared duly passed and adopted.

FORM NO. 2

NOTICE REGARDING SENIORITY AND LICENSURE

NOTICE is hereby given to all professional employees of Independent School District No. _____ required to be licensed as follows:

1. On _____, 20____, the school district promulgated a tentative seniority and licensure list for teachers in the district.
2. A copy of the tentative list is posted on the _____ bulletin board in each schoolhouse of the district and has been given to the exclusive representative of each employee group.
3. If after reviewing the tentative seniority list, a teacher believes the tentative seniority and licensure is in error in any respect, he or she shall submit detailed objections in writing to the school district office no later than January 25 at 4:30 p.m.
4. Failure by any teacher to object within said time period, shall be deemed a waiver of any objection. The final seniority list will be a factor in any staff reductions that may be necessary and shall continue in effect until modified in subsequent school years.
5. Any teacher who, with knowledge of the true facts, fails to call to the attention of the administration any mistakes in any seniority and licensure list or information which would affect such teacher's placement on the list as it applies to him or her may be subject to appropriate discipline which may include discharge.
6. On ____ (Date) ____ or as soon thereafter as possible, a final seniority list incorporating any change in the original list resulting from errors or additional information shall be posted and distributed as provided in No. 2. The school board reserves the right at any time, to add to or delete from the list of licenses of any teacher, a licensure listing which is made effective, or ineffective, respectively, after the promulgation of the final seniority list.
7. Any teacher having a new licensure pending by ____ (Date) ____ of any year (Jan. 1 suggested) shall notify the school district administration in writing no later than ____ (Date) ____ (Jan. 15 suggested) at 4:30 p.m. on a form available for the purpose. Failure to notify the school district administration office of pending new licensure by ____ (Date) ____ (same date as in line 2) shall be deemed a waiver of any objection involving the new licensure should such teacher's seniority and licensure be a factor in any staff reduction that may be necessary. Such notice is intended to assist the school district in staff planning. It is not a substitute for the copy of the actual license itself. It is the obligation of each individual teacher to file for record his most current teacher's license. The school district is not obligated to recognize a teacher's licensure classification unless it is included on his most recent license filed for record with the school district administration office.
8. Even when a notice of pending licensure has been received, additional licensures filed on or after March 1 of any year shall not be taken into account in making staff reductions in that year.

Note: This date may vary according to the administrative needs of the district, but in no event should it be later than March 10 to allow time to complete the statutory procedures, if necessary, by July 1.

Dated this _____ day of _____, 20____.

By order of the School Board:

By: _____

Title: _____

FORM NO. 3

DATE: _____

CONTINUING CONTRACT TEACHER
(TENTATIVE/FINAL) SENIORITY LIST

1. This list is intended to reflect the first day of most recent continuous service in the district and major and minor licenses filed of record with the school district office as of _____ (Date) _____, 20__ (Jan. 1 suggested).
2. Time off for leave of any kind authorized by the school district shall not be deemed to be a break in continuous service.
3. (AA) After a name, indicates hired pursuant to the school district's affirmative action program.
4. Expiration refers to license expiration. A license expires July 1 in the year indicated, unless otherwise indicated.

NO.	NAME	FIRST DAY	CURRENT VALID LICENSURE M:MAJOR m:MINOR	EXPIRATION	CURRENT GENERAL ASSIGNMENT
2	A___ B___	9/1/43	M=English m= Math	Life 1976	6 Sections 11th Grade English
1	C___ D___	9/1/42	M=Elementary	Life	4th Grade
3-5	E___ F___	9/1/44	M=Elementary	Life	2nd Grade
3-5	G___ H___	9/1/44	M=Elementary	Life	5th Grade
3-5	I___ J___	9/1/44	M=Elementary	Life	3rd Grade
6	K___ L___	9/1/45	M=Elementary	Life	Grade
100	Y___ Z___	9/1/70	M=Math	1977	6 Sections 10th Grade Math

NOTE: A tie exists with each of the 3-5 categories.

FORM NO. 4

DATE: _____

PROBATIONARY TEACHER LIST
(For administrative purposes only)

1. This list is intended to reflect the first day of most recent continuous service in the district and major and minor licenses filed of record with the school district office as of _____ (Date) _____, 20____ (Jan. 1 suggested).
2. Time off for leave of any kind authorized by the school district shall not be deemed to be a break in continuous service.
3. (AA) After a name, indicates hired pursuant to the school district's affirmative action program.
4. Expiration refers to license expiration. A license expires July 1 in the year indicated, unless otherwise indicated.
5. Continuing contract year indicates when the named teacher will acquire continuing contract rights in the district, if not notified of non-renewal on or before June 30, of the year shown.

CONTINUING CONTRACT YEAR	NAME	FIRST DAY	CURRENT VALID LICENSURE M=MAJOR m=MINOR	EXPIRATION	CURRENT GENERAL ASSIGNMENT
1975	M____ N____	9/1/74	M=English m= Math	1976 1977	3 Sections, 9th Grade English; 3 Sections, 9th Grade Math
1976	O____ P____ (AA)	9/1/74	M=Elementary	1976	4th Grade

FORM NO. 5

NOTICE OF PENDING LICENSURE

TO SCHOOL DISTRICT OFFICE:

This is to notify you that I have pending an application for licensure in the following license classification(s), for which I am not now licensed:

My best estimate of the date this
license will be issued is:

MAJOR:

MINOR:

Date: _____, 20____.

Teacher

This form must be filled out and returned to the school district Personnel Office no later than (Date, Jan. 15, _____ suggested) for all current applications for new licenses which are pending.

Failure to notify the Personnel Office of pending applications for new licenses by _____ shall be deemed a waiver of any objection involving the new licensure should your seniority and licensure be a factor in any staff reduction that may be necessary.

This notice is intended to assist the school district in staff planning. It is not a substitute for the copy of the license itself. It is the obligation of each individual teacher to file for record his most current teacher's license. The school board will not recognize a teacher's licensure classification unless it is included on his most recent license filed for record with the school district.

FORM NO. 6

Member _____ introduced the following resolution and moved its adoption:

RESOLUTION DIRECTING THE ADMINISTRATION
TO MAKE RECOMMENDATIONS FOR REDUCTIONS
IN PROGRAMS AND POSITIONS AND REASONS
THEREFOR.

* WHEREAS, the financial condition of the school district dictates that the school board must reduce expenditures immediately, and

** WHEREAS, there has been a reduction in student enrollment, and,

WHEREAS, this (reduction in expenditure*) and (decrease in student enrollment**) must include discontinuance of positions and discontinuance or curtailment of programs, and

WHEREAS, a determination must be made as to which teachers' contracts must be terminated and not renewed and which teachers may be placed on unrequested leave of absence without pay or fringe benefits in effecting discontinuance of positions,

BE IT RESOLVED, by the School Board of Independent School District No. _____, as follows:

That the School Board hereby directs the Superintendent of Schools and administration to consider the discontinuance of programs or positions (to effectuate economies in the school district and reduce expenditures*) and, (as a result of a reduction in enrollment**), make recommendations to the school board for the discontinuance of programs, curtailment of programs, discontinuance of positions or curtailment of positions.

The motion for the adoption of the foregoing resolution was duly seconded by Member _____ and upon vote being taken thereon, the following voted in favor thereof:

and the following voted against the same:

whereupon said resolution was declared duly passed and adopted.

NOTE:

* To be used where decrease in expenditures is reason.

** To be used where decrease in enrollment is reason.

FORM NO. 7

Member _____ introduced the following resolution and moved its adoption:

RESOLUTION DISCONTINUING AND REDUCING
EDUCATIONAL PROGRAMS AND POSITIONS

WHEREAS, the School Board of Independent School District No. _____ adopted a resolution on _____, 20____, directing the administration to make recommendations for reductions in programs and positions, and

WHEREAS, said recommendations have been received and considered by the school board,

BE IT RESOLVED, by the School Board of Independent School District No. _____, as follows:

That the following programs and positions, or portions thereof, be discontinued:

1. _____
2. _____
3. _____
4. _____
5. _____

The motion for the adoption of the foregoing resolution was duly seconded by Member _____ and upon vote being taken thereon, the following voted in favor thereof:

and the following voted against:

whereupon said resolution was declared duly passed and adopted.

FORM NO. 8

Member _____

introduced the following resolution and moved its adoption:

RESOLUTION RELATING TO THE TERMINATION
AND NONRENEWAL OF THE TEACHING CONTRACT
OF _____, A
PROBATIONARY TEACHER.

WHEREAS, _____ is a probationary teacher in Independent School District No. _____.

BE IT RESOLVED, by the School Board of Independent School District No. _____, that pursuant to Minnesota Statutes 122A.40, Subdivision 5, that the teaching contract of _____, a probationary teacher in Independent School District No. _____, is hereby terminated at the close of the current 20____ - _____ school year.

BE IT FURTHER RESOLVED that written notice be sent to said teacher regarding termination and non-renewal of his/her contract as provided by law, and that said notice shall be in substantially the following form:

NOTICE OF TERMINATION
AND NON-RENEWAL

Mr./Ms. _____

Dear Mr./Ms. _____:

You are hereby notified that at a _____ meeting of the School Board of Independent School District No. _____ held on _____, 20____, a resolution was adopted by a majority roll call vote to terminate your contract effective at the end of the current school year and not to renew your contract for the 20____ - _____ school year. Said action of the board is taken pursuant to M.S. 122A.40, Subd. 5.

You may officially request that the school board give its reasons for the non-renewal of your teaching contract. For your information, however, this action is taken because of (insert appropriate grounds for termination and non-renewal) (the discontinuance of your position; namely, a _____ teacher in the _____) (the financial condition of the school district) (decrease in enrollment) (merger of classes caused by consolidation).

Yours very truly,

SCHOOL BOARD OF
INDEPENDENT SCHOOL DISTRICT NO. _____

Clerk of the School Board

The motion for the adoption of the foregoing resolution was duly seconded by
_____ and upon vote being taken thereon, the

following voted in favor thereof:

and the following voted against the same:

whereupon said resolution was declared duly passed and adopted.

FORM NO. 9

Member _____ introduced the following
resolution and moved its adoption:

RESOLUTION PROPOSING TO PLACE

ON UNREQUESTED LEAVE OF ABSENCE

BE IT RESOLVED by the School Board of Independent School District No. _____, as follows:

1. That it is proposed that _____, a teacher of said school district, be placed on unrequested leave of absence without pay or fringe benefits, effective at the end of the 20____ - ____ school year on June 30, 20____, pursuant to M.S. 122A.40, subdivision 11*.

(If the school district has entered into an education district agreement pursuant to M.S. 123A.15, et seq., the following paragraph must be included in the resolution:

2. That said proposed placement on unrequested leave of absence (is) (is not) the result of the implementation of an education district agreement.)

3. That written notice be sent to said teacher regarding the proposed placement on unrequested leave of absence without pay or fringe benefits as provided by law and said notice shall include a date for hearing if requested and be in substantially the following form:

NOTICE OF PROPOSED PLACEMENT
ON UNREQUESTED LEAVE OF
ABSENCE AND NOTICE OF HEARING
DATE, IF REQUESTED

Dear Mr./Ms. _____:

You are hereby notified that at the _____ meeting of the School Board of Independent School District No. ____ held on _____, 20____, consideration was given to your placement on unrequested leave of absence without pay or fringe benefits as a teacher of Independent School District No. _____, and a resolution was adopted by a majority vote of the Board, proposing your placement on unrequested leave of absence effective at the end of the 20____ - ____ school year on June 30, 20____, pursuant to Minnesota Statutes 122A.40, subdivision 11* upon the grounds described in said statute and which are specifically as follows (include appropriate grounds):

Discontinuance of Position, Lack of Pupils and
Financial Limitations, and
Merger of Classes Caused by Consolidation.

(If the school district has entered into an education district agreement pursuant to M.S. 123A.15, et seq., the following paragraph must be included in the notice:

Your proposed placement on unrequested leave of absence (is) (is not) the result of the implementation of an education district agreement.)

Under the provisions of the law, you are entitled to a hearing before the school board provided that you make a request in writing within fourteen days after receipt of this notice. If no hearing is requested within such period, it shall be deemed acquiescence by you to the school board's proposed action.

(If time is of the essence, the following paragraph may be inserted in said notice:

If you desire a hearing, it will be held on _____, 20____, at _____ o'clock __.m. in the school board room or as soon thereafter as you can be heard. Please advise if such hearing is requested.)

Yours very truly,

SCHOOL BOARD OF
INDEPENDENT SCHOOL DISTRICT NO. _____

Clerk of the School Board

4. That each and all of the foregoing grounds of said notice are within the grounds for unrequested leave placement as set forth in M.S. 122A.40, subdivision 11* and are hereby adopted as fully as though separately set forth and resolved herein.

The motion for the adoption of the foregoing resolution was duly seconded by

Member _____ and upon vote being taken thereon, the

following voted in favor thereof:

and the following voted against the same:

whereupon said resolution was declared duly passed and adopted.

* Note: If proposed placement is pursuant to M.S. Sec. 122A.40, Subd. 10, insert at the asterisk "10" instead of "11" and also the reference to the specific article and/or section of the collective bargaining agreement, which contains the unrequested leave of absence plan. Example: Minnesota Statutes, Section 122A.40, subdivision 10 and Article _____, Section _____ of the current Master Agreement between the School District and the exclusive representative.

FORM NO. 10

Member _____ introduced the following
resolution and moved its adoption:

RESOLUTION PLACING _____
ON UNREQUESTED LEAVE
OF ABSENCE

WHEREAS, the School Board of Independent School District No. ____ adopted a resolution proposing placement of _____ on unrequested leave of absence on _____, 20____, on the grounds of _____; and

WHEREAS, said written notice of the proposed placement on unrequested leave was received by _____ by certified mail (or personal service) on _____, 20____, and

WHEREAS, said written notice of the proposed placement on unrequested leave contained a statement setting forth the reasons for the proposed placement as well as a statement that he (she) was entitled to a hearing before the school board provided he (she) make a request in writing within fourteen days of receipt of said notice, and that if no hearing was requested within said fourteen day period it constituted acquiescence by _____ to the school board's proposed action, and

WHEREAS, no written request of any kind was received by the school board or superintendent of schools from _____ for a hearing as of _____, 20____, and

WHEREAS, said failure to make written request for a hearing within fourteen days after receipt of notice of proposed placement on unrequested leave constitutes acquiescence by _____ to his (her) placement on unrequested leave.

BE IT HEREBY RESOLVED, by the School Board of Independent School District No. ____ that _____ be and hereby is placed on unrequested leave of absence as a teacher of Independent School District No. ____ on the grounds of _____ effective at the end of the 20____ - ____ school year on June 30, 20____ pursuant to Minnesota Statutes, Sec.122A.40, Subd. 11*, without pay or fringe benefits.

(If the school district has entered into an education district agreement pursuant to M.S. 123A.15, et seq., the following paragraph must be included:

BE IT FURTHER RESOLVED that said placement on unrequested leave of absence (is) (is not) the result of the implementation of an education district agreement.)

BE IT FURTHER RESOLVED, that a notice of placement on unrequested leave, together with a copy of this resolution be forwarded to said teacher personally and that an affidavit of same be placed in his/her file, together with a copy of the notice and resolution.

The motion for the adoption of the foregoing resolution was duly seconded by

Member _____ and upon vote being taken

thereon, the following voted in favor thereof:

and the following voted against the same:

whereupon said resolution was declared duly passed and adopted.

* Note: If proposed placement is pursuant to M.S. Sec. 122A.40, Subd. 10, insert at the asterisk "10" instead of "11" and also the reference to the specific article and/or section of the collective bargaining agreement, which contains the unrequested leave of absence plan. Example: Minnesota Statutes, Section 122A.40, subdivision 10 and Article _____, Section _____ of the current Master Agreement between the School District and the exclusive representative.

FORM NO. 11NOTICE OF PLACEMENT ON
UNREQUESTED LEAVE OF ABSENCE

_____, 20 ____

Mr./Mrs./Miss/Ms. _____

Dear _____:

You are hereby notified that at a _____ meeting of the School Board of Independent School District No. _____, held on _____, 20____, a resolution was adopted by majority roll call vote of the full membership of the School Board, placing you on unrequested leave of absence as a teacher of Independent School District No. _____ effective at the end of the 20____ - ____ school year on June 30, 20____, pursuant to Minnesota Statutes, Sec. 122A.40, Subd. 11* without pay or fringe benefits.

(If the school district has entered into an education district agreement pursuant to M.S. 123A.15, et seq., the following paragraph must be inserted in the notice:

Your placement on unrequested leave of absence (is) (is not) the result of the implementation of an education district agreement.)

A copy of the resolution duly adopted by the School Board is attached hereto for your information.

If a position becomes available in a field in which you are licensed, at any time up to 5 years after your leave is effective, you may have a right to reinstatement to that position if you have sufficient seniority in the district and if you filed a written request for reinstatement prior to April 1 of each year while you are on leave. If you do not file such a request each year, your right to reinstatement will be automatically terminated.

Please keep the school district's personnel office advised in writing of your address at all times until your rights have expired, so that the district may notify you of any available positions for which you may qualify.

Yours very truly,

SCHOOL BOARD OF INDEPENDENT
SCHOOL DISTRICT NO. _____By: _____
Clerk of the School Board

* Note: If proposed placement is pursuant to M.S. Sec. 122A.40, subdivision 10, insert at the asterisk "10" instead of "11" and also the reference to the specific article and/or section of the collective bargaining agreement, which contains the unrequested leave of absence plan. Example: Minnesota Statutes, Section 122A.40, subdivision 10 and Article _____, Section _____ of the current Master Agreement between the School District and the exclusive representative.

FORM NO. 13

REINSTATEMENT LIST

All Teachers Placed on Unrequested Leave Including Probationary Teachers If So Placed.

The teachers are listed in the order of their first day of most recent continuous employment in the school district. Reinstatement to a position from which a teacher has been placed on unrequested leave, or if not available, to another available position in the school district in a field in which he is licensed (or additional qualifications if required under collective bargaining agreement) shall be made on the basis of seniority and licensure (and any additional qualifications required under contract), or in other words, the most senior teacher on unrequested leave who has filed the proper license and fulfills all other qualifications, if any, for the position is entitled to reinstatement. Op. Att'y Gen. (Aug. 12, 1985). See Matter of Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987).

The names of teachers whose reinstatement rights have terminated, either due to the expiration of the five year reinstatement period or failure to file a written request for reinstatement by April 1st of any year, should be removed from the reinstatement list.

NOTE: A school district may but need not place probationary teachers on unrequested leave of absence. If this is done, they are to be considered for reinstatement on the basis of seniority and licensure.

		First Day of Most Recent Con- tinuous Service	Current Valid Licensure <u>M=Major, m=Minor</u>
1.	A _____ B _____	9/1/74	
2.	C _____ D _____	9/1/78	
3.	E _____ F _____	9/1/79	
4.	G _____ H _____	9/1/82	

FORM NO. 14

Member _____ introduced the following
resolution and moved its adoption:

RESOLUTION ANNOUNCING AVAILABILITY
OF POSITIONS.

BE IT RESOLVED, by the School Board of Independent School District No. _____ ,
as follows:

1. That the following specific positions are declared to be available:

1. _____

2. _____

3. _____

2. That Reinstatement rights to the above positions shall be determined as of
_____, 20____ .

3. That the superintendent and the administration are directed to notify the appropriate
persons on the reinstatement lists of the availability of the positions.

Member _____ seconded the foregoing resolution and
upon vote being taken thereon, the following voted in favor thereof:
and the following voted against:

whereupon said resolution was declared duly passed and adopted.

FORM NO. 15

NOTICE OF AVAILABILITY OF POSITIONS

_____, 20____.

TO:

This is to notify you that the following position has become available:

Our records indicate that you are properly licensed to fill this vacancy and have reinstatement rights to this position.

Please advise the School District office in writing, which must be received in the School District office within 30 days of delivery of this letter, whether you will assume the duties of this position. The Board has determined that the duties of the position commence on _____.

While you have every right to use the full 30 days to make your decision, if you make your decision earlier, a prompt reply would be appreciated by the School District and by others who may be affected by your decision.

If you should have any questions, please contact the undersigned.

Sincerely,

FORM NO. 16

NOTICE OF PROPOSED REINSTATEMENT

Dear _____:

You are hereby notified that the following position has become available: (position). The School District proposes to (reinstate)(hire) (name) to fill the position. In filling this position, the School District has considered all potential realignments and has determined that there is no reasonable realignment which would enable you to reinstatement.

If you wish to challenge this determination, you may do so in a hearing before the School Board, provided you make a request for such a hearing in writing within ten (10) days after receipt of this notice. In the event that no hearing is requested within such period, it shall be deemed acquiescence by you to the proposed (reinstatement)(hiring) of the above-named individual.

(If time is of the essence, the following paragraph may be inserted in the notice:

If you request a hearing, it will be held in the School Board room on _____, 20____, at _____ o'clock __.m. room _____ or as soon thereafter as can be heard).

Yours very truly,

 Superintendent of Schools

FORM NO. 17

Member _____ introduced and moved the adoption of
the following:

RESOLUTION PROVIDING BASIS FOR
DIFFERENTIATION IN CASES OF EQUAL SENIORITY
FOR PURPOSES OF REINSTATEMENT
FROM UNREQUESTED LEAVE.

WHEREAS, the following items shall be applied in order to choose between teachers of equal seniority for purposes of reinstatement, no negotiated understanding having been reached on this point,

BE IT RESOLVED, by the School Board of Independent School District No. _____, as follows:

1. A teacher placed on unrequested leave from a full-time position, including one who had been on authorized requested leave from such a position shall be deemed senior to one placed on leave from a less than full-time position.
2. A teacher whose experience in the year of unrequested leave placement in the district is more closely associated with the available position in the determination of the board shall be deemed more senior than one whose experience is less closely associated with the available position.
3. A teacher, who in the year of unrequested leave placement has been assigned to one extra-duty assignment, for which he, in the determination of the board remains the best qualified shall be deemed senior to one who had not been so assigned, or is not so qualified.
4. A teacher having experience (for at least one full school term) in more licensure fields, within the five years including the year of unrequested leave placement, within the district shall be deemed more senior than one having experience in fewer licensure fields. As between teachers having such experience in an equal number of licensure fields, one having such experience in more major licensure fields shall be deemed senior to one having experience in fewer licensure fields.
5. A teacher whose appointment to an available position in the determination of the board, would result in a more efficient, economic or flexible school program or schedule than another, or has had higher evaluation and competency, shall be deemed more senior than the other.
6. Any demonstrable basis having a reasonable relation to a legitimate educational interest of this district, individually, case by case.
7. Other: _____

The motion for the adoption of the foregoing resolution was duly seconded by

Member _____ and upon vote being taken thereon, the
following voted in favor thereof:

and the following voted against the same:

whereupon said resolution was declared duly passed and adopted.

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

EQUAL ACCESS ACT
Revised September 2014

Prepared by:

KNUTSON, FLYNN & DEANS. - COUNSEL FOR
MINNESOTA SCHOOL BOARDS ASSOCIATION

1. INTRODUCTION.

The first amendment to the United States Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .” Conflicts between the “establishment” clause and the free speech or free exercise clauses have often erupted in the nation’s public schools.

Balancing this conflict, some federal courts have held that the Constitution prohibits public schools from allowing students to hold meetings on school premises for religious purposes. See, e.g., Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cer. den., 454 U.S. 1123 (1981) Rehearing denied 455 U.S. 983 (1982). Responding to decisions such as Brandon, in 1984 Congress passed the Equal Access Act. There are certain obligations that the Act places on schools of which school districts should be aware.

2. TEXT OF THE EQUAL ACCESS ACT - 20 U.S.C. Subsections 4071-4074.

SEC. 4071. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that –

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof –

- (1) to influence the form or content of any prayer or other religious activity;
- (2) to require any person to participate in prayer or other religious activity;
- (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
- (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
- (5) to sanction meetings that are otherwise unlawful;
- (6) to limit the rights of groups of students which are not of a specified numerical size; or
- (7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

3. DEFINITIONS UNDER THE EQUAL ACCESS ACT.

- A. The term “secondary school” means a public school that provides secondary education as determined by State law. Under Minnesota law, “secondary school means a school containing pupils enrolled in grades seven through twelve.”
- B. The term “sponsorship” includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.
- C. The term “meeting” includes those activities of student groups that are permitted under a school’s limited open forum and are not directly related to the school curriculum.
- D. The term “noninstructional time” means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

4. DISCUSSION OF THE EQUAL ACCESS ACT.

- A. Essentially, if a public secondary school receives federal financial assistance and has a limited open forum, then the Act requires the school to give equal access to all student groups to meet within that limited open forum regardless of the religious, political, philosophical, or other content of the groups’ speech. A “limited open forum” occurs whenever a school gives one or more “noncurriculum related student groups” the opportunity to meet on school premises during noninstructional time.
- B. The Act does not require public schools to have a “limited open forum” for student groups to meet. Thus, a school district is free to decide that student groups will not be allowed to use the school premises for meetings because of perceived difficulties in administering the forum and a potential for controversy. If this is the policy, then there is no limited open forum and the Act does not apply.

Other school districts may choose to have a limited open forum because of the perceived benefits for the community and for the students. Once a limited open forum has been established, however, equal access must be given to all student groups. If a school board consciously chooses not to have a limited open forum, or if a school board makes no choice, it is still possible for a limited open forum to be created as a matter of practice or by making limited “exceptions to the general rule.” Student Coalition for Peace v. Lower Merion School District, 776 F.2d 431, 433 (3d Cir. 1985). Even if a limited open forum is established, however, it can be discontinued at a later time. Student Coalition for Peace, *supra* at 442-443; Pope by Pope v. East Brunswick Board of Education, 12 F.3d 1244, 1254 (3d Cir. 1993).

- C. The Act does not require schools having a limited open forum actually to give access to *all* groups. What is required is that all noncurriculum related student groups be given the same *opportunity* for access on a nondiscriminatory basis. For example, the legislative history of the Act indicates that if more groups want to meet than there are rooms available, the rooms could be assigned on a first-come, first-served basis.

The courts have held that student groups wishing to invite non-students on to school property are protected by the Act if the school’s limited open forum encompasses non-student participation in student events, as long as those non-students do not direct, conduct, control or regularly attend such activities. The school is not required to permit any and all outsiders to use its facilities, or even to permit student groups indiscriminately to invite outsiders to its activities. The purpose of the Act is to enable all students to use the facilities on the same terms as all other students. If the school’s limited open forum includes non-student participation, then non-student participation must be permitted for all such student groups subject to reasonable and nondiscriminatory regulation. Student Coalition for Peace, *supra* at 442.

- D. The Act applies to public schools, which are defined as public schools that provide secondary education “as determined by State law.” Minnesota law specifies that secondary schools are those containing pupils enrolled in grades seven through twelve. See M.S. 120A.05, Subd. 13.
- E. The Act also does not define the circumstances under which a school receives federal financial assistance. It is unclear whether the Act will apply only when the school itself uses some federal funds, or if it will apply whenever the school district receives federal money. Some courts have indicated that a school receives federal financial assistance whenever the district itself receives federal funds. See, e.g., Sanders v. Marquette Public Schools, 561 F.Supp. 1361 (W.D. Mich. 1983).
- F. The Act specifies that a school has a “limited open forum” whenever the school gives one or more “noncurriculum related student groups” the opportunity to meet on school premises during noninstructional time. Perhaps the most difficult question in applying the Act is the determination of whether a student group is curriculum related or not. The Act does not define the term “noncurriculum related student groups.”

Minnesota law defining co-curricular and extracurricular activities may also offer some guidance, although it will not determine how the federal law will be interpreted in the courts. See M.S. 123B.49, which generally defines co-curricular activities as those allowing students an opportunity to improve their skills under the direction of school staff, and extracurricular activities as services for students that are offered under the guidance of a staff member or other adult.

- G. In Mergens v. Board of Education of the Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989), cert. granted, 492 U.S. 917, 109 S.Ct. 3240 (1989), aff'd, 496 U.S. 226, 110 S.Ct. 2356 (1990) the Eighth Circuit Court of Appeals ruled that a public school district could not prohibit the formation and meeting within the school building of a Christian Bible Club. The students involved argued that the school had created a limited open forum, citing ten student groups or clubs which had been allowed the use of school premises to meet. The school attempted to show that each of these clubs was curriculum-related. The school attempted to do so by relating the chess club to the curriculum because the chess club fostered critical thinking and logic, and by attempting to relate a service club peripherally connected to Rotary International to the curriculum by stating that the service club related to the goals of sociology and psychology.

The Eighth Circuit U.S. Court of Appeals held that to allow such a broad interpretation of “curriculum-related” would make the EAA meaningless. By allowing a school’s administration to declare that it maintains a closed forum and to choose those clubs it allows to meet by tying the purpose of the club to some broadly defined educational goal, the administration could arbitrarily deny access to school facilities to an unfavored student club on the basis of its speech content. The Court of Appeals stated that this was exactly the result Congress sought to prohibit enacting the EAA.

The United States Supreme Court defined the term in Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226, 110 S.Ct. 2356 (1990). The Court Stated

...the term “noncurriculum related student group” is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

Id. at 496 U.S. 240, 110 S.Ct. 2366 (emphasis in original). The Court went on to note that the French Club and the school’s student government constitute curriculum related classes. Similarly, if participation in band or orchestra was required for band or orchestra classes or resulted in academic credit, it would be considered a curriculum related class. However, groups such as chess clubs, a stamp collecting club, or a community service club would not ordinarily be considered a curriculum related class.

Mergens remains the leading case interpreting the Equal Access Act.

Courts have applied the reasoning of Mergens in cases which did not fall within the Equal Access Act. See e.g., Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir. 1990); cert. den., 498 U.S. 899, 111 S.Ct. 253 (1990) (public school could not refuse to rent auditorium to student Christian group when it had created limited public forum by renting auditorium to other community organizations).

A school district may not prohibit a student religious group from equal access to school facilities on the basis that the student group required that officers who would conduct the meetings of the student group be professed Christians, thus discriminating against members of other religions, or non-religious students, in violation of the school district’s nondiscrimination policy. When an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive content of the meetings, a school’s decision to

deny recognition to the club because of the exclusion is a decision based on the content of the speech at the meetings. HSU v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2nd Cir. 1996), cert. den. Subnom. Roslyn Union Free School District No. 3, 519 U.S. 1040, 117 S.Ct. 608, (1996).

However, the Ninth Circuit Court of Appeals has held that a school district did not violate the Act when it required a religious club to remove Christian-based membership restrictions prior to granting its recognition. Truth v. Kent, 542 F.3d 634 (9th Cir. 2008), overruled on other grounds by L.A. Cnty, Cal. V. Humphries __U.S.__, 131 S.Ct. 447 (U.S. 2010). In that case, the court clarified that the nonrecognition of the group was not a restriction on speech or religion, but instead was in accord with HSU v. Roslyn Union Free School District No. 3 that any religious test for membership or participation violates the Act. Moreover, the membership requirements violated the school district's content neutral, nondiscrimination policies because it excluded non-Christians. Id. at 642.

The Act only applies to meetings that are student initiated, at which attendance is voluntary, and which occur outside of the instructional day during the "limited open forum." However, student initiation of clubs or other groups is not a requirement for triggering the Equal Access Act. Clubs or other groups that are initiated by faculty may also trigger the creation of an open forum thus making the Equal Access Act applicable to the school. The Act says that the limited open forum occurs during "noninstructional time," which is time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. Noninstructional time can include a lunch period where no classroom instruction occurs and where other voluntary, noninstructional student clubs meet during the lunch period. Such noninstructional time occurs after actual classroom instruction ends for the morning session and before actual classroom instruction begins for the afternoon. However, a school may prohibit all noncurriculum-related groups from meeting at lunch time. Ceniceros v. Board of Trustees of the San Diego Unified School District, 106 F.3d 878 (9th Cir. 1997). Actual classroom instructional time may include a scheduled class where attendance is taken, and where no formal classroom instruction takes place, except on a voluntary, individual basis. During this time a student may work on homework, receive one-on-one tutoring, attend school assemblies, or, with prior arrangement and scheduling, participate in a student club meeting. A school is not required to allow a religious student group to meet during this time since the time period does not qualify as noninstructional time. Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002), cert. den. 540 U.S. 813, 124 S.Ct. 62 (2003).

In Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91 (E.D.N.Y. 1991), a federal district court made clear that the Equal Access Act applies only to student-conducted activities and does not extend to nonstudent religious activities. Reversing the lower court decision, the United States Supreme Court did not consider the EAA but ruled on First Amendment grounds that a church could use school facilities to show a film. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S.Ct. 2141 (1993).

Student distribution of religious tracts at school did not fall within the scope of conduct protected by the Equal Access Act since the activity was not a "meeting." Clark v. Dallas Indep. Sch. Dist., 806 F.Supp. 116 (N.D. Tex. 1992).

- H. Neither the school nor its employees may sponsor these meetings, although school employees may be present to ensure proper discipline and order. In fact, a school district may have a legal obligation to have school employees present as supervisors to provide for student safety. See generally School Law Bulletin on Liability of Principals and Administrators.

- I. The Act also does not specify whether meetings during the limited open forum can be announced over the school public address system, in the school newspaper, or on school bulletin boards. However, in Mergens, the student group sought “equal access” to the school’s limited open forum in the form of official recognition by the school which allowed student clubs to be part of the student activities program with access to the school public address system, the school newspaper and school bulletin boards. The U.S. Supreme Court held in Mergens that the school’s denial of the students’ request to form a Christian club denied them “equal access” under the Act. A school district would be required to afford high school religious student groups equal access to the school’s public address system and bulletin boards used by other groups to publicize their activities. Denial of access to a student body fund which is not raised from public money and which is accounted for separately from general school district funds would also violate the Equal Access Act. Prince v. Jacoby, supra. A school district does not provide a “limited open forum” with respect to the time period at the beginning of the school day in which students are allowed to broadcast announcements over the public address system, such that school is required to allow student group to broadcast prayers or devotionals, where the other student clubs only make announcements. Herdahl v. Pontotoc County School District, 933 F.Supp. 582 (N.D.Miss. 1996).
- J. Meetings that occur during the limited open forum are not permitted to interfere with the school’s educational activities. Schools are permitted to adopt and enforce reasonable rules and regulations designed to assure noninterference with other activities, voluntariness of student attendance, and to maintain order and discipline in meetings that occur during the limited open forum. For example, in addition to setting aside certain rooms and a certain time period for a limited open forum, rules can be adopted that prohibit groups from engaging in illegal, dangerous, or disruptive activities. Rules or policies may not deny access to a particular student group, however, merely because the ideas which that group advocates are unpopular.
- K. Under the Act, no school employee has the right to participate in one of these student initiated meetings although, as discussed above, school employees can be present in a non-participatory capacity. Furthermore, no school employee can be compelled to attend a meeting if the content of the speech at that meeting is contrary to the employee’s beliefs. The Act does not address the question of what should be done if no school district employee can be found who is willing to supervise a particular student group.
- L. Although the Act allows students to initiate, conduct and attend meetings during the limited open forum, the Act does not give outsiders or non-school persons any right to be on school premises for these meetings. Specifically, the Act says that non-school persons may not direct, conduct, control, and regularly attend activities of students. Apparently, however, an occasional visit from a non-school person is not prohibited, and school districts retain the right to regulate access to the schools by non-school persons during the limited open forum, subject to other laws that may apply. The legislative history of the Act indicates that school districts may adopt a policy that uniformly prohibits all non-school persons from being present at these meetings.
- M. The Act does not authorize the expenditure of public funds beyond the cost of providing space for student initiated meetings. The legislative history indicates that the cost of providing space includes expenditures for heat, light, and pay to a school district employee to supervise the meetings. The Act is also silent on the question of charging a fee for rental of school facilities. If a fee is charged, presumably it should be reasonable and assessed in a nondiscriminatory manner. In Sease v. School District of Philadelphia, 811 F. Supp. 183 (E.D. Pa. 1993), black students asked permission to establish a gospel choir after school hours and asked a school employee to lead the choir. The court held that the choir was a religious activity and, thus, having a school employee as sponsor and participant violated the EAA. School boards adopting a limited open

forum may wish to review their policies on the use and rental of school facilities to be sure there is no conflict with their Equal Access policy.

In addition, the EAA has been held applicable in the following cases: antinuclear and peace exposition, School Coalition for Peace, supra; school was required to grant access to a bible club where a student service club had been granted access, Pope supra; religious club granted access during lunch period, Ceniceros, supra; Colin ex. rel. Colin v. Orange Unified Sch. Dist., 83 F.Supp.2d 1135 (C.D. Cal. 2000); “Gay-Straight Alliance Club” granted access similar to access granted to “Christian Club” and “Red Cross Key Club,” East High Gay-Straight Alliance v. Board of Educ., 81 F.Supp.2d 1166 (D. Utah 1999); Gay-Straight Alliance of Okeechobee High School v. School Bd. of Okeechobee County, 483 F.Supp.2d 1224 (S.D. Fla. 2007); Straights and Gays for Equality (SAGE) v. Osseo Area School Dist. No. 279, 471 F.3d 908 (8th Cir. 2006). Gay-Straight Alliance Club must be granted access; but see Caudillo v. Lubbock Independent School Dist., 311 F.Supp.2d 550 (N.D. Tex. 2004) (no violation of EAA when school district denied a gay student club’s request for access to pass out club flyers, use the public address system, and meet on campus).

The EAA has been held inapplicable. The distribution of a religious newspaper was not a “meeting” within the scope of the EAA. Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

Access to school facilities for non-school groups has also been required on grounds other than the EAA. A school may create a limited open public forum in which student groups are free to meet as well as to use school facilities and equipment. While not required to grant student clubs access to such benefits, where a school has chosen to do so, it cannot deny access to some student groups because of their desire to exercise their First Amendment rights without a compelling government interest that is narrowly drawn to achieve that end. Prince v. Jacoby, supra. A restriction excluding the Good News Club from meeting after hours violated the club’s free speech rights where a limited public forum had been established permitting groups to meet which promoted the moral and character development of children. Good News Club v. Milford Central School, 533 U.S. 98, 121 S.Ct. 2093 (2001).

- N. The Act contains no enforcement provisions, but it does specify that federal funds cannot be denied or withheld if the Act is violated. Possibly the Act will be enforceable in the courts under the guise of civil rights actions.
- O. The Safe & Supportive Minnesota Schools Act provides that Minnesota Department of Education (MDE) must post on its website information indicating that when districts and schools allow noncurriculum-related student groups access to school facilities, the district or school must give all student groups equal access to the school facilities regardless of the content of the group members’ speech. (M.S. 121A.031, Subd. 6(c)).**

5. SAMPLE EQUAL ACCESS POLICY.

School districts that choose to have a limited open forum should also have a written policy to help clarify how the Equal Access Act is to be implemented and administered. School boards that consciously choose not to have a limited open forum are cautioned that the Act still may apply in a given school district if a limited open forum has been created as a matter of practice.

School boards that consider adopting an Equal Access Policy are advised to consider questions of which times should be available for a limited open forum, procedures for student access to the forum, whether rental

fees should be charged, how supervisors will be assigned, and whether a limited open forum should be established at all. A sample Equal Access Policy is found in the MSBA/MASA Policy Reference Manual - Model Policy 801.

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

DUTIES OF SCHOOL DISTRICTS RELATING TO
ENFORCEMENT OF THE COMPULSORY ATTENDANCE LAWS
FOR STUDENTS WHO DO NOT ATTEND PUBLIC SCHOOLS

Revised September 2014

Prepared by:

KNUTSON, FLYNN & DEANS - COUNSEL FOR
MINNESOTA SCHOOL BOARDS ASSOCIATION

I. INTRODUCTION:

In the past several years there has been an increase in the number of private or nonpublic schools established in Minnesota and in the number of families educating their children at home. The State's compulsory school attendance law has also been amended by the legislature to include several provisions specifically authorizing education of children in home-schools and other nontraditional settings. Questions often arise as to the duties and responsibilities of a school district and its personnel as they relate to the enforcement of compulsory attendance laws for students who do not attend public schools. This law bulletin is intended to give a brief review of the relevant law in this area.

II. COMPULSORY ATTENDANCE LAW:

A. General. The Minnesota compulsory attendance law is codified as Minn. Stat. § 120A.22 to § 120A.42.

B. Age and Duration Requirements.

1. General Rules: Minn. Stat. § 120A.22, Subds. 5 provides as follows:

- (a) Every child between 7 and 16 years of age must receive instruction. Every child under the age of 7 who is enrolled in a half-day kindergarten, or a full-day kindergarten program on alternate days, or other kindergarten programs shall receive instruction. Except as provided in Subd. 6, a parent may withdraw a child under the age of 7 from enrollment at any time.
- (b) A school district by annual board action may require children subject to this subdivision to receive instruction in summer school. A district that acts to require children to receive instruction in summer school shall establish at the time of its action the criteria for determining which children must receive instruction.

NOTE: In the 2013 session, the Minnesota Legislature modified Minn. Stat. § 120A.22, Subd. 5 to state that every child between seven and 17 years of age must receive instruction unless the child has graduated.

A new subsection (c) was also added to Section 120A.22, Subd. 5 which states that a pupil 16 years of age or older who meets the criteria of section 124D.68, Subd. 2 [the Graduation Incentives statute] **and under clause (5) of that subdivision has been excluded or expelled from school or under clause (11) of that subdivision has been chronically truant**, may be **referred** to an area learning center. Such **referral** may be made only after **consulting** with the principal, area learning center director, **student** and parent or guardian **and only if, in the school administrator's professional judgment, the referral is in the best educational interest of the pupil. Nothing in this paragraph limits a pupil's eligibility to apply to enroll in other eligible programs under section 124D.68.**

These changes become effective commencing in the 2014-2015 school year.

2. Children Under Seven. Minn. Stat. § 120A.22, Subd. 6, specifically addresses children under the age of seven as follows:

- a. Once a pupil under the age of seven is enrolled in kindergarten or a higher grade in a public school, the pupil is subject to the compulsory attendance provisions of this chapter and section 120A.34, unless the board of the district in which the pupil is enrolled has a policy that exempts children under seven from this subdivision.
- b. In a district in which children under seven are subject to compulsory attendance under this subdivision, paragraphs (c) to (e) apply.
- c. A parent or guardian may withdraw the pupil from enrollment in the school for good cause by notifying the district. Good cause includes, but is not limited to, enrollment of the pupil in another school, as defined in Subd. 4, or the immaturity of the child.
- d. When the pupil enrolls, the enrolling official must provide the parent or guardian who enrolls the pupil with a written explanation of the provisions of this subdivision.
- e. A pupil under the age of seven who is withdrawn from enrollment in the public school under paragraph (c) is no longer subject to the compulsory attendance provisions of this chapter.
- f. In a district that had adopted a policy to exempt children under seven from this subdivision, the district's chief attendance officer must keep the truancy enforcement authorities supplied with a copy of the board's current policy certified by the clerk of the board.

In the 2013 session, the Minnesota Legislature modified Minn. Stat. § 120A.22, Subd. 12 to add a new subsection (b), which states that notwithstanding Minn. Stat. § 120A.22, Subd. 6 [the statute governing children under seven years old] a), a parent may withdraw a child from an all-day, every-day kindergarten program and put their child in a half-day program, if offered, or an alternate-day program without being truant. A school board must excuse a kindergarten child from a part of a school day at the request of the child's parent. This change becomes effective commencing in the 2014-2015 school year.

3. Age Requirement. The compulsory attendance law is only applicable until a student reaches the age of 16. However, if a student between 16 and 18 desires to withdraw from school, the student and the student's parent must attend a meeting with school personnel to discuss the educational opportunities available to the student, including alternative educational opportunities, and sign a written election to withdraw from school. Minn. Stat. § 120A.22, Subd. 8. If the child has not lawfully withdrawn from school, the child may be treated as a truant.

In the 2013 session, the Minnesota Legislature modified Minn. Stat. § 120A.22, Subd. 8 to state that any student who is 17 years old who seeks to withdraw from school, and the student's parent or guardian must: (1) attend a meeting with school personnel to discuss the educational opportunities available to the student, including alternative educational opportunities; and (2) sign a written election to withdraw from school. This change becomes effective commencing in the 2014-2015 school year.

4. Authority for Attendance Regulations in Public Schools. Notwithstanding the fact that a student may not be compelled to attend school beyond the age of 16, Minn. Stat. § 120A.20 grants public schools the authority to develop a reasonable set of rules governing the conduct of all secondary school pupils under the age of 21. Minn. Stat. § 121A.61 also requires school boards to establish a written district-wide school discipline policy which includes written rules of conduct for all public school pupils. Willful violation of school board rules or regulations is a ground for dismissal from a public school or public school program pursuant to Minn. Stat. § 121A.45 or for removal from class pursuant to Minn. Stat. § 121A.61.

C. Place of Instruction Requirements.

1. School Defined. For purposes of the compulsory attendance law, a "school" is defined as a public school, a nonpublic school, a church, or religious organization or a home-school. Minn. Stat. § 120A.22, Subd. 4.
2. Public or Private School. The requirements of the law may be met by attendance at either a public or private school. The rationale behind this was well-stated in Mercer v. Michigan State Board of Education, 379 F. Supp. 580 (1974), as follows:
 Parents are not compelled to send their children to public schools. They are presented with a choice. They may opt to send their children to either public or private schools. This is a choice which is protected by the Constitution. Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925). This gives the parents a degree of authority concomitant with the state and the local authorities in molding, shaping and selecting the type of education to which their children are exposed. Often the most obvious reason for choosing one over the other is a desire for sectarian or non-sectarian education.
3. Home-School. The requirements of the law may also be met by instruction of a child in a home-school, or a similar setting outside of a regular public or nonpublic school, in which the child is provided instruction in compliance with the requisite provisions of the compulsory attendance law.

- D. Curriculum Requirements [hereinafter “Required Curriculum”]. Minn. Stat. § 120A.22, Subd. 9 requires that all schools, including home-schools, provide instruction in at least the following subject areas:

1. Basic communication skills including reading and writing, literature, and fine arts;
2. Mathematics and science;
3. Social studies including history, geography, and government; and
4. Health and physical education.

The instruction, textbooks, and materials must be in the English language unless the student is enrolled in a Limited English Proficiency (LEP) program.

- E. Instructor Requirements. A person providing instruction to a child, including a person providing instruction to a child in a home-school or similar setting, is required by Minn. Stat. § 120A.22, Subd. 10, to meet *at least one* of the following requirements:

1. Hold a valid Minnesota teaching license in the field and for the grade level taught (Any person providing instruction in a public school must meet this requirement);
2. Be directly supervised by a person holding a valid Minnesota teaching license (it appears that the holding of any license by the supervisor is sufficient regardless of whether the license is for the field and grade level supervised);
3. Successfully complete a teacher competency examination;
4. Provide instruction in a school that is recognized by an accrediting agency, recognized according to section 123B.445, or recognized by the commissioner;
5. Hold a baccalaureate degree; or
6. Be the parent, guardian, or other person having legal custody of a child who is assessed according to the performance assessment procedures set out in the compulsory attendance law. See II F. below.

- F. Performance Assessment Requirements.

1. General. Except for a child attending a nonpublic school or being taught by a person or institution that is accredited by an accrediting agency, recognized by the council on non-public education or recognized by the commissioner, the compulsory attendance law requires that the performance of every child ages seven through 16 who is not enrolled in a public school be assessed each year using a nationally norm-referenced standardized achievement examination.

In the 2013 session, the Minnesota Legislature modified Minn. Stat. § 120A.22, Subd. 11(a) to state that each year the performance of every child ages seven through 16 and every child ages 16 through 17 for which an initial report was filed pursuant to section 120A.24, Subd. 1, after the child is 16 and who is not enrolled in a public school must be assessed using a nationally norm-referenced standardized achievement examination. This change becomes effective commencing in the 2014-2015 school year.

Minn. Stat. § 120A.22, Subd. 11, provides that the superintendent of the district in which the child receives instruction and the person in charge of the child’s instruction must agree about the specific examination to be used and the administration and location of the examination. However, the law fails to provide any guidance if an agreement cannot be reached as to the specific examination to be

administered, the location where it will be administered, or the terms of its administration.

2. Additional Assessment of a Child. To the extent that the achievement examination that is administered does not assess all of the Required Curriculum subject areas, the parent, guardian, or person having legal custody of the child must assess the child's performance in the applicable additional subject area. The statute does not provide any guidance as to the nature, format, or procedure for this additional assessment.

This additional assessment requirement applies only to a parent, guardian or person having legal custody of the child who is providing instruction to the child and who does not hold a valid Minnesota teaching license in the field and for the grade level taught; who is not directly supervised by a person holding a valid Minnesota teaching license; or who has not successfully completed a teacher competency examination.

3. Assessment Results. If the results of the performance assessments indicate that the child's performance is at or below the 30th percentile of the total battery score or one grade level below the performance level for children of the same age, the law states that the parent must obtain an additional evaluation of the child's abilities and performance for the purpose of determining whether the child has learning problems. It does not state how or by what means this is to be accomplished.

Note: A parent may instruct a child at home or in a nonaccredited setting if the child is annually tested. The fact that the child is tested, rather than the results of the test, allows the parent instructor to meet the statutory requirement and authorizes his or her instruction of the child in that nonaccredited setting.

4. Assessment Exception. A child is exempt from these performance assessment requirements altogether if the child is receiving instruction from a nonpublic school, person, or institution that is recognized by the council on non-public education or the commissioner.

G. Reporting Requirements.

1. Reports to Superintendent. The compulsory attendance law mandates a number of reporting obligations for both instruction providers and school districts. Minn. Stat. § 120A.24, Subd. 1, provides:
 - a. The person or nonpublic school in charge of providing instruction to a child must submit to the superintendent of the district in which the child resides the name, birth date, and address of the child; the annual tests intended to be used under Minn. Stat. § 120A.22, Subd. 11, if required; the name of each instructor; and evidence of compliance with one of the requirements specified in Minn. Stat. § 120A.22, Subd. 10. This information must be submitted by October 1 of the first school year the child receives instruction after reaching the age of seven, within 15 days of when a parent withdraws a child from public school after age seven to provide instruction in a nonpublic school that is not accredited by a state-recognized accrediting agency, within 15 days of moving out of a district; and by October 1 after a new resident district is established.
 - b. The person or nonpublic school in charge of providing instruction to a child between the ages of seven and 16 must submit, a letter of intent to continue to

- provide instruction under this section for all students under the person's or school's supervision and any changes to the information required in paragraph (a) for each student by October 1 of each school year.
- c. In the 2013 session, the Minnesota Legislature modified Minn. Stat. § 120A.24, subd. 1(b) to state that the person or nonpublic school in charge of providing instruction to a child between the ages of seven and 16 and every child ages 16 through 17 for which an initial report was filed pursuant to Section 120A.24, Subd. 1 must submit, by October 1 of each school year, a letter of intent to continue to provide instruction for all students under the person's or school's supervision and any changes to the information required in the report to the superintendent for each student. This change becomes effective commencing in the 2014-2015 school year.
 - d. The superintendent may collect the required information under this section through an electronic or Web-based format, but must not require electronic submission of information under this section from the person in charge of reporting under this section.
2. Curriculum Documentation. The person or nonpublic school in charge of providing instruction to a child, including a person providing instruction in a home-school, must maintain documentation indicating that the Required Curriculum subjects are being taught and proof that the tests under Minn. Stat. § 120A.22, Subd. 11, have been administered. This documentation must include class schedules, copies of materials used for instruction, and descriptions of methods used to assess student achievement. Minn. Stat. § 120A.24, Subd. 2(a).
 3. Test Score Documentation. The parent of a child who enrolls full time in public school after having been enrolled in a nonpublic school that is not accredited by a state-recognized accrediting agency must provide the enrolling public school or school district with the child's scores on any tests administered to the child under Minn. Stat. § 120A.22, Subd. 11, and other education-related documents the enrolling school or district requires to determine where the child is placed in school and what course requirements apply. This paragraph does not apply to a shared time student who does not seek a public school diploma. Minn. Stat. § 120A.24, Subd. 2(b).
 4. Accredited or Recognized School Exemption. A nonpublic school, person, or other institution that is accredited by an accrediting agency, recognized by the council on non-public education or recognized by the commissioner, is required to submit the information set forth in section II. G.1. above to the superintendent of the district in which the child resides by October 1 of each school year, but is exempt from the documentation requirements set forth above.
 5. Superintendent Reports to the State. A superintendent must make an annual report to the Commissioner of Education by December 1 of the total number of nonpublic children reported as residing in the district. The report must include the following information:
 - a. The number of children residing in the district attending nonpublic schools or receiving instruction from persons or institutions other than a public school;
 - b. The number of children attending nonpublic schools or receiving instruction from other than a public school who are in compliance with the compulsory

attendance law and the reporting requirements set forth in this section; and

- c. The number of children whom the superintendent has determined are not in compliance with the compulsory attendance laws and the reporting requirements set forth in this section.

III. EXEMPTIONS FROM COMPULSORY ATTENDANCE:

- A. General. As discussed above, Minn. Stat. § 120A.22, Subd. 4, provides that children subject to the compulsory attendance law may satisfy its requirements by attendance at a public school, a nonpublic school, a church or religious organization, or a home-school.
- B. Excused Absences—Legitimate Exemptions. Minn. Stat. § 120A.22, Subd. 12, provides for absences from compulsory attendance which may be granted at the discretion of the board and provides as follows:

A parent, guardian, or other person having control of a child may apply to a school district to have the child excused from attendance for the whole or any part of the time school is in session during any school year. Application may be made to any member of the board, a truant officer, a principal, or the superintendent. The school district may state in its school attendance policy that it may ask the student's parent or legal guardian to verify in writing the reason for the child's absence from school. A note from a physician or a licensed mental health professional stating that the child cannot attend school is a valid excuse. The board of the district in which the child resides *may* approve the application upon the following being demonstrated to the satisfaction of the board:

1. That the child's physical or mental health is such as to prevent attendance at school or application to study for the period required which includes:
 - (i) child illness, medical, dental, orthodontic, or counseling appointments;
 - (ii) family emergencies;
 - (iii) the death or serious illness or funeral of an immediate family member;
 - (iv) active duty in any military branch of the United States;
 - (v) the child has a condition that requires treatment for a mental health diagnosis; or
 - (vi) other exemptions included in the district's school attendance policy;
2. The child has already completed state and district standards required from high school; or
3. That it is the wish of the parent, guardian, or other person having control of the child, that the child attend for a period or periods not exceeding in the aggregate three hours in any week, a school for religious instruction conducted and maintained by some church, or association of churches, or any Sunday school association incorporated under the laws of this state, or any auxiliary thereof. This school for religious instruction must be conducted and maintained in a place other than a public school building, and must not, in whole or in part, be conducted and maintained at public expense. However, a child may be absent from school on such days as the child attends upon instruction according to the ordinances of some church.

The board is not required to excuse attendance under the cited circumstances but may do so in its discretion. Op. Atty. Gen. No. 219 (November 29, 1937). The Attorney General has also ruled that any evidence related to whether an individual comes within one of these exemptions which is sufficient to satisfy the board is sufficient to satisfy the requirements of the law. Op. Atty. Gen. 169-M (October 24, 1944). Thus, unless the excuse is clearly outside the terms of the statute, it is a fact question to be determined by the board. A decision by the

board to refuse to grant such an excuse will be sustained unless it can be demonstrated that the board acted in an arbitrary or capricious manner. Op. Atty. Gen. 169-B (December 28, 1944).

Minn. Stat. § 120A.22, Subd. 13, provides that the clerk or other authorized officer of the board must keep a record of all excuses granted according to rules established by the board.

- C. Release Time. While a detailed discussion is beyond the scope of this law bulletin, the provisions of Minn. Stat. § 120A.22, Subd. 12 (3), allows the board to excuse absences for limited periods of time, not to exceed in the aggregate three hours in any week for the child to attend a school for religious instruction conducted and maintained by some church, or association of churches, or any Sunday school association. A child may be absent from school on such days as the child attends instruction according to the ordinances of some church. The board may grant such excuses in its discretion, for general religious instruction. See Op. Atty. Gen. (Sept. 25, 1923) (Nov. 9, 1923); 169-0 (December 19, 1934); 622a-17 (October 8, 1942). However, it is mandatory that the board grant excused absences for instruction necessary for church membership. See Op. Atty. Gen. 169-0 (Feb. 19, 1935).
- D. Religious Belief. In order for the state to compel school attendance against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear that the state does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. The party challenging a compulsory attendance law has the burden to show how the law infringes upon the party's religious beliefs. See Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

It must also be noted that Minn. Stat. § 120A.35 requires that the school make reasonable efforts to accommodate any pupil who wishes to be excused from a curricular activity for a religious observance.

- E. Reports of Absences. Minn. Stat. § 120A.22, Subd. 13 requires the clerk or another authorized officer of the board to keep a record of all excuses granted under the rules established by the board.
- F. Educational Neglect. Minn. Stat. § 626.556, the mandatory reporting statute requires reporting of suspected child abuse or neglect. The definition of "neglect" includes the failure to ensure that a child is educated in accordance with state law.

IV. ENFORCEMENT OF COMPULSORY ATTENDANCE LAWS:

- A. Violation Procedure.
 - 1. Parent Notification. Minn. Stat. § 120A.26, Subd. 3, provides that the superintendent must notify the parent in writing if a child is alleged to be receiving instruction in violation of the compulsory attendance law. It appears that the violation could relate to the provision or nonprovision of the instruction or to the statutory reporting requirements. The law requires that this written notification include a list of the specific violations alleged.
 - 2. Fact-Finding and Mediation. If the specified alleged violations of the compulsory attendance requirements are not corrected within 15 days of receipt of the written

notification, Minn. Stat. § 120A.26, Subd. 4 provides that the superintendent must request fact-finding and mediation services from the commissioner. It would appear that if multiple notices are sent to the parents because of multiple or continuing violations, a new 15-day period would begin to run after each notice. The law does not provide a time period within which the commissioner must provide the mediation services.

3. Notice of Noncompliance to County Attorney. If the alleged violations are not corrected through the fact-finding and mediation process, Minn. Stat. § 120A.26, Subd. 5 provides that the superintendent must notify the county attorney of the violations and must notify the parents by certified mail of the intent to notify the county attorney.
4. Criminal Prosecution. Minn. Stat. § 120A.26, Subd. 6 provides that the county attorney in the county in which the alleged violations of the compulsory attendance law occurred has jurisdiction to prosecute the violators. This provision encompasses those situations where the parent does not send the child to any school or provide for any instruction; where the child receives instruction in a school or setting which does not meet the requirements of the compulsory attendance law; or where the person providing the instruction fails or refuses to comply with the statutory reporting requirements. The county attorney will make the final determination as to whether to proceed with a criminal prosecution or whether another legal route would be more effective.

- B.** School Officials & Criminal Sanctions: Enforcement of the Compulsory Attendance Law. While carrying out the duties required under the compulsory attendance law may seem like an additional burden for school officers and employees, there are criminal sanctions imposed by law for failure to do so.

Minn. Stat. § 120A.32 provides criminal penalties for school personnel who do not enforce the compulsory attendance law. It provides:

“Any school officer, truant officer, public or nonpublic school teacher, principal, district superintendent, or person providing instruction *other than a parent* refusing, willfully failing, or neglecting to perform any duty imposed by Sections 120A.22 to **120A.26**, 120A.35, 120A.41, and 123B.03 is guilty of a misdemeanor. All persons found guilty shall be punished for each offense by a fine of not more than \$10 or by imprisonment for not more than ten days. All fines, when collected, shall be paid to the county treasury for the benefit of the school district in which the offense is committed.” (emphasis added)

- C.** Criminal Sanctions for Parents and Others. Minn. Stat. § 120A.34 provides criminal penalties for parents and other persons who cause or encourage violations of the compulsory attendance laws. It provides:

“Any person who fails or refuses to provide for instruction of a child of whom the person has legal custody, and who is required by § 120A.22, Subd. 5, to receive instruction, when notified so to do by a truant officer or other official, or any person who induces or attempts to induce any child unlawfully to be absent from school, or who knowingly harbors or employs, while school is in session, any child unlawfully absent from school, shall be guilty of a petty misdemeanor. Any fines collected shall be paid into the county treasury for the benefit of the school district in which the offense is committed.”

D. Enforcement Against the Child.

1. Juvenile Court. An alternative method of securing compliance with the compulsory attendance law is to request that the county attorney file a child in need of protection or services petition in juvenile court alleging that the child is an habitual truant. Pursuant to Minn. Stat. § 260C.007, Subd. 19, habitual truant is a child under the age of 16 years who is absent from attendance at school without lawful excuse for seven school days if the child is in elementary school or for one or more class periods on seven school days if the child is in middle school, junior high school, or high school; or a child who is 16 or 17 years of age who is absent from attendance at school without lawful excuse for one or more class periods on seven school days and who has not lawfully withdrawn from school.
2. In juvenile court, certain presumptions apply to determining fault when a child is not going to school. A child's absence from school is presumed to be due to the parent's, guardian's, or custodian's failure to comply with compulsory instruction laws if the child is under 12 years old and the school has made appropriate efforts to resolve the child's attendance problems. The presumption may be rebutted based on a showing by clear and convincing evidence that the child is habitually truant. A child's absence from school without lawful excuse, when the child is 12 years old or older, is presumed to be due to the child's intent to be absent from school. This presumption may be rebutted based on a showing by clear and convincing evidence that the child's absence is due to the failure of the child's parent, guardian, or custodian to comply with compulsory instruction laws. See Minn. Stat. § 260C.163, Subd. 11.
3. County Attorney. It is the duty of the county attorney to determine whether to go forward with a criminal action against the parents or with a truancy petition in juvenile court.
4. Truancy Programs and Services. In addition to the court system, Chapter 260A provides for intervention and services to support families and children to keep children in school and combat truancy and educational neglect. The programs involve school districts, county attorneys, law enforcement, and other community-based services. Court authority is to be used only when necessary. A truancy program is voluntary and not required of the school district.

Minn. Stat. § 260A.03 requires the school district to provide notice to the parent or guardian when a child who is subject to compulsory attendance is first classified as a "continuing truant." The criteria for "continuing truant" status are different from the juvenile court standards for "habitual truant." "Continuing truant" means the child is absent without valid excuse within a single school year for:

- a. three days if the child is in elementary school; or
- b. three or more class periods on three days if the child is in middle school, junior high school, or high school.

The school district may, of course, notify a parent or guardian of attendance problems before the child becomes a continuing truant.

In accordance with Minn. Stat. § 260A.03, the notice provided to the parent by the school must notify the parent of the following information:

- a. That the child is truant;
- b. That the parent should notify the school if there is a valid excuse for the absences;
- c. That the parent or guardian is obligated to compel the attendance of the child at school and that parents or guardians who fail to meet this obligation maybe subject to prosecution;
- d. That the notification serves as the school's mandatory notice requirements under the compulsory education law;
- e. That alternative educational programs and services may be available in the child's enrolling or resident district;
- f. That the parent or guardian has the right to meet with appropriate school personnel to discuss solutions to the child's truancy;
- g. That if the child continues to be truant, the parent and child may be subject to juvenile court proceedings;
- h. That if the child is subject to juvenile court proceedings, the child may be subject to suspension, restriction, or delay of the child's driving privilege pursuant to section 260C.201; and
- i. That it is recommended that the parent or guardian accompany the child to school and attend classes with the child for one day.

E. District Responsibilities. The following is a nonexhaustive list of district responsibilities relating to the compulsory attendance law:

- 1. The district should determine that all pupils enrolled in the public schools are in compliance with the law.
- 2. The district should determine if all other residents of the district between the ages of 7 and 16 are receiving instruction in a school or home setting that fulfills the requirements of the law.
- 3. To accomplish the district's responsibilities, the superintendent may have to take such steps as necessary to ascertain information relating to a school, its program, its instructors, and the duration of its instruction. The superintendent has no right to attempt to exercise control over the management or operation of a nonpublic school. His or her sole authority is to attempt to ascertain facts relative to compliance or noncompliance with the law.
- 4. The superintendent must notify the parent, guardian or other person having legal custody of a child, in writing, if the child is alleged to be receiving instruction in violation of the compulsory attendance law. This written notification shall include a list of the specific violations alleged.
- 5. If the specified violations of the compulsory attendance law are not corrected within 15 days of receipt of the written notification, the superintendent shall request fact-finding and mediation services from the Commissioner of Education.
- 6. If the violations are not corrected through the fact-finding and mediation

process, the superintendent must notify the county attorney. The superintendent must further notify the parent, by certified mail, of the superintendent's intent to notify the county attorney of the alleged violations.

7. All officers and employees of the district must perform all duties and make all required reports relating to the compulsory attendance law or be subject to possible criminal prosecution. All officers and employees must also comply with the mandatory reporting statute. The superintendent must make an annual report to the Commissioner of Education relating to compliance and noncompliance with the compulsory attendance law.
8. The school board must review and, at its discretion, approve applications made to members of the board, truant officers, principals or the superintendent relating to absences excusable under the statute.
9. The school district may establish one or more school attendance review boards to prepare plans to promote interagency and community cooperation and to describe services and procedures related to truancy. Such boards are to oversee referrals of truant students to community-based projects and service centers and to establish procedures for documenting attendance, actions and interventions with respect to truant students and their families.

V. OTHER PROGRAMS:

There are a great number of other areas of interrelationship between public and nonpublic schools. While it is beyond the scope of this law bulletin to discuss them in any great detail, districts should carefully consider their actions in at least the following areas of responsibility:

- A. Shared time programs generally;
- B. Shared time special education;
- C. Transportation of nonpublic school pupils;
- D. Health and developmental screening;
- E. Provision of textbooks and standardized tests to nonpublic school pupils;
- F. Provision of health services and guidance and counseling services to nonpublic school pupils;
- G. Privacy of records relating to nonpublic school students maintained by the district.

VI. CONCLUSION:

The role of the school district in enforcing the compulsory attendance law as it relates to students who do not attend public schools is very complicated. As stated above, this law bulletin is intended to provide a brief review of the relevant law and decisions in this area. Consult the Minnesota School Boards Association, your county attorney, or other competent legal counsel for advice based on particular facts or circumstances that arise in your district.

APPENDIX: SAMPLE LETTERS.

I.

Sample Request for Submission of Report to Superintendent
From Non-Accredited Person, School or Institution

Dear (Person in Charge of Providing Instruction to Child):

Minn. Stat. § 120A.22, Subd. 5, requires that every child between 7 and 16 years of age, and every child under the age of 7 who is enrolled in grade kindergarten or above, must receive instruction from a public school, a nonpublic school, a church or religious organization, or a home-school. While we wish to assure you that the school board and the district have no interest or desire whatsoever relative to controlling or interfering with the operation of your legitimate affairs, we are required by law to determine your compliance with the compulsory attendance law. Hopefully, we may be able to work together to accomplish this task in a spirit of cooperation.

NOTE: In the 2013 session, the Minnesota Legislature modified Minn. Stat. § 120A.22, Subd. 5 to state that every child between seven and 17 years of age must receive instruction unless the child has graduated.

These changes become effective commencing in the 2014-2015 school year.

Pursuant to Minn. Stat. § 120A.24, Subd. 1, please provide us with the information specified below:

1. The name, age and address of each child receiving instruction. The annual tests intended to be used under Minn. Stat. § 120A.22, Subd. 11, if required; the name of each instructor; and evidence of compliance with one of the requirements specified in Minn. Stat. § 120A.22, Subd. 10. This information must be submitted by October 1 of the first school year the child receives instruction after reaching the age of seven, within 15 days of when a parent withdraws a child from public school after age seven to provide instruction in a nonpublic school that is not accredited by a state-recognized accrediting agency, within 15 days of moving out of a district; and by October 1 after a new resident district is established.

2. The name of each instructor and evidence of that instructor's compliance with one of the instructor requirements specified in Minn. Stat. § 120A.22, Subd. 10. Under that provision, a person who is providing instruction to a child must meet at least one of the following requirements:

- (a) Hold a valid Minnesota teaching license in the field and for the grade level taught;
- (b) Be directly supervised by a person holding a valid Minnesota teaching license;
- (c) Successfully complete a teacher competency examination;
- (d) Provide instruction in a school that is accredited by an educational accrediting agency recognized by the council on nonpublic education or the commissioner.
- (e) Hold a baccalaureate degree; or
- (f) Be the parent, guardian, or other person having legal custody of a child who is assessed according to the performance assessment procedures set out in the compulsory attendance law.

3. An annual instructional calendar showing when instruction will occur in that year.
4. For each child who is instructed by a parent, guardian, or other person having legal custody and who is required to be assessed each year, a quarterly report on the achievement of the child.
5. Please provide documentation indicating that the curriculum subjects required by Minn. Stat. § 120A.22, Subd. 9 are being taught. Under that provision, all schools must provide instruction in at least the following subject areas:
 - (a) Basic communication skills including reading and writing, literature and fine arts;
 - (b) Mathematics and science;
 - (c) Social studies including history, geography, and government; and
 - (d) Health and physical education.

This documentation must include class schedules, copies of materials used for instruction, and descriptions of methods used to assess student achievement.

Please provide the requested information no later than (specify date) so that the School District may fulfill its statutory responsibilities under the compulsory attendance law.

Sincerely,

Superintendent

II.

Parent Notification

Dear (Name of Parent, Guardian, or other person having legal custody of child):

The Minnesota compulsory attendance law, Minn. Stat. §§ 120A.22 to 120A.42, requires that every child between 7 and 16 years of age shall receive instruction at a public school, a nonpublic school, a church or religious organization, or a home-school.

NOTE: In the 2013 session, the Minnesota Legislature modified Minn. Stat. § 120A.22, Subd. 5 to state that every child between seven and 17 years of age must receive instruction unless the child has graduated.

These changes become effective commencing in the 2014-2015 school year.

Our records indicate that you are the parent, guardian, or other person having legal custody of (name of child) and that this child has been receiving instruction at (nonpublic school, church or religious organization or home-school).

In compliance with Minn. Stat. § 120A.26, Subd. 3, we are hereby notifying you that we believe your child is receiving instruction at that school in violation of Sections 120A.22 and 120A.24 of the Minnesota compulsory attendance law.

A list of the specific violations alleged are as follows: (List)

The alleged violations specified above must be corrected within 15 days of receipt of this written notification. If there are facts of which we are unaware, or if you dispute the violations listed, please contact us with this information within 15 days of receipt of this written notification.

If the alleged violations specified above are not corrected within 15 days of receipt of this written notification, we will be required to request fact-finding and mediation services from the Commissioner of Education. If the alleged violations are not corrected in that mediation process, we will be required to notify the County Attorney.

We would like to work with you on this matter and look forward to your response.

Sincerely,

Superintendent

III.

Notification to County Attorney

Dear County Attorney:

The records of Independent School District No. _____ indicate that (name of child), a resident of this school district, is currently receiving instruction from (person who is providing instruction to the child) at (nonpublic school, church, or religious organization or home-school).

Pursuant to Minn. Stat. § 120A.26, Subd. 3, we have sent written notification to the parents that the aforementioned child is receiving instruction in violation of the Minnesota compulsory attendance law and have listed the specific violations alleged. A copy of the correspondence is attached.

This matter was submitted to fact-finding and mediation through the Commissioner of Education pursuant to Minn. Stat. § 120A.26, Subd. 4. This fact-finding and mediation process has failed to correct the violations. Copies of all relevant materials are attached.

Therefore, in compliance with Minn. Stat. § 120A.26, Subd. 5, we are hereby notifying you of the violations of the compulsory attendance requirements as specified herein. The parents have been notified by certified mail of our intent to notify you of these violations.

Additional facts which are relevant to this matter are as follows: (List)

If you are in need of any additional information or if we may be of any further assistance, please do not hesitate to contact us.

We look forward to hearing from you in the near future so that we might review this matter and proceed as you deem necessary and appropriate.

Sincerely,

Superintendent

IV.

Sample Notice to Parent or Legal Guardian
of Student's Continuing Truancy

Dear [Name of Parent or Legal Guardian]:

This is to advise you that [Name of Student] has been absent without a valid excuse on three days within this current school year. The dates of absence were [dates]. Please notify the undersigned if there is a valid excuse for the absences. If there is no valid excuse, [Name of Student] will be classified as a continuing truant.

You are obligated to compel the attendance of [Name of Student], and if you fail to do so, you may be subject to prosecution. This notice serves as notification required by Minn. Stat. § 120A.34, which provides penalties for violation of compulsory attendance laws. (A copy of the statute is attached.)

You have the right to meet with appropriate school personnel to discuss solutions. Alternative educational programs and services may be available.

If [Name of Student] continues to be truant, both you and [he/she] may be subject to juvenile court proceedings. If [Name of Student] is subject to juvenile court proceedings, [he/she] may be subject to suspension, restriction, or delay of driving privileges.

The School District supports family participation in your child's education. We recommend that you accompany [Name of Student] to school and attend classes with [him/her] for one day.

We will be in contact with you to make arrangements to discuss solutions, alternative educational programs and services, and your visit to [Name of Student]'s classes with [him/her].

Sincerely,

[School Official]

(No Changes from 2014 Session)

School Law Bulletin
for
School Board Members and Administrators

LIABILITY OF PRINCIPALS AND ADMINISTRATORS

Revised October 2014

Prepared by:
KNUTSON, FLYNN & DEANS-COUNSEL
MINNESOTA SCHOOL BOARDS ASSOCIATION

I. INTRODUCTION. The Minnesota courts have defined standards of care that school districts and their employees must follow with respect to students. In certain specific situations, however, even if those standards of care allegedly have been breached, school districts, administrators and principals may have immunity from lawsuits for damages.

There are several different kinds of immunity that apply to school district and administrator actions, based in both state and federal law. Some are derived from statute, such as the “statutory immunity” available to government entities under Minnesota law. Others are derived from common law, such as the “official immunity” (state law) and “qualified immunity” (federal law) available to administrators sued in their individual capacities, or the “vicarious immunity” (state law) available to school districts. Immunity does not automatically apply whenever a breach of duty has been alleged, but rather is available only under very specific circumstances, which are described further below.

This area of the law is extremely complex. Each type of immunity is governed by different legal criteria. Lawyers often mistakenly use immunity terms interchangeably and even the courts get the analysis wrong on occasion, as discussed further below. School districts are advised to consult with their legal counsel whenever issues of liability and immunity arise.

This bulletin discusses negligence standards, immunity (both statutory and common law), liability insurance considerations, and recommendations for school district action. With respect to immunity, several important decisions of the Minnesota Supreme Court are discussed. In 2004, the Supreme Court clarified its position on official immunity and pointed out its own past mistakes in the application of immunity terms and concepts.

II. NEGLIGENCE STANDARDS IN THE SCHOOL CONTEXT.

The case most commonly cited for a basic summary of school district negligence standards is Verhel v. Indep. Sch. Dist. No. 709, 359 N.W.2d 579 (Minn. 1984).

A. VERHEL v. INDEP. SCH. DIST. NO. 709, 359 N.W.2d 579 (Minn. 1984).

1. Facts. The facts of the Verhel case were as follows:

Twelve cheerleaders from Duluth Denfeld were involved in an automobile accident at 5:00 a.m., while they were bannering the homes of the school's football players prior to the first game of the season. One of the girls was severely injured, and she and her father sued another cheerleader driver, the driver of the other car, the school district and the faculty cheerleader advisor.

2. Analysis.a. Duty to Supervise.

- (1) The court held that where a school district has a duty to supervise, that duty is to "use ordinary care and to protect its students from injury resulting from the conduct of other students under circumstances where such conduct would reasonably have been foreseen and could have been prevented by the use of ordinary care." There is no requirement of constant supervision of all the movements of pupils at all times. Sheehan v. St. Peter's Catholic School, 291 Minn. 1, 3, 188 N.W.2d 868, 870 (Minn. 1971).
- (2) A school district is not relieved of liability simply because there was no prior notice of danger. Raleigh v. Indep. Sch. Dist. No. 625, 275 N.W.2d 572, 575 (Minn. 1978). On the other hand, a teacher is not required to anticipate the hundreds of unexpected student acts that occur daily or to guard against dangers inherent in rash student acts.
- (3) Recovery is allowed in Minnesota if the jury can find from the evidence, "that supervision would probably have prevented the accident[.]"
- (4) A school district may be found liable where it has undertaken the supervision of an activity. If a district has assumed control and supervision over an extracurricular activity or organization, parents of participants have a right to rely on that assumption.
- (5) In this case, even though the banner was done early in the morning during the summer, the court held that the school district had assumed control and supervision over the cheerleading squad and its activities, and had "a duty to supervise, by the exercise of reasonable care, the planning and conduct of the banner activity of the cheerleaders."

- b. Negligent Supervision. The court held the school district also "had a duty to instruct properly and adequately the supervisor it assigned to the cheerleading activity." It then specified a number of ways the district could have exercised this care.

c. Foreseeability.

- (1) Although a school district might not be liable for sudden, unanticipated conduct of students, it is liable for sudden, foreseeable misconduct that probably could have been prevented by the exercise of ordinary care.
- (2) Reasonable supervision may prevent sudden injuries by interrupting misconduct or deterring it altogether.
- (3) The court held, in this case, that there was a lack of supervision and organization, that erratic driving behavior on behalf of the unsupervised cheerleader driver was to be expected, and that such behavior was precisely the harm to be guarded against by the exercise of supervision.

B. Further Negligent Supervision Decisions.

A school district is not liable for actions that are not foreseeable when reasonable measures of supervision are employed to insure adequate educational duties are being performed by teachers and there is

adequate consideration being given for the safety and welfare of all students in the school. P.L. v. Aubert 545 N.W.2d 666 (Minn. 1996) (finding that teacher's sexual contact with student was not well-known hazard and thus was not foreseeable by school district where reasonable supervisory and safety measures were in place).

III. OFFICIAL IMMUNITY (*available to a school official sued in his or her individual capacity*). The common law doctrine of official immunity "protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of a willful or malicious wrong." Rico v. State, 472 N.W.2d 100, 106-07 (Minn. 1996). The critical issue in a claim of official immunity, when there is an absence of malice, is whether the public official's conduct is discretionary (protected) or ministerial (unprotected). See Kari v. City of Maplewood, 582 N.W.2d 921 (Minn. 1998). A discretionary act requires the exercise of individual judgment in carrying out the official's duties. Id. By contrast, a ministerial act is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Id.

A. LARSON v. INDEP. SCH. DIST. NO. 314, 289 N.W.2d 112 (Minn. 1979).

One of the immunity cases most important to school districts is Larson v. Indep. Sch. Dist. No. 314, which the Minnesota Supreme Court decided in 1979. The Court discussed both negligence and immunity standards and held certain school staff personally liable for a significant amount of damages to the plaintiff student. As the holding is significant for teachers and principals, we lay out the facts of the case in some detail. *Please note that, while the Supreme Court in Larson properly acknowledged the concept of official immunity that applied to the individuals in this case, the Court incorrectly used terms from another type of immunity (statutory immunity) when discussing and applying the legal standard. See Anderson v. Anoka-Hennepin Sch. Dist. No. 11, 678 N.W.2d 651, 656 n.5 & 661 (Minn. 2004) (recognizing flawed application of immunity concepts in Larson).* We have updated the Larson court's terminology for purposes of this analysis.

1. Facts. The facts of the Larson case were as follows:

- a. On April 12, 1971, an eighth grade student in the Braham school district was severely injured while performing a gymnastic exercise known as a "headspring over a rolled mat," which was a required activity in his eighth grade physical education class. As a result of landing on his head, and from the force of running and diving onto the rolled mat, he broke his neck and suffered resulting quadriplegic paralysis.
- b. The class was a compulsory physical education class taught by a first-year teacher with a teaching certificate in physical education. The accident occurred nine class periods after this teacher had replaced the former physical education teacher who had been required to report to military duty.
- c. The headspring exercise was taught before the class had participated in the necessary preliminary progressions of less advanced gymnastic exercises. The accident occurred because the teacher had improperly spotted the exercise.
- d. Except for matters of budgeting and financing, the principal was the designated administrator of Braham Junior-Senior High School. The district's policy manual required the principal to develop, organize and implement the school's curriculum, including physical education classes. It further made the principal responsible for assigning duties to teachers, supervising classroom instruction, providing orientation for new teachers and administering the requirements of the school board.

- e. The principal of the school had not actively participated in developing or administering the physical education curriculum, other than to furnish the teacher with a copy of a curriculum bulletin published by the State Department of Education.
- f. When the principal was informed of the date the previous teacher would be leaving, he told him to meet with the new teacher to plan physical education classes for the remainder of the year for the entire junior-senior high school. He gave no instructions for the transition plan to be formulated.
- g. The two teachers met for approximately 30 minutes, and their discussion was limited to whether a unit in gymnastics had been taught that year and the possibility of the new teacher teaching such a unit.
- h. When the new teacher reported to the principal, he told him what subjects he was going to teach, but did not discuss in detail what methods he was going to use to teach gymnastics. The principal did not ask detailed questions about the teaching methodology to be employed.
- i. The previous teacher had not been required to submit a plan of activities for the entire school year even though the principal knew that he might be leaving. The new teacher was not requested to and did not submit a detailed written plan of what he was going to teach, even though unit planning of physical education programs in addition to daily lesson plans is important to insure that proper progressions for the promotion of safety are followed.
- j. The superintendent of the district had general supervisory and administrative authority over the school system and was ultimately responsible to the school board for the manner in which the school system was managed.

2. Analysis.

a. Liability of the Principal.

(1) Negligence.

The court upheld the jury's finding that the injury of the student was due in part to the negligence of the principal where the record indicated that the principal failed to exercise reasonable care in the following areas:

- (a) Supervising the development, planning and administration of the school's physical education curriculum; and
- (b) Supervising the inexperienced physical education instructor.

(2) Official Immunity as a Defense.

- (a) Holding. The Court held that a principal who abdicates his or her responsibility for developing and administering the teaching of the physical education curriculum is not engaged in discretionary decision-making and thus official immunity is not available to preclude liability for the negligent discharge of that responsibility.
(Note: In the opinion, the Court often mistakenly referred to "decision-making at the planning level" – the "planning level" or "policy-making level" concepts apply only

in an analysis of school district liability, not the individual liability that was at stake for the principal and teacher in Larson.)

(b) Analysis.

- (i) Principal's Argument. The principal argued that any liability on his part for the student's accident was precluded by the doctrine of official immunity. Under this doctrine (as discussed above), school district officials and employees are not absolutely immune from suit but ordinarily may be held liable only in the performance of ministerial rather than discretionary duties.
- (ii) Classification of Acts as Discretionary or Ministerial. The Court conceded that classifying acts as "discretionary" or "ministerial" was difficult. Footnote 1. In fact in Anderson v. Anoka-Hennepin Independent School District No. 11, 678 N.W.2d 651 (Minn. 2004), while discussing the Larson case, the Supreme Court admitted that it had "conflated statutory immunity and common law official immunity standards in analyzing a common law official immunity issue". See Anderson at 656. The Court reviewed the following cases, among others:
 - (a) In Cook v. Trovatten, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937), the Court described a ministerial duty as "one in which nothing is left to discretion, a simple, definitive duty arising under and because of stated conditions and imposed by law. 'Official duty is ministerial when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.'" (Citations omitted.)
 - (b) In Williamson v. Cain, 310 Minn. 59, 245 N.W.2d 242 (1976), the Court found state employees who caused damage to a nearby structure while attempting to demolish an abandoned building to be personally liable to the neighboring owner because they were performing a ministerial duty. The Court reasoned that while any act involves some measure of freedom of choice and while certain decisions had to be made in doing this job, it was a simple and definite task and the nature, quality and complexity of the decision-making process involved did not entitle them to immunity from suit.
- (iii) Application of Official Immunity Doctrine to Actions of Principal. While the Court in Larson felt that it was difficult to apply the official immunity doctrine to the position of principal, one which involves many discretionary decisions in the course of administering a school, the Court concluded that the applicability of official immunity did not depend on the nature of the individual's overall job but rather on the nature of the specific action undertaken. The majority of the members of the Court felt that the principal in this case had not exercised discretion in his decisions concerning curriculum development or staff supervision. The Court stated:

The doctrine of discretionary immunity is intended to protect a public official or employee whose policy-making duties include choosing between various alternatives even if one of the alternatives is to do nothing. Cf., Silver v. City of Minneapolis, 284 Minn. 266, 170 N.W.2d 206 (1969). In

the present case, Peterson (the principal) did not engage in a discretionary choice between alternatives; he made no decision about the curriculum. In effect, Peterson completely abdicated his responsibility for developing, administering, and teaching the physical education curriculum. Because Peterson never engaged in decision-making relevant to developing and administering the physical education curriculum, his negligence did not involve [discretionary] decision-making.

Discretionary immunity must be narrowly construed in light of the fact that it is an exception to the general rule of liability. Because of the special protection that the law affords school children, Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 291, 118 N.W.2d 795, 802 (1962), failure by Peterson, in this case, to adequately supervise the planning and administering by Lundquist (the teacher) of the physical education curriculum cannot be considered [discretionary] decision-making that the doctrine of [official] immunity is designed to protect. We therefore hold that Peterson's liability is not precluded by the doctrine of discretionary immunity. (Emphasis supplied)

- (iv) The Dissent. It should be pointed out that this was the opinion of the majority of the court. In her dissent, Justice Wahl felt that the principal should have been protected from liability by the doctrine of official immunity because the principal's alleged negligence arose out of acts requiring judgment and discretion. She cited as discretionary acts of judgment the principal's recommendation to hire the teacher, his decision to let the new and the former teacher plan the program and lessons, and his delegation to the teacher of the power to work out the details of the physical education curriculum. She also felt that the principal's decision not to provide more specific direction to the teacher and not to request more detailed curriculum plans was a discretionary act. She likened this situation to that in Silver v. City of Minneapolis, 284 Minn. 266, 170 N.W.2d 206 (1974), where the court had held that choosing to take no action can require as much an exercise of discretion as choosing one action over another.
- (v) Petition for Rehearing. On January 28, 1980, the court denied a petition by the principal for rehearing in the case. The court found the principal's contention that the court's denial of the defense of official immunity would have the effect of subjecting administrators of public schools to liability for almost any conceivable mishap that might happen in the vast number of areas of the school to be unfounded. The court ruled that the decision was based on the narrow ground that, rather than exercising discretion, the principal had abdicated his responsibility by not acting at all. It further stated that a principal, as a reasonable school administrator, must exercise reasonable care in the exercise of administrative functions, and may not, without more, entirely delegate these functions to others.

b. Liability of the Teacher.

- (1) Negligence. The Larson jury found the teacher 90 percent negligent for the student's accident based on the following:

- (a) His teaching of the advanced exercise before the class had participated in the necessary preliminary progressions of less advanced exercises; and
- (b) His improper spotting of the exercise.

The evidence of the negligence was uncontested on appeal.

(2) Application of Doctrine of Official Immunity. Footnote 2. As noted in Note 1 of this discussion, in the Anderson v. Anoka-Hennepin Independent School District No. 11, case, the Supreme Court noted that this was the incorrect standard to apply as it was the standard for analyzing a statutory immunity defense rather than an official immunity defense which was applicable for the teacher under the Larson case facts.

- (a) Holding. The Larson court held that the judgment employed by the teacher in determining how to spot and teach the gymnastic exercise was not the type of decisionmaking entitled to protection under the doctrine of official immunity, and the teacher was liable for his negligent spotting and teaching of the exercise.
- (b) Analysis. The court ruled against the teacher's defense of official immunity because it determined that the nature, quality and complexity of the decisionmaking process used by the teacher did not involve a discretionary decision. Footnote 3. But see Note 2 of this discussion, for the Anderson Court holding which invalidates this analysis as applying the incorrect statutory immunity analysis for an official immunity defense. It felt that his decision to spot the headspring in the manner he chose was a decision that clearly involved a ministerial duty. The same was true as to the decision to teach this exercise prior to less advanced progressions. Overall, the court felt the level of judgment he exercised was not covered under the doctrine of discretionary immunity.

c. Liability of the Superintendent.

- (1) Holding. The Larson court upheld the lower court's decision that the superintendent was not required to be and was not sufficiently involved to be liable for the plaintiff's injury.
- (2) Analysis. The court upheld a directed verdict by the lower court in favor of the superintendent. The plaintiffs had argued that the superintendent had a specific duty to develop and administer the physical education curriculum and the breach of that duty resulted in the improper teaching technique that caused the accident. The court found that the superintendent had expressly and properly delegated supervision of the curriculum and supervision of teaching duties to the principal. This placed him at a level removed from these responsibilities and he was not sufficiently involved in the actions or inactions of the principal or teacher to be liable in this case.

d. Damages.

- (1) Amount. The trial court awarded the student and his father approximately \$1,156,000 in damages, costs and disbursements. The principal and teacher were found jointly and severally liable and the school district was liable up to the amount of \$50,000 for each plaintiff (that was the statutory limit at the time of the accident). While the principal was found only 10 percent negligent, the teacher's subsequent bankruptcy shifted the

responsibility for the remainder of the award to him because of their joint liability.

- (2) Award of Damages Based Upon Law Applicable at Time of Accident. It should be pointed out that these damages were awarded on the basis of the Tort Liability Act as it read at the time of the accident in 1971. The court ruled that the liability of the principal and the teacher was not limited by statute (M.S. 466.04) as was that of the school district. The court pointed out that this was corrected by the legislature in 1976 so that the liability of an officer or employee arising out of an alleged act or omission occurring in the performance of his duty may not exceed the statutory limits. It held, however, that provision was not applicable to actions incurred prior to the effective date of that amendment. If it had been, the limit of liability would have been \$50,000 to each plaintiff.
- (3) Present Law. If this case had been determined under the present law and if the claim had arisen before January 1, 2008, the limit would have been \$300,000 for each plaintiff, up to a \$1,000,000 maximum. Since there were two plaintiffs, the limit would have been \$600,000 in this case. The limits have been increased to \$400,000 for each plaintiff, up to a \$1,200,000 maximum for claims arising on or after January 1, 2008, but before July 1, 2009, and to \$500,000 for each plaintiff, up to a \$1,500,000 maximum for claims arising on or after July 1, 2009.

e. Indemnity.

- (1) Indemnity Determined Under Applicable Law. The court held that under the governmental immunity law applicable at the time of the accident, the principal was not entitled to indemnity from the school district.
- (2) Present Law. That result would be different if the accident were to occur today. M.S. 466.07, Subd. 1 now provides that a school district, however organized, is required to defend and indemnify its officers and employees, whether elected or appointed, for damages, including punitive damages, claimed or levied against the officer or employee, providing that the officer or employee was acting in the performance of the duties of the position and was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

B. ANDERSON v. ANOKA-HENNEPIN INDEP. SCH. DIST. NO. 11, 678 N.W.2d 651 (Minn. 2004).

The Minnesota Supreme Court recently had occasion to revisit its jurisprudence on official immunity in Anderson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 678 N.W.2d 651 (Minn. 2004). In addition to clarifying the distinction between ministerial and discretionary acts for purposes of official immunity in Minnesota, the Court used this opportunity, as discussed above, to point out its own previous mistakes in terminology in Larson (mistakes that the Court of Appeals also mistakenly adopted in earlier stages of the Anderson case). See Anderson, 678 N.W.2d at 665 n.5. As with the Larson analysis, because the holding of the case depends so heavily on its facts, we set them out in detail below.

1. Facts.

- a. On May 16, 2000, a high school student enrolled in the Anoka-Hennepin schools lost part of a finger in an accident that occurred while he was “ripping” 1 ½ -inch strips of wood on a circular table saw for his Woods II class project, a TV/VCR stand. The student was an experienced woodworker. (“Ripping” is the cutting of a piece of wood along the grain.)

- b. The student's Woods II teacher had directed the student to rip wood strips with the blade guard disengaged and to instead use a "push stick." (A "push stick" is a device that allows the operator of a table saw to push pieces of wood through the saw while maintaining a safe distance from the blade.) The teacher watched the student cut four or five of the strips and then moved to another part of the classroom while the student continued to cut.
- c. After the teacher walked away, the student completed pushing a piece of wood through the saw with a push stick. A "waste" piece of wood was resting on the other side of the blade and began to move. The student reached over the blade with his left hand to move the wood scrap, and as he reached over the blade his left index finger hit the blade, amputating the finger at the knuckle.
- d. The teacher's instruction to disengage the blade guard to make rip cuts was dictated by a long-standing unwritten school protocol. The high school technology education department staff determined that the best practice in making rip cuts on wood with a width of four inches or less would be to proceed with the blade guard up, and therefore disengaged, while simultaneously using a push stick to guide the wood. The staff had determined that if the blade guard were down, and engaged, a push stick could not be used and it would thus be possible for a student's fingers to come within four inches of the blade. This unwritten protocol was part of the "circular saw safety test" taken by students in Woods II. The teacher was aware of the protocol because it was discussed in staff meetings.

2. Analysis.

a. Liability of the Teacher.

The Court did not address the issue of liability because the appeal simply involved the immunity issue (immunity precedes an analysis of the merits of a case).

b. Official Immunity as a Defense.

- (1) Holding. The Court held that even though the teacher's act in following the protocol was ministerial in nature, the teacher was entitled to official immunity because the development of the protocol involved discretionary judgment entitled to official immunity and the teacher was simply following the established protocol.
- (2) Analysis. The Court stated that this was the first time it had addressed a challenge where liability was alleged to arise from compliance with a ministerial duty. In previous cases, the liability was alleged to have stemmed from the failure to perform a ministerial duty.
 - (a) The Court turned to its statutory immunity cases for guidance, noting that there it had held that where a decision was made at the policy-making level and was therefore protected by statutory immunity, such immunity could not be eliminated by imposing liability for conduct merely following the policy. See Nusbaum v. County of Blue Earth, 422 N.W.2d 713 (Minn. 1988).
 - (b) The Court concluded that the fact that the teacher's conduct was ministerial in nature was not necessarily enough to deny official immunity. Rather, the Court stated, "[t]he ministerial-conduct bar to official immunity arises when the allegation is that a ministerial duty was either not performed or was performed negligently." Anderson,

678 N.W.2d at 660 (citing cases).

- (c) The Court noted that there did not seem to be any question that both the decision to establish a protocol and the decisions regarding the substance of the protocol involved the exercise of staff discretion as educators and woodworkers, and thus was entitled to common law official immunity.
- (d) The Court also concluded that the teacher's adherence to the protocol was not a willful or malicious wrong (conditions that would have eliminated the official immunity defense).

c. Vicarious Immunity for the School District.

Based on its finding of official immunity for the teacher, the Court also granted vicarious immunity for the School District in Anderson. Vicarious immunity, which is a form of school district immunity premised on the employer/employee relationship, is discussed further below. Vicarious immunity is a common law construction distinct from the statutory immunity available to school district under Minnesota law.

C. Other Official Immunity Cases.

Applying Anderson, the Court of Appeals in Meier v. City of Columbia Heights, 686 N.W.2d 858 (Minn. Ct. App. 2004), held that city officials were entitled to official immunity from a claim that they had damaged the plaintiff's private property in the process of removing it from the plaintiff's building. The officials removed the items because they were deemed to be "nuisance property" in violation of state housing and fire codes. Even though the city officials were deemed to be conducting ministerial duties in the process of abating the property, the Court found that they were entitled to immunity because they were acting in accordance with a state ordinance (adoption of which was a discretionary decision entitled to official immunity) and were not negligent in the performance of their duties. Unlike Anderson, however, the city was denied vicarious official immunity because it had failed to adopt procedures to deal with abatement proceedings or the imposition of costs and expenses related to the abatement of real property. See Vicarious Immunity, below.

The doctrine of official immunity may apply to discrimination claims under the Minnesota Human Rights Act. State by Beaulieu v. City of Mounds View, 518 N.W.2d 567 (Minn. 1994).

In Pletan v. Gaines, 460 N.W.2d 74 (Minn. Ct. App. 1990), a municipality initially was found liable for the death of a child that resulted from a high speed police chase. The focus of the suit was upon the implementation of an established policy, not upon the making of the policy itself, so statutory immunity was held inapplicable (see Statutory Immunity section, below). In a later appeal of the case, however, the municipality and the police officer escaped liability under the theory of official immunity. Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992). The police officer's decisions regarding the high-speed chase were found to be discretionary acts at the operational level.

Official immunity was found to be applicable to a decision by a school district to lay off one individual instead of another. In Kunst v. Independent School District No. 191, 1998 WL 887535 (Minn. Ct. App. 1998) (unpublished), the Court of Appeals held that a decision to lay off one site coordinator instead of another with the same seniority date required judgment and discretion at the operational level, was therefore discretionary in nature, and the type of conduct covered by official immunity. Further, since the evidence showed the school official acted in good faith and with subjective legal reasonableness, despite the fact that

the decision constituted discrimination against the laid off individual on the basis of her pregnancy leave, the Court of Appeals found no willful or malicious wrong that would strip the school official of the immunity's protection. Vicarious official immunity was found to extend to the school district.

In Chervestad v. Independent School District No. 627, 1997 WL 118171 (Minn. Ct. App. 1997) (unpublished), parents sued over the death of a student run over by a float in a school homecoming parade. The court commented that official immunity protects judgment or discretion that is exercised by a school official on an operational level but does not protect public officials from liability for the performance of ministerial tasks, i.e. tasks that are absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. Here, since the superintendent failed to communicate the school district's established policy of float supervision to the class advisors supervising students during the parade, determined to be a ministerial act, no protection was available through the doctrine of official immunity. Since the official, here the superintendent, was not entitled to official immunity, the court held that vicarious official immunity was not available to the school district.

In S.W. v. Spring Lake Park School District No. 16, 592 N.W.2d 870 (Minn. Ct. App. 1999), the Minnesota Court of Appeals held that the reaction of school officials to a foreseeable threat of a non-student on school premises was not directed by school policy and, therefore, was a discretionary act deserving of immunity. The Court of Appeals refused, however, to extend vicarious official immunity to the school district. The Minnesota Supreme Court affirmed the May 1999 decision of the Court of Appeals without any opinion. See 606 N.W.2d 61 (Minn. 2000).

Fear v. Independent School District 911, 634 N.W.2d 204 (Minn. Ct. App. 2001) was an action brought by a student for injuries resulting from a fall from a snow pile on the school playground. The Minnesota Court of Appeals found the decisions of a principal and of individual school employees in charge of supervising students on the playground to be ministerial and, consequently, the school employees were not entitled to official immunity. There was insufficient evidence presented to the court that the principal addressed the potential danger to children of playing on snow piles or that he participated in the general supervision of the teachers regarding supervising the children at recess. As to the teachers, the Court of Appeals determined there was insufficient evidence that they actually made discretionary decisions regarding recess and children playing on snow piles for them to be entitled to official immunity.

In Motl ex rel. Motl v. Powder Ridge Ski Area, 2012 WL 426602 (Minn. Ct. App. 2012) (unpublished), the parents of a middle school student filed suit against a ski area and a school district after the student was injured skiing during a school field trip. Although the district court analyzed the case on the basis of assumption of the risk, the Minnesota Court of Appeals held that there was no specific or definite protocol the principal should have followed in supervising the students, the principal's decisions for supervision were discretionary and he was afforded immunity from liability. Since the principal was covered by official immunity, the school district was vicariously immune from liability as well (see further discussion of vicarious liability below).

IV. VICARIOUS IMMUNITY (*available to a school district when an employee is protected by official immunity*). The common law doctrine of vicarious immunity protects a school district from liability for an employee's actions where the employee is entitled to official immunity. As the Minnesota Supreme Court has stated: "Generally, if a public official is found to be immune from suit on a particular issue, his or her government employer will be vicariously immune from a suit arising from the employee's conduct." Anderson, 678 N.W.2d at 663.

Courts often apply the doctrine of vicarious immunity and dismiss claims against the employer without explanation. See Anderson, 678 N.W.2d at 663-64 (citing cases). However, the Minnesota Supreme Court

has held that the question of whether to extend vicarious immunity to a government employer is not automatic but is a “policy question,” Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn. 1992), and has noted in dicta that “not infrequently a governmental entity is required to compensate for the harm done by a public official even though the official is not held personally liable.” Id. (citing Holmquist v. State, 425 N.W.2d 230, 233 n.1 (Minn. 1988)). Vicarious immunity is applied to the government entity “when failure to grant it would focus ‘stifling attention’ on an official’s performance ‘to the serious detriment of that performance.’” Id. (citing Olson v. Ramsey County, 509 N.W.2d 368, 372 (Minn. 1993)). This standard grants vicarious immunity “in situations where officials’ performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions” Id.

The Supreme Court granted the school district vicarious immunity in Anderson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, discussed above, because it concluded that to rule otherwise would create a disincentive for academic departments to use collective wisdom to create curricular protocols and policies. This, in turn, would cause “stifling attention” to the actions of the academic department that would deter them from making protocol determinations, which would, in turn, place stifling attention on the work of the teachers. Id. at 664-65. See also Fedke v. City of Chaska, 685 N.W.2d 725 (Minn. Ct. App. 2004) (city protected by vicarious official immunity where denial of immunity would inhibit the exercise of discretion by police officer in bona fide training exercise involving simulated school bus accident).

Vicarious immunity was denied to the school district in S.W. v. Spring Lake Park Sch. Dist. No. 16, 592 N.W.2d 870 (Minn. Ct. App. 1999), aff’d without opinion, 606 N.W.2d 61 (Minn. 2000), even though the employees in question were granted official immunity. This case involved the brutal sexual assault of a student by a stranger who had gotten into the school building. The school district did not have a security policy. The Court felt that extending immunity to the school district in this case would reward the school district for its failure to develop and implement a basic security policy that would have applied under the circumstances. See also Meier v. City of Columbia Heights, 686 N.W.2d 858 (Minn. Ct. App. 2004) (denying vicarious immunity to city even though officials were granted official immunity, where city failed to adopt proper abatement procedures).

Vicarious immunity was granted to the governmental entities in both Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992) and S.L.D. v. Kranz, 498 N.W.2d 47 (Minn. Ct. App. 1993). In both cases, while recognizing that the grant of vicarious immunity was a policy decision, the Court found that the governmental employee was entitled to official immunity and then also granted immunity to the municipality because the Court was concerned that in order to impose liability on the employer the court would have to scrutinize the behavior of the already-immunized employee. Scrutinizing the behavior of the immunized employee would defeat the purpose for issuing immunity to the employee, which was to shield the employee’s exercise of independent judgment from civil adjudication. (Note that, while the vicarious immunity analysis in Kranz appears to be useful, the Court of Appeals’ s analysis of the official immunity issue for individual employees falls into the erroneous terminology discussed in the Official Immunity section, above.)

V. STATUTORY IMMUNITY and TORT LIABILITY ACT (*immunity available to school district by statute under certain circumstances*).

Since 1962, governmental entities in Minnesota have been liable for their torts (civil wrongs or injuries other than breach of contract, such as negligence), subject to certain exceptions and limitations. See Minn. Stat. Ch. 466.

A. Present Tort Liability Act.

1. Definition. Minnesota Statutes section 466.01 provides that the provisions of the Tort Liability Act apply to, among other entities, school districts, however organized; special districts; public corporations; joint powers boards or organizations created pursuant to Minn. Stat. § 471.59 or other statute; other political subdivisions; family services collaboratives established under Minn. Stat. § 124D.23; children's mental health collaboratives established under Minn. Stat. §§ 245.491 to 245.495; or a collaborative established by the merger of a children's mental health collaborative and a family services collaborative, other political subdivision, community action agency, or a limited partnership in which a community action agency is the sole general partner. This provision will be broadly construed to apply to whatever cooperative association school districts enter into.
2. Tort Liability. Minnesota Statutes section 466.02 provides that a school district is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function. An officer, employee or agent for purposes of the Tort Liability Act means a present or former employee, officer or agent of a municipality, or other person acting on behalf of the municipality in an official capacity, temporarily or permanently, with or without compensation, but does not include an independent contractor. Minn. Stat. § 466.01, Subd. 6. For example, in Pritchard Bros., Inc. v. Grady Co., 436 N.W.2d 460 (Minn. Ct. App. 1989), the Court held that an architect, when acting in his role as an arbiter of contract documents, was not an agent of the school district.

B. Statutory Immunity.

Chapter 466 of the Minnesota Statutes provides for certain exceptions to the general rule of municipal liability. One of the exceptions is the "discretionary function" exception, see Minn. Stat. § 466.03, Subd. 6, which provides that a political subdivision, such as a school district, is not liable for its torts and those of its officers, employees and agents acting within the scope of their employment for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." (NOTE: The remaining exceptions to municipal liability are discussed below).

The Minnesota Supreme Court, in Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988) noted that, while both the official immunity of a government official and the state statutory immunity of a governmental unit will attach if discretion is involved, these two types of immunity are based on different types of discretion. Official immunity protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties. This is sometimes referred to as discretion at the "operational" level. Statutory immunity, on the other hand, rests on the need to protect policy-making activities by governmental units that involve a balancing of social, political or economic considerations. This is often referred to as discretion on the "policy-making" level. Elwood, 423 N.W.2d at 678.

3. Statutory Immunity Cases.

This is a confusing and developing area of the law. The Minnesota Supreme Court has stated:

Courts have found resolution of statutory immunity claims difficult. In part, that is due to: (1) a failure to rigidly apply the test for determining entitlement to statutory immunity; (2) difficulty in separating negligence issues from immunity issues; (3) merging concepts associated with statutory immunity with those from the doctrine of official immunity; and (4) desire to reach a specific outcome.

S.W. v. Spring Lake Park School District No. 16, 580 N.W.2d 19 (Minn. 1998). Thus, school districts must keep in mind that each case will turn on its facts and, quite possibly, the judge or court reviewing the matter.

The courts have held that the discretionary immunity granted school districts must be narrowly construed in light of the fact that the immunity is an exception to the general rule of governmental liability. Johnson v. Nicollet County, 387 N.W.2d 209 (Minn. Ct. App. 1986). In drawing the distinctions, the courts have ruled that a planning decision that is protected by governmental immunity as a discretionary act is one that involves the balancing of complex and competing factors comprising a discretionary choice between alternatives. Gonzales v. Hollins, 386 N.W.2d 842 (Minn. Ct. App. 1986). The making of the decision itself is what is protected; the manner in which the Plan is implemented is not immune for purposes of statutory immunity.

This principle was reiterated by the Minnesota Supreme Court in Pletan v. Gaines, 460 N.W.2d 74 (Minn. Ct. App. 1990). The court in Pletan held that a municipality was liable for the death of a child which resulted from a high speed chase. The court noted that the focus of the suit was upon the implementation of an established policy, not upon the making of the policy itself, so statutory immunity was not applicable.

In a later appeal of the case, however, the Minnesota Supreme Court determined that the municipality and the police officer were not liable, because they were protected by the doctrine of "official immunity." In addition to the official immunity issue against the police officer and the city in Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992), the plaintiffs also had sued a school district, arguing that the school district had a duty to put the child on his school bus rather than permit him to walk home. The supreme court ruled that the school district had statutory immunity arising out of its adoption of a district-wide transportation policy. The school district's policy provided that pupils were responsible for being on their bus at the designated departure time. Id. at 44.

If the actions of the school board are an exercise of discretionary school functions, such as whether to discharge a teacher, the school board members and school district are entitled to absolute official privilege. Frier v. Independent School District No. 197, 356 N.W.2d 724 (Minn. Ct. App. 1984). The decision to discipline a teacher is a discretionary school board act not unlike the decision to discharge. Grossman v. School Board of Independent School District No. 640, 389 N.W.2d 532 (Minn. Ct. App. 1986).

The decision to inform the other county employees of the child sexual abuse allegations against a county social worker and the decision to prevent the social worker from seeing clients during the investigation conducted pursuant to Minnesota Statute were discretionary decisions immune from tort liability due to the necessity of balancing public policy objectives. Johnston v. Michael Shea and Associates, 425 N.W.2d 263 (Minn. Ct. App. 1988).

The city's decision to close municipal skating rinks on a holiday weekend was a discretionary act, thus insulating it from liability for negligence based on the doctrine of statutory immunity. Stucci v. City of St. Paul, 403 N.W.2d 850, 852 (Minn. Ct. App. 1987). Similarly, in Dahlheimer v. City of Dayton, 441 N.W.2d 534 (Minn. Ct. App. 1989), the appellate court held that the discretionary function exception to the Tort Liability Act barred an action for negligent fire fighting. The court articulated that it would be inappropriate for a jury or court to second-guess a complicated decision made during a fire. To do so would submit the tactical decisions of fire chiefs to the monetary and psychological threats of litigation.

The decisions by the state and county to retain a person at a residential treatment facility rather than return him to a state security hospital was protected by discretionary immunity. Koelln v. Nexus Res. Treatment Facility, 494 N.W.2d 914 (Minn. Ct. App. 1993).

A decision to place a child in a particular foster home is immune from suit. The implementation and administration of a policy, however, may or may not be protected. Sayers by Sayers v. Beltrami County, 481 N.W.2d 547 (Minn. 1992).

The school board of Independent School District No. 640 was held not to have made defamatory statements regarding a teacher because publication of the school board proceedings at which allegations regarding the teacher were discussed was mandated by statute and because the allegations were part of a disciplinary proceeding that was a discretionary act. Grossman v. School Board of Independent School District No. 640, 389 N.W.2d 532 (Minn. Ct. App. 1989).

The city of Sauk Rapids was not liable for property damage resulting from flooding from a city storm water holding pond. The decision not to make major capital improvements to the existing drainage system is immune as a discretionary function. Although the city waived its immunity by the purchase of liability insurance, there is no liability unless the city was negligent in maintaining or operating the storm sewer system. Chabot v. City of Sauk Rapids, 422 N.W.2d 708 (Minn. 1988). (The legislature subsequently amended M.S. 466.06 so that procurement of insurance does not constitute a waiver of governmental immunities.)

The city was entitled to discretionary act immunity for its decision not to place concrete safety dividers along a roadway. The court held there was no evidence showing the city was on notice the section of the highway was dangerous. Berg v. City of St. Paul, 414 N.W.2d 204 (Minn. Ct. App. 1987).

On the other hand, the Court of Appeals determined that a county's decision not to erect guard rails at an accident site was not protected by the doctrine of discretionary immunity. The court characterized the county's decision here as "professional judgment" rather than legislative "policymaking." Abbett v. St. Louis County, 424 N.W.2d 82 (Minn. Ct. App. 1988).

Design of a guardrail also involved professional judgment and was thus operational, not policymaking. Schaeffer v. State, 444 N.W.2d 876 (Minn. Ct. App. 1989).

Protection afforded by the discretionary function exception does not extend to professional or scientific judgment where such judgment does not involve a balancing of policy objectives. Nusbaum v. Blue Earth County, 422 N.W.2d 713 (Minn. 1988).

Further, Minnesota courts will not allow minimal declarations in an affidavit alone to be sufficient evidence of a planning decision since the courts recognize the risk of having professional or scientific decisions, as well as nondecisions, bootstrapped into planning decisions and thus protected by statutory immunity. Fear v. Independent School District 911, 634 N.W.2d 204, 212 (Minn. Ct. App. 2001). In the Fear case, the Court of Appeals found that school officials did not meet their burden of proof that the decision to place snow on a school playground was a planning-level decision entitled to statutory immunity. However, the court did find the school district protected by statutory immunity for the hiring, training and supervising of school employees who worked as supervisors of the playground.

The court interprets the discretionary exception function narrowly. The exception is designed to assure that the courts do not pass judgment on policy decisions entrusted to coordinate branches of government. The exception is thus limited to decisions that involve the balancing of competing public policy decisions. The court distinguishes planning level decisions from operating decisions. Planning level decisions are those involving questions of public policy including the evaluation of factors such as the financial, political, economic and social effects of a given plan or policy. Operational level decisions involve decisions relating

to the day-to-day operation of government. The application of this standard can be difficult. In Gorecki v. County of Hennepin, 443 N.W.2d 236 (Minn. Ct. App. 1989), the court held that the county's decision to adopt a policy to preclude snow from being thrown from bridges was protected from liability as a planning level decision, but the decision not to remove snowbanks from certain bridges without sidewalks was an employee's professional judgment not involving policy considerations and was not protected.

The school district's decision to delegate to the school buildings the duty to make decisions regarding building safety and security is protected by discretionary immunity. The school district's decision to delegate responsibility to each school building is a policy decision involving social, political and economical considerations. Montemayor v. Special School District No. 1, 1996 WL 636210 (Minn. Ct. App. 1996) (unpublished).

In Belkey v. Independent School District No. 16, 1996 WL 571467 (Minn. Ct. App. 1996) (unpublished), a student sued a school district as a result of injuries suffered on the playground when tackled by another student. The school district had adopted a non-tackling policy, and the student alleged the negligent implementation of that policy. The Court of Appeals noted that planning activities generally are protected by statutory immunity, but operational activities generally are not. It held that the enforcement of the no-tackling policy was operational conduct not protected by statutory immunity.

While the decision to terminate an employee is almost always discretionary, statutory immunity does not protect a school district for a public employee's termination that violates a statute prohibiting retaliatory discharges. Edina Educ. Ass'n v. Board of Educ. of Independent School District No. 273 (Edina), 562 N.W.2d 306 (Minn. Ct. App. 1997).

In Davis v. Hennepin County, 559 N.W.2d 117, 121-22 (Minn. Ct. App. 1997), review denied, the Court of Appeals concluded that the Minnesota Human Rights Act impliedly waives statutory immunity.

In S.W. v. Spring Lake Park School District No. 16, 580 N.W.2d 19 (Minn. 1998), a student sued a school district alleging that its failure to provide adequate supervision, protection and security resulted in her being the victim of a brutal sexual assault on school grounds by a non-employee who entered school property. The Court commented that the "purpose of statutory immunity is to protect government entities from having the judiciary second-guess the important public policy decisions they are required to make." This would include a decision about adopting a security policy that was ineffective. However, the Court concluded that the school district's "failure or refusal to enact a [security] policy is conduct at an operational level and therefore is not entitled to statutory immunity." (The Court also conducted a separate official immunity analysis, as discussed above in part III.)

A school district's decisions as to method, manner, and extent of investigation of anonymous tip alleging inappropriate teacher-student contact were held to be policy decisions entitled to statutory immunity from tort claims in Doe v. Park Center High School, 592 N.W. 2d 131 (Minn. Ct. App. 1999).

As noted above, many courts have gotten the concepts and terms mixed up while trying to analyze this highly complex area. For example, some courts, including even the Minnesota Supreme Court on one occasion (see Larson), have mistakenly imported the "policy-making" concept (applicable in only in the statutory immunity context) into an official immunity analysis (which only involves "operational" decisions). Courts also mistakenly have implied that "operational" decisions are always "ministerial" decisions (not protected by immunity) (see Larson, Kranz), when in fact, operational decisions could be either discretionary (protected) or ministerial (not protected).

4. Other Statutory Exceptions to Tort Liability.

Minnesota Statutes section 466.03 provides immunity from liability when claims arise as a result of certain enumerated causes, including:

- (a) Claims in connection with the assessment and collection of taxes (Subd. 3);
- (b) Claims based on snow or ice conditions on any highway or public sidewalk that does not abut a publicly-owned building or publicly-owned parking lot, except when the condition is affirmatively caused by the negligent acts of the school district (Subd. 4);
- (c) Claims based upon an act or omission of an officer or employee, exercising due care, in the execution of a valid or invalid statute, charter, ordinance, resolution or rule (Subd. 5);
- (d) Claims based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused (Subd. 6). Note: The Courts have upheld the constitutionality of this provision in Bjorkquist v. City of Robbinsdale, 352 N.W.2d 817 (Minn. Ct. App. 1984) and held that school board members and school officials are entitled to official immunity in the exercise of discretionary school district functions; See also, Frier v. Independent School District No. 197, 356 N.W.2d 724 (Minn. Ct. App. 1984);
- (e) Claims based on the condition of unimproved real property owned by the district (Subd. 6b);
- (f) Subject to the duty to use reasonable care to warn trespassers of any danger of risk, claims arising from use of a municipalities' beach or pool equipment including use of a diving board, diving platform, diving raft, water slide, non water slide, or dock if the injury occurred when the beach or swimming pool was closed as indicated by a sign posted at the beach or pool (Subd. 6f);
- (g) Claims based upon the construction, operation or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or from claims based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claims arise from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person (Subd. 6e);
- (h) Any other claims as to which a school district is immune from liability by the provisions of any other statute (Subd. 7);
- (i) Claims for losses other than injury to or losses of property or personal injury or death (Subd. 8);
- (j) Claims for losses caused by the condition of unimproved real property owned by a district, which means land that the district has not improved, and appurtenances, fixtures and attachments to land that the district has neither affixed nor improved (Subd. 13);
- (k) Claims against a district, if the same claims would be excluded under section 3.736, if brought against the state (Subd. 15);
- (l) Any claim based on injury arising out of a decision by a school or school district to obtain a fire code variance for purposes of school building security, if the decision was made in good faith and in accordance with applicable law governing variances. (Subd. 18); and

(m) Any claim based on alleged or actual inaccuracies in geographic information systems (GIS) data, arising from the public's use of the GIS data if the school district provides a disclaimer of the accuracy of the information at any point of initial contact with a GIS to which the public has general access. (Subd. 21).

The Legislature in 2000 adopted various regulations and requirements pertaining to application of pesticides at school. The law, called the Parents Right to Know Act of 2000, (M.S. 121A.30), requires all schools planning to apply specific pesticides to provide notice to employees and parents. The law also provides for immunity from liability for school districts who fail to comply with the statutory provisions. (Subd. 12).

C. Maximum Liability.

(1) Dollar Limit. M.S. 466.04, Subdivision 1 provides that for claims arising before January 1, 2008, the liability of a school district shall not exceed \$300,000 for a single claim and \$1,000,000 for any number of claims arising out of a single occurrence. The limits increase to \$400,000 for a single claim and \$1,200,000 for any number of claims arising out of a single occurrence for claims arising on or after January 1, 2008 but before July 1, 2009, and \$500,000 for a single claim and \$1,500,000 for any number of claims arising out of a single occurrence for claims arising on or after July 1, 2009. In Snyder v. City of Minneapolis, 441 N.W.2d 781 (Minn. 1989) rehearing denied, it was held that the cap on municipal tort liability provided under M.S. 466.04 is not an affirmative defense, but a statutory rule of law that district courts are obliged to impose whenever damages exceed the statutory limit. Furthermore, the court held that the cap on municipal tort liability, as noted in M.S. 466.04, survives any constitutional challenges based on equal protection and due process and does not violate Article 1, Section 8 of the Minnesota Constitution.

M.S.A. § 466.04, Subdivision 1 was recently amended to increase the single claim limit to \$400,000 for claims arising on or after January 1, 2008, and before July 1, 2009, and to \$500,000 for claims arising on or after July 1, 2009. The multiple claims limit was increased to \$1,200,000 for any number of claims arising out of a single occurrence for claims arising on or after January 1, 2008, and before July 1, 2009, and to \$1,500,000 for any number of claims arising out of a single occurrence for claims arising on or after July 1, 2009. These tort liability cap amendments were effective July 1, 2008, and apply to claims arising from acts or omissions that occur on or after that date.

The Eighth Circuit Court of Appeals, in Reimer v. City of Crookston and Crookston Public School Dist. No. 593, 421 F.3d 673 (8th Cir. 2005), held that a city and school district as municipalities under Chapter 466, which partner in a joint enterprise retained their own cap on tort liability, and a claimant was allowed to collect damages up to each governmental entity's maximum cap from each entity. In response to this decision, M.S.A. § 471.59, Subdivision 1(a) "Liability" was enacted. According to this statutory provision, a governmental entity participating in a joint venture or joint enterprise, including participation in a cooperative activity undertaken pursuant to the Joint Powers Act or other law, is not liable for the acts or omissions of another governmental entity participating in the joint venture unless the participating governmental entity has agreed in writing to be responsible for the acts or omissions of another participating governmental entity.

M.S.A. § 471.59, Subdivision 1(a) also provides that for purposes of determining total liability for damages, the participating governmental entities and the joint board, if one is established, are considered a single governmental entity and the total liability for the participating entities and the joint board, if established, shall not exceed the limits on governmental liability for a single governmental unit as specified in the statutory caps set forth in M.S.A. § 466.04, Subdivision 1 or as waived or extended by

either the joint board purchasing its own insurance or by all participating governmental entities. This provision does not protect the governmental entity for liability for its own independent acts or omissions not directly related to the joint activity.

This statutory provision further provides that if a participating governmental entity has procured or extended insurance coverage in excess of the limits on governmental liability that covers participation in the joint venture or joint enterprise, procurement of that insurance constitutes a waiver of the limits of governmental liability for the governmental entity to the extent that valid and collectible insurance or self-insurance exceeds those limits and covers that governmental entity's liability for the claim, if any.

(2) Claims Arising from Release of Hazardous Substances. For claims arising out of the release or threatened release of a hazardous substance, the limits are doubled.

(3) Punitive Damages.

(a) An award for damages under a state law claim may not include punitive damages against the school district. M.S. 466.04, Subd. 1(b). Punitive damages may, however, be included against the school district's officers and employees. Wilson v. City of Eagan, 297 N.W.2d 146, (Minn. 1980); Paradise v. City of Minneapolis, 297 N.W.2d 156 (Minn. 1980). M.S. 466.07, Subd. 1 requires that a school district, however organized, defend and indemnify its officers and employees for damages, including punitive damages, claimed or levied against the officer or employee, subject to the restrictions below.

(b) M.S. 549.20, Subd. 1 provides that punitive damages will be allowed only in civil actions where the defendant shows a deliberate disregard for the rights or safety of others. This is a more stringent standard than the "willful indifference" under former statutes. Further, the plaintiff must establish the deliberate disregard by clear and convincing evidence. In a civil action in which punitive damages are sought, the trier of fact is first to determine whether compensatory damages are to be awarded. Then, in a separate proceeding, the trier of fact is to determine whether and in what amount punitive damages are to be awarded. M.S. 549.20, Subd. 4. The statute provides for judicial review of punitive damages under the "deliberate disregard" standards set out above. M.S. 549.20, Subd. 5.

(c) Restrictions on Defense and Indemnification. A district is not required to defend and indemnify an officer or employee for punitive damages if the officer or employee was not acting in the performance of the duties of the position or was guilty of malfeasance in office, willful neglect of duty, or bad faith. (M.S. 466.07, Subd. 1(2)).

(d) Exception to Dollar Limit. M.S. 466.04, Subd. 1a provides that the liability of an officer or employee of a school district cannot exceed the tort liability limits unless the officer or employee (1) provides professional services, and also (2) is employed in the profession for compensation by a person or persons outside the school district.

(e) Total Liability Limit. The total liability of the school district on a claim against it and its officers and employees arising out of a single occurrence may not exceed the limits specified above (M.S. 466.04, Subd. 1b). The limitation includes damages for loss of services or loss of support arising out of the same claim (Subd. 2). In Rowe v. St. Paul Ramsey Medical Center, 472 N.W.2d 640 (Minn. 1991), the Minnesota Supreme Court determined that a spouse's claim for loss of consortium is included in the same liability cap that limits recovery by the injured spouse.

(f) Apportionment of Damages to Multiple Claimants. If there are multiple claimants and the amount awarded or settled upon exceeds the applicable limit specified above, the court, upon application, may apportion to each claimant a proper share based on the proportion that the ratio of the award or settlement made to each bears to the aggregate awards and settlements for all claims arising out of the same occurrence. (M.S. 466.04, Subd. 3). (e.g., if there were a total jury award of \$3,000,000 to three claimants based on the same accident arising after July 1, 2009, divided \$2,000,000 to A, \$800,000 to B and \$200,000 to C, the claimants actually would recover only one-half of their jury awards, since $\$1,500,000 \text{ maximum} \div \$3,000,000 \text{ actual} = 1/2$. Thus, A would get \$1,000,000, B would get \$400,000 and C would get \$100,000.)

D. Liability Insurance.

(a) Procurement of Insurance. The limits on liability set out are not absolute. M.S. 466.06 provides that the school board may procure insurance against liability of the school district and its officers, employees and agents. M.S. 123B.23 also allows the procurement of this insurance.

(b) Waiver of Liability to Level of Coverage. The procurement of liability insurance under M.S. 466.06 constitutes a waiver of the limits of governmental liability only to the extent that valid and collectible insurance, exceeds limits and covers the claim. Thus, if a district has \$1,000,000 worth of coverage, it waives immunity up to that level. The procurement of the insurances constitutes a waiver of limits of liability but does not constitute a waiver of any of the statutory immunities conferred under M.S. 466.03, as discussed above.

Note that the waiver of immunity only relates to insurance purchased by the school district. There is no waiver where a district employee purchases private professional liability insurance. Cairl v. State, 323 N.W.2d 20 (Minn. 1982). This rule applies even if the private insurance covers job-related activities or is purchased as excess liability insurance. Nelson v. House, 402 N.W.2d 639 (Minn. Ct. App. 1987).

(c) Undercoverage. If the school district has only \$200,000 worth of coverage, it is still liable up to the maximum limit. (See below for more detailed discussion of insurance coverage and needs of the district.)

(d) Payment of Premium Costs. Premium costs are to be paid from the general fund without additional levy authority and are authorized reserved general revenue expenditures.

E. Indemnification.

(a) Present Law. M.S. 466.07, Subd. 1 provides that a school district, however organized, is required to defend and indemnify its officers and employees, whether elected or appointed, for damages, including punitive damages, claimed or levied against the officer or employee, providing that the officer or employee was acting in the performance of the duties of the position and was not guilty of malfeasance in office, willful neglect of duty, or bad faith. This obligation may arise in employer vs. employee actions as well unless there is a showing of “bad faith” on the part of the employee seeking indemnification. See Caster v. Independent School District No. 404, 670 N.W.2d 758 (Minn. Ct. App. 2003).

(b) Limit on Indemnification. The indemnification is subject to the limits specified above.

(c) Restriction on Indemnification. The provisions requiring indemnification do not apply in cases of malfeasance in office, willful neglect of duty, or bad faith. See Queen v. Minneapolis Public Schools, 481 N.W.2d 66 (Minn. Ct. App. 1992).

(d) Punitive Damages. M.S. 466.07, Subd. 1, requires that school districts indemnify and defend an officer or employee for punitive damages levied against the officer or employee, subject to the restrictions above. The district may provide a defense against a claim for punitive damages as a necessary ingredient of other elements of a defense.

F. Settlement. M.S. 466.08 grants authority to the school board, the administrator of a self-insurance pool, or the authorized representative of a private insurance carrier to compromise, adjust and settle tort claims, and to pay the amounts agreed upon. If the settlement exceeds \$10,000, it must be approved by the District Court.

G. Payment of Judgments.

(a) Authority. M.S. 466.09 grants school districts the authority to pay judgments or settlements.

(b) Levy for Unpaid Judgments. If the district does not have sufficient insurance coverage or if funds are otherwise unavailable to pay the judgment, it may levy for the unpaid judgment pursuant to the provisions of this section and M.S. 126C.43.

H. Notice of Claim.

(a) Notice Requirement. M.S. 466.05 requires a person who claims damages from a school district, or school district employee, to present to the school board within 180 days after the alleged loss or injury is discovered a notice stating the time, place and circumstances thereof, the names of the district employees known to be involved, and the amount of compensation or other relief demanded. However, see Glassman v. Miller, 356 N.W.2d 655 (Minn. 1984) and O'Brien v. Mercy Hospital and Convalescent Nursing Care Section, 382 N.W.2d 518 (Minn. 1986), where the Court held that failure to give notice is not grounds for dismissal of an action, but may be used as a defense provided the municipality can establish prejudice. That is, failure to give notice is a nonjurisdictional defect that bears only on damages.

(b) Actual Notice. Actual notice of facts sufficient to put the school board on notice is sufficient.

(c) Period of Incapacity. The time for giving the notice does not include the time when the person is incapacitated by the injury from giving the notice.

(d) Wrongful Death Actions. The notice of a wrongful death claim may be presented within one year after the date of the injury or loss resulting in the death. If sufficient notice was presented by the person who later died, the action may be brought without additional notice.

I. Scope of Liability. The Larson court narrowly construed the official immunity doctrine. The Faber and Scott cases discussed below have broadened the law relating to multiple claimants. When these are taken in conjunction with the mandatory employee indemnification provisions, the school district is open to a much broader scope of liability than has historically been the case. This may necessitate a review of the quality and level of district liability insurance coverage and of the practices of district personnel.

VI. LIABILITY INSURANCE CONSIDERATIONS.

A. Authority. As stated above, M.S. 123B.23 and 466.06 authorize a school district to purchase liability insurance. The district must carefully review its policies to guarantee that it has adequate protection against its exposure under the Tort Liability Act.

B. Limits on Liability. Under M.S. 466.04, for claims arising before January 1, 2008, the total liability of a school district on a state law claim arising against it and its officers and employees is limited to \$300,000 for a single claim and \$1,000,000 for any number of claims arising out of a single occurrence. The limits increase to \$400,000 for a single claim and \$1,200,000 for any number of claims arising out of a single occurrence for claims arising on or after January 1, 2008 but before July 1, 2009, and \$500,000 for a single claim and \$1,500,000 for any number of claims arising out of a single occurrence for claims arising on or after July 1, 2009.

M.S.A. § 466.04, Subdivision 1 has been amended to increase the single claim limit to \$400,000 for claims arising on or after January 1, 2008, and before July 1, 2009, and to \$500,000 for claims arising on or after July 1, 2009. The statutory provision increases the multiple claims limit to \$1,200,000 for any number of claims arising out of a single occurrence for claims arising on or after January 1, 2008, and before July 1, 2009, and to \$1,500,000 for any number of claims arising out of a single occurrence for claims arising on or after July 1, 2009. These tort liability cap amendments were effective July 1, 2008, and apply to claims arising from acts or omissions that occur on or after that date.

C. Multiple Claimants; Statutory Limitations and Insurance Coverage.

1. In the Larson case, both the injured student and his father were allowed to recover damages.

2. In Faber v. Roelofs, ("Faber I"), 212 N.W.2d 856 (Minn. 1973), the Minnesota Supreme Court previously upheld this practice. In that case, the court ruled that the parent's action to recover medical expenses was separate from the child's action to recover for the injury. Since M.S. 466.04, Subd. 1(a) speaks of "any claimant," more than one claim may be brought as a result of the one injury and each claimant may recover up to the limit on liability.

3. In "Faber II," Faber v. Roelofs, 250 N.W.2d 817 (Minn. 1977), the liability issue again came to the Supreme Court, but this time the issue was a question of interpretation of the liability insurance coverage on the claim in Faber I. In that case the insurance policy provided for limits of liability of \$50,000 for bodily injury to each person and \$300,000 for each occurrence. The court held that under policies fixing a maximum recovery for bodily injury to one person, the limitation was applicable to all claims of damage flowing from such bodily injury and that it is immaterial that some part of the damages may have been claimed by a person other than the one suffering the bodily injuries. In other words, all damage claims resulting from injury to one person are subject to the insurance policy limitation. See also Holtz v. Mutual Service Gas Co., 264 Minn. 121, 117 N.W.2d 767 (1962); Holmgren v. Heisick, 287 Minn. 386, 178 N.W.2d 854 (1970); 13 A.L.R.3d 1228, 1234. In Faber II, the school district fortunately was also covered by another insurance policy. Construing application of provision in liability policy limiting the amount of insurer's liability to one person. However, the court stated:

Of course, had the school district not been covered by the Mutual policy it would have been exposed to an uninsured liability because of our interpretation of the 'each claimant' language of 466.04 in Faber v. Roelofs (Faber I) supra. We trust that school districts will take note of this problem and modify their insurance coverage accordingly . . .

4. In Scott v. Indep. Sch. Dist. No. 709, Duluth, 256 N.W.2d 485 (Minn. 1977), this issue arose again when a student who was not wearing safety glasses was injured in the eye in an industrial arts class. The court reviewed Faber I and Faber II and the insurance policy which provided the same coverage as that in Faber II. The district's insurance provided coverage of \$50,000 for all damages sustained by one person as a result of any one occurrence. The jury had found the student 10 percent negligent and the district 90

percent negligent and awarded damages of \$3,100 to the student and \$60,000 to his father. The father's award was subsequently reduced to \$54,000. The court found that the district was liable for the uninsured amount above the \$50,000 coverage up to the statutory limit.

In Rowe v. St. Paul Ramsey Medical Center, 472 N.W.2d 640 (Minn. 1991), the Minnesota Supreme Court determined that a spouse's claim for loss of consortium is included in the same liability cap that limits recovery by the injured spouse.

5. Example. To take another example, assume a student is injured in 2010. He and his father each assert a separate claim for \$800,000. The school district liability insurance policy provides coverage of \$500,000 for all claims arising from bodily injury for each person and \$1,500,000 per occurrence. M.S. 466.04 provides for liability of \$500,000 for each claimant and \$1,500,000 per occurrence.

Under Faber I, Faber II and Scott, supra, the total statutory exposure is \$1,600,000 because the father and son will each be claimants. The insurance company will provide coverage under its policy for only \$500,000 for the claims of the father and son because they arise out of the one bodily injury. In Scott, the Supreme Court held that where there is a conflict between the statutory language and the insurance company language, the school district is uninsured but remains liable for the difference between its coverage and its liability. Thus the district is not insured for and must make up \$1,100,000 out of the \$1,600,000 liability.

This situation can be resolved only by careful review of the language of the school district liability policy and the purchase of additional insurance which will fully cover liability to all claimants.

D. Insurance Coverage Exceeding the Statutory Limits. M.S. 466.06 provides that the procurement of liability insurance by a school district constitutes a waiver of the limits of governmental liability to the extent of the liability stated in the policy. Thus, if the district has coverage for \$1,000,000 for each claimant, that is the limit of its state law liability in areas in which it is not immune, not the limit provided under M.S. 466.04. Since the district is liable for the negligent acts of its employees and must indemnify and provide defense for them, the excess coverage is no longer as important as in the past for claims brought under color of state law. Of course, there are social policy considerations relating to amounts of coverage that must be determined by each board. The other area for which protection must be provided is against liability for claims brought under federal statutory provisions, such as the Civil Rights Act, which often provide for actual and punitive damages and attorney's fees. The particular level of coverage needed should be decided by the board after consultation with experts in the insurance field.

E. Insurance Policy Review. The district should review its liability insurance policies carefully with special attention to the following:

1. No Uninsured Gaps. The policy language must be broad enough so that there are no uninsured gaps. As discussed above, this is especially important in the liability limit area so the bodily injury coverage is at least equal to the statutory liability limit for each claimant.

2. Coverage. The policy should cover torts of all officers, employees and agents of the district acting within the scope of their employment or duties whether arising out of a governmental or proprietary function, both as to defense for those acts and as to judgment or settlement so there will be direct indemnification by the insurer rather than the district.

3. Named Insureds. The various officers, employees and agents of the district should be named insureds under the district's policy to insure coverage for their acts and so that there will be direct

indemnification by the insurance company rather than the district.

4. No Exclusion. There should be no exclusion for discretionary acts of those officers or employees. After Larson, this is obviously a very broad area to be without coverage and the district does not want the insurer to be able to set up a separate defense to payment under the policy.

5. Release of Hazardous Materials. The district should be certain that the policy covers the release or threatened release of hazardous materials and that the level of coverage is at least equal to the increased limits for such releases.

VII. RECOMMENDATIONS.

A. Review. As stated above, in addition to reviewing the scope of its liability coverage, the district should review its own policies and the practices of its personnel.

B. Decision. The Larson decision narrowed considerably the discretionary acts doctrine as a defense to school district liability although the Anderson case opened up the possibility of vicarious immunity for school districts where employees are following established school district policy. Nonetheless, actions and delegations of authority that may be commonplace in the district must be reexamined in light of the increased liability of administrators for actions of teachers and other personnel. While the decision creates a very difficult burden for administrators in that it seems to require an expertise in all things at all times, the new responsibility must be approached in an affirmative rather than a negative manner. On the other hand, the Anderson case provides some relief from liability under the official immunity defense.

C. General Principles.

1. Larson Case

a. Superintendent. While the superintendent was found not negligent in Larson because he was one step removed from the action, the next case with different facts could find a closer connection. Thus, if the superintendent has delegated duties, he or she should follow through to make sure they are being carried out in the proper manner. This may require more reports from subordinate administrators and supervisors, both licensed and nonlicensed. It may involve more personal inspection and consultation.

b. Principals. Principals are obviously going to be held to a much higher standard than was previously thought to be the case or than that which may be applicable in other states. This may necessitate less complete delegation of authority and more actual investigation and follow through by each principal. There are some specific areas which the court does address, which include the following:

(1) Curriculum. The Larson decision stressed the failure of the principal in that case to participate in the development, administration and supervision of the physical education curriculum. While there are certain human limits, this necessitates a greater involvement by the principal in this area. There should also be like concentration in other areas where injuries are most likely to occur, such as industrial arts, vocational subjects, labs, playground supervision, etc.

The court also stressed the lack of the development of a safe progression of activities. It appears to require not only daily lesson plans but also unit plans that demonstrate a progression from easier or safer activities to more difficult tasks. This will be especially important in the higher risk areas, but should be emphasized for all activities. As a corollary to this, safety should be made a specific part of

these plans and the principal should require and review the various safety measures of each plan. This will entail requiring written reports. It may be well to also require some form of follow-up report which emphasizes how the various safety procedures were performed and including recommendations for further improvement. This will necessitate the principal and teachers or other employees taking some extra time to prepare, review and act on these matters. There will also need to be supervisory follow-up when unsafe conditions are discovered since to do otherwise may initiate future liability for allowing that unsafe condition to continue. Note that a written curriculum specifying safety measures and practices for each curricular area was crucial to the immunity granted to both the school staff and the school district in Anderson, since the student's injury occurred while curricular measures were being followed.

(2) Supervision. The court in Larson also put great emphasis on the lack of supervision by the principal, especially in the case of an inexperienced teacher performing in a risk area. The court appears to be requiring greater orientation of new teachers and more detailed explanations of what is required of them in specific situations. The majority of the court appears to disregard the fact that by their training and licensure, the teachers are expected to be the experts in their areas of instruction. Most administrators do not have expertise in every area of academic, vocational or co-curricular or extra-curricular instruction. Still, the court appears to require at least a good faith attempt by the administrators to find out what is actually going on and to use their best judgment as to whether this is safe and proper. The dissent in Larson expresses concern that the decision "would compel principals out of an abundance of caution to impose restrictions and restraints on subordinate teachers that might very well be inappropriate and wholly inconsistent with sound teaching practices." One would hope that this would not occur but, at the same time, there may need to be a tightening of supervision and control over lax practices. In order to accomplish this, it will be necessary for administrative personnel to get into the classrooms and various other instructional and work areas to observe and supervise the activities taking place. Close attention should be paid to the curriculum and whether the observed activities are within its parameters. This does not require measures that impede the instructional process or intrude upon academic freedom, but safety requirements must be met.

(3) New Teachers; Transition. The court places stress on the principal properly orienting and supervising new or inexperienced teachers, which one would assume includes instructors teaching in subject areas new to them or the curriculum. It puts at least some affirmative duty on the principal to require and to review planning by the teacher, to make direct inquiry about the conduct of specific activities and to consult with the teacher as to what the class has learned and will be learning in the future. There should be definite goals established and written reports on their implementation. If there is a transition between two teachers, it should be well explored and thought out. The administration can no longer take for granted that those who have the expertise in the field are performing their duties correctly.

In Verhel, the court held that the district had a duty to instruct properly and adequately the supervisor it assigned to the cheerleading squad. It found the instructions given to be general and nonspecific. It also found that the district should have properly, adequately and specifically instructed the supervisor so that plans for the banner and its attendant transportation would have been approved by the supervisor or principal or prohibited.

2. Anderson Case

- a. School District. The School District was found to qualify for vicarious official immunity because it had authorized its Technology Education Department to use their collective wisdom and

experience in formulating protocols for the use of the power saw in the classroom. Thus, well thought out policies and procedures, adopted by school districts and properly followed by school district employees may provide a shield against liability claims.

- b. Individual Education Departments. In Anderson, the plaintiffs did not bring suit against the Technology Education Department. However, the Supreme Court noted that had such a claim been brought, the Technology Education Department would have also qualified for official immunity given that the protocol it adopted when students used the power saw was deemed to be a discretionary decision at the operational level. Therefore as noted above, it is important to craft carefully thought out policies and procedures culled from the collective wisdom and experience of the organization, and effectively communicate such policies and procedures to ensure compliance.
- c. Teacher. In Anderson, the Supreme Court noted that although the teacher's implementation of the saw blade protocol was properly categorized as a ministerial duty, the analysis does not end there. The Court cautioned that it is important to correctly identify the negligent act the claim is based upon. If in fact the negligent act is compliance with a formal protocol or policy adopted by the school district, official immunity may attach, regardless of whether the teacher was acting in a ministerial fashion. However, should the claim involve a teacher failing to follow the policy or procedure, such actions will not be shielded from liability through official immunity. Therefore it is important to stress to teachers and employees the protective benefits of following protocol, in effort to maximize the protections offered by the doctrine of official immunity.

VIII. CONCLUSION. While on balance the Larson case and the other decisions cited herein broaden the scope of a district's liability, it should be remembered that the Tort Liability Act has been amended and the Anderson case decided since the time of the accident in Larson. The liability of administrators and teachers is now included within the tort liability limits and there is a requirement of indemnification and defense, all factors that were not present in 1971. While the district will still wish to avoid any liability through tightened procedures and increased supervision, as will its officers and employees, there is now greater protection in the area of state law claims, especially if the district has taken care to properly insure itself. Panic is certainly not necessary. There may need to be tightening of procedures and increased supervision, but the Larson decision should not at this time open the way for an onslaught of catastrophic law suits under the present law.

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

CHARTER SCHOOLS IN MINNESOTA

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I. INTRODUCTION:

In 1991, enabling legislation was adopted which permits and governs the establishment of charter schools in Minnesota. Conceptually, this legislation was intended to allow teachers, parents and community members with innovative ideas for improving learning to form and operate an independent public charter school. In order to promote such innovation, the legislature determined that genuine differences in philosophy, methods and structure would be necessary. Accordingly, the legislation allows these new models of education to be formed unrestrained by some statutes and rules governing traditional public school districts.

II. CITATION:

The Minnesota charter school statute, which may be cited as M.S. 124D.10, includes the following provisions and requirements:

A. Purposes. A charter school must be designed to meet the primary purpose of the legislation, which is to: improve **all** pupil learning and **all** student achievement. Additional purposes include to: increase learning opportunities for pupils; encourage the use of different and innovative teaching methods; measure the learning outcomes and create different and innovative forms of measuring outcomes; establish new forms of accountability for schools; or create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site. Charter schools are not a means to keep open a school that a school board decides to close. However, a school board may endorse or authorize the establishing of a charter school to replace the school the board decided to close. Applicants seeking a charter under this circumstance must demonstrate to the authorizer that the charter sought is substantially different in purpose and program from the school the board closed and that the proposed charter satisfies the requirements of this subdivision. If the school board that closed the school authorizes the charter, it must document in its affidavit to the commissioner that the charter is substantially different in program and purpose from the school it closed. An authorizer shall not approve an application submitted by a charter school developer if the application does not comply with these requirements. The commissioner shall not approve an affidavit submitted by an authorizer if the affidavit does not comply with these requirements (M.S. 124D.10, Subd. 1(a)(b)).

B. Authorizer. 1. The following organizations may authorize one or more charter schools: a school board; intermediate school district school board; education district; a charitable organization under section 501(c)(3) of the Internal Revenue Code of 1986, excluding a nonpublic sectarian or religious institution, any person other than a natural person that directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with the nonpublic sectarian or religious institution and any other charitable organization under this clause that in the Federal IRS Form 1023, Part IV, describes activities indicating a religious purpose; that is a member of the Minnesota Council of Nonprofits or the Minnesota

Council on Foundations, is registered with the attorney general's office; is incorporated in the state of Minnesota and has been operating continuously for at least five years but does not operate a charter school; a Minnesota private college that grants two-or four-year degrees; community college, state university, technical college, governed by the board of trustees of the Minnesota State Colleges and Universities; or the University of Minnesota or a nonprofit corporation subject to chapter 317A, and exempt from federal income tax under section 501(c)(6) of the Internal Revenue Code of 1986, if the charter school has operated for at least three years under a different authorizer and if the nonprofit corporation has existed for at least 25 years. Single-purpose authorizers **formed as** charitable, non-sectarian organizations under Section 501(c)(3) of the Internal Revenue Code of 1986 and incorporated in the state of Minnesota under Chapter 317A with no members **or under Section 322B.975, as a nonprofit limited liability company for the sole purpose of chartering** schools may charter a school (M.S. 124D.10, subdivision 3).

2. Eligible organizations interested in being approved as an authorizer must submit a proposal to the commissioner that includes eligibility criteria and a five-year financial plan. Such authorizers shall consider and approve charter school applications using the criteria set forth in M.S. 124D.10, Subd. 4 and shall not limit the applications it solicits, considers, or approves to any single curriculum, learning program or method.

3. Eligible authorizers must apply to the commissioner for approval as an authorizer before submitting any affidavit to the commissioner to a charter school. The application for approval as a charter school authorizer must demonstrate the applicant's ability to implement procedures and satisfy the criteria for chartering a school under this section.

4. The commissioner must approve or disapprove an application within 45 business days of the application deadline. If the commissioner disapproves the application, the commissioner must notify the applicant of the specific deficiencies in writing and the applicant then has 20 business days to address the deficiencies to the commissioner's satisfaction. After the 20 business days expire, the commissioner has 15 business days to make a final decision to approve or disapprove the application. Failing to address the deficiencies to the commissioner's satisfaction makes an applicant ineligible to be an authorizer.

5. The commissioner, in establishing criteria for approval, must consider the applicant's:

- a. Capacity and infrastructure.
- b. Application criteria and process.
- c. Contracting process.
- d. Ongoing oversight and evaluation process.
- e. Renewal criteria and processes.

6. An applicant must include in its application to the commissioner to be an approved authorizer at least the following:

- a. How chartering schools is a way for the organization to carry out its mission.
- b. A description of the capacity of the organization to serve as an authorizer, including the personnel who will perform the authorizing duties, their qualifications, the amount of time they will be assigned to this responsibility and the financial resources allocated by the organization to this responsibility.

- c. A description of the application and review process the authorizer will use to make decisions regarding the granting of charters.
 - d. A description of the type of contract it will arrange with the schools it charters that meets the provisions of M.S. 124D.10, Subd. 6.
 - e. The process to be used for providing ongoing oversight of the school consistent with the contract expectations specified in Clause 4 above that assures that the schools chartered are complying with both the provisions of applicable law and rules and with the contract.
 - f. A description of the criteria and process the authorizer will use to grant expanded applications under M.S. 124D.10, Subd. 4(j).
 - g. The process for making decisions regarding the renewal or termination of the school's charter based on evidence that demonstrates the academic, organizational and financial competency of the school, including its success in increasing student achievement and meeting the goals of the charter school agreement.
 - h. An assurance specifying that the organization is committed to serving as an authorizer for the full five-year term.
7. A disapproved applicant may resubmit an application during a future application period.
8. If the governing board of an approved authorizer votes to withdraw as an approved authorizer for a reason unrelated to any cause under M.S. 124D.10, Subd. 23, the authorizer must notify all its charter schools and the commissioner in writing by July 15 of its intent to withdraw as an authorizer on June 30 in the next calendar year. The commissioner may approve the transfer of a charter school to a new authorizer under this paragraph after the new authorizer submits an affidavit to the commissioner.
9. The authorizer must participate in department-approved training.
10. The commissioner shall review an authorizer's performance every five years in a manner and form determined by the commissioner and may review an authorizer's performance more frequently at the commissioner's own initiative or at the request of a charter school operator, board member or other interested party. The commissioner, after completing the review, shall transmit a report with findings to the authorizer. If the commissioner finds that an authorizer has not fulfilled the requirements herein, the commissioner may subject the authorizer to corrective action which may include terminating the contract with the charter school board of directors of a school it chartered. The commissioner must notify the authorizer in writing of any finding that may subject the authorizer to corrective action. The authorizer then has 15 business days to request an informal hearing before the commissioner takes corrective action. If the commissioner terminates a contract between an authorizer and a charter school under this paragraph, the commissioner may assist the charter school in acquiring a new authorizer.
11. The commissioner may, at any time, take corrective action against an authorizer, including terminating an authorizer's ability to charter a school for:
- a. Failing to demonstrate the criteria under 124D.10, Subd. 3© under which the commissioner approved the authorizer;
 - b. Violating a term of the chartering contract between the authorizer and the charter school board of directors;

- c. Unsatisfactory performance as an approved authorizer; or
- d. Any good cause shown that provides the commissioner a legally sufficient reason to take corrective action against an authorizer.

(M.S. 124D.10, Subd. 3).

C. Formation of School.

1. An authorizer, after receiving an application from a school developer, may charter one or more licensed teachers under M.S. 122A.18, Subd. 1, to operate a school subject to the commissioner's approval of the authorizer's affidavit (M.S. 124D.10, Subd. 4(a)).

2. Charter schools are independent entities. They are to be organized and operated as a nonprofit corporation under M.S. Chapter 317A and the provisions under the applicable chapter shall apply to the school except as provided in this section. Notwithstanding sections 465.717 and 465.719, a school district, subject to this section and Section 124D.11, may create a corporation for the purpose of establishing a charter school (M.S. 124D.10, Subd. 4(a)).

3. Before the charter school operators may establish and operate a school, the authorizer must file an affidavit with the commissioner stating its intent to charter a school. An authorizer must file a separate affidavit for each school it intends to charter. **An authorizer must file an affidavit by May 1 to be able to charter a new school in the next school year after the commissioner approves the authorizer's affidavit.** The affidavit must state the terms and conditions under which the authorizer would charter a school and how the authorizer intends to oversee the fiscal and student performance of the charter school and to comply with the terms of the written contract between the authorizer and the charter school board of directors. The commissioner must approve or disapprove the authorizer's affidavit within 60 business days of receipt of the affidavit. If the commissioner disapproves the affidavit, the commissioner shall notify the authorizer of the deficiencies in the affidavit and the authorizer then has 20 business days to address the deficiencies. **The commissioner must notify the authorizer of final approval or disapproval within 15 business days after receiving the authorizer's response to deficiencies in the affidavit.** If the authorizer does not address the deficiencies to the commissioner's satisfaction, the commissioner's disapproval is final. Failure to obtain commissioner approval precludes an authorizer from chartering the school that is the subject of this affidavit. The authorizer may prevent an approved charter school from opening for operation if, among other grounds, the charter school violates these requirements or does not meet the ready-to-open standards that are part of the authorizer's oversight and evaluation process or are stipulated in the charter school contract (M.S. 124D.10, Subd. 4(b) and (c)).

4. **A charter school may apply to the authorizer to amend the school charter to expand the operation of the school to additional grades or sites that would be students' primary enrollment site beyond those defined in the original affidavit approved by the commissioner. After approving the school's application, the authorizer shall submit a supplemental affidavit in the form and manner prescribed by the commissioner. The authorizer must file a supplemental affidavit by October 1 to be eligible to expand in the next school year. The supplemental affidavit must document that the school has demonstrated to the satisfaction of the authorizer the following:**

- a. **The need for the expansion with supporting long-range enrollment projections;**
- b. **A longitudinal record of demonstrated student academic performance and growth on statewide assessments under chapter 120B or another academic assessments that measure**

longitudinal student performance and growth approved by the charter school's board of directors and agreed upon with the authorizer;

- c. A history of sound school finances and a finance plan to implement the expansion in a manner to promote the school's financial sustainability; and**
- d. board capacity and an administrative and management plan to implement its expansion.**

The commissioner shall have 30 business days to review and comment on the supplemental affidavit. The commissioner shall notify the authorizer **in writing** of any deficiencies in the supplemental affidavit and the authorizer then has 20 business days to address to the commissioner's satisfaction any deficiencies in the supplemental affidavit. **The commissioner must notify the authorizer of final approval or disapproval within 15 business days after receiving the authorizer's response to the deficiencies in the affidavit.** The school may not expand grades or add sites until the commissioner has approved the supplemental affidavit. The commissioner's approval or disapproval of a supplemental affidavit is final (M.S. 124D.10, Subd. 4(k)).

5. The granting or renewal of a charter school by an authorizer must not be contingent on the charter school being required to contract, or purchase services from the authorizer. Any potential contract, lease, or purchase of service from an authorizer must be disclosed to the commissioner, accepted through an open bidding process and be a separate contract from the charter contract. The school must document the open bidding process. An authorizer must not enter into a contract to provide management and financial services for a school that it authorizes, unless the school documents that it received at least two competitive bids (M.S. 124D.10, Subd. 4(i)).

6. The granting or renewal of a charter by an authorizer must not be conditioned upon the bargaining unit status of the employees of the school (M.S. 124D.10, Subd. 4(b)).

D. Board of Directors.

1. An individual is prohibited from serving as a member of the charter school board of directors if the individual is an immediate family member, or the individual partner is an owner, employee or agent of or a contractor with a for-profit or non-profit entity or individual with whom the charter school contracts, directly or indirectly, for professional services, goods, or facilities. Violation of this prohibition renders a contract voidable at the option of the commissioner or the charter school board of directors. A member of a charter school board who violates this prohibition is individually liable to the charter school for any damage caused by the violation. No member of the board of directors, employee, officer or agent of a charter school shall participate in selecting, awarding, or administering a contract if a conflict of interest exists. A conflict exists when the board member, employee, officer, agent, partner of the board member, employee, officer or agent or an organization that employs or is about to employ any of those individuals has a financial or other interest in the entity with which the charter school is contracting. A violation of this prohibition renders the contract void (M.S. 124D.10, Subd. 4a(b)(1) - (4)). Any employee, agent or board member of the authorizer who participates in the initial review, approval, ongoing oversight, evaluation, or the charter renewal or nonrenewal process or decision is ineligible to serve on the board of directors of a school chartered by that authorizer. The conflict of interest provisions do not apply to compensation paid to a teacher employed by the charter school who also serves as a member of the board of directors (M.S. 124D.10, Subd. 4(a)).

2. The operators authorized to organize and operate a charter school before entering into a contract or other agreement for professional or other services, goods, or facilities, must incorporate as a nonprofit corporation under chapter 317A and must establish a board of directors composed of at least five

members who are not related parties until a timely election for members of the charter school board of directors is held according to the school's articles and bylaws. A charter school board of directors must be composed of at least five members who are not related parties. Staff members who are employed at the school, including teachers providing instruction under a contract with a cooperative, members of the board of directors, and all parents or legal guardians of children enrolled in the school are the voters eligible to elect members of the school's board of directors. A charter school must notify eligible voters of the school board election dates at least 30 days before the election. Board of director meetings must comply with chapter 13D.

3. A charter school shall publish and maintain on the school's official website: (1) the minutes of meetings of the board of directors and of members and committees having any board delegated authority, for at least one calendar year from the date of publication; (2) directory information for members of the board of directors and committees having board-delegated authority; and (3) identifying and contact information for the school's authorizer. Identifying and contact information for the school's authorizer must be included in other school materials made available to the public. Upon request of an individual, the charter school must also make available in a timely fashion financial statements showing all operations and transactions affecting income, surplus and deficit during the school's last accounting period; and a balance sheet summarizing assets and liabilities on the closing date of the accounting period. A charter school also must include that same information about its authorizer in other school materials that it makes available to the public (M.S. 124D.10, Subd. 4(e)).

4. Every charter school board member shall attend annual training throughout the member's term on the board. All new board members shall attend initial training on the board's role and responsibilities, employment policies and practices and financial management. A board member who does not begin the required initial training within six months after being seated and complete that training within 12 months of being seated on the board is automatically ineligible to continue to serve as a board member. The school shall include in its annual report the training attended by each board member during the previous year (M.S. 124D.10, Subd. 4(f)).

5. The ongoing board must be elected before the school completes its third year of operation. Board elections must be held during the school year but may not be conducted when the school is closed for holidays, breaks, or vacations. The charter school board of directors shall be composed of at least five non-related members and include:

- a. At least one licensed teacher employed as a teacher at the school or providing instruction under contract between the charter school and a cooperative;
- b. At least one parent or legal guardian of a student enrolled in the charter school; who is not an employee of the charter school; and
- c. At least one interested community member who resides in Minnesota and is not employed by the charter school and does not have a child enrolled in the school.

The board may include a majority of teachers described in this paragraph or parents or community members or it may have no clear majority. The chief financial officer and the chief administrator may only serve as ex-officio nonvoting board members. No charter school employees shall serve on the board other than teachers under paragraph 5a above. Contractors providing facilities, goods, or services to a charter school shall not serve on the board of directors of the charter school. Board bylaws shall outline the process and procedures for changing the board's governance structure, consistent with M.S. Chapter 317A. A board may change its governance structure only:

- a. By a majority vote of the board of directors and a majority vote of the licensed teachers employed by the school as teachers, including licensed teachers providing instruction under a contract between the school and a cooperative; and
- b. With the authorizer's approval.

Any change in board governance structure must conform with the composition of the board established in this paragraph (M.S. 124D.10, Subd. 4(g)).

6. The charter school board may determine the age or grade levels to be served by the school, the philosophical approach, the focus of the curriculum, the teaching/learning methods, and may target a specific population. The board of directors is responsible for staffing decisions, budgeting, contracting for services, determining curriculum, and other operating procedures (M.S. 124D.10, Subds. 9 and 11).

7. The board of directors of a charter school may have an advisory board and other committees to provide information and make recommendations.

8. The charter school board of directors may sue and be sued (M.S. 124D.10, Subd. 25(a)).

9. The charter school board of directors may not levy taxes or issue bonds (M.S. 124D.10, Subd. 25(b)).

10. Board of director meetings must comply with the Minnesota Open Meeting Law, Minn. Stat. § 13D (M.S. 124D.10, Subd. 4(c)).

E. Conversion of Existing Schools. A board may convert one or more of its existing schools to a results-oriented charter school if 60 percent of the full-time teachers at the school sign a petition seeking conversion. The conversion must occur at the beginning of an academic year. There are many legal issues related to such a conversion which should be reviewed with legal counsel prior to initiating a conversion. This does not provide a means to keep open a school that a school board decides to close. However, a school board may endorse or authorize the establishing of a charter school to replace the school the board decided to close. Applicants seeking a charter under this circumstance must demonstrate to the authorizer that the charter sought is substantially different in purpose and program from the school the board closed and that the proposed charter satisfies the requirements of this subdivision. If the school board that closed the school authorizes the charter, it must document in its affidavit to the commissioner that the charter is substantially different in program and purpose from the school it closed.

F. Charter School Contract. The authorization for a charter school must be in the form of a written contract signed by the authorizer and the board of directors of the charter school. The contract must be completed within 45 business days of the commissioner's approval of the authorizer's affidavit. The authorizer shall submit to the commissioner a copy of the signed charter contract within 10 business days of its execution. The charter school contract must be in writing and contain at least the following (M.S. 124D.10, Subd. 6):

- 1. A declaration that the charter school will carry out the primary purpose of II.A. above and how the school will report its implementation of the primary purpose;
- 2. A declaration of the additional purpose or purposes in Subd. 1 that the school intends to carry out and how the school will report its implementation of those purposes;

3. A description of the school program and the specific academic and nonacademic outcomes that pupils must achieve;
4. A statement of admission policies and procedures;
5. A governance, management and administration plan for the school;
6. Signed agreements from charter school board members to comply with all federal and state laws governing organizational, programmatic and financial requirements applicable to charter schools;
7. The criteria, processes and procedures that the authorizer will use to monitor and evaluate the fiscal, operational, and academic performance consistent with M.S. 124D.10, Subd. 15 (a) and (b);
8. For contract renewal, the formal written performance evaluation of the school that is a prerequisite for reviewing a charter contract under M.S. 124D.10, Subd. 15;
9. Types and amounts of liability insurance coverage to be obtained by the charter school consistent with M.S. 124D.10, Subd. 8(k);
10. A provision to indemnify and hold harmless the authorizer and its officers, agents, and employees from any suit, claim, or liability arising from any operation of the charter school, and the commissioner and department officers, agents, and employees notwithstanding M.S. 3.736;
11. The term of the initial contract, which may be up to five years plus an additional preoperational planning year, and up to five years for a renewed contract or a contract with a new authorizer after a transfer of authorizers, if warranted by the school's academic, financial and operational performance;
12. How the board of directors or the operators of the charter school will provide special instruction and services for children with a disability under M.S. 125A.03 to 125A.24 and 125A.65, a description of the financial parameters within which the charter school will operate to provide the special instruction and services to children with a disability;
13. The specific conditions for contract renewal that identify performance **of all students** under the primary purpose of M.S. 124D.10, Subd. 1 as the most important factor in determining contract renewal;
14. The additional purposes under M.S. 124D.10, Subd. 1(a) and related performance obligations under clause (7) contained in the charter contract renewal; and
15. The plan for an orderly closing of the school under chapter 317A, whether the closure is a termination for cause, a volunteer termination, or a nonrenewal of the contract, that includes establishing the responsibilities of the school board of directors and the authorizer and notifying the commissioner, authorizer, school district in which the charter school is located and parents of enrolled students about the closure, information and assistance sufficient to enable the student to re-enroll in another school, the transfer of student records under subdivision 8, paragraph (p) and procedures for closing financial operations.

G. Public Status; Exemption From Statutes and Rules. A charter school is a public school and is a part of the state's system of public education. A charter school is exempt from all statutes and rules applicable to a school, a school board, or school district unless a statute or rule is made specifically applicable to a charter or discussed in H below (M.S. 124D.10, Subd. 7).

H. Charter School Requirements.

1. Charter schools must meet all state and local health and safety requirements applicable to school districts (M.S. 124D.10, Subd. 8(a)).
2. A charter school must comply with statewide accountability requirements, governing standards and assessments in M.S. Ch. 120B (M.S. 124D.10, Subd. 8(b)).
3. A charter school authorized by a school board may be located in any school district, unless the school board of the district of the proposed location disapproves by written resolution (M.S. 124D.10, Subd. 8(c)).
4. A charter school must be nonsectarian in its programs, admission policies, employment practices and all other operations. An authorizer may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or a religious institution. A charter school student must be released for religious instruction consistent with M.S. 120A.22, Subd. 12, clause (3) (M.S. 124D.10, Subd. 8(d)).
5. Charter schools must not be used as a method of providing education or generating revenue for students who are being home-schooled. This paragraph does not apply to shared time aid, under M.S. 126C.19 effective fiscal year 2014 (M.S. 124D.10, Subd. 8(e)).
6. The primary focus of a charter school must be to provide a comprehensive program of instruction for at least one grade or age group from five through 18 years of age. Instruction may be provided to people older than 18 years of age. **A charter school may offer a free preschool or prekindergarten that meets high quality early learning instructional program standards that are aligned with Minnesota's early learning standards for children** (M.S. 124D.10, Subd. 8(f)).
7. A charter school may not charge tuition (M.S. 124D.10, Subd. 8(g)).
8. A charter school is subject to and must comply with the Minnesota Human Rights Act and must comply with the law that requires school districts to provide equal opportunity for members of both sexes to participate in their athletic programs (M.S. 124D.10, Subd. 8(h)).
9. **Once a student is enrolled in the school, the student is considered enrolled in the school until the student formally withdraws or is expelled under the Pupil Fair Dismissal Act in sections 121A.40 to 121A.56.** A charter school is subject to and must comply with the Pupil Fair Dismissal Act, M.S. 121A.40 to 121A.56, and the Minnesota Public School Fee Law, M.S. 123B.34 to 123B.39 (M.S. 124D.10, Subd. 8(i)).
10. A charter school is subject to the same financial audits, audit procedures, and audit requirements as a school district, except as required under M.S. 124D.10, Subd. 6a. Audits must be conducted in compliance with generally accepted governmental auditing standards, the Federal Single Audit Act, if applicable, and section 6.65. A charter school is subject to and must comply with sections 15.054; 118A.01; 118A.02; 118A.03; 118A.04; 118A.05; 118A.06; 471.38; 471.391; 471.392; and 471.425. The audit must comply with the requirements of sections 123B.75 to 123B.83, except to the extent deviations are necessary because of the program at the school. Deviations must be approved by the commissioner and authorizer. The Department of Education, State Auditor, Legislative Auditor or authorizer may conduct financial, program, or compliance audits. A charter school determined to be in statutory operating debt under applicable law must submit a plan under Minn. Stat. § 123B.81, Subd. 4 (M.S. 124D.10, Subd. 8(j)).

11. A charter school is a school district for the purpose of tort liability under M.S. Chapter 466 (M.S. 124D.10, Subd. 8(k)).

12. A charter school must comply with M.S. Chapters 13 and 13D - Educational data; M.S. 120A.22, Subd. 7 - Educational records; 121A.75 - Receipt of records, Sharing; and 260B.171, Subd. 3 & 5 - Records (M.S. 124D.10, Subd. 8(l)).

13. A charter school is subject to the Pledge of Allegiance requirement under M.S. 121A.11, Subd. 3 (M.S. 124D.10, Subd. 8(m)).

14. A charter school offering on-line courses or programs must comply with M.S. 124D.095 (M.S. 124D.10, Subd. 8(n)).

15. A charter school and charter school board of directors are subject to M.S. Ch. 181 (M.S. 124D.10, Subd. 8(o)).

16. A charter school must comply with M.S. 120A.22, Subd. 7 - Transfer of Student Educational Records and M.S. 138-163 and 138.17 - Management of Local Records (M.S. 124D.10, Subd. 8(p)).

17. Charter schools that elect to provide an early childhood screening program must comply with the requirements of M.S. 121A.16 to 121A.19 (M.S. 124D.10, Subd. 8 (q)).

18. A charter school that provides school-sponsored youth athletic activities must comply with section 121A.38.

19. A charter school is subject to and must comply with continuing truant notification under section 260A.03.

20. A charter school must develop and implement a teacher evaluation and peer review process, under section 122A.40, subdivision 8, paragraph (b), clauses (2) to (13). **The teacher evaluation process in this paragraph does not create any additional employment rights for teachers.**

21. A charter school must adopt a policy, plan, budget, and process, consistent with section 120B.11, to review curriculum, instruction, and student achievement and strive for the world's best workforce.

22. A charter school must comply with all pupil transportation requirements in section 123B.88, subdivision 1. A charter school must not require parents to surrender their rights to pupil transportation under section 123B.88, subdivision 2.

23. The commissioner may reduce a charter school's state aid under M.S. 127A.42 or 127A.43 if the charter school board fails to correct a violation under this section (M.S. 124D.10, Subd. 8(a)).

24. The commissioner may reduce a charter school's state aid by an amount not to exceed 60 percent of the charter school's basic revenue for the period of time that a violation occurs (M.S. 124D.10, Subd. 8(b)).

I. Admission Requirements.

1. A charter school may limit admission to: pupils within an age group or grade level; pupils who are eligible to participate in the graduation incentives program; or residents of a specific geographic area in which the school is located when the majority of students served by the school are members of

underserved populations in which the school is located when the majority of students served by the school are members of underserved populations (M.S. 124D.10, Subd. 9).

2. A charter school shall enroll an eligible pupil who submits a timely application, unless the number of applications exceeds the capacity of a program, class, grade level, or building. In such cases, students must be accepted by lot (M.S. 124D.10, Subd. 9).

3. The charter school must develop and publish, including on its website, a lottery policy and process that it must use when accepting students by lottery (M.S. 124D.10, Subd. 9).

4. A charter school shall give enrollment preference to a sibling of an enrolled pupil and to a foster child of that pupil's parents and may give preference for enrolling children of the school's staff before accepting other pupils by lot (M.S. 124D.10, Subd. 9). **A charter school that is located in Duluth township in St. Louis County and admits students in kindergarten through grade 6 must give enrollment preference to students residing within a five-mile radius of the school and to the siblings of enrolled children. A charter school may give enrollment preference to children currently enrolled in the school's free preschool or prekindergarten program under subdivision 8, paragraph (f), who are eligible to enroll in kindergarten in the next school year.**

5. A person shall not be admitted to a charter school (1) as a kindergarten pupil, unless the pupil is at least five years of age on September 1 of the calendar year in which the school year for which the pupil seeks admission commences; or (2) as a first grade student, unless the pupil is at least six years of age on September 1 of the calendar year in which the school year for which the pupil seeks admission commences or has completed kindergarten; except that a charter school may establish and publish on its website a policy for admission of selected pupils at an earlier age, consistent with the enrollment process in M.S. 124D.10, Subd. 9 (b) and (c).

6. Except as permitted in M.S. 124D.10, Subd. 9, a charter school may not limit admission to pupils on the basis of intellectual ability, measures of achievement or aptitude, or athletic ability and may not establish any criteria or requirements for admission that are inconsistent with this subdivision. The charter school shall not distribute any services or goods of value to students, parents, or guardians as an inducement term or condition of enrolling a student in a charter school (M.S. 124D.10, Subd. 9).

J. Pupil Performance. A charter school must design its programs to at least meet the outcomes adopted by the commissioner for public school students. In the absence of the commissioner's requirements, the charter school must meet the outcomes contained in the contract with the authorizer. The achievement levels of the outcomes contained in the contract may exceed the achievement levels of any outcomes adopted by the commissioner for public school students (M.S. 124D.10, Subd. 10).

K. Employment and Operational Matters.

1. A charter school must employ or contract with necessary teachers, as defined by M.S. 122A.15, who hold valid licenses to perform the particular service for which they are employed in the school. The charter school's state aid may be reduced under applicable law if the school employs a teacher who is not appropriately licensed or approved by the Board of Teaching. However, a person, without holding a valid administrator's license, may perform administrative, supervisory or instructional leadership duties in a charter school. The board of directors shall establish qualifications for persons that hold administrative, supervisory or instructional leadership roles. The qualifications shall include at least the following areas: instruction and assessment; human resource and personnel management; financial management; legal and compliance management; effective communication; and board, authorizer and community relationships. The board of directors shall use those qualifications as the basis for job

descriptions, hiring and performance evaluations of those who hold administrative, supervisory or instructional leadership roles. The board of directors and an individual who does not hold a valid administrative license and who serves in an administrative, supervisory or instructional leadership position shall develop a professional development plan. Documentation of the implementation of the professional development plan of those persons shall be included in the school's annual report (M.S. 124D.10, Subd. 11).

2. The charter school may employ necessary employees who are not required to hold teaching licenses to perform duties other than teaching and may contract for other services (M.S. 124D.10, Subd. 11).

3. A charter school may discharge teachers and non-licensed employees. The charter school is subject to M.S. 181.932. When offering employment to a prospective employee, a charter school must give that employee a written description of the terms and conditions of employment and the school's personnel policies (M.S. 124D.10, Subd. 11).

4. The board of directors shall decide and be responsible for policy matters related to the operation of the school, including budgeting, curriculum programming, personnel, and operating procedures (M.S. 124D.10, Subd. 11). The board shall adopt a policy on nepotism in employment. The board shall adopt personnel evaluation policies and practices that, at a minimum:

- a. carry out the school's mission and goals;
- b. evaluate the execution of charter contract goals and commitments;
- c. evaluate student achievement, postsecondary and workforce readiness, and student engagement and connection goals;
- d. establish a teacher evaluation process under subdivision 8, paragraph (t); and
- e. provide professional development related to the individual's job responsibilities.

L. Pupils With a Disability. A charter school must comply with all state and federal statutes and rules and regulations relating to the education of pupils with a disability as though it were a school district (M.S. 124D.10, Subd. 12).

M. Length of School Year. A charter school must provide instruction each year for at least the number of hours required by M.S. 120A.41. It may provide instruction throughout the year according to M.S. 124D.12 to 124D.127 or 124D.128.

N. Reports.

1. The charter school must submit an audit report to the commissioner by December 31 each year. The charter school, with the assistance of the auditor conducting the audit, must include with the report a copy of all **management agreements with a charter management organization or an educational management organization and service agreements or contracts over the lesser of \$100,000 or ten percent of the school's most recent annual audited expenditures. The agreements must detail the terms of the agreement, including the services provided and the annual costs for those services.** If the entity that provides the professional services to the charter school is exempt from taxation under section 501 of the Internal Revenue Code of 1986, that entity must file with the commissioner by February 15 a copy of the annual return required under section 6033 of the Internal Revenue Code of

1986. If the audit report finds that a material weakness exists in the financial reporting systems of a charter school, the charter school must submit a written report to the commissioner explaining how the material weakness will be resolved. An auditor, as a condition of providing financial services to a charter school, must agree to make available information about a charter school's financial audit to the commissioner and authorizer upon request (M.S. 124D.10, Subd. 6a).

2. A charter school must publish an annual report approved by the board of directors. The annual report must at least include information on school enrollment, staffing, finance, academic performance, innovative practices and implementation and future plans. A charter school must post the annual report on the school's official website. A charter school must also distribute the annual report by publication mail or electronic means to its authorizer, school employees and parents and legal guardians of students enrolled in the charter school. Reports are public data under M.S. Chapter 13, the Minnesota Government Data Practices Act (M.S. 124D.10, Subd. 14).

3. The commissioner shall establish specifications for an authorizer's annual public report that is part of the system to evaluate authorizer performance under M.S. 124D.10, Subd. 3(h). The report shall at least include key indicators of school academic, operational, and financial performance.

4. The authorizer shall provide a formal written evaluation of the school's performance before the authorizer renews the charter contract. The Minnesota Department of Education must review and comment on the authorizer's evaluation process at the time the authorizer submits its application for approval and each time it undergoes its five-year review under M.S. 124D.10, Subd. 3(h). An authorizer shall monitor and evaluate the academic, financial, operational and student performance of the charter school, and may for this purpose annually assess a charter school a fee according to the following fee schedule, which must be stated in the school contract:

The fee that an authorizer must annually assess is the greater of:

1. The basic formula allowance for that year; or
2. The lesser of:
 - a. The maximum fee factor times the basic formula allowance for that year; or
 - b. The fee factor times the basic formula allowance for that year times the charter school's adjusted pupil unit for that year. The fee factor equals .015. The maximum fee factor equals 4.0.
5. An authorizer may not assess a fee for any required service other than as provided above.
6. For the preoperational planning period, after a school is chartered, the authorizer may assess a charter school a fee equal to the basic formula allowance. By September 30 of each year, an authorizer shall submit to the commissioner a statement of income and expenditures related to the chartering activities during the previous school year ending June 30. A copy of the statement shall be given to all schools charter by the authorizer (M.S. 124D.10, Subd. 15).

O. Transportation.

1. During its first fiscal year of operation, a charter school must notify the district in which the school is located and the Department of Education, by July 1, if it will provide its own transportation or

use the transportation services of the district in which it is located. Thereafter, the charter school must provide such notice by March 1 of each fiscal year (M.S. 124D.10, Subd. 16).

2. If a charter school elects to provide transportation for pupils, the transportation must be provided by the charter school within the district in which it is located, and the state will pay transportation aid to the charter school (M.S. 124D.10, Subd. 16).

3. For pupils who reside outside the district in which the charter school is located, the charter school is not required to provide or pay for transportation between the pupil's residence and the border of the district in which the charter school is located. A parent may be reimbursed by the charter school for costs of transportation from the pupil's residence to the border of the district in which the charter school is located if the pupil is from a family whose income is at or below the federal poverty level. Reimbursement may not exceed the pupil's actual cost of transportation, or 15 cents per mile, whichever is less, and may not be paid for more than 250 miles per week (M.S. 124D.10, Subd. 16).

4. At the time a pupil enrolls in a charter school, the charter school must provide the parent or guardian with information regarding transportation (M.S. 124D.10, Subd. 16).

5. If a charter school elects not to provide transportation, transportation for pupils enrolled in the school must be provided by the district in which the charter school is located in the same manner as other pupils residing in the school district. Transportation may also be provided by the district in which the charter school is located for a pupil residing in a different district. If the district provides the transportation, the scheduling of routes, manner and method of transportation, control and discipline of the pupils, and any other matter relating to the transportation of pupils under this paragraph shall be within the sole discretion, control and management of the district (M.S. 124D.10, Subd. 16).

P. Leased Space.

1. A charter school may lease space from an independent or special school board, other public organization, private, nonprofit nonsectarian organization, private property owner or a sectarian organization if the leased space is constructed as a school facility. The Department must review and approve or disapprove leases in a timely manner for purposes of determining eligibility for lease aid under M.S. 124D.11, Subd. 4 (M.S. 124D.10, Subd. 17).

2. A charter school may organize an affiliated nonprofit building corporation to purchase, **expand or renovate** an existing facility to serve as a school or **to** construct a new school facility **if the charter school (i) has been in operation for at least six consecutive years; (ii) as of June 30 has a net positive unreserved general fund balance in the preceding three fiscal years; (iii) has long-range strategic and financial plans that include enrollment projections for at least five years; (iv) completes a feasibility study of facility options that outlines the benefits and costs of the options; and (v) has a plan for purchase, renovation, or new construction which describes project parameters and budget** (M.S. 124D.10, Subd. 17a).

3. An affiliated nonprofit building corporation must 1) be incorporated under M.S. 317A; 2) comply with applicable Internal Revenue Service regulations, including regulations for "supporting organizations" as defined by the Internal Revenue Service; **3) post on the school website the name, mailing address, bylaws, minutes of board meetings, and the names of the current board of directors of the affiliated nonprofit building corporation;** 4) submit to the commissioner a copy of its annual audit **by December 31 each year;** and 5) comply with government data practices law under M.S. Chapter 13 (M.S. 124D.10, Subd. 17a).

4. An affiliated nonprofit building corporation must not serve as the leasing agent for properties or facilities it does not own. A charter school that leases a facility from an affiliated nonprofit building corporation that does not own the leased facility is ineligible to receive charter school lease aid. The state is immune from liability resulting from a contract between a charter school and an affiliated nonprofit building corporation (M.S. 124D.10, Subd. 17a).

5. **Once an affiliated nonprofit building corporation is incorporated under subdivision 17a, the authorizer of the school must oversee the efforts of the school's board of directors to ensure the affiliated nonprofit building corporation complies with all legal requirements governing the affiliated nonprofit building corporation. A school's board of directors that fails to ensure the affiliated nonprofit building corporation's compliance violates its responsibilities and an authorizer must factor the failure into the authorizer's evaluation of the school (M.S. 124D.10, Subd. 17a).**

6. **A charter school or its affiliated nonprofit building corporation must receive a positive review and comment from the commissioner before initiating any purchase agreement or construction contract that requires an expenditure in excess of the threshold specified in section 123B.71, subdivision 8, for school districts that do not have a capital loan outstanding. A purchase agreement or construction contract finalized before a positive review and comment is null and void (M.S. 124D.10, Subd. 17a).**

7. A charter school is prohibited from entering into a lease of real property with a related party as defined by M.S. 124D.10, Subd. 23a, unless the lessor is a non-profit corporation under M.S. Chapter 317A or a cooperative under M.S. Chapter 308A and the lease is reasonable under M.S. 124D.11, Subd. 4. A lease of real property to be used for a charter school not excluded above must contain the following statement: "This lease is subject to Minnesota Statutes Section 124D.10, Subdivision 23(a)." If a charter school enters into, as lessee, a lease with a related party, as defined in M.S. 124D.10, Subd. 23a(b)(1), and the charter school subsequently closes, the Commissioner has the right to recover from the lessor any lease payments in excess of those reasonable under M.S. 124D.11, Subd. 4 (M.S. 124D.10, Subd. 23a(d)).

Q. Teacher Extended Leave of Absence to Teach in a Charter School.

1. Limits leave to a total of 5 years, the length of a teachers leave of absence to teach at a charter school. Gives school boards the discretion to extend the leave of absence. The district may require the request for a leave be made before February 1 in the preceding school year or February 1 in the calendar year in which the teacher's leave is scheduled to terminate (M.S. 124D.10, Subd. 20).

2. Leave is governed by M.S. 124A.46 with respect to reinstatement, seniority, salary, notice of intention to return and insurance.

3. During the leave, the teacher may continue to aggregate benefits and credits in his or her Teachers' Retirement Association account under Chapters 354 and 354A, consistent with M.S. 124D.10, Subd. 22 (M.S. 124D.10, Subd. 20).

R. Collective Bargaining.

1. Employees of a charter school may, if otherwise eligible, organize under the Public Employment Labor Relations Act, Minnesota Statutes Chapter 179A (PELRA) and comply with its provisions. The board of directors of a charter school is a public employer for the purposes of PELRA, upon formation of one or more bargaining units at the charter school (M.S. 124D.10, Subd. 21).

2. Bargaining units at the charter school must be separate from any other units within an authorizing district, except that bargaining units may remain part of the appropriate unit within the authorizing district, if the employees of the charter school, the board of directors of the charter school, the exclusive representative of the appropriate unit in the authorizing district, and the board of the authorizing district agree to include the employees in the appropriate unit of the authorizing school district (M.S. 124D.10, Subd. 21).

3. The granting or renewal of a charter by an authorizing entity cannot be conditioned upon the bargaining unit status of the employees of the charter school (M.S. 124D.10, Subd. 4(h)).

S. Teacher and Other Employee Retirement.

1. Teachers in a charter school are public school teachers for the purposes of teachers' retirement (M.S. 124D.10, Subd. 22).

2. Employees in a charter school, other than teachers, are public employees for the purposes of Public Employees Retirement Association (PERA) (M.S. 124D.10, Subd. 22).

T. Nonrenewal or Termination of Charter School Contract.

1. A charter school contract may be terminated or not renewed upon any of the following grounds:

a. Failure to demonstrate satisfactory academic achievement for all students, including the requirements for pupil performance contained in the contract;

b. Failure to meet generally accepted standards of fiscal management;

c. Violations of law; or

d. Other good cause shown.

2. An authorizer may or may not renew a contract at the end of the term specified in the contract, or may unilaterally terminate a contract during its term, for any of the specified grounds. At least 60 business days before not renewing or terminating a contract, the authorizer shall notify the board of directors of the charter school of the proposed action in writing. The notice shall state the grounds for the proposed action in reasonable detail and that the charter school's board of directors may request in writing an informal hearing before the authorizer within 15 business days of receiving notice of nonrenewal or termination of the contract. Failure by the board of directors to make a written request for an informal hearing within the 15-business-day period shall be treated as acquiescence to the proposed action. Upon receiving a timely written request for a hearing, the authorizer shall give ten business days' notice to the charter school's board of the hearing date and shall conduct an informal hearing before taking final action. The authorizer shall take final action to renew or not renew a contract no later than 20 business days before the proposed date for terminating the contract or the end date of the contract (M.S. 124D.10, Subd. 23).

3. If a contract is terminated or not renewed, the school must be dissolved according to the applicable provisions of chapter 317A, except when the commissioner approves the decision of a different eligible authorizer to authorize the charter school (M.S. 124D.10, Subd. 23).

4. If the authorizer and the charter school board of directors mutually agree not to renew the contract, a change in authorizers is allowed. The authorizer and the school board must jointly submit a written and signed letter of their intent to the commissioner to mutually not renew the contract. The

authorizer that is a party to the existing contract must inform the proposed authorizer about the fiscal, operational, and student performance status of the school, as well as any outstanding contractual obligations that exist. The charter contract between the proposed authorizer and the school must identify and provide a plan to address any outstanding obligations from the previous contract. The proposed contract must be submitted at least 105 business days before the end of the existing charter contract. The commissioner shall have 30 business days to review and make a determination. The proposed authorizer and the school shall have 15 business days to respond to the determination and address any issues identified by the commissioner. A final determination by the commissioner shall be made no later than 45 business days before the end of the current charter contract. If no change in authorizer is approved, the school and the current authorizer may withdraw their letter of nonrenewal and enter into a new contract. If the transfer of authorizers is not approved and the current authorizer and the school do not withdraw their letter and enter into a new contract, the school must be dissolved according to applicable law and the terms of the contract (M.S. 124D.10, Subd. 23).

5. The commissioner, after providing reasonable notice to the board of directors of a charter school and the existing authorizer, and after providing an opportunity for a public hearing, may terminate the existing contract between the authorizer and charter school board if the charter school has a history of:

- (1) failure to meet pupil performance requirements consistent with state law;
- (2) financial mismanagement or failure to meet generally accepted standards of fiscal management; or
- (3) repeated or major violations of the law.

(M.S. 124D.10, Subd. 23).

6. Pupil Enrollment Upon Nonrenewal or Termination of Charter School Contract. If a charter school contract is not renewed or is terminated, a pupil who attended the charter school, siblings of the pupil, or another pupil who resides in the same place as the pupil may enroll in the resident district or may apply to a nonresident district in the same manner as open enrollment, but without a deadline. The closed charter school must transfer the student's educational records within ten business days of closure to the student's school district of residence where the records must be retained or transferred under M.S. 120A.22, Subd. 7 (M.S. 124D.10, Subd. 24).

7. Pupil Adjustment for Closed Charter Schools and Contracted Alternative Programs. For a charter school or contracted alternative program operating during the prior school year but ceasing operations before the end of the current school year, prior year pupil data used in computing revenues for the current school year shall be prorated based on the number of days of student instruction in the current school year to 170 (M.S. 126C.05, Subd. 18).

8. Final Adjustment Payment. For a charter school that ceases operation before the end of a school year, a final adjustment payment for aid programs funded with an open appropriation may be made after audit of the prior fiscal year and current fiscal year pupil counts (M.S. 127A.45, Subd. 9).

U. Immunity. The commissioner, an authorizer, members of the board of an authorizer in their official capacity, and employees of an authorizer are immune from civil or criminal liability with respect to all activities related to a charter school they approve or authorize. The charter school board of directors shall obtain at least the amount of and types of insurance up to applicable tort liability limits under M.S. Chapter 466.

The charter school board must submit a copy of its insurance policy to its authorizer before starting operations. The charter school board must submit changes in its insurance carrier or policy to its authorizer within 20 business days of the change (M.S. 124D.10, Subd. 25(c)).

Notwithstanding M.S. 3.736, the charter school shall assume full liability for its activities and indemnify and hold harmless the authorizer and its officers, agents, and employees from any suit, claim, or liability arising from any operation of the charter school and the commissioner and department officers, agents, and employees. A charter school is not required to indemnify or hold harmless a state employee if the state would not be required to indemnify and hold the employee harmless under M.S. 3.736, Subd. 9.

III. REVENUE SOURCES. Minnesota Statutes Section 124D.11 provides revenue for a charter school. In general, a charter school is eligible to receive state aids, grants, and revenue as though it were a school district. However, it may not receive aids, grants or revenue if a local levy is required to obtain the revenue, or if the aid, grant, or revenue replaces levy revenue that is not general education revenue, except as provided in this section. A charter school is eligible to receive federal aid received through the Minnesota Department of Education if it qualifies for the aid as though it were a school district. A brief summary of funding sources is as follows:

A. General Education Revenue. General education revenue is paid to a charter school as though it were a school district. The formula per adjusted pupil unit is specified in Minn Stat § 124D.11, Subd. 1.

1. In order to receive state aid payments, a charter school in its first three years of operation must submit a school calendar in the form and manner requested by the department and a quarterly report to the Department of Education. The report must list each student by grade, show the student's start and end dates, if any, with the charter school, and for any student participating in a learning year program, the report must list the hours and times of learning year activities. The report must be submitted not more than two weeks after the end of the calendar quarter to the department. The department must develop a Web-based reporting form for charter schools to use when submitting enrollment reports. A charter school in its fourth and subsequent year of operation must submit a school calendar and enrollment information to the department in the form and manner requested by the department (M.S. 124D.11, Subd. 9(f)).

B. Transportation Revenue. A charter school that provides its own transportation services is eligible for transportation revenue (M.S. 124D.11, Subd. 2).

C. Operating Capital Revenue. A charter school may use total operating capital revenue for any purpose related to the school and is not limited by the restrictions on use of that revenue applicable to school districts (M.S. 124D.11, Subd. 3).

D. Building Lease Aid. When a charter school finds it economically advantageous to rent or lease a building or land for instructional purposes, and it determines that its total operating capital revenue is insufficient for this purpose, it may apply to the commissioner for building lease aid. The commissioner must review and either approve or deny a lease aid application using the following criteria (M.S. 124D.11, Subd. 4):

1. the reasonableness of the price based on current market values;
2. the extent to which the lease conforms to applicable state laws and rules; and
3. the appropriateness of the proposed lease in the context of the space needs and financial circumstances of the charter school. The commissioner must approve aid only for a facility lease that has (i) a sum certain annual cost and (ii) **a closure clause to relieve the charter school of its lease obligations at the time the charter contract is terminated or not renewed; the closure clause must not be constructed or construed to relieve the charter school of its lease obligations in effect before the charter contract is terminated or not renewed.**

A charter school must not use the building lease aid it receives for custodial, maintenance service, utility, or other operating costs. The amount of annual building lease aid for a charter school shall not exceed the lesser of: a) 90% of the approved cost or b) the product of the pupil units served for the current school year times \$1,314. [NOTE: The changes in this paragraph are effective July 1, 2014].

E. Special Education Aid. Special education aid is paid to a charter school as though it were a school district. The charter school may also charge a resident district tuition for providing educational services to non-resident pupils with a disability who are attending the charter school. The charter school must allocate its special education levy equalization revenue to the resident districts of the pupils attending the charter school. The districts of residence shall levy as though they were participating in a cooperative (M.S. 124D.11, Subd. 5; 125A.11).

F. Other Aids, Grants, Revenue.

1. A charter school is eligible to receive other aids, grants and revenue according to Minnesota Statutes Chapters 120A to 129C, as though it were a school district. However, except as specifically provided by the statute for integration revenue, it may not receive aid, a grant, or revenue if a levy is required to obtain the money, or if the aid, grant, or revenue replaces levy revenue that is not general education revenue as provided in this section (M.S. 124D.11, Subd. 6).

2. Federal aid received by the state must be paid to the charter school, if it qualifies for the aid, as though it were a school district (M.S. 124D.11, Subd. 6).

3. A charter school may receive money from any source for capital facilities needs. In the year-end report to the Commissioner of Education, the charter school shall report the total amount of funds received from grants and other outside sources (M.S. 124D.11, Subd. 6(d)).

G. Use of State Money; Land and Buildings. A charter school may not use funds received from the state to purchase land or buildings. A charter school may own land and buildings if obtained through nonstate sources (M.S. 124D.11, Subd. 7). A charter school may not issue bonds (M.S. 124D.10, Subd. 25(b)).

H. Start-up Costs. During the first two years of a charter school's operation, the charter school is eligible for aid to pay for start-up costs and additional operating costs. Start-up aid equals the greater of \$50,000 per charter school or \$500 times the charter school's pupil units served for that year (M.S. 124D.11, Subd. 8) (Note: M.S. 124D.11, Subd. 8 is repealed by Laws 2011, effective fiscal year 2013 and later).

I. Payment of Aids to Charter Schools.

(a) Notwithstanding section 127A.45, subdivision 3, if the current year aid payment percentage under section 127A.45, Subd. 2, paragraph (d), is 90 or greater, aid payments for the current fiscal year to a charter school shall be of an equal amount on each of the 24 payment dates. Notwithstanding section 127A.45, Subd. 3, if the current year aid payment percentage under section 127A.45, Subd. 2, paragraph (d), is less than 90, aid payments for the current fiscal year to a charter school shall be of an equal amount on each of the 16 payment dates in July through February (M.S. 124D.11, Subd. 9).

(b) Notwithstanding paragraph (a) and M.S. 127A.45, for a charter school ceasing operation on or prior to June 30 of a school year, for the payment periods occurring after school ceases serving students, the commissioner shall withhold the estimated state aid owed the school. The charter school board of directors and authorizer must submit a closure plan to the commissioner and financial information about the school's liabilities and assets and may continue regular payments up to the current year percentages if amounts are owed. Based on audits and monitoring, if the school received excess aid, the commissioner shall retain aid

sufficient to eliminate overpayment. For a charter school ceasing operations prior to, or at the end of, a school year, notwithstanding section 127A.45, Subd. 3, preliminary final payments may be made after receiving the closure plan's audit of pupil counts, monitoring of special education expenditures, documentation of lease expenditures and school submission of UFARS financial data for the final year of operation. Final payment may be made upon receipt of audited financial statements under section 123B.77, Subd. 3 (M.S. 124D.11, Subd. 9).

(c) If a charter school fails to comply with the commissioner's directive to return, for cause, state or federal funds administered by the Department, the commissioner may withhold an amount of state aid sufficient to satisfy the directive (M.S. 124D.11, Subd. 9).

(d) If, within the time line for payment set forth in M.S. 471.425, a charter school fails to pay the state of Minnesota, a school district, intermediate school district or service cooperative after receiving an undisputed invoice for goods and services, the commissioner may withhold an amount of state aid sufficient to satisfy the claim and shall distribute the withheld aid to the interested state agency, school district, intermediate school district, or service cooperative. An interested state agency, school district, intermediate school district or education cooperative shall notify the commissioner when a charter school fails to pay an undisputed invoice within 75 days of when it received the original invoice (M.S. 124D.11, Subd. 9).

(e) Notwithstanding section 127A.45, subdivision 3, and paragraph (a), 80 percent of the start-up cost aid under subdivision 8 shall be paid within 45 days after the first day of student attendance for that school year (M.S. 124D.11, Subd. 9a to 9c).

(f) In order to receive state aid payments under this subdivision, a charter school in its first three years of operation must submit a school calendar in the form and manner requested by the department and a quarterly report to the Department of Education. The report must list each student by grade, show the student's start and end dates, if any, with the charter school, and for any student participating in a learning year program, the report must list the hours and times of learning year activities. The report must be submitted not more than two weeks after the end of the calendar quarter to the department. The department must develop a Web-based reporting form for charter schools to use when submitting enrollment reports. A charter school in its fourth and subsequent year of operation must submit a school calendar and enrollment information to the department in the form and manner requested by the department.

(g) Notwithstanding sections 317A.701 to 317A.791, upon closure of a charter school and satisfaction of creditors, cash and investment balances remaining shall be returned to the state (M.S. 124D.11, Subd. 9).

(h) A charter school must have a valid, signed contract under 124D.10, Subd. 6, on file at the Department of Education at least 15 days prior to the date of first payment of state aid for the fiscal year.

(i) State aid entitlements shall be computed for a charter school only for the portion of the school year for which it has a valid, signed contract under section 124D.10, Subd. 6.

IV. OTHER RELEVANT STATUTORY PROVISIONS.

A. Collaboration between charter school and school district. A charter school board may voluntarily enter into a two-year, renewable agreement for collaboration to enhance student achievement with a school district within whose geographic boundaries it operates. 1) A school district need not be an approved authorizer to enter into a collaboration agreement with a charter school; 2) A charter school need not be authorized by the school district with which it seeks to collaborate; 3) A charter school authorizer is prohibited from requiring a collaboration agreement as a condition of entering into or renewing a charter contract. Nothing in this paragraph or in the collaboration agreement may impact in any way, the authority or

autonomy of the charter school; 4) Nothing in this paragraph or in the collaboration agreement shall cause the state to pay twice for the same student, service or facility or otherwise impact state funding, or the flow thereof, to the school district or the charter school; 5) The collaboration agreement may include, but need not be limited to, collaboration regarding facilities, transportation, training, student achievement, assessments, mutual performance standards and other areas of mutual agreement; 6) The school district may include the academic performance of the students of a collaborative charter school site operating within the geographical boundaries of the school district, for purposes of student assessment and reporting to the state; 7) Districts, authorizers, or charter schools entering into a collaborative agreement are equally and collectively subject to the same state and federal accountability measures for student achievement, school performance outcomes, and school improvement strategies. The collaborative agreement and all accountability measures must be posted on the district, charter school, and authorizer website (M.S. 124D.10, Subd. 27).

B. School Enrichment Partnership Program. A charter school is eligible to participate in the School Enrichment Partnership Program as if it were a school district (M.S. 124D.90).

C. Non-licensed Community Experts; Variance. The State Board of Teaching may allow charter schools to hire non-licensed community experts to teach on a limited basis. The charter school must apply to the Board of Teaching for approval to hire non-licensed teaching personnel from the community. In approving or disapproving the application for each community expert, the Board shall consider:

1. The qualifications of the community person whom the charter school proposes to employ;
2. The reasons for the need for a variance from the teacher licensure requirements;
3. The charter school's efforts to obtain licensed teachers for the particular course or subject area;
4. The amount of teaching time for which the community expert would be hired;
5. The extent to which the charter school is utilizing other non-licensed community experts;
6. The nature of the community expert's proposed teaching responsibilities; and
7. The proposed level of compensation to the community expert.

The Board of Teaching shall approve or disapprove an application within 60 days of receiving it from a charter school (M.S. 122A.25).

A school district or charter school shall provide the board of teaching with confirmation that criminal background checks have been completed for all nonlicensed community experts employed by the district or charter school and approved by the Board of Teaching under this section.

D. Dissemination of Information. Authorizers and the Minnesota Department of Education must disseminate information to the public on how to form and operate a charter school. Charter schools must disseminate information about how to use the offerings of a charter school. Targeted groups include low-income families and communities, students of color, and students who are at risk of academic failure (M.S. 124D.10, Subd. 19).

NOTE: For up-to-date information on charter schools documents, forms and other information, you can review the Minnesota Department of Education's website at: <http://education.state.mn.us>

(Bolded Items - 2014 Session Changes)

School Law Bulletin
for
School Board Members and Administrators

SCHOOL DISCIPLINE POLICIES

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I. INTRODUCTION.

For years, the issue of discipline in the schools has been a matter of major public concern. School discipline consistently ranks at or near the top of public opinion polls listing major problems in public education. In reaction to these perceived concerns the Minnesota legislature has specifically addressed issues related to school discipline since 1983. In this regard, the 1983 legislature enacted a law requiring each school board to adopt a written district-wide school discipline policy prior to the beginning of the 1984-85 school year. The 1989 legislature enacted a law prohibiting corporal punishment. The 2000 legislature clarified that school employees may use reasonable force when necessary to restrain a student or to prevent bodily harm or death to another. Legislation enacted in 2003 required school boards to develop a policy on the appropriate use of peace officers and crisis teams to remove students who have an individualized education plan from school grounds. Most recently, in 2007 the legislature required school boards to adopt a written policy prohibiting all forms of intimidation and bullying of a student.

II. GENERAL POWERS OF SCHOOL BOARDS.

A. Management and Control. In Minnesota, the governance, care, management and control of each school district is vested in the school board. (M.S. 123B.09, Subd. 1; See also M.S. 123B.02, Subd. 1). As part of its powers and duties, the school board clearly has the authority and responsibility to establish reasonable rules and regulations to govern student conduct. Most districts have established such policies, whether they are called student conduct codes, discipline policies, statements of student rights and responsibilities, behavior codes or are given some other related title.

B. Secondary Students. M.S. 120A.20 provides that "Notwithstanding the provisions of any law to the contrary, the conduct of all students under 21 years of age attending a public secondary school shall be governed by a single set of reasonable rules and regulations promulgated by the school board." This provision was passed in 1974 to clarify the general authority of the board to establish rules and extend their application to all students under the age of 21, even though the age of majority had been reduced to age 18. For further information on this topic, see Chapter 13 School Law Bulletin entitled "Effects of 18 year old age of majority law on certain school district policies."

C. Court Review. In the case of Brown v. Wells, 288 Minn. 468, 181 N.W.2d 708 (1970), the Minnesota Supreme Court held that the rules of a school board will not be overturned by a court unless they are clearly arbitrary or unreasonable. This principle of school board discretion was reaffirmed in Pletan v. Gaines, 481 N.W.2d 566 (Minn. App. 1992).

The deference accorded rules and regulations of a school district extends to the reasonable rules and regulations laid down by the teacher in conducting the class. See Zellman v. Independent School District No. 2758, 594 N.W.2d 216 (Minn. App. 1999) (upholding academic discipline imposed for plagiarism).

A school district has discretion to apply its discipline policy to off-campus misconduct where the school district can show (1) the misconduct is a continuation of or has a nexus with improper conduct that occurred on school grounds, or (2) the student's actions have a direct and immediate effect either on school discipline or on the general safety and welfare of the students. In the matter of the Expulsion of Z.K. and S.K. from Anoka-Hennepin Independent School District No. 11, 695 N.W.2d 656 (Minn. App. 2005) (school board had jurisdiction where victim was lured away from bus stop under the guise of a basketball game, only to be shot at with a BB gun by a fellow student.)

There is a process for judicial review of expulsion/exclusion decisions of school districts. (M.S. 121A.50). However, such review is limited and can occur only after such decisions have first been reviewed by the Commissioner of the Department of Education. (M.S. 121A.49); See also Eason v. Independent School District No. 11, 598 N.W.2d 414 (Minn. App. 1999) (holding that there is no judicial review of a suspension decision under the Pupil Fair Dismissal Act).

D. Pupil Fair Dismissal Act. In 1974, the Minnesota legislature enacted the Pupil Fair Dismissal Act, M.S. 121A.40 to 121A.56. A review of the detailed provisions of the act is beyond the scope of this School Law Bulletin other than to point out that any due process procedures that may be established by a board to govern suspensions, expulsions and exclusions must be in compliance with the provisions of that law.

In 1991, the legislature added a provision that requires school districts to provide special education and related services to a pupil with a disability who is excluded or expelled for misbehavior that is not a manifestation of the pupil's disability. (M.S. 121A.43). In 2001, the legislature added a provision requiring that if a student's total days of removal in any school year exceeds ten cumulative days, the school district must attempt to schedule a meeting with the parents of the student before subsequently removing the student from school. The purpose of the meeting is to attempt to determine the student's need for "assessment or other services." (M.S. 121A.45, Subd. 3). In 2004, the legislature addressed the scope of the "assessment or other services" contemplated by such meetings, adding a provision requiring school districts to discuss with parents whether "mental health screening" for the child is appropriate. The school district is not required to pay for such screening. In 2009, the legislature clarified suspension and expulsion procedures for students with a disability regarding the timing of meetings. If a child with a disability has been suspended, but will not be recommended for expulsion, the individualized education program team must meet as soon as possible but not more than 10 days after the sixth consecutive day of suspension, or the tenth cumulative day of suspension has elapsed. Additionally, before initiating expulsion, the individualized education program team must meet, consistent with federal law, to make a manifestation determination. (M.S. 121A.43).

E. Expulsion for Possession of Firearm. In 1995, the Minnesota legislature added a provision that requires school boards to expel for a period of at least one year a pupil who is determined to have brought a firearm to school. (M.S. 121A.44). The board may modify this expulsion requirement on a case-by-case basis, however. This same statute provides for disclosure of such a weapons violation to another school district in connection with the possible admission of the student to the other district. The Minnesota Department of Education has interpreted the No Child Left Behind Act to require that school districts also forward a student's disciplinary records (with respect to a suspension or expulsion) to another school district in connection with a student's possible enrollment in the other district. See 20 U.S.C. § 7165; see also Minn. Stat. § 120A.22, Subd. 7. See generally Minn. Dept. of Educ., Memorandum from Chas Anderson and Amy Roberts to Superintendents, Principals and Other Interested Parties Re: Transmittal of Disciplinary Records to Other Schools (Sept. 23, 2003).

F. Hazing. In 1997, the Minnesota legislature enacted legislation requiring each school board to adopt a written policy governing student or staff hazing. The policy must include reporting procedures and disciplinary consequences for violating the policy. Disciplinary consequences are to be sufficiently severe to deter violations and to appropriately discipline prohibited behavior. Each school must include the policy in the student handbook on school policies. (M.S. 121A.69). Minnesota State High School League Rules (MSHSL) also provide for mandatory consequences for having violations for student athletes. These consequences are in addition to other school district penalties.

G. In 2007, the Minnesota legislature adopted legislation requiring school boards to adopt a written policy prohibiting intimidation and bullying. The policy must address intimidation and bullying in all forms, including but not limited to, electronic forms and forms involving Internet use.

III. MANDATORY DISCIPLINE POLICY LEGISLATION.

A. Suspension, Exclusion or Expulsion. The Pupil Fair Dismissal Act, as amended, requires each school board to establish uniform criteria for dismissal and to adopt written policies and rules to effectuate the purposes of the Pupil Fair Dismissal Act. (M.S. 121A.55).

B. Discipline and Removal From Class. Aside from policies and rules governing the suspension, expulsion or exclusion of students, each school board is required by state law to adopt a written districtwide school discipline policy. This requirement comes from the following statutory provisions:

[M.S. 121A.60] DEFINITIONS.

Subdivision 1. Removal from class. “Removal from class” and “removal” mean any actions taken by a teacher, principal, or other school district employee to prohibit a pupil from attending a class or activity period for a period of time not to exceed five days, pursuant to procedures established in the school district discipline policy adopted by the school board pursuant to section 121A.61.

Subd. 2. Class period. “Class period” or “activity period” means a period of time as defined in the district's written discipline policy.

[M.S. 121A.61] DISCIPLINE AND REMOVAL OF STUDENTS FROM CLASS.

Subdivision 1. Required policy. Each school board must adopt a written districtwide school discipline policy which includes written rules of conduct for students, minimum consequences for violations of the rules, and grounds and procedures for removal of a student from class. The policy must be developed with the participation of administrators, teachers, employees, pupils, parents, community members, law enforcement agencies, county attorney offices, social service agencies, and such other individuals or organizations as the board determines appropriate. A school site council may adopt additional provisions to the policy subject to the approval of the school board.

Subd. 2. Grounds for removal from class. The policy must establish the various grounds for which a student may be removed from a class in the district for a period of time pursuant to the procedures specified in the policy. The policy must include a procedure for notifying and meeting with a student's parent or guardian to discuss the problem that is causing the student to be removed from class after the student has been removed from class more than ten times in one school year. The grounds in the policy must include at least the following provisions as well as other grounds determined appropriate by the board:

- (a) willful conduct that significantly disrupts the rights of others to an education, including

conduct that interferes with a teacher's ability to teach or communicate effectively with students in a class or with the ability of other students to learn;

(b) willful conduct that endangers surrounding persons, including school district employees, the student or other students, or the property of the school; and

(c) willful violation of any rule of conduct specified in the discipline policy adopted by the board.

Subd. 3. Policy components. The policy must include at least the following components:

(a) rules governing student conduct and procedures for informing students of the rules;

(b) the grounds for removal of a student from a class;

(c) the authority of the classroom teacher to remove students from the classroom pursuant to procedures and rules established in the district's policy;

(d) the procedures for removal of a student from a class by a teacher, school administrator, or other school district employee;

(e) the period of time for which a student may be removed from a class, which may not exceed five class periods for a violation of a rule of conduct;

(f) provisions relating to the responsibility for and custody of a student removed from a class;

(g) the procedures for return of a student to the specified class from which the student has been removed;

(h) the procedures for notifying a student and the student's parents or guardian of violations of the rules of conduct and of resulting disciplinary actions;

(i) any procedures determined appropriate for encouraging early involvement of parents or guardians in attempts to improve a student's behavior;

(j) any procedures determined appropriate for encouraging early detection of behavioral problems;

(k) any procedures determined appropriate for referring a student in need of special education services to those services;

(l) the procedures for consideration of whether there is a need for a further assessment or of whether there is a need for a review of the adequacy of a current individualized education program of a student with a disability who is removed from class;

(m) procedures for detecting and addressing chemical abuse problems of a student while on the school premises;

(n) the minimum consequences for violations of the code of conduct;

- (o) procedures for immediate and appropriate interventions tied to violations of the code;
 - (p) a provision that states that a teacher, school employee, school bus driver, or other agent of a district may use reasonable force in compliance with section 121A.582 and other laws; and
 - (q) an agreement regarding procedures to coordinate crisis services to the extent funds are available with the county board responsible for implementing sections 245.487 to 245.4888 for students with a serious emotional disturbance or other students who have an individualized education program whose behavior may be addressed by crisis intervention.
- C. Removal of Students Who Have IEPs. The legislature in 2003 added a requirement that each school district “develop a policy and report it to the commissioner on the appropriate use of peace officers and crisis teams to remove students who have an individualized education program from school grounds.” (M.S. 121A.55(c)).

IV. DISCIPLINE POLICY.

See MSBA/MASA Model Policy 506 on Student Discipline for a model discipline policy.

V. CORPORAL PUNISHMENT.

A. Citation. Corporal punishment has not been allowed in Minnesota since 1989. M.S. 121A.58 provides as follows:

Section 1. [M.S. 121A.58] CORPORAL PUNISHMENT.

Subdivision 1. Definition: For the purpose of this section, “corporal punishment” means conduct involving:

- (1) hitting or spanking a person with or without an object; or
- (2) unreasonable physical force that causes bodily harm or substantial emotional harm.

Subd. 2. Corporal punishment not allowed. An employee or agent of a district shall not inflict corporal punishment or cause corporal punishment to be inflicted upon a pupil to reform unacceptable conduct or as a penalty for unacceptable conduct.

Subd. 3. Violation. Conduct that violates subdivision 2 is not a crime under section 645.241, but may be a crime under chapter 609 if the conduct violates a provision of chapter 609.

B. Use of Reasonable Force. The law prohibiting certain corporal punishment does not, however, change M.S. 609.06, Subd. 1(6), which authorizes teachers to use reasonable force when used, in the exercise of lawful authority, to restrain or correct a pupil.

The legislature in 1993 amended M.S. 609.06 by adding the following provision:

[Reasonable force may be used] (7) When used by a school employee or school bus driver, in the exercise of lawful authority, to restrain a child or pupil, or to prevent bodily harm or death to another.

Another section of the criminal code similarly authorizes the use of reasonable force in limited circumstances. M.S. 609.379 provides, in relevant part, as follows:

609.379 PERMITTED ACTIONS.

Subdivision 1. Reasonable force. Reasonable force may be used upon or toward the person of a child without the child's consent when the following circumstance exists or the actor reasonably believes it to exist:

(a) when used by a ... teacher ... in the exercise of lawful authority, to restrain or correct the child or pupil; or

(b) when used by a teacher or other member of the instructional, support, or supervisory staff of a public or nonpublic school upon or toward a child when necessary to restrain the child from self-injury or injury to any other person or property.

Neither the statute or case law defines reasonable force. What is reasonable would depend largely on the situation, i.e., age of the child, harm caused, reason for discipline. Reasonable force has been defined in other situations as no more force than is necessary to prevent injury to the actor or another person.

How the prohibition against certain corporal punishment (M.S. 121A.58) and the authorized use of reasonable force (M.S. 609.06) will interact has not yet been judicially determined. However, taken together, it appears that the language of the above-referenced statutes prohibits spanking or hitting for punitive reasons, but allows other reasonable physical force to restrain a child under the specified circumstances.

The legislature has attempted to develop a standard for use of reasonable force as follows:

121A.582 STUDENT DISCIPLINE; REASONABLE FORCE.

Subdivision 1. Reasonable force standard. (a) A teacher or school principal, in exercising the person's lawful authority, may use reasonable force when it is necessary under the circumstances to correct or restrain a student or prevent bodily harm or death to another.

(b) A school employee, school bus driver, or other agent of a district, in exercising the person's lawful authority, may use reasonable force when it is necessary under the circumstances to restrain a student or prevent bodily harm or death to another.

(c) Paragraphs (a) and (b) do not authorize conduct prohibited under sections 121A.58 and 121A.67.

Subd. 2. Civil Liability. (a) A teacher or school principal who, in the exercise of the person's lawful authority, uses reasonable force under the standard in subdivision 1, paragraph (a), has a defense against a civil action for damages under section 123B.25.

(b) A school employee, bus driver, or other agent of a district who, in the exercise of the person's lawful authority, uses reasonable force under the standard in subdivision 1, paragraph (b), has a defense against a civil action for damages under section 123B.25.

Subd. 3. Criminal prosecution. (a) A teacher or school principal who, in the exercise of the person's lawful authority, uses reasonable force under the standard in subdivision 1, paragraph (a), has a defense against a criminal prosecution under section 609.06, subdivision 1.

(b) A school employee, bus driver, or other agent of a district who, in the exercise of the person's lawful authority, uses reasonable force under the standard in subdivision 1, paragraph (b), has a defense against a criminal prosecution under section 609.06, subdivision 1.

Subd. 4. Supplementary rights and defenses. Any right or defense in this section is supplementary to those specified in section 121A.58, 121A.67, 123B.25, or 609.06, subdivision 1.

In civil actions, the legislature has provided in M.S. 123B.25(c), that it is a defense to a civil action for damages against a school official to prove that the force used by the official was reasonable, was in the exercise of lawful authority, and was necessary under the circumstances to restrain the pupil or to prevent bodily harm or death to another.

Section 123B.25(b) also requires the school district, upon written request of the teacher involved, to provide legal counsel for any teacher against whom a civil claim is made for physical injury or wrongful death arising out of or in connection with the employment of such teacher with the district. In Queen v. Minneapolis Public Schools, Special School District No. 1, 481 N.W.2d 66 (Minn. Ct. App. 1992), the court of appeals held that the school district had no such obligation where the teacher was guilty of malfeasance.

C. Criminal Liability. M.S. 121A.58, Subd. 3, clarifies that conduct that is a violation of the prohibition against corporal punishment is not a misdemeanor under M.S. 645.241, but may be subject to criminal prosecution if it constitutes a violation of the criminal code.

D. Corporal Punishment Policy. See MSBA/MASA Model Policy 507 on Corporal Punishment.

VI. REQUIREMENT FOR ANNUAL REVIEW.

M.S. 121A.65 provides that the principal or other person having general control and supervision of the school, and representatives of parents, students and staff in a school building must confer at least annually to review the discipline policy and to assess whether the policy has been enforced. In addition, this section requires the school board to conduct an annual review of the district-wide discipline policy. Other reviews also can be provided for by the board.

VII. HAZING.

Each school board must adopt a written policy governing student or staff hazing. (M.S. 121A.69). See MSBA/MASA Model Policy 526 on Hazing Prohibition.

VIII. REMOVAL OF STUDENTS WITH IEPS.

Each school board must adopt a written policy regarding their use of peace officers and crisis teams to remove students who have an individualized education plan from school grounds. (M.S.121A.55 (c)). See MSBA/MASA Model Policy 532 on Use of Peace Officers and Crisis Teams to Remove Students with IEPs from School Grounds.

IX. BULLYING.

Each school board must adopt a written policy prohibiting bullying in any form. (**M.S. 121A.031**). See MSBA/MASA Model Policy 514 on Bullying Prohibition.

X. CONCLUSION.

While the legislature has required the adoption of a district-wide discipline policy in each district and has specified many of the required policy components, the final decisions are left to the determination of the school board.