

HOT TOPICS IN SCHOOL LAW



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CLARK HILL

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What's on Tap?

- **New Laws on Expenditures**
- **“Loitering” on School property**
- **New FOIA Amendments**
- **Sale of Surplus Real Property**



This document is comprised of general information relative to the subject matters discussed herein. It is not intended to give legal advice and does not establish any attorney-client relationship. School Districts facing specific issues should seek the assistance of an attorney.

New Law on Expenditure of Funds – MCL 380.1814



Permissible Expenditures - Generally

- ❑ **Three Part Inquiry For Determining Whether Expenditure Is Permissible:**
 - What are the **powers** school district's have to expend funds?
 - What are the specific **source and use limitations** or **specific prohibitions** on expenditures?
 - What is provided for in the school board approved **budget**?

Permissible Expenditures - General Statutory Powers

General Powers School District

- ❑ School districts have **express** powers, and may exercise those powers that are **implied** or **incidental** to those express powers, and may also exercise a power incidental or appropriate to the performance of any function related to the operation of the school district in the **interest of public elementary and secondary education** within the school district. MCL 380.11a
- ❑ Requirement of an “**Educational Nexus**”

Definition of “Educational Nexus”

Our definition...

Unless some specific **limitation** or **prohibition** has been placed on expenditures from the General Fund, so long as there is a reasonable **“educational nexus”** between the expenditure and the performance of any function related to the operation of a school district in the interests of public elementary and/or secondary education in the school district, the expenditure from the General Fund is **allowed**.

New Law – MCL 380.1814 – *Effective April 12, 2015*

- A person **shall not use** school district, intermediate school district, public school academy, or education achievement authority **funds or other public funds** under the control of a school district, intermediate school district, public school academy, or education achievement authority **for purchasing alcoholic beverages, jewelry, gifts, fees for golf, or any item the purchase or possession of which is illegal.**
- **HOWEVER, this does not prohibit the use of public funds for the purchase** of a plaque, medal, trophy, or other **award for the recognition** of an employee, volunteer, or pupil if the purchase **does not exceed \$100.00** per recipient.
- **“Public Funds”** means funds generated from taxes levied under this act, state appropriations of state or federal funds, or payments to a school district, intermediate school district, public school academy, or education achievement authority for services, but does not include voluntary contributions made for a specific purpose by a school district, intermediate school district, public school academy, or education achievement authority board member; a school district, intermediate school district, public school academy, or education achievement authority employee; another individual; or a private entity.

New Law – MCL 380.1814 – *Effective April 12, 2015*

- **VIOLATION** = **Misdemeanor** + up to 93 days in **jail** and/or monetary **fine**.
- The **fine** that may be levied by the Court gradually escalates depending upon amount of Public Funds that were expended in violation of the law. Lowest fine is “up to \$1,000” and highest fine is “at least \$4,000”.
- In addition to the jail and/or monetary fine, the person is legally required to pay **restitution** to the school district in the amount of the Public Funds that were expended in violation of the law.
- ISDs also have corollary law regarding policy on similar issue. *See MCL 380.634.*

Sex Offenders Registration Act (“SORA”) – MCL 28.721 *et seq.*



Sex Offenders Registration Act (“SORA”) – MCL 28.721 *et seq.*

The SORA is an Act that requires persons convicted of certain listed offenses from engaging in certain activities within a “student safety zone.”

- Persons required to be registered as sex offenders under SORA may NOT reside within a School Safety Zone, with some exceptions.
- Persons convicted of a SORA listed offense may NOT work or loiter in a School Safety Zone, with certain exceptions

Definitions under SORA

- **“Student Safety Zone”** is defined to include the area within **1,000 feet** or less from School Property.
- **“School”** is defined as a public, private, denominational, or parochial **school offering** developmental kindergarten, **kindergarten**, or **any grade from 1 through 12**. A School does not include a home school.
- **“School Property”** is defined to include **property used to impart educational instruction**, or for **use by students** not more than 19 years of age for sports or other **recreational activities**.

Doe v. Snyder - USDC E.D. of Michigan – March 31, 2015

Following a decision from a federal court last month, registered sex offenders in Michigan CANNOT currently be arrested for coming within 1,000 feet of School Property.

FACTS: In *Doe v. Snyder*, a group of six Tier III sex offenders, with school-aged children, challenged SORA on several constitutional grounds. On March 31, 2015, U.S. District Court Judge Robert Cleland issued an opinion finding certain provisions of SORA unconstitutional and ordering their enforcement enjoined, including, but not limited to SORA's geographic exclusion zones provisions. The plaintiffs in this matter successfully argued that many of SORA's provisions should be ruled void for constitutional vagueness.

EXAMPLE: SORA makes it a crime for a registered sex offender to work, loiter, or reside within a Student Safety Zone. The statute defines "Student Safety Zone" as the area that lies 1,000 feet or less from School Property, but Judge Cleland determined that SORA provides insufficient guidance for how the 1,000 foot zones should be measured - such "as the crow flies or as people actually travel."

Doe v. Snyder - USDC E.D. of Michigan – March 31, 2015

OUTCOME: Judge Cleland also found SORA's prohibition against registered sex offenders "loitering" within 1,000 feet of School Property **unconstitutionally vague**. SORA defines "loiter" to mean to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of **observing or contacting minors**. The plaintiffs in this matter also successfully argued that it was unclear whether they were permitted to attend parent-teacher conferences, go to a school movie night, or take their children to a school playground on the weekend.

The plaintiffs also argued that SORA's geographic exclusion zones infringed on their fundamental constitutional right to participate in the education and upbringing of their children. Although the Judge found that Michigan has a compelling interest in protecting minors from violence and sexual abuse, the unconstitutional vagueness of the geographical exclusion zone prevented him from evaluating whether the loitering ban infringed upon the plaintiffs' parental rights. Judge Cleland wrote that if the Michigan legislature amends SORA to clarify its vague provisions, the court could find in favor of the State on this issue.

IMPACT ON YOUR SCHOOL DISTRICT: This decision should not impact current practices in most school districts, as most school districts already permit parents of students who are registered sex offenders to participate in teacher-parent conferences, and participate in meetings about their students with teachers and administrative staff.

Freedom of Information Act



Freedom of Information Act

Michigan Freedom of Information Act - MCL 15.231 et seq. ("FOIA")

- FOIA requires school districts to maintain those records which document the official business of the school district.
- Any person may request in writing to inspect, copy or receive copies of public records.
- There are multiple exemptions from disclosure. Some examples include:
 - Personal Information - *Michigan Fed. of Teachers v. Univ. of Michigan* case.
 - Disclosure exempt by statute.
 - Attorney-Client Privilege and other privileges recognized by statute.
 - Bid/Proposal prior to public opening.
 - Frank communications prior to final determination by board.
 - FERPA covered information.

Responding to FOIA Requests

- **Timeline for Responding to FOIA Requests**
 - **Within 5 business days of receipt of request, must either:**
 - Respond by granting or denying the request; OR
 - Issue notice extending response period by not more than 10 business days.
 - May obtain different timelines if the requester agrees in writing.
- **When is Request Received ?**
 - If received by mail or personal delivery - on date written request received.
 - If received by e-mail, fax or other electronic transmission – 1 business day after written request received.
- **Format for Response**
 - **Must Grant or Deny Request – may be in whole or in part.**
 - **If deny request (in whole or in part), must state:**
 - Reasons for denial (*e.g.* record exempt from disclosure or does not exist).
 - Requester's right to appeal and right to receive attorney fees if appeal successful.

New FOIA Amendments – *Effective July 1, 2015*

- **Requires Public Bodies to establish *specific written procedures and guidelines* for FOIA requests, including information on fees, disputes and appeals for FOIA requests. If do not have written procedures in place, cannot charge fees.**

- **Requires a separate *written summary* informing public on:**
 - How to submit a FOIA request to the Public Body.
 - How to understand the Public Body's written responses to a FOIA request.
 - What deposits may be required and how they are to be paid.
 - Fee calculations for FOIA requests.
 - Avenues for Challenge and Appeal of fees charged or denial of FOIA request by Public Body.

- **Public Body must provide free copies of these procedures and guidelines and the summary.**

- **If Public Body maintains an internet presence, must post copies of these procedures and guidelines and the summary on its Website.**

Highlights of New FOIA Amendments – *Effective July 1, 2015*

- Allows a public body to inform a FOIA requester that requested information is available on the public body's website, in lieu of providing the public records, so long as the records were available on the website at the time of the request.
- If a court determines that a public body has arbitrarily and capriciously violated FOIA by refusing or delaying in disclosing or providing copies of a public record, then the fines have been raised to \$1,000.
- If a written request is delivered to the public body's spam or junk mail folder, the request is not received until one day after the public body first becomes aware of the written request.
- There are expanded the provisions relating to discounting FOIA response costs for indigent FOIA requesters.

New FOIA Amendments – Fees

- When a public body estimates charges for complying with a FOIA request, the total fee cannot exceed the sum of the hourly wage of its lowest paid employee capable of searching for, locating, and examining the public records in the particular instance, **regardless if that person is available or is the one that actually performs the labor**. Labor costs are to be estimated in increments of 15 minutes or more and **rounded down** for partial time increments. Fees for contractors used to redact information cannot exceed \$51.00.
- A public body can still require a good faith deposit that does not exceed 50% of the total estimated fee, but the public body's request for a deposit must include a detailed itemization. Deposit may be 100% of estimated fee if requester has failed to pay for fulfilled request previously.
- Prohibits a public body from charging more than \$0.10/sheet for paper copies of public records (excluding labor costs).
- If a public body fails to respond to a written request in a timely manner, then the public body must reduce the charges for labor costs otherwise permitted by 5% for each day that the public body exceeds the time permitted for the response with a maximum of 50% reduction if (1) the late response was willful and intentional and (2) the written request included language that indicated it was a request for information or submitted under FOIA.

Sale of Surplus Real Property



Sale of Surplus Real Property

Statutory Framework – Revised School Code

- As a “general powers school district” under Section 11a of the Revised School Code, MCL 380.11a, a Michigan public school district has all the rights, powers and duties expressly stated in the Revised School Code; may exercise powers implied or incident to those powers expressly stated in the Code; and, except as provided by law, may exercise powers “incidental or appropriate to the performance of any function related to the operation of the school district in the interests of public elementary and secondary education in the school district . . .” Within this last grant of powers, Section 11a(3)(c) states as follows:
 - Acquiring, constructing, maintaining, repairing, renovating, **disposing of, or conveying school property**, facilities, equipment, technology or furnishings.

Sale of Surplus Real Property

❑ Sale of Surplus Real Property

- Revised School Code silent.
- Attorney General Opinion No. 5522 of 1979
 - Infers requirement to sell land for valuable consideration.
 - Considers \$1.00 to be valuable consideration for sale of land to City to be used as park for joint recreational purposes.
- General Fiduciary Responsibilities of Board is to properly maintain and care for the assets and fiscal conditions of the School District.
- Review of relevant School District Policies and/or Procedures.
- Independent Appraisals
 - Not legally required.
 - Practical and politically advisable.
 - Sets parameters for Fair Market Value (“FMV”).
 - Helps insulate Board from public criticism of purchase price.

Marketing of Surplus Real Property

❑ For Sale by Owner

- Saves Brokerage Fees.
- Burdens time of School District employees.
- May not reach qualified prospective purchasers.

❑ Traditional Brokerage Approach

- Listing with broker exposes parcel to wide variety of brokers in the multi-listing community.
- Broker responsible for all “leg work” associated with sale.
- Broker Charges Commission
 - Traditionally 6% for improved and 10% for vacant property.
 - May be negotiable.
 - Earned by broker provides a willing and able purchaser.

Sale of Surplus Real Property

❑ Hybrid Brokerage Approach

- Hire Broker/Consultant on Hourly Basis.
- Perform certain levels of due diligence to determine ability to develop property:
 - Title Work.
 - Environmental Studies.
 - Zoning analysis.
 - Municipality Input.
- Prepare RFP
- Accept Proposals
- Negotiate Transaction

Sale of Surplus Real Property

CAUTION!!!!

Once the transaction is open to any “Public Bidding” type approach, a School District may be forced to consider an offer from a party, such as a public school academy, which may directly compete with the School District for its resident students.



Sale of Surplus Real Property

❑ **MCL 380.1260(1) provides in pertinent part as follows:**

Unless approved by the state board, a school board or intermediate school board shall not impose any deed restriction prohibiting, or otherwise prohibit, property sold or transferred by the school board or intermediate school board from being used for any lawful public education purpose. Any deed restriction or other prohibition in effect as of the effective date of this subsection is void. MCL 380.1260(1) (emphasis added).

❑ **MCL 380.1260(2) provides in pertinent part as follows:**

If a school board or intermediate school board offers property of the school board or intermediate school board for lease or rent, the school board or intermediate school board shall not refuse to lease or rent the property to a person solely because the person intends to use the property for an educational purpose, if the intent of the person is to use the property for a lawful educational purpose. MCL 380.1260(2) (emphasis added).

Sale of Surplus Real Property

❑ Open Meetings Act Considerations

- A public body may meet in closed session . . . to consider the **purchase or lease** of real property up to the time an option to purchase or lease that real property is obtained. MCL 15.268(d).
 - Limited to acquisitions.
- A public body may meet in closed session . . . to **consider materials exempt** from discussion or disclosure by state or federal statute. MCL 15.268(h).
 - Attorney/client communications are exempt under FOIA.
 - Requirement of *bona fide* legal advice in written form.
- Duration of confidential treatment of information discussed in closed session.
- Persons other than Board Members permitted to participate in closed session of Board.

THANK YOU! Any Questions?



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