

HOT TOPICS IN SCHOOL LAW



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What's on Tap?

- **Conflicts of Interest**
- **Revenue Raising & Cost Containment**
- **Privatization**
- **FOIA Amendments**



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.

Conflict of Interest Laws

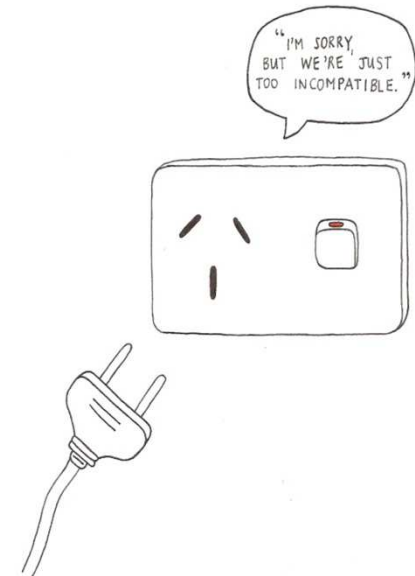


Incompatible Public Offices – MCL 15.181 *et seq.*

General Rule:

A PUBLIC OFFICER OR PUBLIC EMPLOYEE SHALL NOT HOLD 2 OR MORE INCOMPATIBLE OFFICES AT THE SAME TIME.

- **“Incompatible Offices”** means public offices which, when performing the duties of any of the public offices, results in the following:
 - The subordination of 1 public office to another;
 - The supervision of 1 public office by another; or
 - A breach of duty of public office.
- **“Public Employee”** means a non-elected and non-appointed person who is employed by a public entity, including a school district and ISD.
- **“Public Officer”** means a person elected or appointed to:
 - An office established by State Constitution of 1963
 - A public office of a city, village, township or county
 - A board of a public entity



Contracts of Public Servants w/ Public Entities – MCL 15.321 *et seq.*

General Rules:

1. A public servant **shall not be a party**, directly or indirectly, **to any contract** between himself or herself and the public entity of which he or she is an officer or employee.
 2. A public servant **shall not directly or indirectly solicit any contract** between the public entity of which he or she is an officer or employee and any of the following:
 - Himself or herself;
 - Any entity which he/she is a partner, member or employee;
 - Any private corporation which he/she is: (1) a stockholder (>1% of outstanding stock if not listed OR in excess of \$25,000 if listed); or (2) a director, officer or employee; or
 - Any trust of which he/she is a beneficiary or trustee.
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- Under Rule 2 (non-solicitation rule) above, a public servant shall also not:
 - Take part in negotiation/renegotiation, amendment or approval of contract; or
 - Represent either party in the transaction.

Contracts of Public Servants w/ Public Entities – MCL 15.321 *et seq.*

Limited EXEMPTION to the Rules for School Board Members and School Employees

- The Rules do not apply to a “public servant” who is paid for working an average of 25 hours or less per week for a public entity PROVIDED THE FOLLOWING ARE MET:
 1. If (1) the **direct benefit** to public servant is **less than \$250 AND less than 5% of the public cost** of the contract and the public servant files a sworn affidavit to that effect with the School Board; **or** (2) the contract is for **emergency repairs or services**; then the public servant must **promptly disclose** any pecuniary interest in the contract to the School Board **at a Board Meeting** and the disclosure is **made a matter of record** in the official minutes.
 2. If contract exceeds or does not meet these thresholds, then the disclosure shall be made by either:
 - a) Written disclosure (that is made a part of the public record) to the Board President (or VP if President is affected public servant) at least 7 days prior to the meeting when vote will be taken; or
 - b) Disclosure at a public meeting of the Board, PROVIDED the vote is taken at a Board Meeting held at least 7 days after the Board Meeting at which the disclosure was made (**MUST BE DONE IF BENEFIT > \$5,000**).

Contracts of Public Servants w/ Public Entities – MCL 15.321 *et seq.*

3. The contract is approved by a vote of not less than 2/3 of the full membership of the Board without vote of disclosing member (if 7 members, must have 5 affirmative votes).
 4. The Board discloses the following summary information in official minutes:
 - a) Name of each party to contract;
 - b) Terms of contract (term, finances and general obligations); and
 - c) The nature of the pecuniary interest disclosed.
- If a conflict of interest exists, a Board Member must abstain; however, the Rules do not prevent a public servant from making or participating in making a governmental decision to the extent required by law.
 - If 2/3 of the Board Members are not eligible to vote on a contract or constitute a quorum under the Rules, a Board Member may be counted for purposes of a quorum and may vote if Board Members pecuniary interest is less than \$250 AND less than 5% of the public cost of the contract.

Contracts of Public Servants w/ Public Entities – MCL 15.321 *et seq.*

EXCEPTIONS TO THE RULES

- The Rules do not prevent an ISD superintendent from serving simultaneously as superintendent of local school district.
- The Rules do not prohibit:
 1. Contracts between public entities;
 2. Contracts awarded to lowest qualified bidder, other than a public servant, upon the receipt of sealed bids received pursuant to public notice;
 3. Contracts for public utility services where rates are regulated; and
 4. Contracts for purchase of residential real property (if public entity has ethics ordinance in place at time of sale).

OTHER ISSUES

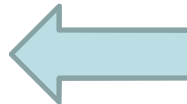
- Violation of Rules is a misdemeanor.
- Rules not intended to penalize innocent persons. Must have actual knowledge.
- Any prohibited activity is not void per se; only voidable by courts.
- School Boards may adopt more stringent policies.

Revised School Code – MCL 380.1203

General Rule

A Board Member of a school district, ISD or PSA who believes or has reason to believe that he/she has a conflict of interest in a contract OR financial transaction that requires Board approval shall **disclose the specific conflict of interest** and **abstain from voting**.

- Presumed to have a “Conflict of Interest” if **Board Member** or his/her “**family member**” has a **financial interest or competing financial interest** in the contract or financial transaction or is an employee of the school district, ISD or PSA.
- A “**family member**” is defined to include a person’s:
 - Spouse;
 - Spouse’s sibling;
 - Spouse’s child;
 - Sibling;
 - Sibling’s spouse;
 - Sibling’s child;
 - Child;
 - Child’s spouse;
 - Parent
 - Parent’s spouse



Includes relationship created by adoption OR marriage

Revised School Code – MCL 380.1203

Exceptions – A “financial interest” does not exist in any of the following:

- A contract or financial transaction between school district, ISD or PSA and:
 1. A corporation which he/she is a stockholder owning 1% or less of outstanding stock (if not listed) OR \$25,000 or less (if listed);
 2. A corporation which a trust (where he/she is beneficiary of trust) owns 1% or less of outstanding stock (if not listed) OR \$25,000 or less (if listed);
 3. A Michigan PLLC if he/she is an employee but not a member;
 4. A corporation in which he/she is not a director, officer or employee;
 5. An entity which he/she is not a partner, member or employee; or
 6. A corporation or firm which has an indebtedness owed to the person.

- A contract between an ISD and a constituent school district.

- Contracts awarded to lowest qualified bidder, other than a public servant, upon the receipt of sealed bids received pursuant to public notice.

Revised School Code – MCL 380.634 (ISDs ONLY)

- **Prohibits** ISD Board Members and Administrators from accepting any money, goods or services in excess of \$55.00 (FY 2013-14 amount) from any person who does or is seeking to do business with the ISD.
- **Prohibits** ISDs from entering into a contract if a Board Member or Administrator has a “substantial conflict of interest” in the contract.
- **Requires** ISDs to adopt and implement a conflict of interest policy.
- **Requires** ISDs to adopt and implement a policy that prohibits the use of ISD or other public funds under control of ISD for purchasing alcoholic beverages, jewelry, gifts, fees for golf or any item the purchase of which is illegal. Employee recognition gifts/awards < \$100 are OK.
- **Requires** ISDs to include a provision in each Administrator’s employment contract that prohibits engaging in conduct involving moral turpitude AND allows voiding of the contract for violation of such provision
- A “**substantial conflict of interest**” means “a conflict of interest on the part of an intermediate school board member or intermediate school district administrator in respect to a contract with the intermediate school district that is of such substance as to induce action on his or her part to promote the contract for his or her own personal benefit.”

Revised School Code – MCL 380.634 (ISDs ONLY)

Exceptions – A “substantial conflict of interest” does not exist in any of the following:

- A contract between the ISD and:
 1. A corporation which he/she is a stockholder owning 1% or less of outstanding stock (if not listed) OR \$25,000 or less (if listed);
 2. A corporation which a trust (where he/she is beneficiary of trust) owns 1% or less of outstanding stock (if not listed) OR \$25,000 or less (if listed);
 3. A Michigan PLLC if he/she is an employee but not a member;
 4. A corporation in which he/she is not a director, officer or employee;
 5. An entity which he/she is not a partner, member or employee; or
 6. A corporation or firm which has an indebtedness owed to the person.

- A contract between an ISD and a constituent school district.

- Contracts awarded to lowest qualified bidder upon the receipt of sealed bids received pursuant to public notice, unless public notice does not bar, unless allowed by law, any qualified entity from bidding.

Revised School Code – MCL 380.634 (ISDs ONLY)

- If an ISD Board Member, Administrator or employee who recommends, negotiates, or is authorized to sign a contract on behalf of the ISD is either employed by, or knows he/she has a family member who is employed by, a business enterprise with which the ISD is considering entering into a contract with, then:
 - Board Member, Administrator or employee must disclose this fact to the Board at a public meeting before the ISD enters into the contract.
 - Board must vote at a public meeting to:
 - 1) Determine if a conflict of interest exists; and
 - 2) Vote on whether to enter into the contract.

- A “family member” is defined to include a person’s:
 - Spouse; Spouse’s Sibling; Spouse’s Child
 - Sibling; Sibling’s spouse; Sibling’s Child
 - Child; Child’s Spouse
 - Parent; Parent’s Spouse

*****Includes relationships created by adoption OR marriage*****

Revenue Raising & Cost Containment Measures



Sale of Surplus Property

- **Maximize sales proceeds by understanding actual value of property versus appraised value through school district initiated due diligence.**
- **Encourage development of property after sale to increase student enrollment within school district.**
- **Politics can be sensitive.**

Schools of Choice

- **Two types of Schools of Choice Available**
 - Section 105 – Accepts students from any school district within your ISD.
 - Section 105c – Accepts students from any school district within an ISD contiguous to your ISD.
- **A school district may elect to participate in only 105 or 105c, or may elect to participate in both.**
- **May limit participation to select grades, schools or special programs.**
- **May begin participation at beginning of school year, or for 2nd semester.**
- **Must follow specified procedures:**
 - Must publish what grades, schools or special programs available.
 - Application Period must be at least 15 days long if starting at beginning of school year.
 - Application Period must be during last 2 weeks of first semester if beginning for 2nd semester.
 - If too many applicants, must use random draw system to select.
- **Not required to provide transportation to schools of choice students.**

Student Fees/Pay to Play

Allowable Fees:

- **Pay to play or participate in extra-curricular activities, if students without financial means are not excluded from participation.**
- **Any activity for which students are not graded or evaluated and for which participation is not required.**
- **School-sponsored trips not related to curriculum.**

Other Ideas...

- **Advertising space on athletic fields/fences.**
- **Cell Tower Leases**
- **Enhanced Foundation Activity**

Privatization



Development of RFPs

- **Understanding Applicable Laws.**
 - No requirement to seek competitive proposals unless:
 - Food Service Management Company;
 - Seeking “Best Practices” Compliance; or
 - Board Policies require bidding.
 - Must provide Bargaining Unit with opportunity to bid on “equal basis.”

- **Analysis of current school district operations.**
- Must review current operations and understand level and scope of services.
- Must account for unique circumstances of school district.
 - **Utilization of Specific Parameters for Comprehensive Proposals**
 - Comparison between vendors’ proposals.
 - Comparison between vendors’ proposals and school districts operations.

RFP Process

- **Possible Board Resolution to Authorize Process**
- **Issuance of RFPs**
- **Pre-Proposal Meetings**
- **Requests for Clarifications from Contractors during RFP process.**
- **Receipt of Proposals**

Proposal Analysis

- **Prudent to establish selection criteria/scoring matrix. Examples of criteria include:**
 - Cost
 - Exceptions
 - Ability to Perform
 - Scope of services offered
 - Contractor “fit” with school district.

- **Review and analyze proposals for:**
 - Cost
 - Compliance with RFP specifications
 - Exceptions to RFP and/or other contract documents
 - Contractor profile

- **Request Contractors to respond to additional clarifications in writing.**

Contractor Due Diligence

- **Conduct Interviews with Contractors**
 - Does not necessarily need to include all those who submitted proposals
- **Conduct Reference Checks of Contractors**
 - Utilize cross-sectional team to do reference checks
 - Board Member(s) contacts Board Member from reference school district
 - Administrator(s) contacts Administrator from reference school district
- **Conduct Site Visits**
 - Do “surprise visits” if at all possible

Developing a Plan for Successful Outsourcing

- **Timing is Critical – Plan Ahead, do NOT rush process or wait until last minute.**
 - Timing of Entire Process.
 - Proper time to implement transition plan.
- **Communication is Crucial**
 - All key stakeholders need to be informed.
 - Administration and Board must speak with “one” voice/message.
- **Involve legal counsel for both labor and bidding issues.**
- **Understand your school district’s current operations and contracts (all have unique issues).**
- **Set forth school district’s service expectations.**
- **Develop a comprehensive RFP. Do NOT just use form RFP from shelf or another district.**
- **Treat all parties participating in RFP process fair.**
- **Retain “knowledgeable” person to “oversee” 3rd party service provider(s).**

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 requestor 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).
 - Requestor's right to appeal and right to receive attorney fees if appeal successful.

Responding to FOIA Requests

- **Public Body May Charge a Fee for Responding.**
- **Parameters for Calculating Cost**
 - Fee must be limited to:
 - Actual Mailing Costs.
 - Actual incremental cost of duplication or publication.
 - Labor costs to search, examine, review and/or delete/separate exempt records.
 - Labor cost must be hourly wage of lowest employee able to do work.
 - First \$20 of fee is without charge if requestor on public assistance or indigent.
 - If fee will exceed \$50, may require 50% deposit.
- **E-Mail and Text Message Records**
 - If not stored, does it need to be produced?

Proposed FOIA Amendments – HB 4001

- **Would further restrict charges/fees for copying of public records**
 - Must adopt formal guidelines and publish before any charges could be made.
 - Cannot use “cost of benefits” in determining hourly wage of individual who searches for, locates, examines or redacts public records.
 - Must itemize labor charges in terms of rate (no overtime) and number of hours.
 - Must charge in 15 minute increments, and must round down.
 - Cannot charge for “redaction fees” if same document previously redacted.
 - Cannot charge more than \$0.10 per page (8 ½ x 11 or 8 ½ x 14).
- **Must give due consideration to fill a FOIA request without charge or at lower fee.**
- **Persons who are indigent and receiving public assistance are without charge for first \$50.**
- **If late in responding, must reduce fees by 10% for each day late if willful or request included “FOIA” or similar language on it.**
- **If arbitrarily and capriciously violate FOIA by charging unreasonable fee, subject to punitive damages of \$1,000 and civil fine between \$2,500 and \$7,500.**
- **Elaborate process to follow if person does not pay the fee.**

THANK YOU! Any Questions?



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