
Districts Must Promptly Enact Policies Banning Abortion Advice or Risk Major Financial Sanctions

By Mark W. McInerney / Aug 23, 2019

Buried about two-thirds of the way through Michigan's 2016 School Aid Act was a fairly onerous provision with a deadline for compliance that was pushed out more than three years. That deadline arrives on **October 1, 2019**, just over a month from now, and districts will need to enact a new policy in order to **avoid a reduction in state aid of \$100,000**.

Before 2016, MCL §388.1766 provided that a school district in which a school official, board member or other person dispensed or distributed a family planning drug or device, contrary to MCL §380.1507, or a prescription for a family planning drug, or made "referrals for abortions," would forfeit 5% of its total state aid appropriation.

As amended in 2016, MCL §388.1766 has become potentially more onerous and threatening to both districts and individuals associated with districts. Under the new statute, districts and intermediate school districts are required by **October 1, 2019**, to adopt a policy that must do two things. First, the new policy must provide "penalties for violation of section 1507" of the school code. MCL §380.1507 deals with the subject of sex education. Before the current amendment, MCL §388.1766 specifically referred to dispensing or distributing in a public school or on school property "a family planning drug or device," which was and is specifically prohibited by MCL §380.1507(7). The new statute is not so limited but presumably continues to refer to distribution of family planning drugs or devices. "Family planning drug or device" is not defined in MCL §380.1507, although "family planning" is; presumably a "family planning device" is anything that limits or controls pregnancy, such as a condom or any other sort of birth control implement or medication.

The second area to be covered by the policy now required by MCL §388.1766 is abortion advice or assistance. The policy must provide penalties "for a school official, member of a governing board, employee of the district or intermediate district, or other person who refers a pupil for an abortion or assists a pupil in obtaining an abortion." As noted, referring a student for an abortion was prohibited under the prior statute; that is now expanded to include "assisting a pupil in obtaining an abortion."

The "penalties" to be imposed for these violations are specified, and quite serious: "an individual employed by the district or intermediate district who violates the required policy" is to be assessed a penalty "**equivalent to not less than 3% of that individual's annual compensation**." In other words, for example, a teacher who dispenses a condom to a student or "assists" a student in obtaining an abortion is subject to a 3% penalty; assuming "annual compensation" means salary, such a fine would amount to \$1,800 for a teacher paid \$60,000 per year. Any penalty collected by the district is to be refunded to the state school aid fund.

Finally and most concerning is that a district or intermediate district which fails to adopt the policy called for in the statute by October 1, 2019 "**shall forfeit from its total state school aid an amount equal to \$100,000**."

There is no provision in the statute for a process to determine an employee's guilt or innocence. Presumably, elementary due process is required; we think that the required policy should require that due process as called for under existing Board employee disciplinary policies and/or collective bargaining agreements is to be provided.

Unlike under the old statute, where the district was subject to a 5% state aid penalty if one of its employees dispensed a forbidden device or made an abortion referral, the district is now subject to a penalty – of \$100,000 – only if it does not adopt the required policy. The new provision does not prescribe a penalty for a district that does not sanction an employee who violates the policy, although violations of the state school aid act generally remain a misdemeanor, subject to 90 days in jail and/or a \$1,500 fine.

The clearest provision in the new statute is the one requiring a district to enact the new policy by October 1, 2019. **Districts are strongly urged to do so, and thus avoid the \$100,000 penalty.**

If you have questions about this or other issues, please contact Mark McInerney at mmcinerney@clarkhill.com or (313) 965-8383, or another member of Clark Hill's Education and Municipal Law Practice Group.