



Gerry Kaufman, ASBSD Director of Policy & Legal Services
Office 605-773-2513; Cell 605-350-1102
306 E. Capitol Ave., Pierre, SD 57501
gkaufman@asbsd.org

HB 1214 Conflict of Interest - Disclosure Requirements Legislation

Questions and Answers

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ASBSD is aware of the S.D. Legislature's Government Operations and Audit Committee's Letter of Intent regarding the implementation of House Bill 1214 which was sent to schools. We believe our HB 1214 Conflict of Interest – Disclosure Requirements Legislations Questions and Answers can further assist schools and school boards with the implementation of HB 1214. Upon additional guidance and clarification from the Attorney General regarding HB 1214, we will update the HB 1214 Conflict of Interest – Disclosure Requirements Legislations Questions and Answer.

This Q n A is designed to help school boards and administrators navigate through the complex and rather confusing language of HB 1214 (SDCL Ch. 3-23). The new law is intended to require school board members and certain school employees to disclose contracts that may impact their school or interactions with the State of South Dakota. Future legislation may be necessary to help define expectations, but for school boards entering into the new fiscal year this Q n A is an attempt to answer some questions. ASBSD and SASD have submitted a joint request for a formal Attorney General Opinion, and we have reason to believe that we will be receiving a response from the Attorney General. While we hope to receive the response prior to the July board meetings we felt it was important to give member schools how ASBSD sees HB 1214 (SDCL Ch. 3-23) being applied. The opinions of interpretation are solely those of ASBSD and should not be considered as legal advice. Schools need to consult their local school attorneys on how to apply HB 1214 (SDCL Ch. 3-23).

EACH SECTION OF HB 1214 IS PRINTED BELOW AND FOLLOWED BY QUESTIONS AND ANSWERS:

Section 6: *“No board member, fiscal agent, officer, or executive of a local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity that receives money from or through the state may have an interest in a contract nor receive a direct benefit from a contract that the local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity is a party to the contract except as provided in section 8 of this Act.*

6-1 What does that mean in English?

ANSWER: Section 6 means that no school board member, business manager or school administrator may have an interest in a contract or receive a direct benefit from a contract that the school district is a party to the contract unless disclosure is given and the interest or direct benefit of the school board member, business manager or school administrator is authorized by the school board.

6-2. What is the definition of “school district fiscal agent” for purposes of HB 1214? To whom in a public school and educational cooperative does the term “fiscal agent” apply?

ANSWER: The term “school district fiscal agent” refers to only the school business manager.

6-3. What is the definition of “officer” and “executive”? To whom in a public school and educational cooperative do the terms “officer” and “executive” apply?

ANSWER: The term “officer” refers to elected and appointed school board members. The general conflict of interest statute, SDCL 6-1-1, says “[i]t shall be unlawful for any *officer* of a... school district, who has been elected or appointed...”.

The terms “officer” and “executive” also refer to all school administrators.

The Administrator Code of Ethics, ARSD 24:11:01:01(7) says the term "Chief administrator" means “an administrator, including a superintendent or chief executive officer (CEO), solely accountable to the appropriate educational governing board, whose responsibilities encompass the total educational operation of a school or district.”

The Administrator Code of Ethics, ARSD 24:11:01:01(8), says the term "Administrator" means “any educational administrator other than the chief administrator or business manager.”

SDCL 3-14-5 states “The terms ‘office,’ ‘officer,’ ‘executive,’ and ‘administrative,’ when used in § 3-14-3 or 3-14-4 mean and apply to any executive or administrative officer of the ... school district....exercising executive or administrative powers as part of the government, or any arm of the government, of the state. The terms ‘executive’ and ‘administrative’ apply interchangeably to any or all of said offices.”

6-4. Section 6 states no school board member, fiscal agent, officer, or executive of a school district or educational cooperative may have an interest in a contract or receive a direct benefit from a contract if that person’s school district or educational cooperative is a party to the same (or closely related) contract. What would be some examples of a contract between the local school district and a third party in which a school board member, business manager or school administrator (or the spouse of any of them) would have a direct personal interest in a contract or which would directly benefit the school board member, business manager or school administrator such that disclosure would (or would not) be required pursuant to HB 1214?

ANSWER: School District A must have a contract with third party B (i.e., a private vendor, a public entity such as with another school district, educational cooperative, federal or state agency, etc.) and a school board member, business manager or school administrator of School District A must have a personal interest in that same or closely related contract *or* receive a direct benefit from that same or closely related contract before HB 1214 applies and disclosure is required. The fact that School District A has a contract with third party B while at the same time a school board member, business manager or administrator of School District A has a contract with third party B does not, by itself, require disclosure pursuant to HB 1214.

View HB 1214 as a triangle. One point on the triangle is the school district. The second point on the triangle is a school district board member, business manager or school administrator. The third point is a 3rd party (person or entity, public/governmental or private, profit or non-profit). One side of the triangle (side 1) connects the school district to the school district board member, business manager or school administrator. The second side of the triangle (side 2) connects the school district with the 3rd party (person or entity, public/governmental or private, profit or non-profit) through some type of contractual relationship between the school district and 3rd party. The third side of the triangle (side 3) connects the school board member, business manager or school administrator to the 3rd party by the school board member, business manager or school administrator having an interest in the contract in or receiving a benefit from the contract between his/her own school district and the 3rd party.

Example #1: School Board member of School District A is a self-employed electrician. School District A contracts with School Board member of School District A to do electrical work at the school. Does the school board member have to disclose the contract?

ANSWER: Yes. Disclosure would be required. The self-employed electrician is a school board member in School District A. School District A has a contract with the electrician. The School Board member of School District A has an interest in the contract between School District A and the electrician and receives a benefit from that contract. The requirements for disclosure are met and disclosure is required. [Although the contract may be authorized by SDCL 6-1-2, HB 1214 assures that the other board members know of the contract and the exception before the school district enters into the contract with the board member.]

Example # 2: School Board member of School District A owns a landscaping business and has a contract with School District B to do landscaping for School District B. Does School Board member have to disclose his landscaping contract to School District A school board?

ANSWER: No. There is no contract between School District A and School District B in which the school board member from School District A has any personal interest or receives a direct (or indirect) benefit.

Example #3: School Board member of School District A owns a landscaping business and has a contract with School District B to do landscaping for School District B. School District A has a sports co-op agreement with School District B. Does School Board member of School District A have to disclose his landscaping contract with School District B to School District A school board?

ANSWER: No. School Board member of School District A has no personal interest in the sports co-op contract between School District A and School District B. School District A Board member receives no benefit from the sports co-op contract between school districts A and B.

Example #4: Administrator at School District A teaches a class for a university. School District A has a contractual agreement with a university so student teachers can be in School District A. Does the administrator have to disclose to the School Board of School District A his teaching contract with the university?

ANSWER: No. School District A administrator has no interest in the contract between School District A and the university contract related to student teachers. The school administrator receives no direct (or indirect) benefit from the contract between School District A and the university related to student teachers. *** However, if the school administrator received a stipend or any other compensation, payment or benefit from the university as a direct result of university student teachers being placed in School District A, then the administrator would have to disclose the administrator's interest in the contract between School District A and the university related to the placement of student teachers in School District A, and the school administrator is required to request a waiver and authorization from School District A School Board to receive the compensation from the university.

6-5. SDCL 6-1-1 says it is unlawful for any officer of a school district, who has been elected or appointed, to be interested, either by himself or agent, in any contract entered into by the school district, for labor, services, or for the purchase of commodities, materials, supplies, or equipment of any kind. However, SDCL 6-1-2 authorizes and allows in certain situations a school board member to have a contract with the school district in which the person serves as a school board member. If a provision in SDCL 6-1-2 allows school board member to have a contract with the school district, does the board member have to disclose the contractual relationship between the school board member and the school district?

ANSWER: Yes. Disclosure would be required by HB 1214 so the other board members know of the contract and the exception before the school district enters into the contract with the board member. [SDCL 6-1-1 and SDCL 6-1-17 prohibit school board member conflict of interest. [SDCL 6-1-2 lists eight exceptions to SDCL 6-1-1. HB 1214 (SDCL Ch. 3-

23) requires school board members, school business managers, and school administrators to disclosure actual or potential conflicts of interest.^{1]}

Section 7: *A person described in section 6 of this Act derives a direct benefit from a contract if the person, the person's spouse, or other persons the person lives with and commingles assets:*

- (1) *Has more than a five percent ownership or other interest in an entity that is a party to the contract;*
- (2) *Derives income, compensation, or commission directly from the contract or from the entity that is a party to the contract;*
- (3) *Acquires property under the contract; or*
- (4) *Serves on the board of directors of an entity that derives income directly from the contract or acquires property under the contract.*

A person does not derive a direct benefit from a contract based solely on the value associated with the person's investments or holdings, or the investments or holdings of other persons the state officer or employee lives with and commingles assets.

7.1 Can that be translated into English?

ANSWER: When Section 7 is read in conjunction with Section 6, Section 7 means

(a) that no school board member, business manager or school administrator that

- (1) has more than a five percent ownership or other interest in an entity that is a party to the contract between the entity and school district; or
- (2) derives income, compensation, or commission directly from the contract between the entity and school district or from the entity that is a party to the contract between the entity and school district; or
- (3) acquires property under the contract between the entity and school district; or
- (4) serves on the board of directors of an entity that derives income directly from the contract between the entity and school district or acquires property under the contract between the entity and school district

may have an interest in a contract or receive a direct benefit from a contract when the school district is a party to that same contract or is a party to a contract that is directly related to a the contract that the school board member, business manager or school administrator has an interest in or receives a direct benefit from, **unless** disclosure is given and the interest or direct benefit of the school board member, business manager or school administrator is authorized by the school board, and

¹ SDCL 13-43-1. Employment of school board member in same district prohibited. No person employed to teach or to draw public money as a teacher may serve as a board member in the same school district.

SD Constitution, Article 8, §17. Interest in sale of school equipment prohibited. No teacher, state, county, township or district school officer shall be interested in the sale, proceeds or profits of any book, apparatus or furniture used or to be used in any school in this state, under such penalties as shall be provided by law.

SDCL 13-20-2.1. Interest of school district officer or employee in sale of school equipment as misdemeanor-- Exception. No school district officer or employee may be interested in the sale, proceeds, or profits of any book, apparatus, or furniture used or to be used in any school district of this state in which the officer serves or the employee is employed. A violation of this section is a Class 2 misdemeanor unless the sale is exempt as provided in § 6-1-2 or the purchase is made at public auction.

(b) the school board member, business manager or school administrator must disclose to the school board the contract of a spouse or other person the school board member, business manager, or school administrator lives with and commingles assets **if** the spouse of the school board member, business manager, or school administrator, or other person the school board member, business manager, or school administrator lives with and commingles assets

- (1) has more than a five percent ownership or other interest in an entity that is a party to the contract between the entity and school district; or
- (2) derives income, compensation, or commission directly from the contract between the entity and school district or from the entity that is a party to the contract between the entity and school district; or
- (3) acquires property under the contract between the entity and school district; or
- (4) serves on the board of directors of an entity that derives income directly from the contract between the entity and school district or acquires property under the contract between the entity and school district.

7-2. Does HB 1214 require there be a contract between the local school district and a person (or entity) which directly benefits the spouse of a school board member, spouse of a business manager or spouse of a school administrator before disclosure is required by the school board member, business manager or school administrator?

ANSWER: Yes. If the school board has a contract with a person or entity, **and if** the spouse of the school board member, spouse of the business manager, or spouse of the school administrator has a direct personal interest in that same or closely related contract or receive a benefit of that same or closely related contract, the board member, business manager or school administrator must disclose that same or closely related contract. The fact that the spouse has a contract (any type of contract) with a person or entity that also has a contract with the school district does not automatically require disclosure of the spouse's contract. The spouse must have a personal interest in or receive a direct benefit from the contract between the school district and the third person or entity (or closely related contract) before the school board member, business manager or school administrator is required to disclose the spouse's contract.

7-3. If a spouse of a school board member, business manager or school administrator (or other person with living with the school board member, business manager or school administrator and they comingle assets) has a contract (an employment contract, or a contract for goods, services, equipment, materials, etc.) with the school district, does the board member, business manager or school administrator have to disclose their spouse's contract to the school board?

ANSWER: Yes. The school board member, business manager or school administrator will have a personal interest in the contract between the school district and the spouse, and the school board member, business manager or school administrator will receive a direct benefit of the contract between the school district and the spouse. The requirements for disclosure are met and disclosure is required. Although it is possible (and maybe probable) the local school district board on which the board member serves, or the local school district which employs the business manager or school administrator, knows the school district employs the spouse or hires the spouse as an independent contract, it should not be presumed. Spouses do not always share the same last name, the new law refers not only to spouses but to people living together and comingling assets, and business names may not clearly identify the business owner/spouse.

7-4. If the spouse of a board member, business manager or school administrator of School District A is a special education teacher in School District B and School District A and School District B has a football sports cooperative agreement, does the school board member, business manager or school administrator of School District A have to disclose the spouse's contract with School District B to School District A School Board?

ANSWER: No. The spouse of School District A's school board member, business manager or school administrator has no interest in the sports cooperative agreement and receives no benefit from of the sports cooperative agreement between School District A and School District B, so School District A's school board member,

business manager or school administrator would have no personal interest in and receive no personal benefit from the sports cooperative agreement between School District A and School District B.

7-5. If the spouse of a board member, business manager or school administrator of School District A is a football coach in School District B and School District A and School District B has a football sports cooperative agreement, does the school board member, business manager or school administrator of School District A have to disclose the spouse's contract with School District B to the school board of School District A?

ANSWER: Yes. The spouse of School District A's school board member, business manager or school administrator has a direct interest in the sports cooperative agreement and would receive a benefit from of the sports cooperative agreement between School District A and School District B. School District A's school board member, business manager or school administrator would have a personal interest in and receive personal benefit from the sports cooperative agreement between School District A and School District B. The school board member, business manager or school administrator in School District A must disclose his interest in the School District A and School District B sports cooperative agreement due to the spouse's employment in School District B.

7-6. The last sentence in Section 7 states "[a] person does not derive a direct benefit from a contract based solely on the value associated with the person's investments or holdings, or the investments or holdings of other persons the state officer or employee lives with and commingles assets." Does the phrase "state officer" in the last sentence apply to a school board member, fiscal agent, officer, or executive?

ANSWER: Yes. ASBSD believes the reference to "state officer" in Section 7 was a drafting error and should be interpreted as applying to "board member, fiscal agent, officer, or executive" (i.e., "[a] person does not derive a direct benefit from a contract based solely on the value associated with the person's investments or holdings, or the investments or holdings of other persons the board member, fiscal agent, officer, or executive or employee lives with and commingles assets).

Section 8: *A local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity may authorize a board member, fiscal agent, officer, or executive to have an interest in a contract or derive a direct benefit from a contract if:*

- (1) The person has provided full written disclosure to the agency, district, or unit governing board;*
- (2) The governing board has reviewed the essential terms of the transaction or contract and the person's role in the contract or transaction; and*
- (3) The transaction or the terms of the contract are fair, reasonable, and not contrary to the public interest.*

No member of a local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity may participate in or vote upon a decision of a local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity relating to a matter in which the member has an interest or derives a direct benefit.

The authorization shall be in writing. Any authorization given pursuant to this section is a public record. Each authorization shall be filed with the auditor-general. The auditor-general shall compile the authorizations and present them annually for review by the Government Operations and Audit Committee. A board member, fiscal agent, officer, or executive of a local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity may comply with this section if: the local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity puts on its regular meeting agenda an inquiry for conflicts disclosure prior to the consideration of any substantive matters; the person subject to this Act publicly discloses his or her interest in a contract, direct benefit, or other conflict with any matter on the agenda; the person is excused from discussion and consideration of such matters; the board determines the matter underlying the conflict is fair, reasonable, and not contrary to the public interest; and the disclosure is included in the minutes which are publicly available.

8-1. What must be included in order for there to be “full written disclosure”?

ANSWER: The “essential terms of the transaction or contract and the person's role in the contract or transaction” which must be included in the disclosure are (1) all parties to the contract, (2) the person’s role in the contract or transaction, (3) the purpose(s)/objective(s) of the contract, (4) the consideration or benefit conferred or agreed to be conferred upon each party, (5) the length of time of the contract, and (6) any other relevant information

8-2. HB 1214 Section 8 states that a school board “may authorize” (i.e., give permission to) a board member, fiscal agent, officer, or executive to have an interest in a contract or derive a direct benefit from a contract if certain requirements are met. Could a school board refuse to authorize the board member, fiscal agent, officer or executive to have an interest in the contract even if the person provided full written disclosure, the governing board reviewed the essential terms of the transaction or contract and the person's role in the contract or transaction, and the transaction or the terms of the contract are fair, reasonable, and not contrary to the public interest?

ANSWER: If the person provided full written disclosure, the governing board reviewed the essential terms of the transaction or contract and the person's role in the contract or transaction, and the transaction or the terms of the contract are fair, reasonable, and not contrary to the public interest, the school board must authorize the board member’s, fiscal agent’s, officer’s or executive’s interest in the contract. The school board should carefully review and consider each disclosure and decide if the terms of the contract are fair, reasonable, and not contrary to the public interest. Keep in mind that if a school board votes to deny that authorization, that school board decision may be appealed into circuit court.

8-4. Section 8 states that “no member” of a local service agency, school district, etc., may participate in or vote upon a decision relating to a matter in which the member has an interest or derives a direct benefit. To whom does “no member” of a local school district or educational cooperative apply?

ANSWER: “Member” means member of the school board (and governing board member of a local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity).

8-5. It is understandable that a school board member is not to vote on something involving a matter which the member has an interest in or something which gives the school board member a direct benefit, but why can’t a school board member even participate in the discussion?

ANSWER: SDCL 6-1-17 states no school official (i.e., school board member) “may participate in discussing or vote on any issue in which the official has a conflict of interest,” and “each official shall decide if any potential conflict of interest requires such official to be disqualified from *participating in discussion* or voting,” and no school board member “may *participate in discussing* or vote on an issue” if (1) the school board member has a direct financial interest in the matter before the school board body; or (2) at least two-thirds of the school board votes that a school board member has an identifiable conflict of interest that should prohibit such school board member from voting on a specific matter.

Also, the SD Supreme Court stated in *Hanig v. Winner*, (2005 SD 10), that if a governing board member's interest fits within any of the following categories, that board member either has an actual bias or an unacceptable risk of actual bias, the categories are succinct and informative, and the categories can serve as guidance to South Dakota officials and courts in determining whether an actual bias or an unacceptable risk of actual bias exists: “(1) ‘Direct pecuniary interests,’ when an official votes on a matter benefiting the official's own property or affording a direct financial gain; (2) ‘Indirect pecuniary interests,’ when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) ‘Direct personal interest,’ when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) ‘Indirect Personal Interest,’ when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.”

Section 9: *Any person who knowingly violates sections 6 to 8, inclusive, of this Act shall be removed from office or employment and is guilty of a Class 1 misdemeanor. Any benefit to a person derived from the person's knowing violation of sections 6 to 8, inclusive, of this Act is subject to forfeiture. Any contract made in violation of sections 6 to 8, inclusive, of this Act is voidable by the governing body of the local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity.*

9.1. How would a school board remove a school board member from office or a person from employment if the person knowingly violates the law?

ANSWER: A school board does not have the legal authority to remove a person from the school board. The proceedings to remove a school board member have to be initiated by the local state's attorney pursuant to SDCL 3-7-7 in which the state's attorney petitions the court to remove the person from office. If the person was an employee, a school board would have to provide the employee with all applicable due process to which the employee is entitled under the law, school board policy and the employee's contract.

9.2 HB 1214 says that any benefit received by a person who knowingly violates the law is subject to forfeiture. How would a school board require or force a forfeiture?

ANSWER: How a forfeiture would be implemented would be based on the specific facts involved in the situation, and a school would need to consult with its school attorney whenever there is a HB 1214 conflict of interest situation, including how to address a forfeiture should the situation get that far such that a forfeiture would be applicable or required.

9.3 HB 1214 says that a contract made in violation of the law voidable by the school district. What does that mean?

ANSWER: When a statute says a contract is voidable, it means that the school board can declare the contract void (after considering the relevant facts and circumstances). If a statute says the contract is void, then the school board has no discretion in the matter and the contract entered into by the governing body is void as a matter of law.

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