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HB 1214 OVERVIEW

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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 Overview 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 Overview.

This *HB 1214 OVERVIEW* 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 *Overview* is an attempt to provide a foundation for understanding HB 1214 and what it means for school districts, school board members and some school employees. 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).

The new law, SDCL Ch. 3-, (23HB 1214) prohibits school board members, school district fiscal agents (business managers), school officers and school executives (school administrators) from having an interest in a contract, or receiving a direct benefit from a contract, if the school district (cooperative education service unit, etc.) is a party to that contract or has a separate contract which is related to the contract of the school board member, business manager or school administrators, unless the school board grants a waiver. HB 1214 disclosure requirements apply to public contracts for labor or services to be rendered, the purchase of commodities, materials, supplies, or equipment of any kind, and any kind of contract related to facilities. There may be other specific conflict of interest laws or administrative regulations relating to school board members, school administrators and the school business manager. The more restrictive conflict of interest law applies.

Under the new law, any school board members, school administrators or school business manager who knowingly violates the provisions of the new conflict of interest law commits a criminal offense (Class 1 misdemeanor) and the violator will either be removed as a school board member or the person's employment with the school district will be terminated. Unless the school board has granted a waiver, the contract in which the school board member, school administrator or school business manager has an interest or receives a direct benefit is voidable by the school board and any benefit received by the school board member, school administrator or school business manager is subject to forfeiture.

A waiver may be granted by the school board to authorize a school board member, school administrator or school business manager to have an interest in or receive a direct benefit from the school district's contract with a person or entity (public, private, for-profit, non-profit) if the following conditions are met:

1. The school board member, school administrator or school business manager provides a full written disclosure to the school board;
2. The school board reviews the essential terms of the contract or transaction and the school board member's, school administrator's or school business manager's role in the contract or transaction;
3. The school board determines that the transaction and terms of the contract are fair and reasonable and not contrary to the public interest; and
4. The authorization of the school board is in writing and filed with the Auditor-General.

If the potential for a conflict exists, the person having the potential conflict of interest should immediately prepare and submit the Request for School Board Waiver form. The request should be submitted to the school board before entering into a conflicted contract or transaction. If in doubt whether a conflict exists, disclose.

- (1) The person requesting the waiver should briefly describe the relationship to the contract in question and why the person believes it may be covered by the law, including how person, his/her spouse or anyone with whom he/she lives and commingles assets, might benefit from the contract. Examples of persons other than a spouse might include a girlfriend, boyfriend, roommate, or an adult child.
- (2) The person requesting the waiver should describe the essential terms of the contract: (a) all parties to the contract, (b) the person's role in the contract or transaction, (c) the purpose(s)/objective(s) of the contract, (d) the consideration or benefit conferred or agreed to be conferred upon each party, (e) the length of time of the contract, and (f) any other relevant information
- (3) The person requesting the waiver should briefly describe why he/she believes a waiver would not be contrary to the public interest (i.e., the contract was part of a competitive bidding process, there are other school district people involved in the decision-making process to enter into the contract, or the terms of the contract are consistent with other, similar contracts).

School boards should have a regular agenda item at the beginning of the school board meeting agenda when the school board will address any disclosures and request for a waiver. A written request for a waiver should be submitted by the school board member, school administrator or school business manager to the school board prior to a regular or special school board meeting.

The request for a waiver should be reviewed by the other Board Members prior to the next Board meeting. The school board member, school administrator or school business manager submitting the waiver request should be prepared to answer questions from school board members. The law requires the school board member, school administrator or school business manager who submitted the waiver request be "excused from discussion and consideration of such matters" which means the requesting school board member, school administrator or school business manager is not to participate in the school board discussion on whether a waiver request should be granted. It also means a requesting school board member is not allowed to vote on his/her own waiver request. SDCL 3-23-8 *does not* require the requesting school board member, school administrator or school business manager to leave the meeting while school board members discuss the request and determine whether authorization is to be granted.

To the maximum extent possible under the circumstances, all waiver requests should be decided at the meeting in which the request is brought forth. If the school board believes the request form information is incomplete, the school board must ask the person requesting the waiver for additional information. The Board should avoid using an incomplete request form as the basis for extending the time for review and decision on the waiver request; the school board may receive the needed information from the requesting party at the school board meeting when the waiver request is being addressed.

When considering a waiver request, the school board should be able to determine the requesting party's relationship to the contract, the requesting party's relationship to the outside contracting party, whether the contract terms are reasonable and in the public interest, and any other factors the school board believes will help establish the relevant facts and circumstances surrounding the contract(s) and the request for waiver.

SDCL 1-25-2(1) permits a school board to go into executive session for "discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee." School boards should consult with their local school attorney on whether or not the school board may go into executive session to discuss a disclosure and waiver request submitted by a school board member, school administrator or school business manager. Any official action concerning the disclosure and request for a waiver must be done during an open meeting.

The request and the Board's determination must be included in the minutes of the meeting. If the authorization is granted, the request for a waiver and decision must be recorded in the meeting minutes. In addition, following the meeting a written authorization should be prepared, signed by the President/Chair of the School Board or other authorized School Board Member, and filed with the Auditor General.

The school board member, school administrator or school business manager requesting waiver is responsible to follow up the waiver requests as necessary.

School District Attorneys may answer general questions about the applicability of the Disclosure Laws or about the other laws that address conflict of interest. However, school district attorneys represent the school district and the school board, and not school board members, school administrators, or the school business manager, in their individual capacities. School board members, school administrators, and the school business manager should contact a private attorney if they have questions as to how the HB 1214 applies to their individual interests and contracts.

The public records laws (SDCL Ch. 1-27) apply to all requests for a waiver.

DISCLAIMER: ASBSD provides legal education and information as a general service to ASBSD members and others. The information provided here does not establish an attorney client relationship. Additionally, the information provided should not be interpreted or used as a substitute for a legal opinion from your school attorney or other qualified counsel. Before making legal decisions, school boards and administrators, and other persons, should consult with their school attorney or other qualified counsel.

REQUEST FOR SCHOOL BOARD WAIVER

Date: _____

Name of the school board member, school administrator or school business manager requesting the waiver:

Brief explanation of the potential conflict of interest:

Brief explanation of the essential terms of the contract(s) or transaction(s) from which a potential conflict of interest may arise, including

- (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

- (6) any other relevant information

Signature of Person Requesting Waiver: _____

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_____ SCHOOL BOARD

WAIVER AUTHORIZATION PURSUANT TO SDCL 3-23-3

A written request for waiver of conflict, dated _____, was received from _____.

_____ The request was acted upon by the members of the _____ School District School Board during a meeting held on _____.

- _____ The request for waiver was denied because the terms of the contract were not considered fair and reasonable, or contrary to the public interest.
- _____ The request for waiver was authorized because the terms of the contract are fair, reasonable, and not contrary to the public interest such that a waiver should be granted.
- _____ The request for waiver was authorized because the terms of the contract are fair, reasonable, and not contrary to the public interest such that a waiver should be granted, subject to the following conditions:

Signature of School Board President /Chairperson or Authorized Member

Printed Name: _____

Date _____

Date mailed to Auditor General _____

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