



National School
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LEADERSHIP Insider

PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

A Membership Benefit of NSBA National Affiliates

Back-to-school resource guide for board members

Numerous legal issues arise at the start of a new school year. In this issue of Leadership Insider, you will find information on these issues as well as some innovative ideas on implementing change in your district. Stanley Eisenhammer, who has represented school boards for 30 years, suggests that this may be the perfect time to think creatively in your staffing decisions. As always, consult with your school board attorney and your state school boards association before addressing these issues in your district.

Doing more with less: Creative approaches to staff shortages

By Stanley Eisenhammer

The current economic crisis has forced the public school community to rethink how we educate our children; there are just not enough dollars to run schools as we once did. On top of the economic crisis is a new layer of government oversight. Through new grant programs, the U.S. Department of Education strongly encourages states and local school districts to restructure teacher training and compensation, systematically track student progress, develop rigorous standards, and “turn around” low-performing schools.

Unfortunately, the most common solutions to financial woes—cutting staff and seeking federal dollars that carry the latest mandates—at best improve student progress at the margins. At worst, they actually are harmful. A teacher evaluation system based upon student performance has little value if what we teach our children is of little value in the first place. Replacing broken or underperforming deck chairs will not save a ship that is about to go under.

If we are truly committed to improving the education we provide, we must be prepared to rebuild the system in which we have invested our time and our reputations. To institute meaningful change, we must face the fact that we—not the

unions, the federal government, state mandates, or disgruntled taxpayers—are its biggest impediments.

We—board members, school attorneys, administrators, teachers, college professors, school board associations, the most committed parents and community members—are victims of our own personal success. We love the system that has made us who we are, and we cannot see its flaws. We need to extricate ourselves from this trap if we are to rework the system to fit the current financial reality. We need to look carefully at what we teach and how we teach. In the end, we need to be at the forefront of this change or we need to get out of the way; otherwise, we will surely be pushed aside.

We all know that cutting staff costs is the only way to save meaningful money in the school budget. Our districts, therefore, have made drastic staff cuts to balance the budget. But if we look at staff shortages as an opportunity for truly creative thinking on a problem, some exciting possibilities arise. Although state laws require a certain number of seat hours, subjects, and teacher credentials, let's think of new ways to meet these requirements so that the whole system works better. For instance, in Illinois, you must have a certified teacher in the classroom or a window that allows observation of

the students. Could the window be a camera allowing remote access by students at another location? We need to consider:

- **Re-examining what we teach.**

At the secondary level, we could teach fewer subjects (using fewer teachers), but teach each subject better, so that every student masters the subject. Not *failing* does not equal mastery.

- **Re-examining how we teach.**

We could implement distance learning by connecting students in different locations. The distance does not need to be far; it could be in the same building, with several classes learning with one master teacher, and uncertified aides assisting in each class.

We could arrange for team teaching. A teacher with 20 students and five subjects each day might be willing to teach groups of 28 students the same subject five times each day.

- **Re-examining the structure of the school day.**

We could employ a shift schedule in which students attend school for the legal minimum time; students not in the classroom do supervised work, online courses or distance learning, career training, outdoor education, etc. In many states, such outside-the-classroom experiences do not need to be taught or supervised by certified staff, and yet can be tied to the curriculum. What better way to show students how they will use mathematics in the “real world” than to

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About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands.

For more information, visit www.nsba.org/na

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts.

School districts are eligible to join provided they are members in good standing of their state school boards associations.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

Staff orientation: What should your staff know before the school year begins?

By *Sonja Trainor*

A staff orientation is the board's opportunity, through the administration, to go over important standards and expectations based on legal and policy concerns. Some possible topics to cover:

1. Electronic communications. Remind staff members of the terms of your district's acceptable use policy and the extent to which, in your jurisdiction, their electronic communications will be deemed private or public. Consider some recent court rulings:

- On June 17, the U.S. Supreme Court issued a decision in *City of Ontario, CA v. Quon*, in which a California police officer claimed that his Fourth Amendment right against unreasonable search and seizure was violated when supervisors reviewed sexually explicit text messages he sent on a department-issued pager. The Supreme Court decided that the search was reasonable; therefore, it did not violate the Fourth Amendment. The search was conducted for a legitimate work-related purpose (to determine if the department needed a new service plan), and in an efficient and expedient manner that was not excessively intrusive. NSBA filed a "friend of the court" brief in support of the public employer, emphasizing public schools' need to monitor employee electronic communications to ensure student safety.

- A Massachusetts court ruled in 2008 that personal e-mails between a principal and a teacher that took place via the town computer system were public records subject to release to the public. In that case,

school employees were required to read and sign a comprehensive acceptable use policy acknowledging that e-mail messages are public records, and therefore employees should not expect them to remain private.

- A Michigan appeals court recently decided that personal e-mail communications between teachers who were also union members were *not* public records subject to disclosure to a member of the public under that state's Freedom of Information Act. The court found that e-mail accounts are much like physical teacher mailboxes that schools have historically provided for teachers, the contents of which are not automatically subject to perusal by members of the public.

- The Kentucky Attorney General's Office issued an opinion concluding that a parent had an "absolute right" to inspect all educational records relating to his child, including e-mails exchanged between teachers and administrators, even if the public did not.

2. Board member e-mails. May board members discuss public business via e-mail? In many states, such discussions may violate open meetings requirements. The Massachusetts Supreme Judicial Court ruled in December that e-mail communications between school committee members prior to open session regarding the school district superintendent's performance violated the state's open meeting law. The court decided that the deliberations conducted via e-mail, even though some were not among a quorum of members, had the effect of circumventing the requirements of the open meeting law and must be made available to the public.

INNOVATION IN PREVENTATIVE LEGAL TRAINING FOR STAFF: THE ESSENTIAL SCHOOL LAW PROGRAM

The May 2009 issue of *Leadership Insider* focused on the importance of legal literacy in school districts: www.nsba.org/MainMenu/SchoolBoardPolicies/Newsletters/Insider-May-09.aspx.

In Georgia's Rockdale County Public Schools, General Counsel Jack Lance and Superintendent Samuel T. King have developed a program in which administrators and teachers participate in a functional approach to literacy in "essential school law" (ESL). The ESL program identifies the functions performed by the teacher and the administrator, and then teaches the "ESL," i.e.,

only the law needed to perform those functions competently. In addition to the functional approach, the ESL program uses a "train the trainer" method. The teachers and administrators who participate then provide further training to their colleagues. The result: teachers and administrators feel more confident to make crucial decisions in their daily work.

Please contact NSBA Senior Staff Attorney Sonja Trainor if you would like more information on the Essential School Law Program: strainor@nsba.org

3. Teacher speech at school. Clarify the district's expectations regarding appropriate dress, speech, and materials in the classroom. While teachers do have First Amendment rights under *Tinker v. Des Moines Independent Community School District* (1969), their rights are not unlimited. The Supreme Court has ruled that public employees have a First Amendment right to speak truthfully as citizens on a matter of public concern, but the employer may regulate or discipline for speech that is part of the employee's official duties. School districts generally have control over teacher speech and classroom materials that are part of the curriculum.

Teachers' free speech rights at times conflict with a school district's interest in remaining neutral on controversial issues like religion and politics. A federal district court in California recently determined that

a school district violated a teacher's First Amendment rights when it required him to remove banners containing patriotic references to God such as "In God We Trust." The banners had been up for 20 years, and other teachers were allowed to display personal messages, some with a religious flavor. The court decided that the district had discriminated against the teacher based on his "Judeo-Christian" viewpoint. The school district is appealing to the U.S. Court of Appeals for the 9th Circuit, where it will argue that that court applied the wrong standard, and that the district may regulate this type of classroom speech.

4. Teacher speech outside of school. Online activity by teachers potentially can cause disruption in school, impairment of the teacher's ability to teach, disclosure of confidential information, defamation of co-workers, and embarrassment to the district.

When teachers communicate online with students, there are even graver concerns. Casual or peer-like interactions between teachers and students are boundary invasions that can be harmless or part of a more sinister grooming strategy. Now is a good time to discuss with your attorney and school boards association whether and to what extent you will address teacher online behavior through policy. Then orient your staff on the district's approach.

5. Harassment policy and procedures. Recent student suicides after prolonged harassment or bullying, along with judgments against school districts, have heightened awareness of this issue. Your staff members should be thoroughly familiar with your district's nondiscrimination, harassment, and bullying policies and procedures, many of which are required by state and federal law. ■

What should your staff know about undocumented students?

By Lisa Soronen

Given recent legislative initiatives in the news, your board may be asked about how it plans to address the enrollment of undocumented students. Below are answers to three of the most common—and controversial—legal questions about undocumented students.

1. Do public schools have to educate undocumented students, and if so, why?

Yes. In 1982, the U.S. Supreme Court held in *Plyler v. Doe* that Texas had violated the Equal Protection Clause of the Fourteenth Amendment by denying undocumented school-age children a free public education. Reasoning that such children are in this country through no fault of their own, the court concluded that they are entitled to the same K-12 education that the state provides to children who are citizens or legal residents.

Students or their parents may be residents of a public school district for purposes of the state's student residency laws, even if they are not "legal" residents or citizens of the U.S.

2. Can school districts ask students about their immigration status?

Probably not. *Plyler* does not directly answer the question of whether a school district may ask students about their immigration status. However, a number of organizations, including some state departments of education, interpret *Plyler* to require that a school district not

"chill" or hinder an undocumented student's access to education. Assuming this interpretation would be accepted by a court, school districts questioning students about immigration status likely would be invalid under *Plyler* because such questioning likely would dissuade undocumented children from enrolling in school.

Again, it is important to distinguish between residency in a school district's attendance area, and "legal" residency or citizenship of the U.S. In some instances, school districts have asked students about their immigration status during the enrollment process to prove residency of the student in the district's attendance area. School districts seeking to prove that a particular student is a resident of the district can ask for documentation such as a utility bill or a lease that provides evidence of where the student lives but does not indicate immigration status.

3. Should school districts report undocumented students to Immigration and Customs Enforcement (ICE)?

Probably not. No federal law requires a school district to report undocumented students to immigration authorities, and arguably, school districts are prohibited from reporting them by *Plyler*. As discussed above, any voluntary reporting of undocumented students could be considered an affront to *Plyler*'s mandate that undocumented children have access to education. If school authorities report an

undocumented student to ICE and ICE subsequently deports or removes the student from school, the school district's actions could be viewed as having denied that student access to school. Even if reporting the student does not actually lead to a denial of access to school, reporting undocumented students would undoubtedly have a chilling effect on the right to access to education because, practically speaking, it would likely drive parents of undocumented students to pull their children out of school indefinitely.

It is difficult to determine with much certainty the answer to many of the legal questions about undocumented students that arise in schools because of the absence of statutory or case law directly answering the questions. In many instances, *Plyler* is the only relevant law. For this reason, school districts faced with legal questions about educating undocumented students should contact their school attorney. ■

Lisa Soronen is a senior staff attorney at NSBA. For a discussion of 13 legal questions commonly asked by school officials related to undocumented students, download Legal Issues for School Districts Related to the Education of Undocumented Children, a publication of NSBA and the National Education Association, from NSBA's website at www.nsba.org/SecondaryMenu/COSA/Search/AIICOSAdocuments/Undocumented-Children.aspx.

ANNUAL NOTICES TO STUDENTS AND PARENTS REQUIRED BY FEDERAL LAW

School districts are required by state and federal law to send out myriad notices to students, parents, and/or the public, many of which must be provided at the beginning of the school year.

Below are some of the federal laws that require notices, with links to online resources that may be of assistance:

- No Child Left Behind Act (NCLB)
www.ed.gov/programs/titleiparta/parentinguid.doc
www.ed.gov/policy/elsec/guid/schoolchoiceguid.doc
 - Family Educational Rights and Privacy Act (FERPA)
www.ed.gov/policy/gen/guid/fpco/pdf/ferparights.pdf
www.ed.gov/policy/gen/guid/fpco/pdf/directoryinfo.pdf
 - The Protection of Pupil Rights Amendment (PPRA)
www.ed.gov/policy/gen/guid/fpco/pdf/ppranotice.pdf
www.ed.gov/policy/gen/guid/fpco/pdf/ppraconsent.pdf
 - Child Nutrition Programs—National School Lunch Program, the School Breakfast Program, and the Special Milk Program
www.fns.usda.gov/cnd/Guidance/eligibility_guidance.pdf
 - The Asbestos Hazard Emergency Response Act (AHERA)
www.epa.gov/region2/ahera/notifyform.htm
 - The McKinney Vento Act (homeless students)
<http://center.serve.org/nche/products.php#electronic>
 - Federal nondiscrimination statutes: Title VI, Title IX, Section 504, Age Discrimination Act, Title II
www.ed.gov/print/about/offices/list/ocr/docs/nondisc.html
www.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html
 - Individuals with Disabilities Education Act (IDEA)
http://idea.ed.gov/download/model_form_Procedural_Safeguards_June_2009.pdf
www.ed.gov/policy/speced/guid/spec-ed-homelessness-q-a.doc
- Adapted from *Annual Notices*, a publication by NSBA and the NSBA Council of School Attorneys, by Lisa E. Soronen, NSBA Senior Staff Attorney, and Katie Demedis, NSBA Legal Intern, June 2010.

ESEA update from the NSBA Advocacy Staff

By Roberta Stanley

Both the House Committee on Education and Labor and the Senate Health, Education, Labor and Pension Committee have held several recent hearings on the reauthorization of the Elementary and Secondary Education Act (ESEA). The Obama administration has issued “A Blueprint for Reform,” and the House and Senate leadership are committed to ushering it through. Normally these are solid signs of the potential for movement, and accordingly NSBA advocacy staff have been strategically meeting with House and Senate committee members’ offices with position papers in hand. We continue to be hopeful that the reauthorization will be undertaken in this session of Congress.

Among the issues NSBA is pressing for:

- More flexibility to accommodate the unique needs of urban, rural and suburban school districts, especially in the turnaround models for low-performing schools

- Using more measures of student progress to determine schools’ effectiveness
- Reinforcing the need for continued reliance on formulas for the distribution of federal education program funds rather than a shift to competitive grants
- Backing more interagency collaboration
- Seeking assurance that program decisions involving employee assignment, promotion, compensation, professional development, and other related personnel actions remain matters left to local officials rather than to the dictates of federal policy or regulations
- Asking for a reduced emphasis on charter schools
- Seeking the creation of a federal commission/task force to review public education financing throughout the U.S., with the goal of addressing the increasing demands and challenges school districts now face. ■

Roberta Stanley is director of federal affairs at NSBA.

SCHOOL

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have them create and use spreadsheets and graphs in that world?

- **Re-examining the use of nonteachers in the educational process.**

We could employ teacher interns at no cost to the school district. Private businesses do it all the time. Why can’t we? Of course, if you are in a bargaining state, you may have to negotiate with the union for a certain number of teacher/classroom interns every school year. These interns would be unpaid, but would receive a unique opportunity to demonstrate what they can do. And the school board will not only save money but also have the opportunity to evaluate the interns’ performance. There will be many laws and contractual obligations at play here: NCLB, state certification requirements, and your collective bargaining agreement, to name a few. If it is possible to implement such a program, it may prove to be a rich source of talent and energy for little or no cost.

We could use volunteers. Parents, retired community members, even college students, may be willing to ease the

burden of your certified staff. Keep in mind that some states’ laws may require fingerprinting, background checks, sex offender checks, and the like; and there may be limitations on the types of tasks volunteers can do in a school. At the very least, volunteers may be able to serve as classroom, recess, or lunchroom aides.

If we attempt changes like these, we will encounter resistance from fellow board members, teachers, state officials, parents, and the community; and many will be quick to offer reasons why these changes cannot work. We must be mindful of this before we begin and adjust our methods to anticipate it. Keep in mind Cassius’s warning to Brutus, later succinctly echoed by Pogo: “We have met the enemy, and he is us.” Let’s help each other out of our little boxes. Rather than, once again, buying the same old stuff in new packaging, let’s think about what we’re teaching, and alternative ways to deliver education in a cost-effective manner. ■

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