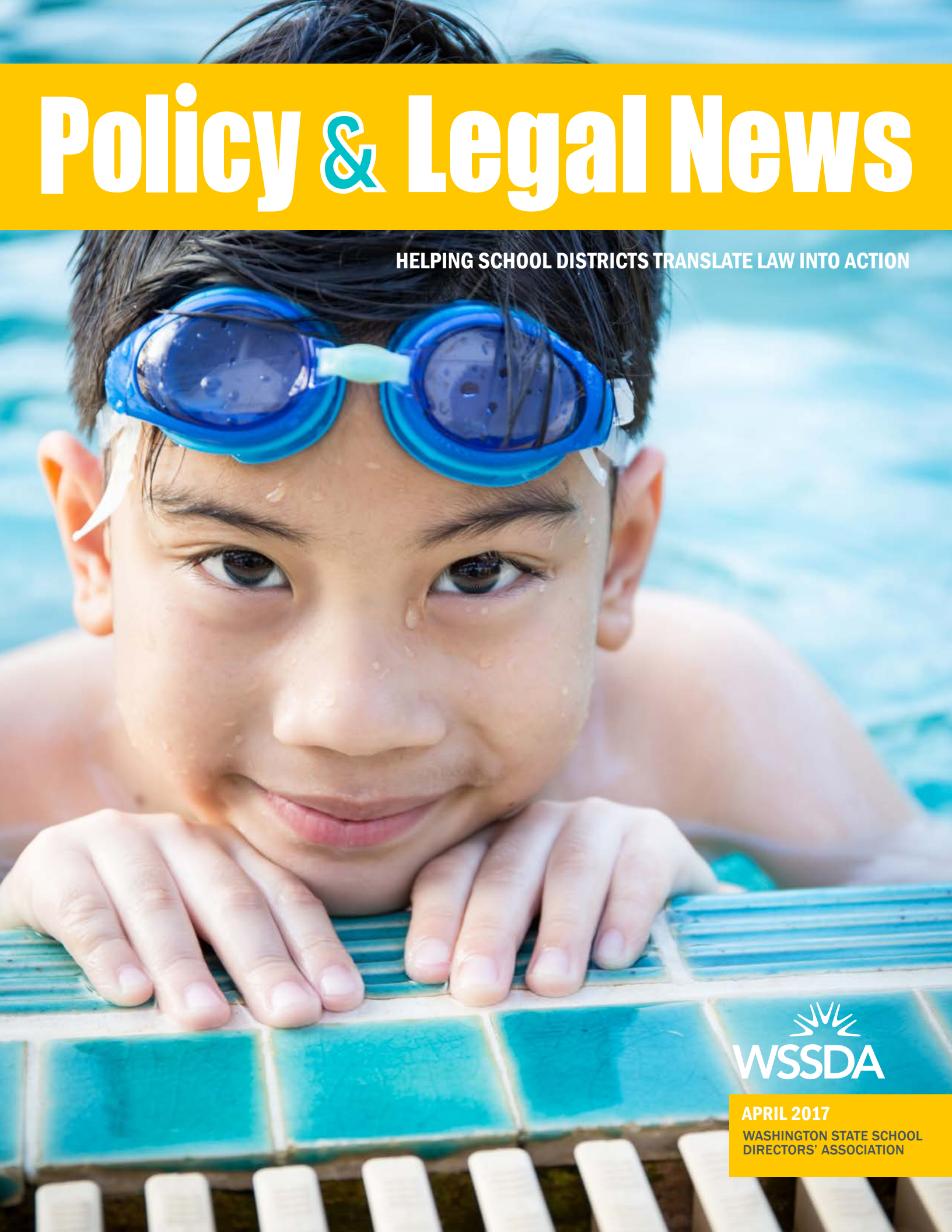
Policy & Legal News

HELPING SCHOOL DISTRICTS TRANSLATE LAW INTO ACTION



WSSDA

APRIL 2017
WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION

"A pessimist sees the difficulty in every opportunity. An optimist sees the opportunity in every difficulty."

–Winston Churchill

When we began to block out this issue of *P&L News* about a year ago, the K-12 education landscape looked very different. We anticipated bringing you updates generated by the state plan on accountability submitted to the federal government pursuant to the Every Student Succeeds Act (ESSA). We expected student discipline rulemaking would be complete so that we could update the policy and procedure and provide administrators with some much needed clarity in regard to this complex process. In the meantime, we hoped to bring you changes based on full funding of basic education and maybe, just maybe…on school siting. As of this writing, all of these best-laid plans have either been delayed or are stuck in legislative limbo.

So what is the opportunity in this difficulty? This is a great time for districts to focus on getting their policy manuals as current as possible. If your district is still on the 9000 series of policies and you have trouble following the updates on the WSSDA numbering system, switch on over to the 6000 series. If you haven't yet converted over to a digital manual, consider doing so and saving your administrative staff enormous amounts of time and headaches finding what they need and updating everyone's hard copy. When all the changes hit in the fall, you'll be ready. District customization can then begin once your manual is as current as possible. And if you don't know where to start, give us a call. We're here to help.

In this issue, we've provided you with an update to P/P 6700, Nutrition and Physical Fitness which contains an important new federal requirement regarding unpaid meal charges. We've also issued a new policy/procedure based on the Student User Privacy in Education Rights (SUPER) Act and some legal updates on two U.S. Supreme Court special education cases. Finally, we've done minor updates to the Alternative Learning Experience and Online Learning policies as well as the discretionary policies regarding board designation of WSSDA legislative representatives.

You may be aware that on April 6, 2017, Washington Attorney General Bob Ferguson issued a document titled *Guidance Concerning Immigration Enforcement*, which includes best practice recommendations for school districts. As you may also know, WSSDA has had model policies and procedures in place for years that speak to this issue. Notably, neither WSSDA nor OSPI was asked to assist in the crafting of this guidance. We thought that a comparison of the AGO's recommended best practices and the WSSDA policies would be useful in order to highlight some K-12 nuances that the guidance doesn't address, so you'll find that included in this issue as well.

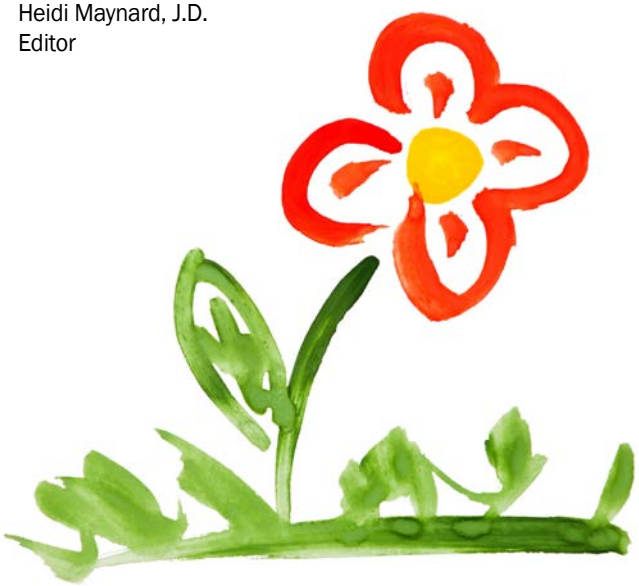
The Department of Homeland Security (DHS) currently has a "Sensitive Locations" policy in place that prohibits immigration enforcement activities by Immigration and Customs Enforcement (ICE) in several locations including schools, churches and hospitals. As of this writing, the federal government has not communicated any anticipated changes to this policy, and there have been no documented incidents of this policy being breached. Parent and student fear, however, is very real and school board directors are increasingly being asked about district preparations for such incidents. As a reminder and in keeping with the AGO guidance, districts should immediately notify district counsel in the event of enforcement attempts on campus.

Now comes the hard part. It is with a mixture of sadness and excitement that I announce my departure from WSSDA after nearly five years. On May 22, I will begin a new adventure as Deputy General Counsel of Tacoma Public Schools. Words cannot express how excited I am to join the dynamic team lead by the Tacoma School Board and Superintendent Santorno.

My tenure here at WSSDA has been one of the most challenging and rewarding experiences of my life, both personally and professionally. I have had the honor of working with and learning from extraordinary members of the WSSDA Board of Directors, WSSDA members, WSSDA staff, school law attorneys, superintendents, principals, executive assistants, district staff, policy directors, education partners, OSPI staff, AGO staff attorneys, non-profit organizations, legislators, legislative staff, reporters, parents and students statewide. I'm really proud of the direction we've taken with policy services, a direction which was always intended to provide maximum benefit to you, our loyal subscribers. We've also planted some seeds for the future by way of the WSSDA Law Conference in 2018. WSSDA will continue with new leadership and new energy, and I can't wait to see what else the future brings for this organization.

All the best,

Heidi Maynard, J.D.
Editor



IN THIS ISSUE

APRIL 2017

POLICY REVISIONS

The following WSSDA model policies have been revised. For your convenience, updated marked-up documents are included with this issue of *Policy & Legal News*.

NEW

CLASSIFICATION: PRIORITY

- **Policy/Procedure 3235, Protection of Student Personal Information**

UPDATES

CLASSIFICATION: ESSENTIAL

- **Policy/Procedure 2024, Online Learning**
- **Policy/Procedure 2255, Alternative Learning Experience**
- **Policy/Procedure 6700, Nutrition, Health, and Physical Fitness [new title]**

CLASSIFICATION: PRIORITY

- **Policy 5010, Nondiscrimination and Affirmative Action**

CLASSIFICATION: DISCRETIONARY

- **Policy 1210, Annual Organizational Meeting**
- **Policy 1220, Board Officers and Duties of Board Members**
- **Policy 1225, School Director Legislative Program**

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- **6000 Series**

As stated in WSSDA Policy 1310, "Non-substantive editorial revisions and changes in administrative, legal and/or cross references need not be approved by the board."

POLICY AND PROCEDURE 6700

Nutrition and Physical Fitness policy/ procedure revised to comply with final rule on wellness policies and to include language on unpaid meal charges

WSSDA has updated **Policy/Procedure 6700, Nutrition, Health, and Physical Fitness,** in order to comply with the final rule issued by the United States Department of Agriculture (USDA) on "Local School Wellness Policies" effective June 30, 2017 and a new federal regulation regarding unpaid meal charges that goes into effect July 1, 2017.

District Wellness Policy

First and foremost, it is important to note that "Local School Wellness Policy" is a misnomer in that it implies that each school in the district must have a separate policy. This is not the case. Each *district* is required to have only *one* Local School Wellness Policy for *all schools*. That's why WSSDA will refer to it as the "District Wellness Policy" or "wellness policy" in our models. Districts are free to address preschools, elementary and secondary schools separately within the policy, but all required elements of the policy will apply to all schools.

The origins of the wellness policy requirement lie in the Child Nutrition and WIC Reauthorization Act of 2004, which was further prioritized by the Healthy Hunger-Free Kids Act (HHFKA) in 2010. All districts participating in the National School Lunch Program or the School Breakfast Program, as amended by the HHFKA, will be required to revise their wellness policies by June 30, 2017. Administrative reviews of compliance will commence during the 2017-18 school year. Districts should have already begun implementing wellness policies pursuant to recommended updates to the WSSDA model policy in June 2015.

The final rule is intended to create a framework and guidelines for wellness policies. The rule emphasizes that responsibility for such policies lives at the local level as opposed to the state or federal level, so that the unique needs of each school can be addressed.

Community engagement

A significant requirement regarding crafting, implementation and regular review of the wellness policy is community engagement and involvement. The general public and school community, including parents, administrators, school food authority members, teachers and the school board, must be *permitted* to participate in the "Wellness Committee." USDA has posted a Local School Wellness Policy Outreach Toolkit which discusses different ways to engage

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the community through social media and other communications. Among other tasks, the toolkit provides suggestions for healthy snacks that parents can contribute to school fundraisers, as well as tweets inviting participation in the local wellness committee.

Leadership

The superintendent must designate (a) school official(s) to lead and coordinate each school's compliance with the wellness policy.

Reviewing and Reporting

Districts are required to:

- Update or modify the wellness policy as appropriate;
- Involve, inform and update the public, students, parents and other stakeholders about the content and implementation of the wellness policy; and
- Conduct an assessment at least once every three years to measure compliance and progress with regard to the extent to which the wellness policy compares to model school wellness policies. The assessment must also be made available to the public.

Required content

The minimum required elements of the wellness policy are as follows:

- **Specific goals for nutrition promotion and education**

  A district wellness committee will bear responsibility for establishing specific goals for nutrition education and promotion, physical activity, and other school-based activities (e.g., school vegetable gardens). Districts are required to review and consider evidence-based strategies to determine these goals, such as the Centers for Disease Control and Prevention (CDC's) Comprehensive School Physical Activity Program. According to the CDC, this is a "multi-component approach by which school districts and schools use all opportunities for students to be physically active, meet the nationally-recommended 60 minutes of physical activity each day, and develop the knowledge, skills and confidence to be physically active for a lifetime."

- **Standards for available foods and beverages**

  Nutrition standards in alignment with Competitive Foods and Beverages and Smart Snacks in Schools are required for all foods and beverages available on campus (e.g., school meals, fundraisers, vending machines, water access).

- **Standards for other foods and beverages**

  Nutrition standards for all other foods and beverages occasionally available during the school day (e.g., classroom parties, snacks brought by parents) are also required.

- **Marketing policy**

  A policy is required allowing marketing and advertising of only those foods and beverages that meet Smart Snacks in Schools standards.

Resources

USDA has also posted several other wellness policy resources including model wellness policies, best practices, "success stories," and grant opportunities.

Unpaid meal charges

USDA has also issued new regulations regarding unpaid meal charges. In September, the agency issued a seventy-page guidance document on the issue, Overcoming the Unpaid Meal Challenge.

Formerly, school districts nationwide had local discretion to operate their meal charge policies as they saw fit. However according to USDA a 2011-12 study found that 58% of schools surveyed incurred unpaid meal charges that year, and within that subset, 93% were still serving meals to children unable to pay at the time of service.[1] Recognizing "the fact local officials must balance their desire to provide for hungry children lacking the means to pay for meals with the demands of maintaining the financial

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[1]**Special Nutrition Program Operations Study – State and School Food Authority Policies and Practices for School Meal Programs School Year 2011-12.**

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viability of their school food service operation," USDA implemented a new requirement that each participating district adopt a written "policy" on unpaid meal charges. USDA later issued FAQs to clarify that the "policy" did not require board adoption. Hence, districts can dispense with writing a policy and instead add the required language to their *procedure*.

The hyperlinked document cited above contains several helpful meal charge "policy" checklists that can be used to customize the WSSDA model language. Districts have discretion to set their own limits for school lunch account balances and their own notification and debt repayment options for parents. Your district may have some special conditions that also require consideration. The hyperlinked document also contains several email and automated call templates for notification of low and negative balances that districts may find helpful.

Alternate meals

Districts have the option to serve low-cost, reimbursable alternate meals to students who are not eligible for free or reduced-price meals but have no money to pay for a meal. Alternate meals usually involve lower cost selections like a sandwich, fruit/vegetable and unflavored milk. Districts opting to provide them will continue to receive federal reimbursement at the reduced price or paid rate and this could help lessen the financial impact of unpaid meal charges to the district. However, districts will want to consider the stigmatizing effect that alternate meals can have on students, as well as the fact that they may require extra staff time to prepare.

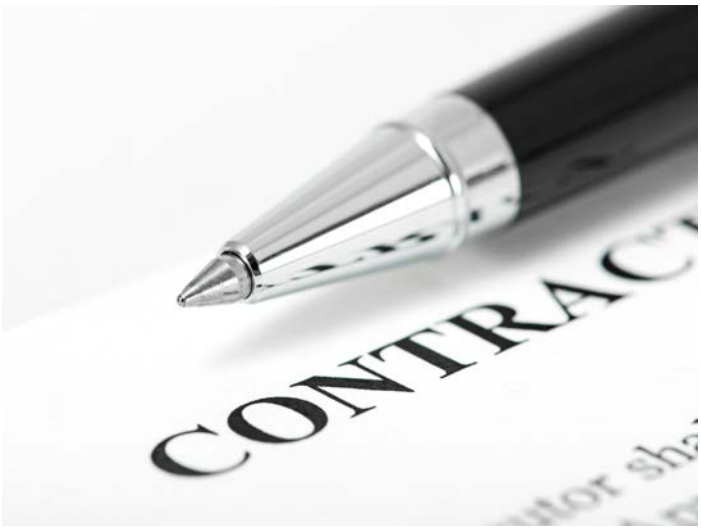
Risk of stigmatizing students

District food service managers should be sensitive, as should other administrators, to the potential that unpaid meal charges have to embarrass and stigmatize students. Announcing names of students with unpaid meal charges, identifying them with stamps or stickers, and sending obvious notices of delinquent balances home with students should be prohibited. The best practice, according to USDA staff who worked with stakeholder food service managers from schools across the nation, is to communicate low or negative balances to parents privately (e.g., by automated call or email). Additionally, students with unpaid meal charges who are provided a low-cost, reimbursable alternate meal should be served in the same line as students receiving regular meals.

"Delinquent debt" versus "bad debt"

Districts must make reasonable efforts to collect unpaid meal charges that they classify as "delinquent" (overdue) in their procedure and the cost of these efforts is an allowable use of National School Food Service Account (NSFSA) funds. However, once the district has determined that further collection efforts are useless or too costly, the debt must be reclassified as "bad debt" and NSFSA resources may not be used to cover related legal and collections costs.

"Districts have the option to serve low-cost, reimbursable alternate meals to students who are not eligible for free or reduced-price meals but have no money to pay for a meal."



POLICY AND PROCEDURE 3235

WSSDA issues new policy/procedure aimed at protecting student personal information and assisting contract managers

WSSDA has issued a new **Policy/Procedure 3235, Protection of Student Personal Information,** based on the Student User Privacy in Education Rights (SUPER) Act enacted in 2015 and codified at Chapter 28A.604, RCW. Given that districts are constantly bombarded by school service providers with new and innovative ideas involving data collection, the legislature apparently believed that some caution was warranted. The intent behind the new law, according to the Final Bill Report, was to limit the sharing of personal student information by entities that provide services to schools.

The new policy and procedure is aimed at assisting districts with their *contracting practices*. The SUPER Act only speaks to requirements for *school service providers* to protect student personal information, but it is the *district* that actually protects students through its contracts with school service providers.

The SUPER Act defines "student personal information" as information collected through a school service provider that identifies as individual student or other information that is linked to information that identifies an individual student. A "school service provider" is a web site, mobile application or online service that is designed and marketed primarily for use in a K-12 school, is used at the direction of teachers or other school employees, and collects, maintains or uses student personal information.

As districts are well aware, the Family Educational Rights and Privacy Act (FERPA) and the state version of that law, RCW 28A.605.030, require parent/guardian consent prior to district release of student records. Significantly, "student personal information," as defined in the SUPER Act, is for all intents and purposes indistinguishable from student educational records subject to FERPA and RCW 28A.605.030. It is therefore important for district administrators and staff to understand that information protected by the SUPER ACT is *also protected* by FERPA and its corresponding state statute. While some student information could meet an exception under the SUPER Act, that doesn't necessarily mean that FERPA and its corresponding state statute don't apply.

In our effort to assist district contract managers with their reading of school service provider contracts, we've included common definitions and model terms often used in these types of contracts. We've also included language that should be avoided in these contracts because of its potential to abuse student personal information. Contract managers are encouraged to contact their district counsel if a contract drafted by a school service provider includes language of this kind.

OTHER UPDATES

Policy 1210, Annual Organization Meeting
Policy 1220, Board Officers and Duties of Board Members
Policy 1225, School Director Legislative Program

The above policies have been updated to reflect that common practice of boards appointing their legislative representatives in January/December rather than June. Formerly, the appointing of "leg reps" occurred with the Legislative Assembly in September in mind. With the advent of the WSSDA Legislative Conference/Day on the Hill event each January in recent years, appointment at the annual organizational meeting in January/December became the rule for the vast majority of boards. The policy updates we've provided simply align policy to this common practice. Note, however, that the entire process is discretionary.

Policy/Procedure 2024, Online Learning
Policy/Procedure 2255, Alternative Learning Experience

The ALE definition has been updated per RCW 28A.232.010. We have also included updates to the assessment requirements as well as the reporting requirements.

Policy 5010, Nondiscrimination and Affirmative Action

This update is consistent with Section 504 of the Rehabilitation Act of 1973, clarifying that school districts cannot use an employment test that excludes a disabled person unless there are no other options available and the test is specifically job-related.

WA Atty. General issues guidance on immigration enforcement in schools

Recent federal executive orders on immigration enforcement have caused concern in public schools across the country that Immigration and Customs Enforcement (ICE) agents would focus enforcement efforts on campus. At present, districts are being presented with requests to adopt resolutions, declare themselves "sanctuary" districts, or to release public statements regarding their stance on immigration enforcement actions.[1]

Plyler v. Doe

Schools are constitutionally required to provide some protections for undocumented students. The landmark 1982 US Supreme Court decision *Plyler v. Doe*[2] stands for the proposition that all children residing in the United States, regardless of immigration status, are entitled to a free public education. *Plyler's* logical implication is that school districts should not engage in any methods by which access to that education would be chilled. To date, no public school student has ever brought suit alleging that a school district violated his or her rights under *Plyler*. However, districts need to be aware that there are several federal and state laws in place that need to be heeded in order to avoid the chilling effect on enrollment that *Plyler* prohibits.

DHS Policy regarding schools

Meanwhile, the Department of Homeland Security (DHS) continues to operate under the Obama administration's Sensitive Locations Enforcement Policy that prohibits immigration enforcement activities by ICE in several locations including schools, churches and hospitals. While the federal government has not communicated any anticipated changes to this policy to date, school board directors are increasingly being asked about district preparations for such an event. It is noteworthy that the current policy only applies to arrests, interviews, searches and surveillance of

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[1] http://www.cnn.com/2017/02/23/us/public-schools-immigration-crackdown/
[2] *Plyler v. Doe*, 457 U.S. 202 (1982)

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undocumented persons. It does not apply to serving of subpoenas and other enforcement activities. It also has exceptions for exigent (i.e., emergency) situations.

AGO Guidance

On April 6, Attorney General Bob Ferguson released Guidance Concerning Immigration Enforcement. The guidance was intended for local government agencies – including schools – to address "limitations on federal immigration enforcement power and the authority of local government agencies related to immigration."[3] In drafting the document, the AGO consulted with numerous stakeholders, but neither WSSDA nor OSPI were among them.

Although general in scope, the AGO guidance includes best practice recommendations for school districts. In the event that some of these best practices are proposed for adoption or implementation, board directors are advised to consult their policy manuals first, given that several WSSDA model policies *already address* the district's legal obligations with regard to undocumented students. Still other WSSDA models address legal requirements with which districts must comply regardless of whether immigration status is involved (e.g., mandatory reporting of child abuse).

The following is a complete list of these model policies:

Model Policies
1111, Oath of Office
2110, Transitional Bilingual Instruction Program
3115, Homeless Students – Enrollment Rights and Services
3120, Enrollment
3207, Prohibition of Harassment, Intimidation and Bullying
3210, Nondiscrimination
3226, Interviews and Interrogations of Students on School Premises
3231, Student Records
3421, Child Abuse, Neglect and Exploitation Prevention
4020, Confidential Communications
4040, Public Access to District Records
4200, Safe and Orderly Learning Environment
4218, Language Access Plan
4310, District Relationships with Law Enforcement and other Government Agencies

[3] http://www.atg.wa.gov/immigrationguidance

Districts are encouraged to review the model policies in conjunction with the AGO's recommended best practices, and to keep in mind the following general concepts when doing so:

✔ The AGO guidance recommends that districts not collect information about immigration status unless doing so is required by law. The WSSDA model policy on Enrollment, 3120, consistent with *Plyler,* specifically states that the district will not inquire into a student's citizenship or immigration status or that of his/her parents or guardians. No WSSDA model policy speaks to collection of student citizenship or immigration status post-enrollment. However, such information may be acquired by the district unintentionally through students disclosing such information to staff. Again, districts need to remember their legal obligations (Policy 4020, Confidential Communications) to report information about students when there is a reasonable likelihood that a crime has or will be committed or the student's welfare may be endangered (e.g., child abuse, suicidal ideation).

✔ In the guidance, the AGO appears to consider ESL/ELL language information/data as "*associated* with an individual's immigration status." ESL/ELL data (Policy 2110) may be an indicator that the student immigrated to the U.S, but it's not necessarily relevant to immigration status. The home language survey that districts conduct pursuant to their Title VI obligation to provide language access services (Policy 4218) to limited-English proficient parents is another example. The bottom line is that districts need to comply with all of their legal obligations to collect and retain information, regardless of whether it may be considered "associated with" immigration status.

✔ One exception to FERPA (Policy 3231), which is not referenced in the AGO guidance, is one that allows release of student records to appropriate persons and agencies in connection with an emergency to protect the health or safety of the student

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or other persons. A second important exception to FERPA which is not referenced in the guidance is the exception stating "Information may be released to state and local officials to whom such information is specifically required to be reported or disclosed pursuant to state statute (examples: reporting child abuse or referrals to juvenile court for truancy)."

✔The AGO guidance recommends encouraging families to prepare for unexpected detention through "one-on-one" contacts rather than gathering them at a preannounced date and time and thereby putting them at risk for enforcement activities. Notwithstanding the practical challenges of a district identifying all of its potentially undocumented families when it is prohibited from inquiring into immigration status in the first place, district staff need to be sensitive to the possibility that activities such as visiting families in their homes could be viewed with suspicion and fear. Such activities could result in the district causing an unintended chilling effect on student access to school in violation of *Plyler*.

✔Again, per *Plyler*, the AGO guidance recommends districts refrain from any activity that may have a chilling effect on student attendance or enrollment. One area where this is particularly important is harassment, intimidation and bullying (HIB) incidents. Districts should always monitor all HIB investigations and procedural requirements carefully and in compliance with federal and state law and their HIB policy. However, when reporting, investigating, and resolving incidents of verified HIB *based on immigration status,* district staff should be mindful of *Plyler's* warning against the chilling effect on the targeted student as well as other students.

The take-away here is that board directors should rely on a comprehensive review of district policies prior to formulating any district position (or non-position) on immigration enforcement issues. It could be that the best course involves affirmation of policies already on the books. Moreover, review allows boards to consider all possible outcomes using a constitutional and statutory framework, rather than a political one, which aligns with the recommendation of the National School Board Association's (NSBA's) Office of General Counsel in their April 26, 2017 webinar: "What's a School to do?"[4]

Finally, board directors who choose to adopt a resolution or issue a statement regarding district interaction with immigration officials should take care to draft it narrowly and in compliance with existing laws and school policies, being mindful of their oath to "support the Constitution..."[5] As a reminder and in keeping with the AGO and NSBA guidance, districts should always notify district counsel immediately in regard to specific incidents.

[4] https://www.nsba.org/services/council-school-attorneys/seminars-webinars/recorded-webinars
[5] RCW 28A.343.360

U.S. Supreme Court revisits the standard for educational services provided to students with disabilities under IDEA, encounters "blizzard of words."

***Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, No. 15-827 (U.S. Mar. 22, 2017)**

In a unanimous 8-0 decision, the U.S. Supreme Court has rejected a Tenth Circuit Court of Appeals finding that educational services provided to a student with disabilities need only be "sufficient to show a pattern of minimal progress."

At issue in *Endrew F.* was the question of what level of educational services are required in order to provide a special education student with a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA). The original standard, which the US Supreme Court established thirty-five years prior in *Board of Education of Hendrick Hudson Central School District v. Amy Rowley,* 458 U.S. 176 (1982), was "some educational benefit." Post-*Rowley*, U.S. Circuit courts interpreted "some" to have a myriad of meanings.

Endrew F. ("Drew"), a student with autism, attended a public school district in Colorado from preschool through fourth grade. Each year, his IEP had been updated to address his needs. By fourth grade, however, Drew's parents became dissatisfied with his progress and believed that a change in course regarding his behavioral problems was warranted. Drew's parents removed him from the school and enrolled him in a private school, where Drew's performance improved.

Six months later, Drew's parents met with the district which had prepared a new IEP for Drew. The parents rejected it based on the belief that the approach to the behaviors at the private school had been more effective, and that essentially the IEP was no different from those the district had presented in previous years. About a year and a half later, Drew's parents sought reimbursement for Drew's private school tuition, arguing that the final IEP proposed by the district had denied Drew a FAPE. Ultimately, the case was affirmed by the U.S. Court of Appeals for the Tenth Circuit based on the *Rowley* standard's "some educational benefit" analysis.

At oral argument in January before the U.S. Supreme Court, the justices wrestled with how a new elevated standard beyond *Rowley* could be worded. Drew's parents argued that the standard should

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"...the National School Boards Association, along with the California and Colorado school boards associations and the Horace Mann League, filed an amicus brief on the merits, asking the court to uphold the *Rowley* standard and noting the practical outcomes that a new standard would trigger."

be that students with disabilities have an opportunity to "achieve academic success," and "attain self-sufficiency." The *New York Times* reported that the justices discussed various levels of educational benefit including "some," "barely more than de minimus," "significant," "meaningful," and "appropriate in light of the child's circumstances." Justices Kennedy and Alito expressed concern that a new standard could lead to costly litigation. The *Times* quoted Justice Alito stating, "What is frustrating about this case and this statute is we have a blizzard of words."[1]

Meanwhile, the National School Boards Association, along with the California and Colorado school boards associations and the Horace Mann League, filed an amicus brief on the merits, asking the court to uphold the *Rowley* standard and noting the practical outcomes that a new standard would trigger. *Amici* concluded their brief by imploring the Court to consider the impact: "Deference to the IEP process is the only workable manner by which to achieve the goals of IDEA." *Amici* urged the Court to reaffirm the standard it set forth in *Rowley* rather than adopt an artificial national standard that would call millions of [IEPs] into question and require schools to re-examine and litigate more claims, contrary to the purposes of the IDEA."[2]

On March 22, the Court unanimously vacated the Tenth Circuit's decision based on the "de minimus" standard. Instead, the Court held that the Individuals with Disabilities Education Act (IDEA) requires schools to offer an "individualized education program *reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances*." (emphasis added). Writing for the court, Justice Roberts noted, "When all is said and done, [the Tenth Circuit's de minimus] standard would barely provide 'an education to all' children with disabilities. For those children," Roberts wrote, "receiving an instruction that aims so low would be tantamount to sitting idly...awaiting the time when they were old enough to 'drop out.'" "The IDEA," he concluded, "demands more."[3]

[1]Liptak, Adam, Justices Face 'Blizzard of Words' in Special Education Case, *New York Times* (January 11, 2017).

[2]https://cdn-files.nsba.org/s3fs- public/reports/Endrew_F_v._Douglas_County_Sch._Dist.pdf?B7kisvH.W1DAJzGgnNsTUXsYTl5mgrtv

[3]Howe, Amy, Opinion analysis: Court's decision rejecting low bar for students with disabilities, under the spotlight, SCOTUS blog (March 23, 2017).

U.S. Supreme Court: Complaints that aren't based on denial of FAPE don't need to exhaust IDEA administrative remedies.

***Fry v. Napoleon County Community Schools*, 136 S.Ct. 923 (2016)**

In a unanimous ruling issued February 22, 2017, the U.S. Supreme Court held that exhaustion of administrative remedies under the Individuals with Disabilities Education Act (IDEA) is not necessary when the basis of the plaintiff's complaint does not involve denial of a free appropriate public education (FAPE).

The student, E.F., suffered from cerebral palsy and was prescribed a service dog for assistance with daily activities. The District provided E.F. with an aide as part of her Individualized Education Program (IEP), but refused to allow her to bring the service dog to school. The student's parents, the Frys, sued the school, alleging Americans with Disabilities Act (ADA) violations.

Meanwhile, at a specially convened IEP meeting, the District confirmed its refusal to allow the student to bring the service dog to school. Four months later, the District agreed to a trial period within which the student could bring the service dog to school. During the trial period, the service dog was not permitted to accompany the student at all times and was not allowed to perform some of the functions for which he had been trained. At the end of the trial period, the District reinstated its prohibition of the service dog.

The Frys began homeschooling E.F. and then filed a complaint with the U.S. Department of Education's Office for Civil Rights under ADA and Section 504 of the Rehabilitation Act. Two years later, OCR found that the District had violated E.F.'s rights under the ADA. The District agreed to resume permitting E.F. to bring her service dog to school.

At the federal district court level, all of the Frys' claims were dismissed on the basis that they had failed to exhaust their administrative remedies under the IDEA. The court noted that parents had failed to allege that the IEP was not amended to include the service animal. The Frys appealed.

The U.S. Court of Appeals for the Sixth Circuit, in a 2-1 decision, affirmed the lower court's decision dismissing the Section 504 and ADA on the basis of failure to exhaust, noting that exhaustion was the appropriate vehicle to determine whether the District's failure to permit the service animal in school denied E.F. a FAPE. The Frys appealed again to the United States Supreme Court.

Writing for the Court, Justice Elena Kagan held that when the plaintiff's lawsuit is for something other than an alleged denial of FAPE, exhaustion of administrative remedies under the IDEA is unnecessary. Moreover, wrote Kagan, in order to determine whether FAPE is involved requires courts to look at the "gravamen" of the plaintiff's complaint, rather than "the labels used in the plaintiff's complaint." She opined that courts should ask whether the plaintiff could have brought the same suit against a public facility such as a public theater or library. Second, they should look at whether an adult at the school such as an employee, could have brought the same complaint. Kagan further advised courts to look at whether the plaintiff originally availed themselves of IDEA's administrative remedies, noting "[P]rior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of the plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term," wrote Kagan.

The Court's opinion represents a significant change in special education and Section 504 process for schools and students. Formerly, litigation was a last resort for parents after an extensive, carefully crafted process in which the district is *required* to work collaboratively with them to ensure the student receives a FAPE. The Court's ruling now subjects Districts to litigation as a first resort, effectively forcing parents and Districts into adversarial positions. As the National School Boards Association (NSBA), argued in its Supreme Court *amici curiae* brief, the Court's opening of the gates to litigation could transform an IEP meeting or a due process hearing into an evidence-gathering opportunity rather than a genuine attempt to ensure a FAPE.

Policy & Legal News

Policy & Legal News is published quarterly by the Washington State School Directors' Association to provide information of interest to school directors and the education community. The views expressed in opinion articles appearing in *Policy & Legal News* are those of the writers and do not necessarily represent WSSDA policies or positions.

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The Washington State School Directors' Association provides leadership and advocacy, and empowers its members with knowledge and skills to govern with excellence.

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All Washington School Directors effectively govern to ensure all students' success.

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WSSDA believes:

- Public education is vital to our country's democratic way of life and local school boards are vital to the success of public education.
- Quality schools require ethical, effective governance and transformational leadership in order to maximize student learning.
- School directors are the Association's primary customers. They are best served through an innovative, professional and flexible organization which provides exceptional training and services in advocacy, governance and leadership.
- The Association is uniquely positioned and empowered by statute to provide training and services that are consistent with the roles and responsibilities of school directors.
- High functioning local school boards have a positive impact on the learning and development for each student.

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