



# bulletin



**NDSBA**  
NORTH DAKOTA SCHOOL  
BOARDS ASSOCIATION

OCTOBER 2018

*Excellence in North Dakota public education through local school board governance* ■ VOL XLIII ISSUE 10

## 2018 NDSBA Convention Highlights Board Leadership and School Safety

NDSBA's Annual Convention will be held October 25-26 at the Ramkota Hotel in Bismarck. The New Member Seminar and School Law Seminar begin at 8:00 a.m. on Thursday, October 25, and run until 2:45 p.m.

The convention will open with keynote speaker Mark J. Lindquist on Thursday afternoon at 3:00, followed by the first business session. Friday begins with a general session speaker, Michael Dorn, and continues with a full day of educational clinic sessions. Friday will wrap up with our final business session and delegate assembly. Congressman Kevin Cramer, Senator Heidi Heitkamp, and State Senator Kelly Armstrong will also address attendees over the course of the convention.

Since individual board members will not be able to attend all sessions, we encourage you to review the clinic session schedule in advance, choose which sessions are of interest to your board, split up to attend as many different sessions as possible, and gather to share what

you've learned later.

Friday Clinic Sessions include the following topics:

- Annual Meeting – ND Small Organized Schools
- Best Practices in School Board Governance
- Bullying Prevention and Response – Commonly Missed Opportunities
- Co-Curricular Arts Participation Outcomes – Positive Impacts for Your High School
- Connecting School-Based Behavioral Health & Safety: Overview
- Connecting School-Based Behavioral Health & Safety: Deeper Dive
- Construction Projects 101
- Conversation with State Superintendent Kirsten Baesler
- Design for School Safety
- Drones: Flight Plan for Classroom Instruction – ND Small Organized Schools
- FERPA and Student Data Privacy
- How to Provide Opportunities While Following North Dakota Century Code
- Legislative Prep Session

- Legislative Session Expectations
- Looking Back: Lessons in Leadership
- NDHSAA Update
- North Dakota Kindergarten Readiness
- North Dakota Native American Essential Understandings and Our Schools
- Open Meetings & Public Records
- Options-Based Lockdown: Overview and Roll-Out
- Rural Schools Collaborative Introduction – ND Small Organized Schools
- School Boards & the Legal Issues They Face
- School Finance 101
- Strategic Planning: Hope for the Best Is Not A Strategic Initiative
- Trends in Opioid and Other Illegal Drug Usage in North Dakota
- Update on Proposed Federal Transportation Requirements
- What's New at TFFR? 2018 Update
- 10 Things That Bug Us About Each Other: Board Member, Business Manager, and Superintendent



**Mark Lindquist**  
3:00 p.m., Thursday  
October 25  
*Passion! 8 Steps  
to Reignite Yours*



**Michael Dorn**  
8:00 a.m., Friday  
October 26  
*School Safety—  
Yesterday, Today,  
and Tomorrow*



# Legal Spotlight

## School Athletic Coaches: Exempt or Non-Exempt?

by Amy De Kok, NDSBA Legal Counsel

The Fair Labor Standards Act (FLSA) is a federal law that establishes minimum wage, overtime pay, recordkeeping, and youth employment standards covering employees in the private sector and in federal, state, and local governments. Covered nonexempt workers are entitled to a federal minimum wage of not less than \$7.25 per hour currently. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek. Generally, employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more are covered by the FLSA. In addition, employees of certain entities are covered by the FLSA regardless of the amount of gross volume of sales or business done. These entities include hospitals, businesses providing medical or nursing care for residents, **schools** (whether operated for profit or not for profit), and public agencies.

All employees are “nonexempt” unless they fit within one of the law’s narrow “exempt” categories. In other words, “nonexempt” is the default position. It

is the employer’s burden to prove that an employee may be taken out of that position pursuant to one of the Act’s specific exemptions. School districts that exempt certain positions must be prepared to defend each exemption decision as exemptions are narrowly construed against the employer asserting them. Improper classification decisions can subject the district to paying fines and back pay. The number of lawsuits and amount of fines have increased dramatically over recent years.

This past January, the Wage and Hour Division (WHD) of the U.S. Department of Labor, which is charged with enforcing the FLSA, issued guidance addressing the application of the FLSA to community members who coach athletic teams for a public school. The WHD confirmed that community members employed as athletic coaches by a public school qualify as teachers under the FLSA and are exempt from FLSA’s minimum wage and overtime pay provisions. This guidance assumes two things. First, that the coaches are not otherwise employed by the district in any other capacity. Second, it assumes the coach’s primary duty involves teaching and imparting knowledge to students in an educational establishment. If both of these conditions are present, then the coach is exempt and need not be paid minimum wage or overtime. The guidance went on to say that, unlike other exempt professional employees, teachers are not subject to the salary requirements in the FLSA. Therefore, schools may pay their coaches who are exempt teachers as it deems appropriate.

Admittedly, the WHD guidance addressed the classification of coaches who are employed by the school solely in that capacity. But what happens if the coach is employed by the district in an additional capacity? Indeed, it is likely that coaches in most districts

are employed by the district in other capacities. In those instances, the classification of the employee under the FLSA will depend on the employee’s primary responsibility with the district. In other words, a person cannot be both exempt and non-exempt. If coaching is their primary responsibility (i.e., more than 50% of their work) and they engage in another non-exempt job, then they likely would be considered exempt. Also, if the employee is a teacher for the district and is also assigned a coaching position, the employee is clearly exempt. If, however, the individual is a custodian or a paraprofessional as their primary duty with the district and they coach on the side, the primary (non-exempt) job would determine their status. Situations involving employees who hold multiple positions with the district need to be carefully examined in order to ensure proper classification for purposes of the FLSA.

Finally, as an additional issue, the district is typically required to count all hours worked in a workweek by a non-exempt employee in calculating any overtime pay. However, whether a district must include hours spent as a coach (along with the hours spent in other non-exempt positions) depends on whether the coaching position is a volunteer position. If an individual is a “volunteer” instead of an “employee,” Congress created an exemption to the FLSA’s coverage applicable in the public employment context.

This issue was directly addressed in *Purdham v. Fairfax County School Board*, 637 F.3d 421 (4th Cir. 2011). In that case, the court held that a safety and security assistant (non-exempt) was not owed overtime wages for hours he worked as a golf coach. The court held that he was acting as a volunteer when serving as a coach, even though he was paid a nominal stipend. A “nominal” stipend does not prevent coaches who are otherwise employed by the district from still being classified as “volunteer” coaches. Typically, the services that coaches perform are “volunteer” services, even though they may receive a stipend. The FLSA states

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## State Law Requires New Board Members to Attend Seminar

North Dakota Century Code § 15.1-09-32 requires new school board members to attend an in-service training workshop hosted by the North Dakota School Boards Association or its designee within one year of assuming office. NDSBA will host a seminar for new board members in conjunction with the annual convention on October 25, 2018. Topics will include the role of a school board member, duties of the school board, and school finance. A panel of experienced school board members will also present their experiences.

You may register at the door if you have not yet pre-registered.

## Legal Spotlight

Continued from page 2

that: "Any individual who volunteers to perform services for a public agency" is exempt from FLSA coverage if: "(i) the individual receives no compensation **or is paid expenses**, reasonable benefits, or **a nominal fee** to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency."

Therefore, even if coaches are paid a "nominal fee" for their services, they are still "volunteers" under the Act. Whether or not an individual coach is motivated by civic or charitable instincts or the amount of the stipend does not affect the determination. Since they are volunteers, schools should not need to worry about paying coaches the minimum wage for their coaching duties or adding overtime to their regular checks, since their coaching duties are volunteer services under the FLSA.

The obvious question that remains is what constitutes a "nominal fee." There is no bright-line rule in this regard and each such situation will need to be judged on its own. The Department of Labor offers the following guidance:

The following factors will be among those examined in determining whether a given amount is nominal: Distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

Utilizing this guidance, the court in *Purdham* determined that the stipends of \$2,114 and \$2,073 received by the plaintiff were "nominal." The court found it important that the district paid a fixed stipend amount regardless of an individual's time and effort and that coaches are free to spend as much, or as little, time as they choose on coaching activities and the stipend amount will not change.

The takeaway from all of this is to approach these classification issues carefully and with thoughtful examination. Please feel free to contact NDSBA legal counsel or your outside counsel for assistance and guidance.

## Burgum, Baesler announce 2019 Teacher of the Year

Gov. Doug Burgum and State Superintendent Kirsten Baesler recently announced Kayla Delzer, a third-grade teacher at Mapleton Elementary School, as the 2019 North Dakota Teacher of the Year.

Delzer was selected from a group of four finalists for the award. Burgum and Baesler presented the award at Mapleton Elementary during a ceremony attended by Delzer's students, fellow teachers, administrators, staff, and other well-wishers. The finalists were Delzer; Leslye Thiery, a fifth-grade teacher at Discovery Elementary School in Grand Forks; Annette Hovey, music director at New Rockford-Sheyenne High School; and Sara Medalen, a Title 1 reading and math interventionist at Sunnyside Elementary School in Minot.

Delzer has 10 years of teaching experience in second and third grade and has taught at Mapleton Elementary since 2016. She is a technology champion, speaker, author, and CEO whose blog, *TopDogTeaching.com*, is approaching 2 million views. Her TEDx talk, "Reimagining Classrooms: Students as Leaders and Teachers as Learners," has surpassed 208,000 views.

Delzer's work with classroom redesign and flexible seating has gained national attention and is becoming a standard. She was selected as a recipient of the Global Hundred Award, designating her as one of the top 100 innovative



Supt. Baesler, Kayla Delzer, Gov. Burgum

educators worldwide. She co-authored the best-selling book "Education Write Now" and is writing a book about classroom learning spaces and flexible seating, titled "FlexEd." *The New York Times* called her "one of the tech-savviest teachers in the United States."

"This event celebrates the thousands of great teachers we have in North Dakota. I am honored to be here with the governor to present Ms. Delzer with her award. She will be an exemplary representative of North Dakota teaching excellence as she travels to our nation's capital with other state teachers of the year," Baesler said.

The Teacher of the Year was chosen by a selection committee that reviewed their applications and interviewed the finalists. Congratulations to Kayla and the Mapleton School District!



## Policy Updates

### Food Procurement Purchasing Thresholds

Updated purchasing thresholds for food procurement were recently shared with your district by the Department of Public Instruction (DPI) either via email and/or through a training workshop offered this summer. These purchasing thresholds were substantially higher than the thresholds found in NDSBA's policy **HCAF, Food Service Procurement**.

This new policy was examined and approved by DPI before it was shared with our Policy Services members in June and has resulted in many questions and conversations with DPI.

After speaking with the State Procurement Office and DPI this past week, we were informed that the updated purchasing thresholds do not impact school districts. These numbers are meant for North Dakota state agencies only. Per NDCC 15.1-09-34, the board of a school district is

still legally obligated to go through the formal bid process for all expenditures greater than \$25,000.

DPI has also informed our office that they will be increasing the micro-purchase threshold for food procurement from \$3,500 to \$10,000 to align with federal and state thresholds. This would also change the small/informal threshold numbers. The North Dakota food procurement purchasing thresholds that school districts must follow are as follows:

- Micro = less than \$10,000
- Small/Informal = \$10,000 or greater, but not more than \$25,000
- Formal = greater than \$25,000

These new food procurement thresholds will be updated in the NDSBA policy and shared in *Policy Ponderings* this month. We apologize for any confusion or additional work this may have caused. Please contact NDSBA at 1-800-932-8791 or [rebecca.duben@ndsba.org](mailto:rebecca.duben@ndsba.org) if you have questions.



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## Superintendent Evaluations

North Dakota law requires that school boards complete a formative evaluation of superintendents **ON OR BEFORE NOVEMBER 15** [NDCC § 15.1-14-03]. This evaluation must take place at an open public meeting. One purpose of the November evaluation is to highlight areas of performance in need of improvement and provide an improvement plan and timeline for expected enhanced performance. The law regarding superintendent evaluations states

that if the superintendent is found to be unsatisfactory in any area, the board shall detail its findings in the report and make recommendations. This process allows opportunity for professional growth before the superintendent's formal evaluation, which must be complete **ON OR BEFORE MARCH 15**. A sample evaluation form is available on NDSBA's website at [www.ndsba.org](http://www.ndsba.org) under RESOURCES.

## 2019 NSBA Annual Conference Philadelphia, Pennsylvania March 30 - April 1, 2019



*REGISTRATION NOW OPEN*

The NSBA Annual Conference & Exposition is the one national event that brings together education leaders at a time when domestic policies and global trends are combining to shape the future of the students. Join us in Philadelphia for a robust offering of over 250 educational programs including three inspirational general sessions that will give you new ideas and tools to help drive your district forward.

[www.nsba.org/conference](http://www.nsba.org/conference)



### 2018 NDSBA Annual Convention

October 25-26, 2018  
Ramkota Hotel, Bismarck

### 2018 NDSBA New Member Seminar

October 25, 2018  
Ramkota Hotel, Bismarck

### 2018 NDSBA School Law Seminar

October 25, 2018  
Ramkota Hotel Bismarck

### 2019 NSBA Annual Conference

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Philadelphia, Pennsylvania

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