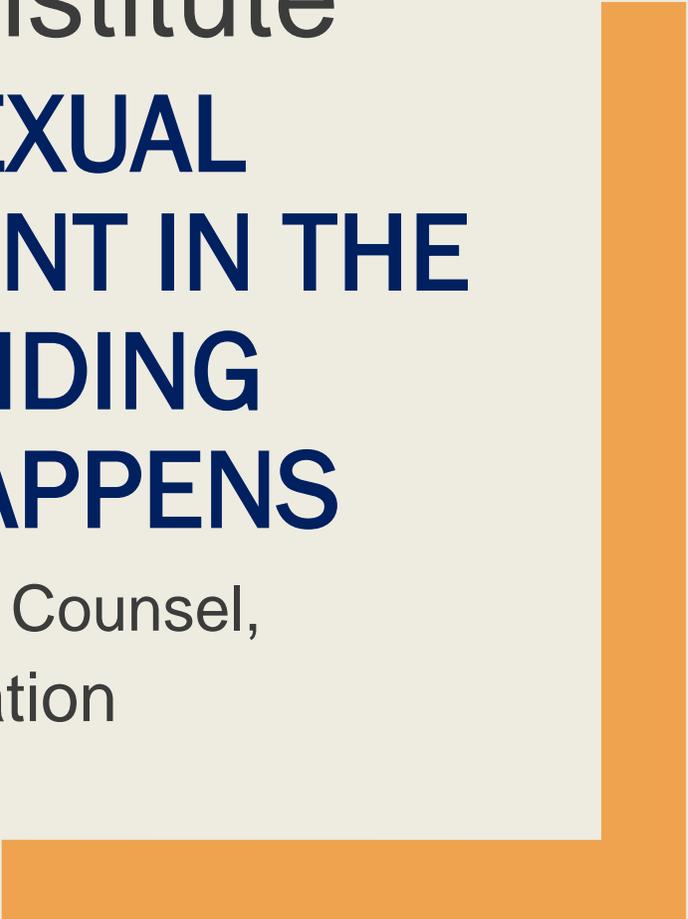




2018 Fall Leadership Institute

**GUARDING AGAINST SEXUAL  
MISCONDUCT & HARASSMENT IN THE  
WORKPLACE & RESPONDING  
EFFECTIVELY WHEN IT HAPPENS**

Jay Bequette, Keith Billingsley, General Counsel,  
Arkansas School Board Association



#MeTooOOO





# The Silence Breakers

# **HBS Working Knowledge: Business research for business leaders**

## **Sexual Harassment: What Employers Should Do About #MeToo**

**(April 11, 2018)**

In 2012, federal court jurors listened as Ani Chopourian described the sexual harassment she endured as a cardiac surgery physician assistant at the Sacramento hospital. One surgeon greeted her each morning with “I’m horny” and slapped her bottom. Another surgeon called her a “stupid chick” and said she performed surgery “like a girl.” Jurors ultimately awarded her \$168 million, the largest judgment for a single victim of workplace harassment in United States history.

**The Washington Post  
#MeToo has a 'chilling effect' on workplace camaraderie  
(January, 28, 2018)**

**The Billy Graham Rule**

Another Investor said his colleagues have canceled their one-on-one meetings with female entrepreneurs. And some men have taken to comparing their own new approach to that of Vice President Mike Pence, who has said that he does not dine alone with any woman but his wife.

# The Washington Post

## #MeToo has a 'chilling effect' on workplace camaraderie (January, 28, 2018)

- A lobbyist flies solo from Texas to Washington to press his case on the Hill, leaving behind the female associate who did much of the work on the issue.
- He recognizes that his decision to fly alone is a lost opportunity for his talented young co-worker, but right now, with everything that's going on, he's not willing to risk a business trip alone with a woman – even if what he sees as caution strikes many women as discrimination.

# **The Washington Post**

## **#MeToo has a 'chilling effect' on workplace camaraderie**

**(January, 28, 2018)**

In Silicon Valley, the chief executive of a midsize company asked his human resources manager what he should do about the undercurrent of tension around issues of sexual misconduct. Stop having dinners with female employees, he was advised. In fact, stop having dinners with employees. Lunches are OK, dinners no way, HR told him.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

- The \_\_\_\_\_ School District is committed to providing an academic and work environment that treats all students and employees with respect and dignity. Student achievement and amicable working relationships are best attained in an atmosphere of equal educational and employment opportunity that is free of discrimination. Sexual harassment is a form of discrimination that undermines the integrity of the educational and work environment and will not be tolerated.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

“Sexual harassment” means conduct that is:

1. Of a sexual nature, including, but not limited to:
  - a. Sexual advances;
  - b. Requests for sexual favors;
  - c. Sexual violence; or
  - d. Other personally offensive verbal, visual, or physical conduct of a sexual nature;
2. Unwelcome; and

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

“Sexual harassment” means conduct that:

3. denies or limits a student’s or employee’s ability to participate in or benefit from any of the District’s educational programs or activities or employment environment through any or all of the following methods:

a. Submission to the conduct is made, either explicitly or implicitly, a term or condition of an individual’s education or employment;

b. Submission to, or rejection of, such conduct by an individual is used as the basis for academic or employment decisions affecting that individual; and/or

c. Such conduct has the purpose or effect of substantially interfering with an individual’s academic or work performance or creates an intimidating, hostile, or offensive academic environment.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

- The terms “intimidating,” “hostile,” and “offensive” include conduct of a sexual nature that has the effect of humiliation or embarrassment and is sufficiently severe, persistent, or pervasive that it limits the student’s or employees ability to participate in, or benefit from, an educational program or activity or employment environment.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

- Within the educational or work environment, sexual harassment is prohibited between any of the following: students; employees and students; non-employees and students; employees; employees and non-employees.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

Actionable sexual harassment is generally established when an individual is exposed to a pattern of objectionable behaviors or when a single, serious act is committed. What is, or is not, sexual harassment will depend upon all of the surrounding circumstances and may occur regardless of the sex(es) of the individuals involved. Depending upon such circumstances, examples of sexual harassment include, but are not limited to:

- Making sexual propositions or pressuring for sexual activities;
- Unwelcome touching;
- Writing graffiti of a sexual nature;
- Displaying or distributing sexually explicit drawings, pictures, or written materials;

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

Actionable sexual harassment is generally established when an individual is exposed to a pattern of objectionable behaviors or when a single, serious act is committed. What is, or is not, sexual harassment will depend upon all of the surrounding circumstances and may occur regardless of the sex(es) of the individuals involved. Depending upon such circumstances, examples of sexual harassment include, but are not limited to:

- Performing sexual gestures or touching oneself sexually in front of others;
- Telling sexual or crude jokes;
- Spreading rumors related to a person's alleged sexual activities;
- Discussions of sexual experiences;
- Rating other students as to sexual activity or performance;

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

Actionable sexual harassment is generally established when an individual is exposed to a pattern of objectionable behaviors or when a single, serious act is committed. What is, or is not, sexual harassment will depend upon all of the surrounding circumstances and may occur regardless of the sex(es) of the individuals involved. Depending upon such circumstances, examples of sexual harassment include, but are not limited to:

- Circulating or showing e-mails or Web sites of a sexual nature;
- Intimidation by words, actions, insults, or name calling; and
- Teasing related to sexual characteristics or the belief or perception that an individual is not conforming to expected gender roles or conduct or is homosexual, regardless of whether or not the student self-identifies as homosexual or transgender.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

- Employees who believe they have been subjected to sexual harassment are encouraged to file a complaint by contacting their immediate supervisor, an administrator, or the Title IX coordinator who will provide assistance on the complaint process. Under no circumstances shall an employee be required to first report allegations of sexual harassment to a school contact person if that person is the individual who is accused of the harassment.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

- Complaints will be treated in a confidential manner to the extent possible. Limited disclosure may be provided to: individuals who are responsible for handling the District's investigation to the extent necessary to complete a thorough investigation; the extent necessary to submit a report to the child maltreatment hotline; the Professional Licensure Standards Board for complaints alleging sexual harassment by an employee towards a student; or the extent necessary to provide the individual accused in the complaint due process during the investigation and disciplinary processes. Individuals who file a complaint have the right to request that the individual accused of sexual harassment not be informed of the name of the accuser; however, individuals should be aware that making such a request may substantially limit the District's ability to investigate the complaint and may make it impossible for the District to discipline the accused.<sup>3</sup>

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

- Employees who file a complaint of sexual harassment shall not be subjected to retaliation or reprisal in any form, including threats, intimidation, coercion, or discrimination. The District shall take steps to prevent retaliation and shall take immediate action if any form of retaliation occurs regardless of whether the retaliatory acts are by District officials, students, or third parties.

# ASBA Model Policy

## 3.26—LICENSED PERSONNEL SEXUAL HARASSMENT

Following the completion of an investigation of a complaint, the District will inform the employee who filed the complaint:

- The final determination of the investigation;

- Remedies the District will make available to the employee; and

- The sanctions, if any, imposed on the alleged harasser relevant to the employee.

# Common Myths

- \_\_\_\_\_ has done that for years.  
Everyone knows it's a joke and that it doesn't mean anything
- Unless the person tells me it's offensive, I don't have to stop and it's not harassment

# Common Myths

- Sexual harassment has to be between opposite sexes
- Sexual harassment is only between the boss and subordinates
- Men can't be victims
- What I do off duty can't be considered harassment

# The “Unwelcome” Requirement

- To constitute unlawful sexual harassment, the conduct must have been “unwelcome”
- The correct inquiry is “whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”

*Meritor Savings Bank v Vinson*, 477 U.S. 57,68 (1986)

# Nontraditional Types of Sexual Harassment Gaining Protection

- Same sex harassment actionable. *Oncale v. Sundowner Offshore Svcs*, 523 U.S. 75 (1998)
- Gender stereotyping actionable. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
- Transgender claims are being recognized. *Smith v. City of Salem*, 378 F.3d 566 (6<sup>th</sup> Cir 2004)
- Sexual orientation not yet actionable, per se.

# Categories of Sexual Harassment

- Quid pro quo- An individual with supervisory authority makes employment promises or threats in exchange for sex
- Hostile environment- Severe or pervasive conduct that alters the conditions of employment and creates an abusive environment

# Hostile Environment

- Severe or pervasive conduct that alters the conditions of employment and creates an abusive or hostile working environment as determined under a 2 part test:
  - Objective element- a reasonable person would have found the work environment hostile.
  - Subjective element- the victim did so find the work environment hostile.

# Hostile Work Environment Case Example

A manager allegedly directed sexually pointed comments exclusively to young women who worked for him, closely examined female employees' bodies, inquired about their pant size, and made reference to size of female employee's buttocks and breasts was sufficient to create a hostile work environment.

*EEOC v. R & R Ventures*, 244 F.3d 334 (4th Cir. 2001).

# Hostile Work Environment Case Example

It was not actionable harassment for supervisor to invite plaintiff to drinks after work, offer to pay for her lunch, offer to drive her home from work, suggest that they go to Florida together, suggest that plaintiff 'dress up,' make comments about plaintiff's skirt and legs, stare at plaintiff, or sit close to plaintiff – court characterized behavior as “relatively mild” and considered the fact that it occurred over the course of an entire year. *Dayes v. Pace Univ.*, 2 Fed.Appx. 204, 206-207 (2nd Cir. Feb. 5, 2001).

# Standards for Employer's Liability under Title VII

The standard for determining an employer's liability for sexual harassment in the workplace varies depending on whether the employee suffered a "tangible employment action"

- *Faragher v. Boca Raton*, 524 U.S. 774 (1998) and
- *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)

# Tangible Employment Action Defined

- A significant change in employment status, e.g. hired, fired, failure to be promoted, reassignment with significantly different responsibilities, significant change in benefits. *Ellerth* at 761.
- Principal confiscated art supplies of teaching intern and gave her negative evaluation – found to be “tangible employment action” *Molnar v. Booth*, 229 F.3d 593 (7<sup>th</sup> Cir. 2000).

# Tip of Terminology

- Supreme Court introduced term “tangible employment action” in *Faragher* and *Ellerth*.
- “Tangible employment action” mirrors Quid Pro Quo and 29 C.F.R. 1604.11(a)(1) and (2) (when submission to sexual conduct is a term of employment or basis for employment decisions).
- Tangible employment action/Quid pro quo/Regs 1604.11(a)(1) and (2) all basically synonymous.

# Only Supervisors have Authority to take Tangible Employment Action

A supervisor is a person “empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.” *Ellerth* at 762

# Supreme Court Cleared up “Supervisor” for Purposes of Title VII Sexual Harassment

- SCOTUS ruled in June, 2013 U.S. Supreme Court ruled that for purposes of vicarious liability under Title VII an employer is a “supervisor” only if he/she has authority to take tangible employment actions against the victim.
- A “tangible employment action” is one constituting “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”
- *Vance v. Ball State University*, 133 S. Ct. 2434 (2013)

# Liability When Supervisor is the Harasser

- If employee suffered a tangible employment action as a result of a supervisor's harassment, the employer is strictly liable.
  - A tangible employment action is an official act of the company.
  - It would be implausible to interpret agency principles to allow an employer to escape liability

*Ellerth* at 762-763

# Liability When Supervisor is the Harasser

- If employee did not suffer a tangible employment action from the supervisor's harassment:
  - Employer may still be vicariously liable, but
  - Employer may raise *Ellerth/Faragher* defense

# *Ellerth/Faragher* defense

An employer's 2 part defense when a supervisor has engaged in sexual harassment but the employee suffers no tangible employment action:

1. The employer exercised reasonable care to prevent and promptly correct the sexually harassing behavior
2. The employee unreasonably failed to utilize employer's preventative or corrective opportunities or to otherwise avoid harm

# Hostile Environment when Coworker or 3<sup>rd</sup> Party is the Harasser

- A Negligence Standard Applies
  - If a supervisor or manager knew or reasonably should have known of the harassment and failed to take timely corrective action reasonably calculated to end the harassment.
    - *Haugerud v. Amery School District*, 259 F.3d 678 (7<sup>th</sup> Cir. 2001)

# THEORIES OF LIABILITY (CATEGORIES OF HARASSMENT)

## Hostile Environment

The Second Circuit Court of Appeals held in 2007 that pornography in the workplace can give rise to sexual harassment liability. A female employee's allegations that she regularly observed her male supervisor watching pornographic videos in his office, that she was regularly required to handle pornographic videotapes in the course of performing her employment responsibilities of opening and delivering her supervisor's mail, and that she once discovered hard core pornographic web sites that her supervisor viewed on her workplace computer, stated a hostile environment claim under both Title VII and the New York State Human Rights Law.

# THEORIES OF LIABILITY (CATEGORIES OF HARASSMENT)

## Hostile Environment

- The Second Circuit also held in 2004 that a woman who was exposed to sexually offensive exchanges and graphic sexual graffiti had been exposed to a hostile environment, since such conduct by male co-workers conveyed a “profound disrespect for women”. Petrosino v. Bell Atlantic, 385 F.3d 210, 213, 222-224 (2d Cir. 2004).
- Some court decisions have indicated that, for racist or sexual comments, slurs and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial or gender-based enmity. *E.g.*, Clark County School District v. Breeden, 121 S.Ct. 1508, 1509-1510 (2001)

# THEORIES OF LIABILITY (CATEGORIES OF HARASSMENT)

## Hostile Environment

- Although isolated instances of harassment ordinarily do not rise to the level of hostile environment, a single incident may do so if it was extraordinarily severe. Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995)
- Although a mild, isolated incident does not make a work environment hostile, the test is whether the harassment is of such a quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse. Whidbee v. Garzarelli Food Specialties, Inc., 223 F.2d 62, 70-71 (2d Cir. 2000) (holding that plaintiffs stated a triable claim where the evidence showed that plaintiffs were subjected to, or at least very aware of, a stream of racially offensive comments over a span of two to three months, including one physically threatening comment, even though all but one of the comments were made with reference to employees other than plaintiffs).

# Litigation Prevention

- Outside reviews and investigations
  - Necessary in some cases of child abuse, suspected employee misconduct
  - Ensures the District is being proactive, not “deliberately indifferent”

# Why Hire Outside Investigator?

- Concern that internal staff might not be independent or neutral
- Concern that internal staff might not have needed investigation experience
- Concern that internal staff may not have the time to conduct immediate investigation
- Concern that internal staff may not be as effective in testifying at board hearing or court proceeding

# ASBA Model Superintendent Agreement

The Arkansas School Boards Association (hereinafter, “Association”) is not a law firm or a substitute for an attorney or law firm. The Association cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies in the drafting or negotiation of a contract with a superintendent, or the defense of litigation arising out of the employment, termination or any other matter arising out of the contract between a school district and its superintendent. The information contained herein is legal information, not legal advice. Although the Association goes to great lengths to assure that the information contained herein is accurate and up to date, it makes no claim as to accuracy of this information and is not responsible for any consequences that may result from the use of such information. The information contained herein is not a substitute for and does not replace the advice or representation of a licensed attorney. The Association recommends that a licensed attorney should be consulted regarding the drafting and negotiation of any contract between a school district and its superintendent. No one is authorized to rely on the information contained herein as a source of legal advice.

# ASBA Model Superintendent Agreement

The Board of Directors of the \_\_\_\_\_ School District (hereinafter “Board”) and \_\_\_\_\_ (hereinafter “Superintendent”) agrees:

1. Employment: The Board agrees to employ the Superintendent of the \_\_\_\_\_ School District for the period of July 1, \_\_\_\_ through June 30, \_\_\_\_\_,<sup>1</sup> on a 240<sup>2</sup> day Agreement, who shall serve as the school district’s chief administrative officer, and perform all duties and possess all powers granted by applicable Arkansas law, rules or regulations, and Board policy, until such time as this Agreement expires or is terminated, as provided in paragraph \_\_\_\_ .

<sup>1</sup> It is traditional for Superintendents to be offered an initial, three year contract or Agreement of employment, and early each calendar year, to be offered an additional year of future employment, to be added to the end of the Agreement. The maximum length of Agreement that may be entered into in Arkansas is three years. Some districts have a strong tradition or culture of only offering a one or two year Agreement; this is certainly legal, but it makes the employment opportunity less attractive to a candidate. For example, your best candidate may be currently employed on a multi-year contract with excellent job security. In addition, three years is considered the minimum amount of time for a superintendent to see changes and new ideas fully implemented.

<sup>2</sup> This assumes that a 240 day contract is typical for a 12 month employee in your district; this could and should be adjusted to match district practice for 12 month employees.

# ASBA Model Superintendent Agreement

## 1. Employment Continued

The Superintendent agrees to accept the employment, and faithfully discharge the duties incident to it.

OPTIONAL ADDITIONAL LANGUAGE: During the term of this Agreement, the Superintendent agrees to devote his/her full attention to the performance of these duties, and will perform no other gainful employment or profession,[ except as herein noted or permitted<sup>3</sup>.]

<sup>3</sup> For example, the Board may agree that the candidate may continue to teach a graduate level class, serve as a consultant, or provide compensated professional services for Scholastic Audit. Each permitted additional employment should be noted in the Agreement, and if the Superintendent wishes to accept an opportunity that is not specifically permitted by the Agreement, this should be negotiated with the Board, and the Agreement modified mid-term by mutual agreement. Do note that any work for pay should be done outside of the contracted days, or a personal or vacation day should be taken as required by A.C.A. 6-17-211.

# ASBA Model Superintendent Agreement

2. Compensation: (Pick one\_

OPTION 1: Compensation: The salary to be paid to the Superintendent, effective July 1, \_\_\_\_\_ shall be at an annual rate of \$\_\_\_\_\_ payable in 26 (or 12) biweekly (or monthly) installments.<sup>4</sup>

OPTION 2: Compensation: The salary to be paid to the Superintendent, effective July 1, \_\_\_\_\_ shall be according to the most recently adopted salary schedule, currently at the annual rate of \$\_\_\_\_\_ payable in 26 (or 12) biweekly (or monthly) installments. <sup>5</sup>

<sup>4</sup> This would be a negotiated salary. The salary schedule must be changed to correspond to this dollar amount. The salary of the Superintendent can be changed by a Board vote, and does not require the usual PPC process in 6-17-204. You want to make sure that the salary that you offer is comparable to the salary offered by other, similar sized school districts. Comparative salary data can be obtained upon request from the Arkansas Association of Education Administrators, who make and publish an annual salary survey of their membership. The telephone number for the AAEA is (501) 372-1691.

<sup>5</sup> This would be an indexed salary, with the index or multiplier established on the salary schedule. The Superintendent would get an automatic raise if money were added to the base teacher's salary schedule.

# ASBA Model Superintendent Agreement

2. Duties: The Superintendent shall serve as the chief executive officer of the School District, and shall have the powers necessary to perform this duty. All district staff shall be subject to the direction of the Superintendent. The Superintendent shall tender an official transcript of all post-secondary course work, a copy of his or her teaching license, proof of age and any other documents necessary to comply with state or federal law. The Superintendent shall maintain his or her license in good standing. Any disciplinary suspension of the Superintendent's license by the Professional Licensing Standards Board shall constitute a material breach of this Agreement.

OPTIONAL: Modify the second sentence to read: All district staff are subject to the direction of the Superintendent and shall be recommended for hire, rehire, termination or nonrenewal by the Superintendent.<sup>6</sup>

<sup>6</sup> This underlined language, if included would mean that the Board could only hire on the recommendation of the Superintendent ; it is required by law that the Superintendent recommend in the event of a termination or nonrenewal or teacher reassignment, but not required by law that the Superintendent make hiring recommendations that limit the Board's ability to "hire around" the Superintendent .

# ASBA Model Superintendent Agreement

3. Fitness for Duty: The Superintendent represents that he or she is fully qualified to serve as Superintendent, and is fit and able to perform all physical and intellectual duties of the office.

OPTIONAL: The Superintendent will , prior to employment and annually thereafter, submit to a physical examination at district expense, and provide a doctor's statement that he or she is mentally and physically capable of performing the traditional and expected duties of Superintendent.<sup>7</sup>

<sup>7</sup> Such an exam is likely to be very costly, and this should be considered and researched before adopting.

# ASBA Model Superintendent Agreement

4. Benefits: Vacation , Sick leave and Travel Expenses: The Superintendent shall have the same fringe benefits as other contracted full year employees, including vacation and personal days, and shall follow all personnel policies concerning these benefits.<sup>8</sup> The Superintendent may transfer in sick leave days from another Arkansas school district as provided by law.

<sup>8</sup> By law, school districts may not contribute additional moneys toward the Superintendent's personal or family health insurance in excess of that which is contributed for all other district employees. However, the district may make contributions to an annuity, or purchase other forms of non-health insurance for the Superintendent as a negotiated fringe benefit.

# ASBA Model Superintendent Agreement

## 4. Benefits: Vacation, Sick leave and Travel Expenses continued

OPTION 1: Unrestricted business and personal use of a vehicle: The Board shall provide a vehicle for the business and personal use of the Superintendent, and shall assume all expenses related to this use of this vehicle, including insurance, fuel, maintenance, etc. The Superintendent will provide and comply with all Internal Revenue Service reporting requirements to enable appropriate reporting of taxable income related to the personal use of the vehicle.<sup>9</sup>

<sup>9</sup> The district should annually issue an IRS form 1099 for the fair market value of the personal use of the vehicle, if this option is selected, and as such, this would constitute taxable income for the Superintendent.

# ASBA Model Superintendent Agreement

## 4. Benefits: Vacation, Sick leave and Travel Expenses continued

OPTION 2: Unrestricted business and personal use of a vehicle, plus additional travel expenses: The Board shall provide a vehicle for the business and personal use of the Superintendent, and shall assume all expenses related to this use of this vehicle, including insurance, fuel, maintenance, etc. The Board will also permit the Superintendent to submit receipts for reimbursement for approved travel to conferences and meetings, in accordance with district policy. The Superintendent will provide and comply with all Internal Revenue Service reporting requirements to enable appropriate reporting of taxable income related to the personal use of the vehicle.<sup>10</sup>

<sup>10</sup> The district should annually issue an IRS form 1099 for the fair market value of the personal use of the vehicle, if this option is selected, and as such, this would constitute taxable income for the Superintendent.

# ASBA Model Superintendent Agreement

## 4. Benefits: Vacation, Sick leave and Travel Expenses continued

OPTION 3: Travel Reimbursement: The Board shall provide a vehicle for the official and business related use of the Superintendent, and shall assume all expenses related to this use of this vehicle, including insurance, fuel, maintenance, etc. The Board will also permit the Superintendent to submit receipts for reimbursement for approved travel to conferences and meetings, in accordance with district policy.

OPTION 4: Travel Reimbursement: The Board shall reimburse the Superintendent for business related use of the Superintendent's own vehicle at the rate of \$\_\_\_\_\_ per mile. The Board will also permit the Superintendent to submit receipts for reimbursement for approved travel to conferences and meetings, in accordance with district policy.

# ASBA Model Superintendent Agreement

## 4. Benefits: Vacation, Sick leave and Travel Expenses continued

OPTION 5: Lump sum in lieu of routine travel reimbursement: The Board shall pay to the Superintendent the sum of \_\_\_\_\_<sup>11</sup> a month, and the Superintendent will obtain a personal vehicle and pay for routine, travel incident to the performance of his or her duties from this, not to include approved out of district travel, which shall be compensated at the rate of \$\_\_\_\_ per mile from the district headquarters to the meeting site, and back.

<sup>11</sup> If selected, this should be a substantial sum of money, such as \$400 to \$800 a month or more to cover the cost of operating a vehicle including insurance, maintenance, wear and tear and fuel. It may be helpful to review documentation of the previous Superintendent's annual reimbursed millage, or if not available, request that information from a similarly configured district to establish a fair number, taking into consideration the distance between and the number of campuses, and the board's expectations concerning travel incident to the superintendent's job performance.

# ASBA Model Superintendent Agreement

5. Evaluation: The Board shall evaluate the Superintendent at least annually, using the last adopted evaluation instrument for the Superintendent, or the evaluation instrument required by law, if one exists. If individual evaluations are completed by board members, each individual evaluation as well as any composite evaluation will be shared with the Superintendent, and retained in the Superintendent's personnel file. If the Board does not use an evaluation instrument, but votes to extend the Agreement of the Superintendent, that vote shall constitute an evaluation of the Superintendent's job performance. The failure of the Board to evaluate the Superintendent or to extend the Agreement of the Superintendent into the future as an evaluation of the Superintendent shall not constitute a material breach of this Agreement.

# ASBA Model Superintendent Agreement

6. Termination: While the parties to this Agreement agree that the Teacher Fair Dismissal Act is neither relevant nor controlling as it relates to the termination of a Superintendent, notice to the Superintendent shall be provided, and an opportunity to a hearing modeled after the hearing provisions in the Teacher Fair Dismissal Act shall be provided in the event that a majority of the Board vote to initiate termination proceedings for material breach of this Agreement, or other just cause. The decision of the Board shall be final.<sup>12</sup> In the event of termination, the salary and benefits of the Superintendent shall terminate immediately.

<sup>12</sup> In this sense, “final” means there is no right to request a rehearing from the school board. The superintendent could certainly pursue legal action against the board, however, following a termination for cause.

# ASBA Model Superintendent Agreement

7. Waiver: The failure of either party to insist, in any one or more instances, upon performance of any of the terms or conditions of this Agreement shall not be construed as a waiver or relinquishment of any right granted hereunder or of the future performance of any such terms or conditions, but the obligations of either party shall continue in full force and effect.

8. Severability: In case any provision of the Agreement shall be invalid, illegal or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

9. Entire Agreement: This instrument contains the entire Agreement of the parties. It may not be changed orally, but only by an agreement in writing signed by all parties thereof.

# ASBA Model Superintendent Agreement

10. Indemnification; Legal Representation. The District shall indemnify and hold the Superintendent harmless from any and all claims, actions, suits and proceedings at law or equity brought against the Superintendent in his capacity and arising out of his reasonable and lawful actions as Superintendent and employee of the Board; provided, however, that the District reserves the right to select such counsel to represent the Superintendent subject to the Superintendent's consent, such consent not to be unreasonably withheld.

11. Governing Law: This Agreement shall be governed by the laws of the State of Arkansas.

# ASBA Model Superintendent Agreement

\_\_\_\_\_ School District

BY: \_\_\_\_\_

\_\_\_\_\_

President of Board

Superintendent

BY: \_\_\_\_\_

Secretary of Board (board member)

Or

BY: \_\_\_\_\_

Disbursing Officer or Vice President (board member)

# ASBA Model Superintendent Agreement

The following are additional numbered paragraphs that the Board may wish to consider:

OPTIONAL NUMBERED PARAGRAPH: Performance Based Bonus: Should the Superintendent [describe goal or desired outcome] by [date] as measured by [very specific language] the Superintendent shall be entitled to a one-time cash bonus in the amount of \$\_\_\_\_\_, which shall be approved for payment by the Board upon tender of proof of performance.<sup>13</sup>

<sup>13</sup> The board will want to think about this carefully, and consider what objectively measurable evidence of outcomes would be available.

# ASBA Model Superintendent Agreement

additional numbered paragraphs that the Board may wish to consider:

OPTIONAL NUMBERED PARAGRAPH: Equipment: The Board will provide the Superintendent with all necessary technology to perform the functions of his or her job, which shall include a tablet computer,<sup>14</sup> \_\_\_\_\_, and a school owned cell phone,

Option 1. The Superintendent shall use school owned and provided technology only for school and business related purposes.

Option 2: The Superintendent may use school owned and provided technology for both school and business related purposes, as well as personal use; however, this use shall not conflict with any school district policy concerning technology or internet use.

<sup>14</sup> A tablet computer may or may not be necessary; this can be adjusted as desired.

# ASBA Model Superintendent Agreement

additional numbered paragraphs that the Board may wish to consider:

OPTIONAL NUMBERED PARAGRAPH: Equipment: The Board will provide the Superintendent with all necessary technology to perform the functions of his or her job, which shall include a tablet computer, \_\_\_\_\_, and a school owned cell phone,

Option 3: The Board will provide the Superintendent with a monthly equipment and technology allotment in the amount of \$\_\_\_\_\_<sup>15</sup> , and from this, the Superintendent is intended to equip him or herself with appropriate portable technology to perform his or her duties.

<sup>15</sup> A reasonable amount of money could range from \$50 up to \$200 or more, depending on the district's needs and efficiencies, such as the Superintendent's phone providing an internet hot spot for other district employees at meetings and conferences.

# ASBA Model Superintendent Agreement

additional numbered paragraphs that the Board may wish to consider:

- OPTIONAL NUMBERED PARAGRAPH: Moving and Relocation Expenses: Pick one
- a. The Superintendent and Board agree that residence within the school district is not a term or condition of his/her employment with the district.
  - b. The Superintendent agrees to relocate and continuously reside within the school district prior to assuming his or her duties as Superintendent as a term and condition of his/her employment by the Board. The failure of the Superintendent to have relocated his or her primary residence to the school district on or before the first day of employment under this Agreement shall automatically void this Agreement and the Board shall have no duties or obligations for any payment or damages to the Superintendent. After establishing residency, if the Superintendent should fail to maintain residence in the school district for a period of time in excess of 90 days, this shall constitute material breach of this Agreement.

# ASBA Model Superintendent Agreement

## additional numbered paragraphs that the Board may wish to consider:

OPTIONAL NUMBERED PARAGRAPH: Moving and Relocation Expenses: Pick one

c. The Superintendent agrees to relocate and continuously reside within the school district as a term and condition of his/her employment by the Board. The Superintendent may submit paid receipts for moving and relocation expenses, including expenses incurred while searching for an appropriate dwelling, expenses for packing materials, movers, rental of moving vans or equipment and up to \$500 in personal and family hotel and restaurant expenses, not to exceed \$\_\_\_\_\_.<sup>16</sup> In the event that the Superintendent does not relocate within the first \_\_\_\_ months of employment, and continuously reside within the school district, it shall constitute a material breach of this Agreement and grounds for termination of this Agreement.

<sup>16</sup> \$5000 is probably a reasonable upper limit to place on in-state relocation; considerably more would be appropriate if a superintendent were moving to Arkansas from another state.

# ASBA Model Superintendent Agreement

**additional numbered paragraphs that the Board may wish to consider:**

OPTIONAL NUMBERED PARAGRAPH: Moving and Relocation Expenses: Pick one

- d. Upon commencement of his duties and tender of proof of relocation to the school district, the superintendent shall be given a lump sum of \$\_\_\_\_\_,<sup>17</sup> to compensate the superintendent for moving and relocation expenses. The superintendent shall not be required to submit proof of relocation expenses.

<sup>17</sup>\$5000 is probably a reasonable upper limit to place on in-state relocation; considerably more would be appropriate if a superintendent were moving to Arkansas from another state.

# ASBA Model Superintendent Agreement

**additional numbered paragraphs that the Board may wish to consider:**

OPTIONAL NUMBERED PARAGRAPH: Disability: In the event that the Superintendent is unable to report to his job site and fulfill the duties of Superintendent for a period in excess of twelve work weeks due to personal illness, disability, incapacity or other cause of unfitness to perform job responsibilities, regardless of whether or not any available sick leave or other paid leave has been exhausted or not, the Board may, by majority vote, deem the inability of the Superintendent to satisfactorily return to his or her contracted duties to be a material breach of the Agreement, and to terminate the Agreement of employment upon tender of 90 days pay. The Board's decision and determination as to the disability of the Superintendent shall be final.

# ASBA Model Superintendent Agreement

The following are additional numbered paragraphs that the Board may wish to consider:

## OPTIONAL NUMBERED PARAGRAPH:

a. Suspension: If, by majority vote, the Board votes to suspend the Superintendent from the performance of his or her duties under this Agreement, the Superintendent will surrender all school district property with the exception of the school owed cell phone, and shall remain available to the school district for consultation, advice and return to duties. Every day that the Superintendent is not available to the school district shall be accounted for as a vacation day, or, if appropriate documentation from a physician is presented and subject to district policy, a sick day. If a suspended Superintendent wishes to accept other employment during a term of suspension, to resign from his or her Agreement, or to retire as the word is defined by the Arkansas Teacher Retirement System, the Board agrees to immediately release him or her from his or her contractual obligation to be available to the district. At the end of 24 consecutive months of suspension, if the Superintendent has not been recalled to duty and if the Agreement has not expired on its own terms, the Board may, by majority vote, terminate the remaining months of the Superintendent's Agreement upon payment of a lump sum of \$\_\_\_\_\_ <sup>18</sup> which shall be tendered to the Superintendent upon a signed release of all claims and causes of action against the school district.

<sup>18</sup> A suggestion for this sum of money would be \$25,000 for Agreements under \$100,000, and \$50,000 for Agreements in excess of \$100,000.

# ASBA Model Superintendent Agreement

The following are additional numbered paragraphs that the Board may wish to consider:

## OPTIONAL NUMBERED PARAGRAPH:

b. Suspension: If, by majority vote, the Board votes to suspend the Superintendent from the performance of his or her duties under this Agreement, the Superintendent will surrender all school district property with the exception of \_\_\_\_\_<sup>19</sup>, and shall remain available to the school district for consultation, advice and return to duties. Every day that the Superintendent is not available to the school district shall be accounted for as a vacation day, or, if appropriate documentation from a physician is presented and subject to district policy, a sick day. If a suspended Superintendent wishes to accept other employment during a term of suspension, to resign from his or her Agreement, or to retire as the word is defined by the Arkansas Teacher Retirement System, the Board agrees to immediately release him or her from his or her contractual obligation to be available to the district. At the end of 60 consecutive days of paid suspension, unless the Agreement has expired on its own terms, the Superintendent will be recalled to duty, if the board has not terminated him or her for cause as provided for in Paragraph \_\_\_\_\_.<sup>20</sup>

<sup>19</sup> An example of property that the superintendent might retain while suspended might be a school owned cell phone or other technology that would facilitate school district contact with him or her during suspension.

<sup>20</sup> This would be a numerical reference to the numbered paragraph referring to termination.

# ASBA Model Superintendent Agreement

The following are additional numbered paragraphs that the Board may wish to consider:

OPTIONAL NUMBERED PARAGRAPH: Professional Development: The district will pay the dues for the Superintendent to be a member of the following state and national organizations and related organizations to enable the Superintendent to obtain high quality professional development and to further the interest of the school district: American Association of School Administrators, National Association of School Superintendents, Arkansas Association of Educational Administrators, Arkansas Rural Education Association, \_\_\_\_\_.<sup>21</sup> (optional language: The Superintendent is required, when it does not conflict with important district duties, to attend the weekly legislative meetings of the Arkansas Association of Education Administrators either in person or by means of electronic participation, as well as to be present, as deemed necessary and desirable at the Capitol during a legislative session, and these meetings shall be deemed to be a meeting related to education as defined by A.C.A. 6-17-211.<sup>22</sup>)

<sup>21</sup> This list is suggestive, not exhaustive, and should be developed based on the candidates own professional interests and previous memberships. Budget is also a consideration, as the expense related to attendance at a National Conference could easily be several thousand dollars per year. It may be more appropriate to limit attendance to one national conference every other year, or every third year or to eliminate this particular provision entirely.

<sup>22</sup> The underlined sentence is entirely optional, but would serve to protect the school district if Legislative Joint Audit wished to challenge school district reimbursement of expenses related to advocacy by the Superintendent, and for this reason, we recommend it.

# ASBA Model Superintendent Agreement

The following are additional numbered paragraphs that the Board may wish to consider:

OPTIONAL NUMBERED PARAGRAPH: Professional Development: The district will pay the dues for the Superintendent to be a member of the following state and national organizations and related organizations to enable the Superintendent to obtain high quality professional development and to further the interest of the school district:

The district will assume the reasonable and customary expenses for registration for the annual meetings and conferences of these groups, and to attend the Legislature, including any out of district or overnight travel and related necessary expenses for the Superintendent. Option 1: The Board may approve out of state travel for the Superintendent on a case-by-case basis. Option 2: The Board agrees that the Superintendent shall attend the annual national meeting of \_\_\_\_\_, and agrees to assume all necessary travel expenses for this meeting for the superintendent.

# ASBA Model Superintendent Agreement

The following are additional numbered paragraphs that the Board may wish to consider:

OPTIONAL NUMBERED PARAGRAPH<sup>23</sup>: Material Breaches: In addition to other designated material breaches of this Agreement contained therein, the following shall also be considered material breaches of the Agreement, and a basis for termination of the Agreement of employment:

<sup>23</sup> The Board may wish to consider including one or all of these provisions. All of these situations, while rare and unlikely to occur, if present, tend to be very disruptive to both the community and the school community.

# ASBA Model Superintendent Agreement

## OPTIONAL NUMBERED PARAGRAPH: Material Breaches Continued

a. After twenty-four consecutive months of employment<sup>24</sup>, the school district being designated as being in Fiscal Distress as defined by A.C.A. 6-20-1901 et. seq., shall be considered a material breach of the Agreement of employment, provided that the school Board has voted to uphold the Superintendent's recommendations to non-renew employment Agreements of district employees pursuant to a Reduction In Force or RIF and has not acted against the Superintendent's recommendations concerning entering into contracts, hiring personnel or making expenditures that, if followed, would have resulted in the district avoiding being placed in fiscal distress status.

<sup>24</sup> A Superintendent has little ability to respond to a dire financial situation that was largely created before his or her assumption of the job, and must wait until spring to implement a RIF or make major changes to policy or salary schedules for the upcoming year. It is, however, fair to hold a Superintendent accountable for a financial situation that developed during his own tenure.

# ASBA Model Superintendent Agreement

## OPTIONAL NUMBERED PARAGRAPH: Material Breaches Continued

- b. The arrest of the Superintendent or the filing of criminal charges against the Superintendent during his or her tenure of office shall constitute a material breach of the Agreement of employment.
- c. Adverse findings by the Professional License Standards Board, or true findings of child abuse or maltreatment;
- c. Entering into what appears to be a dating or romantic relationship, with a current school district employee during the Superintendent's tenure of office, shall constitute a material breach of the Agreement of employment.
- d. Exhibiting favoritism or preference based on a personal, family or marital relationship with a district employee or potential district employee shall constitute a material breach of the Agreement of employment.

# Optional Provision: Morality Clause

- Superintendent shall not commit any act or do anything which might reasonably be considered:
  - (i.) to be immoral, deceptive, scandalous or obscene; or
  - (ii.) to injure, tarnish, damage or otherwise negatively affect the reputation and goodwill associated with the District or the Board.