SOUTH DAKOTA
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RE: HF No 11G, 2021/22- Katie Jackson v. Wessington Springs School District 36-2 and Board of Education

Greetings:

This letter addresses Petitioner's (Jackson) Motion to Amend Petition for Hearing on Grievance to Conform to Evidence. All submissions have been considered. Amendments to pleadings are addressed in SDCL 15-6-15(a) and SDLC 15-6-15(b). The South Dakota Supreme Court has stated that "the most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." *Dakota Cheese, Inc. v. Ford*, 1999 S.D. 147, 24, 603 N.W.2d 73, 78 (citation omitted).

Jackson's Petition referenced Board Policy BBA, School Board Powers and Duties. She wishes to amend the Petition because she asserts it should have referred to Board Policy BBAA (BBAA), Board Member Authority which states,

> The powers delegated to a School Board by the state are delegated to the board as a whole. No authority is granted board members acting as individuals.
>
> The Board exercises its powers and duties only in properly called meetings, where a majority of the Board constitutes a quorum to transact business. Except when performing a specific duty as ordered by the Board, the decision and actions of a single member of the Board are not binding on the entire Board.

Jackson argues that the appropriate statute is SDCL 15-6-15(b):

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

She asserts that at the hearing on September 20, 2022, the parties litigated the essence of the BBAA as they offered evidence regarding who had authority to determine what constituted partisan politics, sectarian religious views, or selfish propaganda of any kind. Thus, amending the petition would fall under an amendment to conform to the evidence. She argues that Wessington Springs School District 36-2 and Board of Education (District) cannot show prejudice because it litigated the issue and has not indicated what evidence it may have offered regarding BBAA. She also adds that the issue is the forced removal of an ALLY magnet and the relevant evidence is that which was in place at the time of the removal, not what the District might have decided in hindsight.

The District argues that the applicable statute to consider in this matter is SDCL 15-6-15(a) which provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has neither been placed upon the trial calendar, nor an order made setting a date for trial, he may so amend it at any time within twenty days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

The District urges that it would be prejudiced because BBAA was not litigated at the hearing. BBAA was not entered into the record as an exhibit and there was no testimony regarding BBAA. The District also argues that BBAA is inapplicable and thus the amendment would be futile.

The Department concludes that the District would be prejudiced if Jackson were allowed to amend her petition to reference BBAA. Evidence and testimony may have referred to similar themes as BBAA, but without BBAA specifically being addressed or brought in as an exhibit, the Department is not persuaded that the policy was addressed by implied consent pursuant to SDCL 15-6-15(b). The District would be prejudiced by the assumption that they presented their case regarding BBAA and addressed it by implied consent. Therefore, Jackson's Motion to Amend Petition for Hearing on Grievance to Conform to Evidence is hereby DENIED.

Sincerely,

Michelle Faw

Michelle M. Faw
Administrative Law Judge