



POLICY 6.144

4-G I recommend that the Board adopt the proposed new Policy 6.144, entitled “Commercial Nondiscrimination.”

[Contact: Dr. Otelia DuBose, PX 48508]

Adoption

CONSENT ITEM

- The Board approved development of this Policy at the special meeting on Policies on March 29, 2006.
- This proposal would satisfy a requirement in paragraph (2)(e)(ii) of Board Policy 6.143 (“Diversity and Equitable Utilization in Business,” adopted on May 11, 2005), which requires the Board to adopt “a commercial non-discrimination policy that ensures that companies doing business with the School Board do not discriminate in the solicitation, selection, or treatment of subcontractors, suppliers, vendors, or commercial customers on the basis of race, color, sex or national origin.”
- Expert outside counsel drafted the proposed provisions and District staff reviewed and finalized the draft in conjunction with the Office of Chief Counsel.

POLICY 6.144

COMMERCIAL NONDISCRIMINATION

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5 1. **Purpose and Intent.**-- It is the intent of the School District of Palm Beach County to
6 avoid becoming a passive participant in private sector commercial discrimination, by
7 refusing to engage in business with business firms that discriminate in the solicitation,
8 selection, hiring, or treatment of vendors, suppliers, subcontractors, or commercial
9 customers on the basis of race, gender, religion, national origin, ethnicity, sexual
10 orientation, age, or disability, and by providing a procedure for receiving, investigating,
11 and resolving complaints of discrimination filed against business firms that have
12 submitted a bid or proposal for, have been selected to engage in, or are engaged in
13 doing business with the School District.
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- 15 2. **Policy Statement.**-- It is the policy of the School Board of Palm Beach County not to
16 accept bids or proposals from, nor to engage in business with, any business firm that
17 has discriminated on the basis of race, gender, religion, national origin, ethnicity,
18 sexual orientation, age, disability, or any other form of unlawful discrimination in its
19 solicitation, selection, hiring, or treatment of another business.
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- 21 3. **Scope.**-- This Policy applies to all business firms and to all contracts to which the
22 School Board is a party. Additionally, as to third-party contracts, every contract and
23 other agreement between the School Board of Palm Beach County and any
24 governmental agency, quasi-governmental agency, corporation, developer, or
25 contractor, under which the agency, corporation, developer, or contractor receives any
26 fiscal assistance from or through the School District for the purpose of contracting with
27 businesses to perform real estate development, renovation, maintenance, or other
28 services, must require the agency, corporation, developer, or contractor to comply with
29 this Policy in awarding and administering that contract or agreement.
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- 31 4. **Definitions.**-- As used herein, the following terms have these meanings unless the
32 context clearly requires a different meaning:
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 - 34 a. ALJ means an administrative law judge assigned by the Florida Department of
35 Administrative Hearings (DOAH) to conduct hearings under this Policy.
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37 b. Business firm means any person, firm, sole proprietorship, partnership,
38 corporation, limited liability company, or other business entity or combination
39 thereof, including any financial institution, developer, consultant, prime contractor,
40 subcontractor, supplier, or vendor, that has submitted a bid or proposal, has been
41 selected to do business, or is doing business with the School District, including
42 selling or leasing supplies, or goods, or providing construction, financial,
43 professional, or other services, in return for a fee or any other form of
44 compensation.
 - 45
46 c. Chief Counsel means the Chief Counsel to the School Board of Palm Beach
47 County.

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49 d. Contract means an agreement with any business firm (including a sole
50 proprietorship) let by or on behalf of the School Board or School District for that
51 business firm to sell or lease supplies or goods, or provide construction, financial,
52 professional, or other services, in return for a fee or any other form of
53 compensation.
54
55 e. Contractor means any business firm (including a sole proprietorship) that holds a
56 contract let by or on behalf of the School Board or School District.
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58 f. Discrimination means, in general, any disadvantage, difference, distinction, or
59 preference in the solicitation, selection, hiring, or treatment of a vendor, supplier,
60 subcontractor, commercial customer, or any other business entity on the basis of
61 race, gender, religion, national origin, ethnicity, sexual orientation, age, disability,
62 or any other form of unlawful discrimination regarding the characteristics of that
63 business entity's employees or owners. However, discrimination does not include
64 otherwise lawful efforts, including those specified in Policy No. 6.143 ("Diversity
65 and Equitable Utilization in Business") to remedy the effects of discrimination that
66 has occurred or is occurring in the marketplace.
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68 g. DOAH means the Florida Department of Administrative Hearings.
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70 h. Financial Institution means any person or entity engaged in the business of
71 lending money, guaranteeing loans, extending credit, securing bonds, or providing
72 venture or equity capital to business entities, or that offers financial services in
73 connection with School District projects or the administration of School District
74 government. For example, financial institution includes any bank, savings and
75 loan association, venture capital company, insurance company, bonding
76 company, mortgage company, credit union, and broker.
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78 i. Includes or Including means by way of illustration and not by way of limitation.
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80 j. ODBP means the School District's Office of Diversity in Business Practices.
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82 k. Presiding officer means, as appropriate to the context, the ALJ presiding over a
83 formal hearing under Fla. Stat. § 120.57(1), or the designated hearing officer
84 presiding over an informal hearing under Fla. Stat. § 120.57(2).
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86 l. School Board or Board means The School Board of Palm Beach County, Florida,
87 the policy-making governing body of the School District of Palm Beach County,
88 which has authority to enter into contracts on behalf of the District School System.
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90 m. School District or District means the School District of Palm Beach County and
91 those agencies, departments, boards, commissions, government authorities, and
92 corporations authorized to act on behalf of, or as agent for, the School District of
93 Palm Beach County.
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95 n. Subcontract means an agreement for the performance of a particular portion of
96 work to be performed under a contract with the School Board or School District.
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98 5. **Complaints of Discrimination.--** Any adult person, business entity, association,
99 organization, or government agency may file an administrative complaint with the
100 ODBP Director stating facts showing or tending to show that a business firm has
101 engaged in discrimination against one or more other businesses. Within ten business
102 days, the ODBP Director shall notify the business firm against whom the complaint
103 was filed that a complaint has been received.
104

105 6. **Investigation of Complaints.--** An investigative unit shall exist in the ODBP to review
106 and investigate discrimination complaints filed under this Policy. The ODBP Director
107 shall exercise his or her best judgment to assign ODBP staff persons and/or outside
108 consultants to the investigative unit as necessary to conduct such investigations in a
109 comprehensive, fair, competent, and efficient manner. (As may be necessary due to an
110 unexpectedly time-intensive investigation, the ODBP Director may also request that
111 the Superintendent temporarily assign other existing qualified District personnel to
112 assist in this unit.) The investigative unit shall seek all relevant evidence from the
113 complainant, from the respondent business firm, and from external sources relating to
114 the allegations of the complaint.
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116 7. **Initial Findings and Recommendations.--** The ODBP Director will make initial
117 findings and recommendations.
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119 a. Based upon the investigative unit's review and investigation, the ODBP Director,
120 with legal counsel available, shall make an initial non-binding finding on each
121 allegation stated in the complaint, that either:
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123 i. the investigation produced sufficient evidence to find that the alleged
124 discrimination did take place ("sustained");
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126 ii. the investigation failed to produce sufficient evidence to find that the alleged
127 discrimination took place ("not sustained");
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129 iii. the investigation produced sufficient evidence to find that the alleged
130 discrimination did not take place ("unfounded");
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132 iv. the investigation produced sufficient evidence to establish that the
133 complainant knowingly made one or more false or frivolous allegations
134 ("false or frivolous");
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136 v. the allegation has been settled or otherwise resolved by agreement of the
137 interested parties ("settled or resolved"); or
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139 vi. the allegation has been withdrawn ("withdrawn").
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141 b. The ODBP Director (who may seek legal advice from the Chief Counsel or

142 designated associate counsel) shall recommend appropriate action to be taken.
143 That action may include additional investigation of the complaint, sanctions,
144 remedies, or other action consistent with this Policy.
145

146 c. The initial non-binding findings and recommendations shall be made by the ODBP
147 Director within 120 calendar days of receipt of the complaint. The ODBP Director
148 may extend this time limit, after consultation with the Chief Counsel, for good
149 cause or if the parties agree to mediate a settlement to the complaint.
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151 d. The ODBP Director shall notify the complainant and the business firm within five
152 business days of the issuance of the initial non-binding findings and
153 recommendations, including an explanation of the reasons justifying the initial
154 findings.
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156 8. **Hearings.**-- If the ODBP Director determines that one or more allegations of
157 discrimination within the scope of this Policy are sustained, the business firm against
158 whom the allegations were made shall be entitled to an administrative hearing on the
159 allegations and an opportunity to participate in the hearing.
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161 a. Pursuant to F.A.C. r. 28-106.111(1), the ODBP shall notify the business firm of
162 the information required by Fla. Stat. § 120.569(1) (e.g., that the business firm
163 may request a hearing; the procedure for obtaining a hearing; and the pertinent
164 time limits). The ODBP's notice shall also advise whether mediation under Fla.
165 Stat. § 120.573 is available as an alternative remedy, and if available, that pursuit
166 of mediation will not adversely affect the right to administrative proceedings in the
167 event mediation does not result in a settlement
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169 b. If the business firm desires a hearing, the business firm must request an
170 administrative hearing by filing a written request with the Board Clerk within
171 twenty-one (21) calendar days of notice of the initial findings and
172 recommendations, pursuant to F.A.C. r. 28-106.111(2). The request for hearing
173 must contain all items required by Fla. Stat. § 120.569(2)(c) and F.A.C. r. 28-
174 106.201(2) (for formal hearings involving disputed issues of material fact, under
175 Fla. Stat. § 120.57(1)) or F.A.C. r. 28-106.301(2) (for informal hearings not
176 involving disputed issues of material fact, under Fla. Stat. § 120.57(2)).
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178 i. If the business firm properly and timely requests an administrative hearing
179 involving disputed issues of material fact, the Chief Counsel shall notify
180 DOAH within fifteen (15) days of receiving the request, and DOAH will assign
181 an ALJ to conduct the administrative hearing.
182

183 A. DOAH will inform the business firm, the ODBP Director, and the Chief
184 Counsel of the time and place for the hearing. The administrative
185 hearing shall be held by the ALJ within ninety calendar days of the
186 assignment of the ALJ. Whenever possible, the hearing shall be held in
187 the place most convenient to all parties as determined by the ALJ.
188

- 189 B. The hearing shall be conducted in a manner consistent with Chapter
190 120, Florida Statutes and any due process rights to which any party is
191 entitled. At a minimum, the hearing shall afford all parties an
192 opportunity to present witnesses, conduct direct and cross-examination
193 of witnesses, introduce relevant evidence, submit briefs, and present
194 oral argument. At such hearing, the ODBP Director or the Director's
195 designee shall present the evidence gathered by the investigative unit.
196 Findings shall be made by the ALJ based upon a preponderance of all
197 evidence presented.
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- 199 ii. If the business firm properly and timely requests an administrative hearing
200 not involving disputed issues of material fact, the Chief Counsel shall notify
201 DOAH within fifteen (15) days of receiving the request. Notwithstanding
202 Policy 4.150, the informal hearing will be conducted under Fla. Stat. §
203 120.57(2) and F.A.C. r. 106.301 - 106.307 by a hearing officer who is a
204 volunteer outside attorney selected by the Superintendent/designee (or, if
205 such volunteer attorney is not available, the hearing may be conducted by
206 any available Board member).
207
- 208 c. The presiding officer may issue protective orders for good cause to limit, or
209 otherwise impose conditions on, access by any person to any document in the
210 possession of a party, including any document in the School District's possession
211 if exempt from the Public Records Act or in the record of the hearing if that
212 particular document in the record is exempt from the Public Records Act.
213
- 214 d. If the business firm fails to properly and timely request an administrative hearing,
215 the ODBP shall notify the business firm that the request is dismissed pursuant to
216 Fla. Stat. § 120.569(2)(c) and that the initial non-binding findings and
217 recommendations will become the final administrative decision of the School
218 District pending review and approval by the Superintendent and School Board,
219 and the School Board's action will constitute final agency action.
220
- 221 e. Pursuant to Fla. Stat. § 120.57(4), unless precluded by law, informal disposition
222 may be made of any proceeding by stipulation, agreed settlement, or consent
223 order, instead of through a hearing.
224
- 225 9. **Disposition after a Hearing.--** Within thirty (30) days after the hearing or receipt of
226 the hearing transcript, whichever is later, the presiding officer shall file a recommended
227 order with the School Board including a caption, time and place of hearing, statement
228 of the issues, findings of fact and conclusions of law, and recommendations for final
229 agency action. The presiding officer's recommended order may affirm or reject the
230 initial findings and recommendations, may substitute different findings and recommend
231 appropriate remedies, or may return the case to the ODBP Director for further
232 investigation and findings to be completed within a period of time specified by the
233 presiding officer.
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- 235 a. The presiding officer's recommended order shall be based upon a preponderance

236 of the evidence contained in the hearing record, and shall reflect the evidentiary
237 basis for its findings.

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239 b. The Board will allow each party fifteen (15) days in which to submit written
240 exceptions to the recommended order.

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242 c. Pursuant to Fla. Stat. §§ 120.569 and 120.57, the School Board shall issue the
243 final order within ninety (90) days, unless the time is waived by all parties, after:

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245 i. the hearing is concluded (defined as the time when the hearing officer
246 submits the recommended order to the Board and the recommended order is
247 mailed to all parties), if an informal hearing is conducted by the District;

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249 ii. a recommended order is submitted to the Board and mailed to all parties, if
250 the hearing is conducted by an ALJ; or

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252 iii. the District has received the written and oral material it has authorized to be
253 submitted, if there has been no hearing.

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255 d. The final order shall be considered at a regularly scheduled School Board
256 meeting. The School Board may adopt the presiding officer's recommended order
257 as its Final Order. The School Board in its final order may, for good cause, reject
258 or modify the conclusions of law in the recommended order but may not reject or
259 modify the findings of fact unless the School Board first determines from a review
260 of the complete record that the findings of fact were not based upon competent
261 substantial evidence or that the proceedings on which the findings were based did
262 not comply with essential requirements of law. The School Board may reduce or
263 increase the recommended penalty in a recommended order, but may do so only
264 with a review of the complete record. In cases where an ALJ provided a
265 recommended order, the Board will provide a copy of its final order to DOAH
266 within fifteen (15) days after the order is filed with the Board clerk.

267
268 10. **Remedies and Penalties.--** When a complaint is sustained in a final order (upon the
269 Superintendent's recommendation in cases where the business firm did not properly
270 and timely request a hearing, or upon the Board's consideration of a recommended
271 order after a hearing that was properly and timely requested), the School Board shall
272 direct the Superintendent to take one or more of the following actions:

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274 a. any remedy provided by law or agreed to by the respondent business firm, the
275 complainant, and the School District;

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277 b. implementation of procedures by the School District for debarment of the
278 respondent business firm from bidding and contract awards on School District
279 projects for a period of not more than three years under Board Policy 6.14(5);

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281 c. rescission, suspension or termination of any current contract between the
282 respondent business firm and the School District;

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- d. exercise of any other rights or remedies available to the School District under any current contract between the respondent business firm and the School District, including, but not limited to, liquidated damages; or
 - e. referral of the matter for criminal prosecution for fraud and other violations of Florida law if appropriate under the circumstances.
11. **Sanctions for Filing a False or Frivolous Complaint.--** If the ODBP Director determines, with legal counsel available, that one or more allegations of a complaint are false and that the complainant knew them to be false when filed, or that one or more of the allegations of a complaint are so frivolous that they are wholly without merit, the ODBP Director may refuse to review or investigate any complaint filed under this Policy by the same complainant for a period of up to three years. The ODBP Director may also recommend to the presiding officer or the School Board that the complainant be required to reimburse the District in the amount of the costs incurred for the investigation and review of the false or frivolous complaint. In the event the presiding officer requires such reimbursement to the School District, the complainant shall have the same right of appeal to the School Board as a respondent business firm has under section (9)(d) of this Policy.
12. **Judicial Review.--** A party who, after having exhausted all administrative remedies available, is aggrieved by a final order of the School Board may seek judicial review of such final order pursuant to Fla. Stat. § 120.68.
13. **Mandatory Nondiscrimination Contract Clause.--** Every written contract (with the possible exception of certain unalterable form contracts or software licenses required by certain corporations or items purchased on State of Florida contracts or piggyback contracts from other agencies, as determined by the Superintendent/designee) shall contain a nondiscrimination clause that reads as follows: "Contractor shall not discriminate on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring, or treatment of subcontractors, vendors, suppliers, or commercial customers. Contractor shall provide equal opportunity for subcontractors to participate in all of its public sector and private sector subcontracting opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that has occurred or is occurring in the marketplace, such as those specified in Palm Beach County School Board Policy 6.143. Contractor understands and agrees that violation of this clause is a material breach of the contract and may result in contract termination, debarment, or other sanctions."
14. **Contractor Bid Requirements.--** All requests for bids or proposals issued by the School District shall include a clause that reads as follows: "As part of its bid or proposal, Bidder or Proposer shall provide to the School District a list of all instances within the past ten years where a complaint was filed or pending against Bidder or Proposer in a legal or administrative proceeding alleging that Bidder or Proposer discriminated on the basis of race, gender, religion, national origin, ethnicity, sexual

330 orientation, age, or disability against its subcontractors, vendors, suppliers, or
331 commercial customers, and a description of the status or resolution of each such
332 complaint, including any remedial action taken.”
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334 15. **Contract Disclosure Requirements.--** Every written contract issued by the School
335 District (with the possible exception of certain unalterable form contracts or software
336 licenses required by certain corporations or items purchased on State of Florida
337 contracts or piggyback contracts from other agencies, as determined by the
338 Superintendent/designee) shall include a clause that reads as follows: “Upon the
339 School District’s request, and upon the filing of a complaint against Contractor
340 pursuant to Palm Beach County School Board Policy 6.144, Contractor agrees to
341 provide the School District, within sixty calendar days, a truthful and complete list of
342 the names of all subcontractors, vendors, and suppliers that Contractor has used in the
343 past five years on any of its contracts that were undertaken within the Palm Beach
344 County School District relevant geographic market as defined in Palm Beach County
345 School Board Policy 6.143, including the total dollar amount paid by Contractor for
346 each subcontract or supply contract. Contractor agrees to fully cooperate in any
347 investigation conducted by the School District pursuant to this Policy. Contractor
348 understands and agrees that violation of this clause is a material breach of the contract
349 and may result in contract termination, debarment, and other sanctions.”
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351 16. **Other Legal Remedies.--** The remedies provided by this Policy are in addition to any
352 other statutory, legal, or equitable remedies that may be available and are not intended
353 to be prerequisite to or exclusive of any other remedies.
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355 17. **Non-Interruption of Performance.--** The filing of a complaint, or the investigation or
356 hearing or recommended order concerning a complaint under this Policy shall not
357 hinder or affect the award of, performance of, or payment on a contract prior to a final
358 administrative order that establishes a violation.
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360 18. **Rules of Construction.--** The provisions of this Policy are to be liberally construed to
361 accomplish its policies and purposes.
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363 a. **Mandatory, Prohibitory, and Permissive Terms**

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365 i. **Mandatory terms.--** “Must” and “shall” are each mandatory terms used to
366 express a requirement or to impose a duty.
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368 ii. **Prohibitory terms.--** “Must not”, “may not”, and “no may” are each
369 mandatory negative terms used to establish a prohibition.
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371 iii. **Permissive terms.--** “May” is permissive.
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373 iv. **Number.--** The singular includes the plural and vice versa.
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375 b. **Severability.--** All provisions of this Policy are severable. If a court determines
376 that a word, phrase, clause, sentence, paragraph, subsection, section, or other

377 provision is invalid or that the application of any part of the provision to any
 378 person or circumstances is invalid, the remaining provisions and the application of
 379 those provisions to other persons or circumstances shall remain in full force and
 380 effect to the maximum extent practicable.

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 382 c. Time Computations

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 384 i. Computation of time After an Act, Event, or Default

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 386 A. In computing any period of time prescribed by this Policy, the day of the
 387 act, event, or default after which the designated period of time begins to
 388 run is not included.

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 390 B. If the period of time allowed is more than seven (7) days, intermediate
 391 Saturdays, Sundays, and legal holidays (observed by the School
 392 District's administrative center) are counted.

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 394 C. If the period of time allowed is seven (7) days or less, intermediate
 395 Saturdays, Sundays, and legal holidays (observed by the School
 396 District's administrative center) are not counted.

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 398 D. The last day of the period so computed is included unless it is a
 399 Saturday, Sunday, or legal holiday, in which event the period runs until
 400 the end of the next day that is not a Saturday, Sunday, or legal holiday
 401 observed by the School District's administrative center.

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 403 ii. Computation of Time Before a Day, Act, or Event

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 405 A. In determining the latest day for performing an act that is required by
 406 this Policy to be performed a prescribed number of days before a
 407 certain day, act, or event, all days preceding that day, including
 408 intervening Saturdays, Sundays, and legal holidays observed by the
 409 School District's administrative center, are counted in the number of
 410 days so prescribed.

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 412 B. The latest day is included in the determination unless it is a Saturday,
 413 Sunday, or legal holiday, in which event the latest day is the first
 414 preceding day that is not a Saturday, Sunday, or legal holiday observed
 415 by the District's administrative center.

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 417 19. **Administrative Guidance.**-- The Superintendent may issue Bulletins or guidelines to
 418 explain the application of this Policy or to guide the District in carrying out this Policy.
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420 STATUTORY AUTHORITY: Fla. Stat. §§ 1001.41(2); 1001.42(22); 1001.43(2), (6)

421 LAWS IMPLEMENTED: Fla. Stat. §§ 1001.41(1), (3); 1001.42(10)(i); 1001.43(2)

422 HISTORY: New: / /2006

423

Legal Signoff:

The Legal Department has reviewed proposed Policy 6.144 and finds it legally sufficient for development by the Board.

Attorney

Date