COLLINS & BLAHA, P.C.
ATTORNEYS AT LAW

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Since 1981, when Collins & Blaha, P.C. was founded, our attorneys have represented educational institutions in the ever-changing area of educational law. We currently represent some of the largest school districts in the state, and some of the smallest. Whatever the size, the issue, or the challenge, our clients are confident that Collins & Blaha, P.C. will represent their interests competently and with the hands-on approach that a specialized firm can provide.

FEDERAL GOVERNMENT ISSUES GUIDANCE ON TITLE IX AND TRANSGENDER STUDENTS

The United States Departments of Justice and Education collaborated to publish a Dear Colleague Letter on May 13, 2016 regarding the rights of transgender students (the "Letter"). The Letter offers the most substantial federal guidance to date on school compliance with Title IX with respect to transgender students.

The Letter provides that as a condition of receiving federal funds,[1] schools may not discriminate on the basis of sex against any person in its educational programs or activities. According to the Letter, "discrimination based on a student's transgender status" is sex discrimination under Title IX and "a school must not treat a transgender student differently from the way it treats other students of the same gender identity."

According to the Letter, schools must:

1. Treat students consistently with their gender identity even if their education records indicate a different sex. Such treatment may include the use of pronouns and names consistent with the student's gender identity.

2. Take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth. Nonconsensual disclosure of such information may violate the Family Educational Rights and Privacy Act.

3. Permit the amendment or correction of education records to the same extent permitted by the school's gender practices for amending other students' records.

4. Allow transgender students to use restrooms and locker rooms that are consistent with their gender identities. A school may make individual-user options available to all students who voluntarily seek additional privacy.

5. Allow transgender students to participate in sex-segregated activities consistent with their gender identity, including single-sex athletic teams, classes, housing and overnight accommodations.

With respect to sex-segregated athletic teams, the Letter provides:

> Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport[…]Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.

On May 13, 2016, Michigan's Superintendent of Public Instruction, Brian Whiston, stated that the Department of Education would "fully review the federal guidance" and "measure how it aligns with the State Board's draft guidance." Whiston noted the nearly 13,000 comments that had been offered on the State Board's draft guidance, stating that the Department was "committed to listening and being considerate of that input." Whiston concluded that the State Board would not take any action on the issue until August, at the earliest.

[1] *A federal agency may not deny or withhold federal funding from a school district because of a Title IX violation unless all of the following occur:*

1. *The agency notifies the school district that it is not in compliance with Title IX and that voluntary compliance cannot be achieved;*
2. *The school district has an opportunity for a hearing, and it is expressly found that the district failed to comply with Title IX;*
3. *The head of the federal agency approves the decision to suspend or terminate funds; and*
4. *The head of the federal agency files a report with the United States House and Senate legislative committees having jurisdiction over the programs involved, and waits 30 days before terminating any funds. The report must provide the grounds for the decision to deny or terminate the funds to the recipient or applicant.*

[See 42 USC 2000d-1; 20 USC 1682; 45 CFR 80.8(c).]

In addition, the termination of federal funding must be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." 42 USC 2000d-1(1).

Since the passage of the Civil Rights Restoration Act of 1987, the Department of Education's Office for Civil Rights has never withheld federal funding, nor initiated the administrative process to terminate federal funding, for an institution's failure to comply with Title IX.

THREAT OF COLLECTIONS FOR UNPAID DUES MAY VIOLATE PERA

In *Grand Blanc Clerical Ass'n*, 29 MPER 57 (2016), the Michigan Employment Relations Commission ("MERC") indicated that threats to hire a debt collector over union dues that accrue after a valid resignation violate the Public Employment Relations Act ("PERA").

The decision involved Mary Carr, an employee of Grand Blanc Community Schools and former member of the bargaining unit represented by the Grand Blanc Clerical Association ("GBCA"), and Alphia Snyder, an employee of Battle Creek Public Schools and former member of the bargaining unit represented by the Battle Creek Educational Secretaries Association ("BCESA"). The GBCA and BCESA are local affiliates of the Michigan Education Association ("MEA") and National Education Association ("NEA").

When Carr became a member of the GBCA, she signed a "Continuing Membership Application," agreeing to join the GBCA and authorizing the school district to deduct union dues from her paycheck. The membership application provided, "Membership is continued unless I reverse this authorization in writing between August 1 and August 31 of any year." Snyder signed similar documents with her union.

On December 11, 2012, the Michigan Legislature passed Public Act 349 of 2012 ("PA 349") and gave public employees the right to refrain from union activity, including paying dues. On November 4, 2013, Carr sent a letter to the MEA to resign her membership. The MEA subsequently denied her request to resign because it was not submitted within the August window period. The MEA later notified Carr that if her 2013-2014 dues were not paid, her debt would be sent to collections. Carr then filed an unfair labor practice charge with MERC.

Snyder similarly attempted to resign her union membership and cease paying union dues. Snyder's resignation was also rejected by the MEA, as it was submitted outside the August window. Snyder filed an unfair labor practice charge.

The administrative law judge ("ALJ") concluded the unions violated PERA by refusing to accept Charging Parties' resignations. However, the ALJ refused to find the MEA's demand that Carr pay her 2013-2014 dues, or be sent to collections violated PERA.

In line with other recent decisions, MERC found Charging Parties' resignations from their respective unions sufficient to end their membership despite being asserted outside the window period. MERC explained, "where employees have a right to refrain from union activity, the union may not make rules that interfere with or restrain employees in the exercise of that right" and "[t]he enactment of [PA 349] gave Charging Parties an express right to refrain from union activity." See *Saginaw Ed Ass'n* 29 MPER 21 (2015).

With regard to the threats of collections, MERC stated, "[s]ince public employees now have the express right to refrain from union activity as employees covered by the NLRA [. . .] it is appropriate to look to NLRB decisions for guidance with respect to the right to refrain." MERC then noted, "the NLRB has repeatedly found that a union's threats to use a debt collector to collect

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MERC concluded the MEA had no legal basis to require Carr to pay dues which accrued after her resignation, stating "[i]n the absence of a valid contract requiring the payment of dues or fees, threats to hire a collection agency or to report delinquencies to a credit bureau are unlawful ways to attempt to collect dues from an employee once the employee has resigned-at-will from his or her membership."

THREAT OF COLLECTIONS FOR UNPAID DUES MAY VIOLATE PERA

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dues to which the union was not entitled from a former member unlawfully restrained or coerced the employee." MERC concluded the MEA had no legal basis to require Carr to pay dues which accrued after her resignation, and stated "[i]n the absence of a valid contract requiring the payment of dues or fees, threats to hire a collection agency or to report delinquencies to a credit bureau are unlawful ways to attempt to collect dues from an employee once the employee has resigned-at-will from his or her membership."

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MERC did not find the MEA violated PERA because MERC had not issued any decisions interpreting the changes resulting from PA 349 and interpretation of the applicable law was uncertain. MERC explained "under the circumstances of this case, we cannot find that the MEA knew or reasonably should have known that it was unlawful to attempt to collect dues that accrued after Carr resigned, since she did not resign within the designated window period." Accordingly, MERC's order did not address the MEA's threat to hire a debt collector, but MERC did warn, "such a threat, if made in the future and established by substantial evidence, will be considered a violation of [PERA]."

FOURTH CIRCUIT ALLOWS TRANSGENDER STUDENT TO PROCEED WITH TITLE IX LAWSUIT

The Fourth Circuit Court of Appeals recently allowed a student to proceed with his Title IX lawsuit based on discrimination because of his status as a transgender student. *GG v Gloucester County School Board*, Docket No 15-2056 (CA 4, 2016). The Fourth Circuit is the first federal appellate court to allow a Title IX suit to proceed on this theory.

In the case, the student's biological sex was female but his gender identity was male. GG had legally changed his name, gone through hormone therapy, and lived all aspects of his life as a boy, but he had not had sex reassignment surgery. School officials initially permitted GG to use the boys' restroom. The use of the boys' restroom, however, "excited the interest of others in the community." The Gloucester County School Board later prohibited GG from using a bathroom or locker room other than the facility corresponding to GG's biological gender. The Gloucester County School Board's prohibition led to the litigation.

The Fourth Circuit examined federal regulation 34 CFR 106.33, which states that schools may provide "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." The Fourth Circuit determined that this regulation was ambiguous as to whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. Consequently, it gave deference to the US Department of Education's interpretation of the regulation, which states schools are required to allow transgender students to use restrooms and locker rooms that are consistent with their gender identities.

Given the above, the Fourth Circuit reversed the lower court's dismissal of GG's Title IX claim. It also ordered the lower court to reconsider GG's request for a preliminary injunction which would allow GG to use the boys' restroom during the pendency of his lawsuit.

While the Fourth Circuit's decision is not binding on Michigan school districts, it offers the first federal appellate guidance on the application of Title IX to transgender students. The school district is expected to appeal to the Supreme Court decision.

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2016-2017 TEACHER AND ADMINISTRATOR EVALUATION REQUIREMENTS

As the 2015-2016 school year comes to an end, administrators, teachers, and board members should begin thinking about the teacher and administrator evaluation requirements that become effective in the 2016-2017 school year. Public Act 173 was enacted in 2015 and amended the Revised School Code. Some amendments were effective immediately; others over time. For the 2016-2017 school year, school districts, intermediate school districts ("ISDs"), and public school academies ("PSAs") must:

- Adopt evaluation tools for both teachers and administrators;
- Post certain information about the evaluation tool on their websites;
- Train teachers, evaluators, and observers on the evaluation tool; and
- Conduct classroom observations so that at least one per year is unscheduled, at least one per year is done by the school administrator responsible for the teacher's performance evaluation, and the teacher is provided feedback within 30 days of each observation.

ADOPT EVALUATION TOOLS FOR TEACHERS AND ADMINISTRATORS

By the beginning of the 2016-2017 school year, school districts, ISDs, and PSAs are required to adopt and implement one of the state-approved evaluation tools, a modified state-approved tool, or a local evaluation tool for both teachers and administrators. The Michigan Department of Education ("MDE") is tasked with establishing and maintaining a list of state-approved evaluation tools for teachers and administrators. MDE has approved these tools:

For Teachers:

1. Charlotte Danielson's Framework for Teaching;
2. The Marzano Teacher Evaluation Model;
3. The Thoughtful Classroom; and
4. 5 Dimensions of Teaching and Learning.

For Administrators:

1. The Michigan Association of School Administrators ("MASA") School ADvance Administrator Evaluation Instrument; and
2. The Reeves Leadership Performance Rubric.

POST INFORMATION ABOUT THE EVALUATION TOOL ON WEBSITE

Beginning in the 2016-2017 school year, school districts, ISDs, and PSAs are required to post the following information on their websites, for both the teacher and administrator evaluation tools:

1. The research base for the evaluation framework, instrument, and process. For modified tools, an assurance that the modification does not compromise the validity of the research base.
2. The identity and qualifications of the author(s). For modified tools, the identity and qualifications of a person with expertise in teacher evaluations who has reviewed the modified tool.
3. Evidence of reliability, validity, and efficacy, or a plan for developing that evidence. For modified tools, an assurance that the modifications do not compromise the reliability, validity, or efficacy of the evaluation tool or process.
4. The evaluation frameworks and rubrics with detailed descriptors for each performance level on key summative indicators.
5. A description of the processes for:
   - Conducting classroom observations
   - Collecting evidence
   - Conducting evaluation conferences
   - Developing performance ratings
   - Developing performance improvement plans
6. A description of the plan for providing evaluators and observers with training.

PROVIDE TRAINING ON THE EVALUATION TOOL

Beginning with the 2016-2017 school year, school districts, ISDs, and PSAs are required to train teachers, evaluators, and observers on the evaluation tool(s) used by the district in its performance evaluation system. Teachers must be trained on how the evaluation tool is used, while the evaluators and observers must receive training on how to use the teacher and administrator evaluation tools.

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2016-2017 TEACHER AND ADMINISTRATOR EVALUATION REQUIREMENTS (CONTINUED FROM PAGE 5)

A school district, ISD, or a consortium of school districts may train the individuals being evaluated on how the evaluation tool is used. With respect to evaluators and observers, a school district, ISD, or PSA must ensure that training is provided by a consultant on that evaluation tool, an individual who has been trained to train others in the use of the evaluation tool(s), or another individual with expertise, which may include a school district, ISD, or consortium.

ADDITIONAL CRITERIA FOR CLASSROOM OBSERVATIONS

The Revised School Code requires at least two classroom observations each school year, unless a teacher has received a rating of effective or highly effective on his or her two most recent annual year-end evaluations. Beginning with the 2016-2017 school year, the school administrator responsible for the teacher's performance evaluation must conduct at least one of the observations and at least one of the classroom observations must be unscheduled. Also starting in the 2016-2017 school year, the teacher must be provided with feedback within 30 days after each observation.

Beginning with the 2016-2017 school year:

- ***At least 1 classroom observation must be unscheduled;***
- ***The school administrator responsible for the teacher's performance evaluation must conduct at least 1 observation; and***
- ***A school district must provide teachers feedback within 30 days after each observation.***

NOVEMBER ELECTION DATES & DEADLINES

Candidates planning to run for their local school board in the election on November 8, 2016, **must** file an Affidavit of Identity and a nonpartisan nominating petition or $100 nonrefundable fee with the county clerk's office by 4:00 p.m. on July 26, 2016.

DEADLINE DATE	ACTION REQUIRED
By 4:00 p.m., July 26, 2016	Local school board candidates planning to run in the November 8, 2016 election must file, with the county clerk, an Affidavit of Identity; and a nonpartisan nominating petition or a $100 nonrefundable fee.
By 4:00 p.m., July 29, 2016	Deadline for local school board candidates to withdraw from the election.
October 3, 2016	Last day to publish and post notice of the voter registration deadline.
October 10, 2016	Last day to register to vote.
November 1, 2016	Last day to publish and post notice of the time and place of the election. Any proposals must appear in the notice as they will appear on the ballot.
By 2:00 p.m., November 5, 2016	Deadline for electors to apply for an absentee ballot.
November 8, 2016	**ELECTION DATE**
By November 14, 2016	County Board of Canvassers meet and certify election results.

NEW RULE WILL ENTITLE OVER 4 MILLION MORE EMPLOYEES TO OVERTIME COMPENSATION

The United States Department of Labor has published a rule updating overtime regulations effective December 1, 2016. The rule will substantially increase the number of employees who are entitled to overtime compensation under the Fair Labor Standards Act (the "FLSA").

Under the FLSA, an employer generally must pay overtime wages to its employees who work more than 40 hours in one workweek. Certain employees are exempt from the overtime requirements of the FLSA. Generally, an employee is exempt if he or she is "employed in a bona fide executive, administrative, or professional capacity." To qualify as an exempt executive, administrative, or professional employee, an employee must be compensated on a salary basis, at a minimum rate. Currently the minimum rate is not less than $455 per week, or $23,600 per year. To be exempt, these employees must also satisfy the job duties test, which was not changed by the new regulation.

The new regulation more than doubles the minimum compensation requirement. Beginning December 1, 2016, a full-time employee will only qualify as an exempt executive, administrative, or professional employee if he or she is paid at least $47,476 annually, or $913 per week. In other words, most employees earning less than $47,476 annually will be entitled to overtime compensation. The new regulation allows employers to use nondiscretionary bonuses and incentive payments, like commissions, to satisfy up to 10% of the new standard salary level. This minimum salary level will be updated every three years, based on the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region.

It is important to note that the new rule will not impact elementary and secondary school teachers. While the FLSA regulations expressly include employees with a primary duty of teaching as exempt professional employees, the regulations also provide that the compensation requirements do not apply to employees engaged as teachers. The Act's definition of teachers includes those who teach kindergarten, nursery school, gifted or disabled children, skilled and semi-skilled trades, driver's education, home economics, and vocal or instrumental music.

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