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.

TEACHER'S RIGHT OF RECALL LIMITED EVEN IF QUALIFIED FOR POSITION

In July 2017, the Michigan Court of Appeals held that a tenured teacher who was laid off in one position was not entitled to recall in a different position for which she was qualified, but for which she had no performance evaluation ratings.[1] The Court found that the teacher was not entitled to relief under Section 1248 of the Revised School Code (the "Code") or under the Teachers' Tenure Act (the "TTA").

In 2014, the Southfield Board of Education (the "Board") laid off Velma Smith, a high school technology teacher who was a tenured employee of the school district for 19 years. Smith taught "PLATO," an online remedial education course at Southfield Regional Academic Campus. She was rated "highly effective," but was laid off when the Board eliminated that position.

After she was laid off, Smith applied twice for a part-time technology position at Birney Middle School for which she was certified and qualified. She was not hired. Instead, each time the same position opened, an external candidate, whose effectiveness was unknown to the school district, was hired. Smith held the same position at Birney Middle School during the 2010-2011 school year, before the Board's performance evaluation system was implemented. Thus, she had not established a rating in that position.

Smith claimed the school district violated the TTA by failing and/or refusing to recall her to positions for which she was certified and qualified to teach. Smith asserted the district deprived her of her vested property right to continuous employment, pursuant to the TTA, without due process of law. Smith also asserted the school district violated Section 1248—which requires recall and rehire decisions to be based on retaining effective teachers—by failing to hire her for the Birney position, given her recent highly effective ratings and the decision to instead hire external candidates with no performance evaluation ratings.

As to Smith's claim under the TTA, the Court rejected the idea that Smith had a due process right to recall. Smith's property interest in employment was pursuant to the TTA, and therefore defined by the TTA. The Court noted the TTA governs improper discharge or demotion, but no longer governs teacher layoff and recall. The latter are governed by Section 1248. The Court further noted that it has long been established under Michigan law that a tenured teacher is not given any protection of his or her employment from a bona fide reduction in personnel. The Court reiterated that layoff due to a necessary reduction in personnel does not qualify as a dismissal or discharge and therefore the Code, and not the TTA, governs layoffs and Smith's claim.

As to Smith's claim under Section 1248, the Court reasoned that Smith did not obtain an effectiveness rating for the Birney position when she held it in the 2010-11 school year. The Court held that the Board was not required to consider Smith's highly effective rating at the Southfield Regional Academic Campus against the rating of other candidates in competition for a substantially different position at Birney Middle School:

> ***Nothing in the language of § 1248 suggests that a teacher's effectiveness evaluation in teaching one subject requires that teacher's recall or rehire to teach a different subject. Indeed, several of the factors on which personnel decisions "shall be based" are position specific. Further, to interpret § 1248 as requiring a school district to recall or rehire a teacher to a specific position, for which she may be qualified but has not been proven effective, is contrary to the purpose of the 2011 Legislative Amendments.***

The Court's holding may have important implications for school districts making recall decisions following layoffs. Pursuant to the Court's decision, a teacher's history of effective or highly effective performance evaluation ratings is irrelevant when considering the teacher's effectiveness in a "substantially different" position within the school district, even if the teacher is otherwise qualified for the position.

[1] *Southfield Ed Ass'n v Southfield Pub Schs*, __ Mich __ App (2017).

SCHOOL DISTRICT SUCCESSFULLY CHALLENGES CONSORTIUM TEACHERS' ELECTION PETITION

Collins & Blaha, P.C. attorneys Jeremy D. Chisolm and Seth A. Filthaut achieved a favorable result for their client, Carman-Ainsworth Community Schools, following a hearing before a Michigan Employment Relations Commission ("MERC") Administrative Law Judge ("ALJ"). The hearing was held after the Michigan Education Association ("MEA") filed a petition for a self-determination election with MERC. The MEA petitioned to accrete a group of alternative education teachers, who teach in two alternative education high schools operated by the Bendle/Carman-Ainsworth Consortium ("Consortium"), into the unit of teachers who teach in Carman-Ainsworth Community Schools ("Carman"). In 2013, Carman became the fiscal agent of the Consortium and took responsibility for the day-to-day operation of the Consortium programs.

The "Consortium Rule," provides that "[w]here the consortium operates as a distinct entity and its member districts share responsibility for its operations" the consortium is the employer under PERA and MERC will not include consortium employees in bargaining units of employees of any of the member districts.

MERC is often reluctant to deny election petitions, as it has explained that the "primary objective is to constitute the largest bargaining unit which . . . includes within a single unit all employees sharing a community of interest." *County of Macomb*, 17 MPER 35 (2004). The MEA asserted the alternative education teachers in question shared a community of interest with Carman-Ainsworth's teachers' unit. In its decision, MERC stated:

> [i]t is well established that the presumptively appropriate bargaining unit in a public school district includes all teaching personnel and nonsupervisory professional employees, including adult education teachers, teachers of enrichment classes, teachers who are required by law to be certified, and teachers who are not required by law to be certified and/or are not covered by the Michigan Teacher Tenure Act.

However, relying upon a theory untested since the 1990s, Mr. Chisholm and Mr. Filthaut successfully argued that the alternative education teachers were *not* employees of Carman, but rather employees of the Consortium. The "consortium rule," relied upon by Carman's counsel, provides that "[w]here the consortium operates as a distinct entity and its member districts share responsibility for its operations" the consortium is the employer under PERA and MERC will not include consortium employees in bargaining units of employees of any of the member districts.

The MEA asserted that since taking over as fiscal agent, Carman was the employer of the alternative education teachers in question. Upon taking over as fiscal agent, individuals who had been teaching in the Consortium programs had to apply, be interviewed, and complete new employment documentation as Carman employees. According to the MEA, whether or not a Consortium agreement was technically in effect, the Consortium effectively ceased to exist. MERC however, rejected the MEA's argument, stating:

> We conclude that there is not enough evidence in this record to support a finding that the alternative education program is no longer controlled jointly by a consortium consisting of Bendle and Carman-Ainsworth, but is now operated solely by Carman-Ainsworth.

For this reason, MERC found the Consortium the employer of the alternative education teachers under PERA and held that a unit consisting of those teachers and Carman-Ainsworth teachers would not be appropriate.

SCHOOL DISTRICTS REQUIRED TO ADOPT RESTRAINT AND SECLUSION POLICY CONSISTENT WITH NEW LAW

In December 2016, the Michigan Legislature enacted legislation restricting the use of seclusion and restraint in schools. The new legislation allows for use of seclusion and restraint only in emergency situations, and prohibits some types of seclusion and restraint even under emergency circumstances. The legislation requires school districts, intermediate school districts, and public school academies to adopt and implement a local policy no later than the beginning of the 2017-2018 school year that is consistent with the new legal requirements, which are discussed below.

DEFINITION AND APPROPRIATE USE OF SECLUSION

Seclusion is the confinement of a student in a room or other space from which the student is physically prevented from leaving. Under the law and the Michigan Department of Education ("MDE") policy only emergency seclusion, which provides an opportunity for a student to regain self-control while maintaining the safety of the student and others, is permitted.

School personnel must continually monitor the student who is being secluded and the room where the seclusion is taking place must:

- comply with state and local fire and building codes;
- provide adequate space, lighting, and ventilation;
- allow staff to adequately observe the student;
- provide for the safety and dignity of the student;
- make it possible for the student to leave if staff members have left the area or are incapacitated; and
- not be locked.

DEFINITION AND APPROPRIATE USE OF RESTRAINT

Restraint means an action that prevents or significantly restricts a student's movement. Under the new law, the only type of restraint allowed is physical restraint in emergency situations, or situations in which a student's behavior poses imminent risk to the safety of the individual student or to the safety of others. All other forms of restraint, including mechanical, chemical, and prone restraint, are prohibited. Emergency physical restraint may not be used in place of appropriate less restrictive interventions.

GENERAL PROCEDURES FOR THE USE OF SECLUSION OR RESTRAINT

Both seclusion and restraint must be performed in a manner that is safe, appropriate, and sensitive to the individual characteristics of the child. Staff must take into account the severity of the student's behavior, as well as the student's chronological and developmental age, physical size, gender, physical condition, medical condition, psychiatric condition, and personal history.

Any instance of emergency seclusion or restraint requires school staff to call key identified personnel (those individuals who receive certain types of mandatory training) for help from within the school building immediately at the onset of an emergency situation, unless school personnel believe that diverting attention toward calling for help would increase the risk to the student's or others' safety.

Emergency seclusion or restraint should not be used longer than necessary to allow a student to regain control of his or her behavior, which the Revised School Code has stated is generally no longer than the time limits set forth in the table below:

GRADE LEVEL	SECLUSION	RESTRAINT
Elementary School	15 minutes	10 minutes
Middle and High School	20 minutes	10 minutes

If a student is restrained or secluded longer than the time limits set forth above, additional staff support and written documentation are required.

When a student is restrained or in seclusion, staff members are required to:

- Continually observe the student for indications of physical distress;
- Seek medical assistance if there is concern;
- Document observations;

SCHOOL DISTRICTS REQUIRED TO ADOPT RESTRAINT AND SECLUSION POLICY CONSISTENT WITH NEW LAW

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- Ensure that there is someone present at all times who can communicate with the student;
- Document each instance of emergency seclusion or restraint and give the documentation to both building administration and the affected student's parent or guardian; and
- Make reasonable efforts to debrief and consult with the parents and the student, as appropriate, in determining future actions.

If the student shows a pattern of behavior that poses a substantial risk of creating an emergency situation in the future that would require emergency seclusion or restraint, school staff should develop a functional behavior assessment and emergency intervention plan that includes input from the parent and, if appropriate, the student, to address these issues.

School districts are required to provide comprehensive training programs that include awareness training for all school staff who have regular contact with students, and comprehensive training for key identified personnel. Substitute teachers must also be informed of the emergency seclusion and restraint procedures.

LEGISLATURE GRANTS SCHOOL DISTRICTS MORE DISCRETION IN STUDENT DISCIPLINE

Changes to the Revised School Code effective August 1, 2017 require school boards or their designees to consider a variety of factors before suspending or expelling a student for an offense listed in the Revised School Code. These seven factors are:

1. **The student's age;**
2. **The student's disciplinary history;**
3. **Whether the student has a disability;**
4. **The seriousness of the violation or behavior;**
5. **Whether the violation threatened the safety of students or staff;**
6. **Whether restorative practices will be used to address the violation; and**
7. **Whether lesser intervention would properly address the violation.**

Each of these seven factors must be addressed before suspending or expelling a student for an offense listed in section 1310, 1311(1), 1311(2), or 1311a of the Revised School Code. Those offenses are:

- Physical assault of another student at school if the student is in grade 6 or above;
- Gross misdemeanor;
- Persistent disobedience;
- Possession of a dangerous weapon, *other than a firearm*, in a weapon-free school zone;
- Arson in a school building or on school grounds;
- Criminal sexual conduct in a school building or on school grounds;
- Physical assault against a school employee, volunteer, or contractor;
- Verbal assault against a school employee, volunteer, or contractor; and
- Making a bomb threat or similar threat directed at a school building, school property, or a school-related event.

LEGISLATURE GRANTS SCHOOL DISTRICTS MORE DISCRETION IN STUDENT DISCIPLINE

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NEW DEFINITIONS FOR "SUSPEND" AND "EXPEL"

The new legislation also added definitions of "suspend" and "expel" to the Revised School Code. Under the new legislation, "suspend" means "to exclude a pupil from school for disciplinary reasons for a period of fewer than 60 school days," while "expel" means "to exclude a pupil from school for disciplinary reasons for a period of 60 or more school days." The seven factors listed above must be applied before suspending or expelling a student for any time period. Additionally, there is a rebuttable presumption that an expulsion or suspension of more than 10 days is *not* justified unless the board can demonstrate that it considered each of the seven required factors.

POSSESSION OF A WEAPON

Because of the heightened scrutiny given when a student possesses a firearm at school, the seven factors are not considered when a student possesses a firearm in a weapon-free school zone. The four-factor test previously established for such cases is still used. The new legislation did, however, add a new rebuttable presumption that a student should not be expelled for possession of a dangerous weapon, *including a firearm*, if:

1. The student has no history of suspension or expulsion; *and*
2. The school board or its designee determines in writing that at least 1 of the following conditions has been established in a clear and convincing manner:
    a. The object or instrument possessed by the pupil was not possessed by the pupil for use as a weapon, or for direct or indirect delivery to another person for use as a weapon.
    b. The weapon was not knowingly possessed by the pupil.
    c. The pupil did not know or have reason to know that the object or instrument possessed by the pupil constituted a dangerous weapon.
    d. The weapon was possessed by the pupil at the suggestion, request, or direction of, or with the express permission of, school or police authorities.

RESTORATIVE PRACTICES

The new legislation also requires school boards to consider using restorative practices as an alternative or in addition to suspension or expulsion. The new legislation suggests that restorative practices should be a school board's first choice to remedy interpersonal conflicts, bullying, verbal and physical conflicts, theft, property damage, class disruption, harassment, and cyberbullying. The legislation defines restorative practices as "practices that emphasize repairing the harm to the victim and the school community caused by a pupil's misconduct."

To schedule a training or for additional information about the new legal requirements related to student discipline, feel free to contact Collins & Blaha, P.C.

Restorative practices are practices that emphasize repairing the harm to the victim and the school community caused by a pupil's misconduct.

WHO QUALIFIES AS A FAMILY MEMBER UNDER THE FAMILY MEDICAL LEAVE ACT?

School district employees often request leave under the Family Medical Leave Act ("FMLA") to care for a family member. This article addresses which family members are "qualifying family members," for whom an employee may care for during an FMLA leave. Upon request, the FMLA *requires* employers to grant eligible employees 12 weeks of cumulative or intermittent unpaid leave to care for a qualifying family member suffering from a serious health condition. An employee is eligible for FMLA leave after working for an employer for 12 months, as long as the employee has worked a minimum of 1,250 hours in the 12 consecutive months preceding the request for leave.

The law provides that an eligible employee may take FMLA leave to care for the "spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." 29 USC 2612(a)(1)(C); 29 CFR 825.122.

- For purposes of the FMLA, the federal regulations define "spouse" as a husband or wife. Husband or wife refers to the other person with whom an eligible employee entered into marriage as defined or recognized under state law. This includes common law marriages, which Michigan does not grant, but recognizes if entered into in another state.
- An individual is a "parent" if he or she is a biological, adoptive, step or foster parent, or any other individual who stood *in loco parentis*[1] when the employee was under 18 years old. "Parent" does not include a parent-in-law.
- "Son" or "daughter" means any one of the following who is under 18 years old, or who is 18 or older and "incapable of self-care"[2] because of a mental or physical disability[3] at the time that FMLA leave is to commence:
    - ◊ a biological child;
    - ◊ a step or adopted child;
    - ◊ a foster child;
    - ◊ a legal ward;
    - ◊ a child for whom the employee stands *in loco parentis*.

In order to verify familial status, employers may require an employee to provide reasonable documentation of a family relationship when requesting FMLA leave. The documentation can take the form of a statement from the employee, a child's birth certificate, a court document, etc. The employer is allowed to examine the documentation, but must return official documents to the employee upon request.

If you have any questions about whether someone qualifies as a family member of one of your employees, please feel free to contact Collins & Blaha, P.C.

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[1]Persons acting in loco parentis are those with day-to-day responsibilities to care for and financially support a child. In the case of an employee, it would be a person who had those responsibilities when the employee was a child. No legal or biological relationship is required.

[2]The federal regulations state that "incapable of self-care" means:

> *that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.*

[3]The federal regulations provide that "physical or mental disability" means "a physical or mental impairment that substantially limits one or more of the major life activities of an individual," which is further defined in the federal regulations for the Americans with Disabilities Act.

STATE IMPOSES FURTHER RESTRICTIONS ON DISCLOSURE OF STUDENT INFORMATION

In March 2017, the Revised School Code was amended to change how certain student information must be handled. The change prohibits the provision or sale of any personally identifiable information ("PII") that is part of a pupil's education records to a for-profit business entity. In defining PII, the statute refers to the definition of PII in the Family Education Rights and Privacy Act ("FERPA"), which defines PII to include a student's:

- Name;
- Address;
- Personal identifiers, such as social security number;
- Indirect identifiers, such as date or place of birth; and
- Similar information that can be linked to a specific student.

The new Michigan law includes some exceptions, including disclosure as necessary for standardized testing, educational support services, and for public school academies providing information to an educational management organization with which it has a management agreement. Additionally, the school must disclose the PII of a student upon written request by the student's parent or legal guardian.

Under the new provision, a parent or legal guardian may make a written request for information regarding the school district's distribution of their student's PII. When a written request is made, a school district must provide all of the following:

- The specific information that was disclosed to a third party;
- The name and contact information of each person, agency, or organization to which the information has been disclosed; and
- The legitimate reason that the person, agency, or organization had in obtaining the information.

The new provision also imposes stricter requirements on school districts with respect to allowing parents to opt out of disclosure of their student's directory information. As with PII, the new Michigan provision uses the FERPA definition for directory information. Under FERPA, directory information means information contained in a student's education records that would generally not be considered harmful if disclosed. Directory information includes, but is not limited to: a student's name, address, telephone number, and date of birth. Though there is a large overlap between the definitions of PII and directory information, there is some information that is considered PII but not directory information, and vice versa. For example, a student's social security number is included under the definition of PII, but is not considered directory information.

Under the new provision, a school district must meet several requirements for notifying and allowing parents to opt out of the disclosure of directory information. Specifically, a school district must:

1. Develop a list of uses/reasons directory information would be disclosed (for example, use in military or college recruiting, or in the school yearbook or school directory);
2. Develop an opt-out form that lists all of the uses from (1) and allows parents to opt out of one or more of these uses;
3. Present the opt out form within the first 30 days of the school year, and make the form available at other times upon request; and
4. Not use a pupil's directory information for any of the uses a parent has opted-out of, if an opt-out form has been signed and submitted to the school district.

Though FERPA also provides a parent with the ability to opt out of the disclosure of a student's directory information, FERPA's requirements are arguably less stringent. Under FERPA, a school district must provide a public notice to parents of their right to opt-out of having their child's directory information disclosed. The notice must include the types of information the school district has designated as directory information, the right of the parent to refuse disclosure of directory information, and the time period within which a parent must notify the school district by writing that he/she wishes to opt out of disclosure. Importantly, while FERPA requirements and exceptions cannot be undone by a state law, states may impose stricter requirements, and Michigan has chosen to do so by enacting these recent changes.

Should you have any additional questions or concerns regarding this new statutory provision, please feel free to contact Collins & Blaha, P.C..

AGREEMENT REQUIRED FOR SPECIAL EDUCATION PROGRAM FUNDING WHEN STUDENT ATTENDS PUBLIC SCHOOL ACADEMY IN NONRESIDENTIAL INTERMEDIATE SCHOOL DISTRICT

Generally, the provision of a student's special education programs and services, and the payment of the added costs of those programs and services, are the responsibility of the school district and intermediate school district ("ISD") in which the student resides. Recent changes to the state's School Aid Act clarified who is responsible for payment of a student's special education programs and services when the student is enrolled in a public school academy ("PSA") located in an ISD other than the one in which the student resides.

The new law requires a PSA that enrolls a student who:

1. resides in an ISD other than the one where the PSA is located (a nonresidential ISD); and
2. is a child with disabilities, as defined under the Individuals with Disabilities Education Act or is eligible for special education programs and services according to statute or rule,

to enter into a written agreement with the ISD in which the student resides for the purpose of providing the student with a free and appropriate public education. The agreement must include who is responsible for the payment of the added costs of special education programs and services for the pupil.

If the PSA that enrolls the student does not enter into an agreement with the student's residential ISD:

1. the PSA may not charge the student's resident ISD, or the ISD in which the PSA is located, for the added costs of the student's special education programs and services; and
2. the PSA is not eligible for any payouts based on the funding formula outlined in the residential or nonresidential ISD's plan.

Example: Public School Academy, located in ISD A, enrolls Student, who lives in School District X which is located in ISD B. Student is a child with disabilities as defined under IDEA. **Public School Academy must enter into a written agreement with ISD B and that agreement must include who is responsible for the cost of the student's special education programs and services.**

Should you have any additional questions or concerns regarding this new statutory provision, please feel free to contact Collins & Blaha, P.C.

LEGISLATURE APPROVES 5% STATE AID PENALTY FOR FAILURE TO COMPLY WITH MERIT PAY AND OTHER REQUIREMENTS

Beginning October 1, 2017, a new section of the State School Aid Act, Section 164h, will impose a 5% reduction in state aid for any school district or intermediate school district that enters into a collective bargaining agreement ("CBA") that does any of the following:

- Establishes racial or religious preferences for employees;
- Automatically deducts union dues from employee compensation;
- Is in conflict with any state or federal law regarding district or intermediate district transparency;
- Includes a method of compensation that does not comply with section 1250 of the Revised School Code, MCL 380.1250 [requiring what is commonly referred to as "merit pay"].

The new statutory provision does not add any requirements for school districts. Rather, compliance with existing laws will ensure compliance with this new section. The significance of the new statutory provision is the 5% state aid penalty imposed on school districts that enter into a CBA that violates one of the above requirements.

Questions remain regarding the enforceability of the portion of the provision that prohibits a school district from entering into a CBA that includes a method of compensation contrary to the merit pay requirements of the Revised School Code. Section 15(3)(o) of the Public Employment Relations Act ("PERA"), makes merit pay a prohibited subject of bargaining. A prohibited subject of bargaining is synonymous with an illegal subject and a contract provision embodying an illegal subject is unenforceable. See *Michigan State AFL-CIO v MERC*, 453 Mich 362 (1996). Thus, while the new law seems to require that merit pay be addressed in the CBA, PERA prohibits its inclusion of this topic in the CBA. In his transmittal letter while signing the legislation, Governor Snyder indicated, without explanation, his belief that this section was unenforceable. However, it should be noted that "[s]tatements regarding the unenforceability made in transmittal letters do not carry the force and effect of law." 2009 OAG 7225.

Please feel free to contact Collins & Blaha, P.C. for questions on this matter and assistance choosing the best course of action for your district.

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