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Deadlines for Probationary Teacher Nonrenewal Approaching Quickly

Pursuant to the Teachers' Tenure Act, school districts are required to give notice to probationary teachers if the school district does not plan on renewing the probationary teacher's contract. Different amounts of notice are required for probationary teachers who have previously achieved tenure in a different school district and probationary teachers who have never achieved tenure in another district. The Michigan Supreme Court has determined that the end of the school year for Teachers' Tenure Act purposes is June 30. Therefore, when calculating deadlines for notice of nonrenewal for a teacher hired at the beginning of a school year, the deadlines are calculated by counting back from June 30. However, if a probationary teacher was hired at a time other than the beginning of a school year, the deadlines for notice of nonrenewal must be calculated using the actual date of hire as the endpoint, not June 30.

"...the deadlines are calculated by counting back from June 30. However, if a probationary teacher was hired at a time other than the beginning of a school year, the deadlines for notice of nonrenewal must be calculated using the actual date of hire as the endpoint..."

School districts are required to provide probationary teachers who have previously achieved tenure in a different school district with 60 days' notice prior to the completion of the probationary period if the school district does not wish to renew the probationary teacher's contract[1]. Assuming that your school district hired a probationary teacher who previously achieved tenure in another district at the beginning of a school year and the probationary teacher will complete his or her probationary period at the end of this school year, **notice of nonrenewal must be provided to the teacher by May 1** if the district does not wish to renew the probationary teacher's contract.

School districts are required to provide probationary teachers who have not previously achieved tenure in a different district with 15 days' notice prior to the end of the school year if the district does not wish to renew the teacher's contract[2]. Therefore, for a probationary teacher who had not previously achieved tenure and whose anniversary date is the beginning of the school year, **notice of nonrenewal must be provided by June 15** if the district does not wish to renew the teacher's contract.

If your school district has questions about nonrenewal deadlines for probationary teachers or other aspects of the nonrenewal process, please contact Collins & Blaha, P.C. for assistance.

[1] MCL 38.92

[1] MCL 38.83(1).

MDE Issues Updated Guidance Addressing Eligibility for Additional Forgiven Time

On March 9, 2022, the Michigan Department of Education ("MDE") issued a guidance memorandum[3] temporarily amending the direction announced through a March 3 memorandum regarding the possible provision of additional forgiven time for districts that have counted professional development time toward the instructional time requirement for the 2021-22 school year.

Previously, MDE had announced that school districts would be permitted to request three additional days of forgiven time for the 2021-2022 school year in compliance with the State School Aid Act. MDE had stated that such additional days of forgiven time could only be requested after a school district had used some of its first six days of forgiven time to offset a cancellation due to the district's needs to address mental health and wellness of staff and students. However, MDE had further determined these three additional forgiven time days would not be granted to school districts who had reduced the amount of instructional time from 180 days to a lesser number using professional development under section 101 of the State School Aid Act.

"…MDE has revised its position on the use of forgiven time in combination with professional development to satisfy the instructional time requirement for the 2021-2022 school year…"

In its most recent guidance, MDE has reversed that decision and is now allowing school districts to request three additional days of forgiven time for the 2021-2022 school year even if the district had used professional development to reduce the amount of instructional days. MDE's guidance states:

> Given that some existing district contracts include professional development days as part of the 180-day-plus instructional calendar for the current school year, MDE has revised its position on the use of forgiven time in combination with professional development to satisfy the instructional time requirement for the 2021-22 school year. A district that counts professional development toward the instructional day requirement this school year ***WILL*** remain eligible for up to three additional days of forgiven time.

However, **MDE further stated that school districts should not expect the same flexibility next school year** when counting professional

[3] MDE, *Revised Forgiven Time Guidance for the 2021-2022 School Year* (March 9, 2022).

education days toward the instructional day requirement.

If your school district has questions about the instructional day requirement generally or counting professional development days toward the instructional day requirement, please contact Collins & Blaha, P.C.

MDHHS Releases Updated COVID-19 Guidance for Schools

On March 11, 2022, the Michigan Department of Education issued updated COVID-19 guidance for schools. The new guidance addresses coordination of efforts between schools and local health departments, updated isolation and quarantine guidance, and rescission of the Emergency Order that required reporting of confirmed or probable COVID-19 cases at schools.

Coordination of Efforts between Schools and Local Health Departments

In the first updated guidance document[4], MDHHS encourages school districts to "partner with and follow guidance from their local health department for the application of COVID-19 mitigation measures." However, MDHHS also notes, in pertinent part:

> **School administrators and leaders should partner with and follow guidance from their local health department for the application of COVID-19 mitigation measures, such as isolation, quarantine, and masking**, to promote healthier and safer school settings for students and staff and to support the goal of in-person, classroom-based learning for school-aged Michiganders and their families.
>
> Additionally, while local health departments are valuable partners and advisors to school districts in responding to health threats, school districts are also responsible for performing their independent legal authority to protect students who are on school property or under school supervision and control. **Schools are encouraged to consult local health departments for expertise on measures to protect the safety and**

"School administrators and leaders should partner with and follow guidance from their local health department for the application of COVID-19 mitigation measures, such as isolation, quarantine, and masking."

[4] MDHHS, *School Guidance: For School Administrator and Local Public Health Coordination* (March 11, 2022).

welfare of students, however they do not need a health department order to act. [Emphasis added.]

The MDHHS guidance further reminds school districts of the following legal requirements for schools pursuant to Michigan law:

- Providing for the **safety and welfare of students** while at school or a school sponsored activity or while en route to or from school or a school sponsored activity, pursuant to the Revised School Code. See MCL 380.11a(3)(b).

- **Reporting suspected and confirmed COVID-19 cases**, outbreaks and unusual occurrences to the local health department, pursuant to the Public Health Code. See Mich Admin Code, R 325.173(9).

- Ensuring that **employees** who (1) test positive for COVID-19, (2) display the principal symptoms of COVID-19, or (3) have had close contact with someone who has COVID-19 **do not come to work during their respective isolation or quarantine periods**, pursuant to the COVID-19 Employment Rights Act. See MCL 419.405.

- As directed by a local health officer, (1) **excluding children from school** or group programs who are symptomatic or test positive with COVID-19, a communicable disease, **during isolation periods** and (2) **excluding children who are identified as close contacts from school during quarantine periods**, pursuant to the Public Health Code. See Mich Admin Code, R 325.175(2)-(4).

- **Assisting with contact tracing** as requested by the local health department, pursuant to the Public Health Code. See Mich Admin Code, R 325.174(2).

Updated Isolation and Quarantine Recommendations

MDHHS has also issued revised quarantine and isolation guidance[5] for settings including schools "[b]ased on current conditions and low numbers of new COVID-19 cases[6]." If an individual tests positive for COVID-19 and/or displays COVID-19 symptoms (without an alternate diagnosis or negative COVID-19 test), MDHHS recommends an isolation period of 5 days, followed by 5 days of wearing a face mask around others. For individuals unwilling or unable to wear a face mask, MDHHS recommends an isolation period of 10 days.

MDHHS recommends that individuals who are exposed to someone with COVID-19 monitor for symptoms and wear a face mask around others for 10 days. MDHHS only recommends that a person quarantine at home for 10 days if (1) the exposure arises from a personal/household contact and (2) the individual exposed cannot wear a mask. A personal/household contact is defined as follows:

> Personal/Household contacts include individuals you share living spaces with, including bedrooms, bathrooms, living room and kitchens. It also includes those who live together, sleep over, carpool or have direct exposure to respiratory secretions from a

[5] MDHHS, *Isolation and Quarantine Guidance for Michiganders in Recovery Phase* (March 11, 2022).
[6] *See* MDHHS, *Press Release: MDHHS updates Isolation and Quarantine Guidance based on law COVID-19 numbers, state entering post-surge, recovery phase* (March 11, 2022).

positive individual (e.g., kissing, sharing drinks, changing diapers, etc…). This would include exposure in childcare settings for those under 2 years of age.

The Centers for Disease Control and Prevention ("CDC") have also issued guidance pertaining to isolation and quarantine that is largely similar to the guidance issued by MDHHS. Pursuant to the COVID-19 Employment Rights Act, employers must follow the CDC's guidance with respect to isolation and quarantine for employees. The CDC's most recent guidance states that individuals who are unable to wear a face mask must quarantine for 10 days regardless of the setting in which the individual was exposed to COVID-19. This differs from the MDHHS guidance which only requires such isolation if the exposure arises from a personal or household contact. As such, in order to comply with the COVID-19 Employment Rights Act, **school districts must require employees who are unable to wear a mask to quarantine for 10 days after exposure to a positive case of COVID-19 regardless of context through which the exposure occurred**.

MDHHS also states that schools can continue to implement "test to stay" strategies for individuals exposed to COVID-19, wherein a school district requires individuals to undergo regular COVID-19 testing following COVID-19 exposure using PCR, school-based antigen, or at-home testing. Pursuant to the guidance, MDHHS is also continuing to provide schools with antigen testing supplies free of charge through the MI Safer Schools Testing program.

Rescission of Emergency Order Requiring Reporting of Confirmed and Probable COVID-19 Cases

As part of the updated guidance, MDHHS has also rescinded its Emergency Order requiring schools to report confirmed and probable cases of COVID-19[7]. This Emergency Order was issued on October 6, 2020, and had required (1) local health departments to notify schools of School Associated COVID-19 cases and (2) schools to post public notice of confirmed and probable School Associated COVID-19 cases on the school's website.

However, this Emergency Order has been rescinded in its entirety and, therefore, **schools are no longer required to post information regarding confirmed and probable COVID-19 cases on their websites**. However, pursuant to the Public Health Code, **schools still have an obligation to assist with contact tracing as requested by the local health department** as discussed in the first section of this article.

If your school district has questions regarding current MDHHS guidance regarding COVID-19 for school districts, please contact Collins & Blaha, P.C.

[7] MDHHS, *Rescission of Emergency Order* (March 11, 2022).

MDE Releases Guidance on Continued Use of Contingency Learning Plans

The Michigan Department of Education's Office of Special Education recently released guidance[8] recommending the continued of contingency learning plans ("CLPs") for students with Individualized Education Programs ("IEPs"). A CLP is a supplement to the IEP — developed in collaboration with the parent — that provides for how a student will receive a free appropriate public education ("FAPE") when in-person implementation of a student's IEP is not possible due to school closures, quarantines, or other pandemic-related circumstances.

School districts are not required to develop CLPs pursuant to state or federal law; however, MDE notes that the development of a CLP is a "best practice" during the COVID-19 pandemic. The CLP is intentionally designed to be implemented for COVID-19 related issues and is to be implemented **only "when the district is not able to provide the primary instructional delivery approach in the educational setting" provided for in a student's IEP**. Specifically, MDE's guidance explains that "CLPs are used for pandemic purposes only and should not be used to address behaviors and disciplinary matters."

Implementation of a CLP could be triggered by student illness due to COVID-19; symptoms of long COVID; student quarantine due to exposure to COVID-19; or school, district, or program closure due to COVID-19. MDE notes that an IEP and CLP operate in tandem and allow special education programs, services, and supports to be "provided seamlessly" during the pandemic.

"MDE guidance indicates that a parent could file a due process complaint against a district for the failure to develop or implement a CLP"

In addition, while MDE notes that a district is not required to develop a CLP, MDE guidance indicates that a parent could file a due process complaint against a district for the failure to develop or implement a CLP, if the failure to develop or implement the CLP results in a denial of FAPE to the student. Finally, MDE also encourages districts to develop CLPs for students who are suspected of having a disability but who have not yet been found eligible under IDEA.

If your district has any questions regarding the use of CLPs, please contact Collins & Blaha, P.C.

[8] MDE, *Guidance on the Recommended Use of Contingency Learning Plans* (March 2022).

Sixth Circuit Court of Appeals Addresses Standard for Deliberate Indifference in Teacher-to-Student Title IX Harassment Cases

In *Wamer v University of Toledo*[9], the Court of Appeals for the Sixth Circuit considered a Title IX deliberate-indifference claim against a university involving teacher-student harassment. The Court of Appeals considered whether a plaintiff must show that harassment continued after a school has actual knowledge of prior harassment in order to successfully bring a claim for deliberate indifference. Ultimately, the Court determined that in cases of teacher-on-student harassment, a plaintiff could successfully plead a deliberate indifference claim if the plaintiff could either demonstrate that additional harassment continued after initially reporting harassment to the school, or could demonstrate an objectively reasonable fear of further harassment that deprived the plaintiff of educational opportunities available to other students.

"In cases of teacher-to-student harassment, plaintiffs could successfully plead... if the plaintiff could either demonstrate that additional harassment continued after reporting... or could demonstrate an objectively reasonable fear of further harassment that deprived the plaintiff of educational opportunities."

In *Wamer*, the plaintiff had reported a professor for sexual harassment after her professor had engaged in behavior such as placing his arm on her and resting his hand on her chest, leaning his head against the plaintiff and placing his hand on the plaintiff's thigh, and mentioning that he used to go into empty restrooms at the state park where the plaintiff worked in order to have sexual relations with women. The plaintiff reported the conduct to the university's Office of Title IX and Compliance. The university requested that the plaintiff attend an in-person interview, but the plaintiff refused, stating that she was uncomfortable doing an in-person interview as she may run into the professor while on campus.

Three weeks after the plaintiff had submitted her complaint, the university closed its investigation and stated that it would not be taking any action. A faculty member assisting the plaintiff filed another complaint on her behalf against the professor, and the university placed the professor on administrative leave due to the complaint. The professor then attempted to smear the plaintiff's reputation by disclosing that she was the individual who reported him, publicizing her grades, and accusing her of lying. As a result of the university's second investigation, the professor was found to have engaged in sexual misconduct as alleged in the plaintiff's first complaint and termination was recommended. Still, the plaintiff filed suit against the university arguing that the university's deliberate indifference had unreasonably interfered with her participation in and enjoyment of the university's educational programs and activities. The federal district court granted summary disposition for the university, and the plaintiff appealed.

[9] 27 F4th 461 (CA 6, 2022).

The Sixth Circuit Court of Appeals reversed, finding that summary disposition was improperly granted for the university. The Court of Appeals first acknowledged that precedent had established a requirement for a plaintiff's harm to be traceable to harassment that occurred after a school has actual knowledge of prior harassment in order for a plaintiff to succeed on a deliberate indifference claim. However, the Court of Appeals specified that this requirement had only been found for instances of **student-on-student harassment**.

The Court of Appeals concluded that this requirement does not apply to teacher-on-student harassment such as that experienced by the plaintiff. The Court reasoned that when a teacher sexually harasses a student, it can more easily be presumed that the harassment would undermine and detract from the student's educational experience because teachers are at the core of a student's access to and experience of education. Thus, in cases of teacher-on-student harassment, the Court found that there is no requirement for a plaintiff to demonstrate that harassment continued after the school had actual knowledge of prior harassment in order to bring a deliberate indifference claim. Instead, the Court found that a plaintiff can satisfy the test for a deliberate indifference claim by demonstrating the following:

> (1) [F]ollowing the school's unreasonable response (2) (a) the plaintiff experienced an additional instance of harassment or (b) an objectively reasonable fear of further harassment caused the plaintiff to take specific reasonable actions to avoid harassment, which deprived the plaintiff of the educational opportunities available to other students. [*Id.* at 471.]

Using this framework, the Court of Appeals concluded that the plaintiff had adequately alleged that the university had unreasonably prematurely closed its investigation after being made aware of harassment. Moreover, the Court agreed that as a result of the university's unreasonable response, the plaintiff took reasonable steps to avoid further harassment — including switching her major and enrolling in online classes to avoid encountering her harasser — which deprived the plaintiff of educational opportunities offered by the university. As such, the Court of Appeals concluded that the plaintiff had sufficiently pleaded a claim for deliberate indifference and reversed the lower court's grant of summary disposition for the university.

If you or your school district have questions regarding claims of deliberate indifference under Title IX or other questions regarding Title IX compliance, please contact Collins & Blaha, P.C.

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, Collins & Blaha, P.C. will represent our clients' interests competently and with the hands-on approach that a specialized firm can provide.

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