# COLLINS & BLAHA, P.C.
## ATTORNEYS AT LAW

# EDUCATION LAW UPDATE

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# City Employee Did Not Have Right to Publish Critical Social Media Posts

A former police officer in Maryville, Tennessee, did not have a First Amendment right to make social media posts critical of the sheriff, the United States Court of Appeals for the Sixth Circuit recently held. In *Kirkland v City of Maryville*, 54 F4th 901 (CA 6, 2022), the court reasoned that the city and its police department's interests in maintaining a good working relationship with the sheriff's department trumped the former officer's free-speech rights.

Shaina Kirkland worked as a patrol officer with the City of Maryville's police department. Kirkland made several Facebook posts criticizing the sheriff and his supporters. Later, she attended a sheriff's office training event, where she nearly ran over a sheriff's deputy and refused to shake the hand of an investigator of the sheriff's office. After the event, the sheriff banned Kirkland from future training events. She thereafter complained and filed a grievance of sex discrimination within the police department. Kirkland was suspended and then shared and commented negatively on an unflattering article about the sheriff on social media. Kirkland was terminated, and she sued the city, alleging a violation of the First Amendment and alleging that suspension without pay and her termination were unlawful retaliation for complaints of sex discrimination.

With respect to Kirkland's First Amendment claim, the court held in favor of the city because her speech interest did not outweigh the government's interest in "promoting the efficiency of the public services it performs through its employees." The city provided that it had terminated Kirkland because her Facebook post threatened to undermine the city police department's working relationship with the county sheriff's office. The court stressed that the city police department and the sheriff's office coordinate various training and investigatory functions, and that the officers may have to rely on one another in life-threatening situations. The court provided that Kirkland's Facebook post, which was the latest escalation in a persistent dispute between her and the sheriff's office, risked undermining the relationship.

> ***In* Kirkland*... the court reasoned that the city and its police department's interests in maintaining a good working relationship with the sheriff's department trumped [a] former officer's free-speech rights.***

With respect to Kirkland's retaliation claim, the court held in favor of the city because the city articulated a legitimate, nonretaliatory reason for the adverse action, and because Kirkland could not demonstrate that the city's justification was pretextual.[1] The court provided that Kirkland was terminated because of her inappropriate Facebook post, a legitimate reason because of the city's interest in preserving the public's trust and its relationship with the sheriff's office outweighed Kirkland's First Amendment interest in making the post. Finally, the court found that Kirkland failed to demonstrate

[1] In the employment law context, pretext means a reason for an action that is false. It is essentially something that is covering up an employer's true actions or motives.

pretext because the city's reasons for suspending and terminating her were contemporaneously documented and consistent.

While Kirkland's free speech rights were outweighed by public interests in this case, school districts should not forget the Teacher Tenure Commission's recent decision in *Ziel v Romeo Community Schools*, TTC 21-9 (2022), where the discharge of a tenured teacher for a social media post criticizing a community organization was overturned. That employee's communication was made in a private Facebook group, in her capacity as a private citizen, and fell under the protection of the First Amendment. Further, the school district's justifications for discharging the teacher were found to be weak compared to the "significant societal and individual value of [the teacher's] political speech."

**If you or your school district have any employment-related issues or questions about an employee's social media behavior, contact us at Collins & Blaha, P.C.**

# FOIA Basics and Best Practices

The Freedom of Information Act, commonly known as FOIA, is a law that gives any person the right to request federal agency records. Michigan also has its own FOIA, MCL 15.231 *et seq*, which provides that all persons "are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees[.]" MCL 15.231(2). Many of our clients have experienced an increase in FOIA requests. This article will address some common FOIA questions we receive and provide guidance on how to respond to FOIA requests.

## RECEIVING REQUESTS

As a public body, a school is required to respond to *all* FOIA requests unless the requester is incarcerated in a state or local correctional facility or the request was submitted without the requester's required contact information. Under Michigan law, FOIA requests must contain the requester's full name, mailing address, and phone number or email address.

Importantly, a FOIA request is not void merely because it was sent to an incorrect or non-functioning email address or because it was captured in a school's spam or junk mail folder. In either situation, the request is not considered received until one business day after the school first becomes aware of the request.

Still, a school's FOIA procedures and guidelines should indicate how often someone will review the school's spam and junk email folders.

## RESPONSIVE DOCUMENTS & EXEMPTIONS

The Michigan FOIA requires the disclosure of all public records, except to the extent that they fall within a statutorily recognized exemption or are not considered public records. Some common examples of the types of records that may be subject to disclosure as public records include electronic records such as email, data saved on a computer, digital photographs, and physical records such as minutes of open meetings, officials' voting records, employee discipline investigation information, and documents that implement or interpret laws, rules, or policies, including, but not limited to, guidelines, manuals, and forms with instructions, adopted or used by the agency.

The legislature and courts have designated certain records as not being public records under FOIA. Notably, a record that a public body prepares, owns, uses, retains, or possesses

not in the performance of an official function is not a public record. For example, a personal email not transmitted in performance of an official function is not a public record. It should be noted however, that personal email could become a public record if it relates to one of the public body's official functions.

Other public records are statutorily exempted from disclosure and are listed under MCL 15.243. This can include exempted information within a public record that can be redacted or removed. For school districts, an example of statutorily exempted information can include information protected by the Family Educational Rights and Privacy Act or the Bullard-Plawecki Employee Right to Know Act.

**RESPONSE TIMELINE**

Upon legal date of receipt of a FOIA request, the public body has 5 business days to respond. If needed, however, the public body may also send a written notice extending the time to respond by 10 additional business days. Under FOIA, any weekday, other than a legal holiday, is a business day, regardless of whether a school is open for business (e.g., vacations or closures). Schools do not need to seek a requester's permission to exercise the 10-business-day extension. The extension notice must specify the reason for the extension and the date by which the response will be issued. A school cannot extend time more than once for each FOIA request.

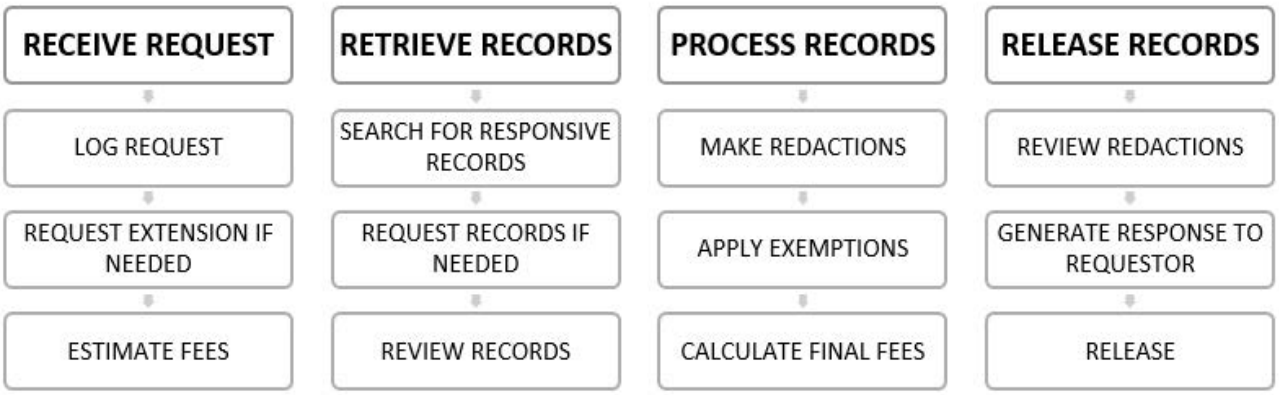
**FEES**

A public body may charge a fee for the cost of the search, examination, review, and copying of the information; for the cost of separation of exempt from nonexempt information; and for mailing costs. However, a fee can only be charged for those costs *if* the failure to charge a fee for that request would result in unreasonably high costs to the public body, and the public body specifically identifies the nature of these unreasonably high costs. Additionally, a school may charge a fee only if its FOIA procedures and guidelines (including the itemized fee form) are posted on the school's website.

**NONCOMPLIANCE**

Fines may be imposed for intentional FOIA violations or for acting in bad faith when processing a FOIA request. An improper denial of a FOIA request could result in a lawsuit, fines, attorney's fees, and punitive damages.

**Districts should regularly review their FOIA procedures and guidelines to ensure that their schools have the required information posted on their websites. If you have questions about whether your school's FOIA procedures and guidelines are legally compliant, or if you need help fulfilling a FOIA request, please contact us at Collins & Blaha, P.C.**



# New Case Sets Precedent for School Liability in Cases of Student-on-Student Harassment

Recently, in a case of first impression, the Michigan Court of Appeals held that schools do have some control over the behavior of students "such that they may be vicariously liable for hostile educational environment discrimination arising from student-on-student harassment." See *Doe v Alpena Pub Sch Dist*, Case No 359190, 2022 WL 17868146 (Mich App, 2022).

In *Alpena Public School District*, during fourth grade, Jane Doe, the plaintiff and minor student, experienced several incidents of unwanted, inappropriate touching by another minor student, John Doe, in her class. Each incident was reported to school officials who disciplined John by giving him out-of-school suspension. Further, upon returning to school, John was assigned to a different classroom, placed in a separate lunch pod from Jane, and school officials sent John's parents a letter indicating that he is to have "no contact" with Jane. Jane transferred to a different school for fifth grade.

> ***"[S]chools do exercise a measure of control over students such that they may be vicariously liable for hostile educational environment discrimination arising from student-on-student harassment."***

John and Jane attended the same middle school for sixth grade. Prior to the start of the school year, Jane's counsel sent school administrators a letter noting that John was to have no contact with Jane. The principal met with Jane and assured her that there would be no interaction with John. Despite such assurances, John and Jane rode on the same bus on the first day of school. Jane also reported seeing John in the hallways when passing between classes. Accordingly, John's aide was directed to take John a different route to his classes and to keep a "straight-eye view" of John at all times. Despite these measures, Jane eventually transferred to a different private school.

Jane filed a complaint against the district alleging a hostile environment under Michigan's Elliot-Larsen Civil Rights Act ("ELCRA"). The district argued that a hostile environment claim on the basis of student-on-student sexual harassment was not actionable under ELCRA.

ELCRA specifically prohibits gender-based discrimination in schools, including sexual harassment as a form of discrimination. According to the Act, conduct constitutes harassment if it creates an "intimidating, hostile, or offensive" environment, including at a school. Many hostile-environment claims stem from the workplace, where courts may hold employers liable for the acts of their employees. Because this was an issue of first impression, the appellate court had to decide whether that employer-employee reasoning carried over to schools, making schools liable for student conduct.

Although the court acknowledged that there is a difference between the control an employer has over its employees and the control a school district has over its students, the court recognized that school districts "do exercise a

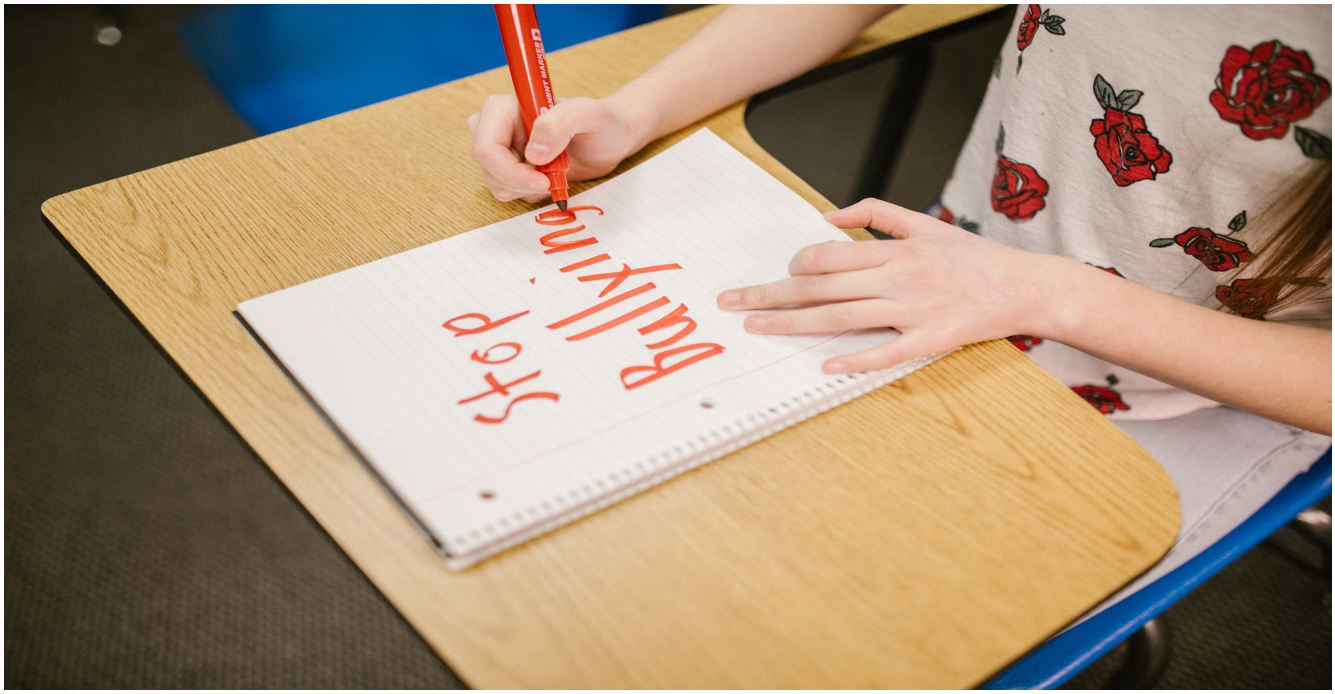
measure of control over students[.]" *Id*. The court reasoned that in their role as surrogate parent during a school day, schools do have some control over student behavior and the environment created by those students. Moreover, the legislature has directed districts to exercise such responsibility by granting them the authority to suspend or expel a student and to exercise "restorative practices" that are designed to "repair[] the harm to the victim and the school community caused by a pupil's misconduct." *Id*. (citing MCL 380.1310c). For the foregoing reasons, the Michigan Court of Appeals held that "schools do exercise a measure of control over students such **that they may be vicariously liable for hostile educational environment discrimination arising from student-on-student harassment**." *Id*. (emphasis added).

Despite holding that student-on-student sexual harassment claims are actionable under ELCRA, the court found that Jane's hostile environment claim against the district failed. The court noted that **vicarious liability may be avoided if a district "adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile . . . environment[]"** *Id.* (emphasis added).

The court found that John's suspensions from school and removal from the classroom constituted prompt, appropriate remedial actions. Therefore, the district could not be held vicariously liable for John's conduct, and consequently, Jane's hostile environment claim failed.

Thus, to help prevent liability for student-on-student harassment claims under ELCRA, it would be prudent for districts to ensure that prompt and appropriate remedial action is taken immediately upon receiving notice of an alleged incident of harassment. A claim for a hostile educational environment under ELCRA (due to sexual harassment) is a different avenue for sexual harassment claims that do not rise to the level of Title IX sexual harassment and do not involve the "deliberate indifference" standard that may be more familiar to school educators and administrators under Title IX. The school's investigation procedures for investigating allegations under the ELCRA and Title IX also may differ.

**If your district needs help reviewing or updating harassment policies, contact us at Collins & Blaha, P.C.**



# New Education Laws in Effect in 2023

As we settle into a new year, school districts should be aware of multiple new education laws that will affect schools throughout Michigan. Some laws were officially in effect as of January 1, 2023, while others will immediately go into effect on March 29, 2023. Here's a review of what's in store for schools this year.

**Personal Finance in High Schools**

Michigan students must successfully take a personal finance class in high school in order to graduate in the future. The MDE needs to create the curriculum for the half-credit course. While the class cannot count toward the half-credit economics class also required for graduation, local school boards can decide whether the class may count toward required credits in math, foreign language, or the performing arts. Students may also complete the course through an approved career and technical education program. The measure takes effect in March, but the new requirement applies to students entering eighth grade in 2023 and thereafter.

**"Critical Incident" Mapping for Schools**

If there is an active shooter or other similar threat, Michigan schools already need to provide law enforcement with blueprints and other building data. But under a new measure that takes effect in March, schools may instead choose to provide local police and sheriffs with comparable information called "critical incident mapping data." As defined in the law, "critical incident mapping data" includes:

- Accurate floor plans overlaid on or current aerial imagery of a school building or school plan;
- Site-specific labeling that matches the structure of the school building, including room labels, hallway names, external door or stairwell numbers, locations of hazards, key utility locations, key boxes, automated external defibrillators, and trauma kits;
- Site-specific labeling that matches the school grounds, including parking areas, athletic fields, surrounding roads, and neighboring properties; and
- A gridded overlay with x/y coordinates.

**"Parental Rights" Signs in Schools**

Michigan schools must prominently display portions of the state Constitution and law under a bill that goes into effect in March. The two sections that need to be posted say:

- "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."
- "It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment."

The quotes need to be displayed in rooms where the local and state school boards meet, the office of the principal or school leader, and every building operated by the MDE.

**Assessing Sign Language Skills in Schools**

There are clear and obvious standards for determining how well young children understand and use written or spoken English. But Michigan does not have comparable requirements to assess similar achievement by students who use American Sign Language ("ASL"). Public Act 256 of 2022, taking effect in March, establishes a commission to create these standards for young children who are deaf and others using ASL in the state. The new standards would be used to both track development and guide any specific Individualized Education Plan ("IEP") for students using ASL. Once established, the assessment tools must be distributed to intermediate school districts—which frequently serve students who are deaf—other public schools and the Michigan School for the Deaf. The Michigan Department of Education ("MDE") must provide this resource and adopted tools to all school districts to be used in the development of individualized family service plans and IEPs. The resource must be created by August 31, 2025, and school districts must implement the resources by September 1, 2025.

**If you or your school district have any questions regarding these new education laws, contact us at Collins & Blaha, P.C. for guidance.**

# WHAT IS A TEACHER UNDER PERA?

The Michigan Employment Relations Commission ("Commission") recently held that a guidance counselor does not meet the definition of a "teacher" as used in the "teacher placement" prohibited subject of bargaining under the Public Employment Relations Act ("PERA"). In *Kalamazoo Education Association & Kalamazoo Public Schools*, 36 MPER 13 (2022), an employee possessed a teaching certificate but had only ever worked as a guidance counselor for the school district—she "had never worked as a classroom teacher or otherwise delivered direct instruction to students."

However, during the 2020-2021 school year, the district transferred the employee from her guidance counselor position to a classroom teacher position. The union filed a grievance challenging the change to the employee's assignment, and subsequently demanded to arbitrate the issue. In response, the district filed an unfair labor practice charge, arguing that under Section 15(3)(j) of PERA, "teacher placement" is a prohibited bargaining subject.

The Commission rejected arguments that the definition of "teacher" as set forth in the Revised School Code or the Teachers' Tenure Act should be applied to PERA in this context. The Commission reasoned that the Michigan Legislature did not include a definition of "teacher" or "teacher placement" in this section of PERA, meaning the Legislature intended for the plain and ordinary meaning of the words to apply. Based on the dictionary definition of "teacher," i.e.., "a person who teaches, especially in a school," the Commission determined that an individual's possession of a teaching certificate does not automatically make the individual a "teacher."

Based on the foregoing, the Commission concluded that the employee did not fall within the definition of "teacher" as used in Section 15(3)(j) of PERA, because although the employee possessed a teaching certificate, she never held any sort of position as a classroom teacher during her employment with the district.

***"[A] guidance counselor does not meet the definition of a "teacher" as used in the "teacher placement" prohibited subject of bargaining under PERA."***

Therefore, the unfair labor practice charge was dismissed, and the union was permitted to move forward with arbitration over the employee's placement.

It would be prudent to note that this was a case of first impression, and neither the Commission nor the courts have considered whether a guidance counselor who has previously served as a classroom teacher may be considered a "teacher" under Section 15(3)(j) in other circumstances.

In distinguishing this case from prior decisions, the Commission emphasized that context matters, and its decisions should be interpreted narrowly to avoid broad extrapolations. For example, in *Garden City Education Association*, 34 MPER 19 (2020), the Commission examined the definition of "teacher placement" rather than "teacher," and in *Pontiac School District*, 28 MPER 34 (2014), a speech pathologist who was moved into a teaching position never contested the position as a teacher.

**If you have any questions about this Commission decision, placement, or prohibited bargaining topics, be sure to reach out to 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, 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.***