

IMPLEMENTING SCHOOL CODE §§ 1249 AND 1250 FOR TEACHER EVALUATION AND COMPENSATION

Public Act 205 of 2009, effective January 4, 2010, enacted Section 1249 of the Revised School Code to require an annual job performance evaluation for school teachers and administrators. MCL 380.1249. This legislation also amended Section 1250 of the Revised School Code to require a compensation method for teachers and administrators that includes job performance and job accomplishments as a "significant factor" in determining "compensation and additional compensation." MCL 380.1250. Public Act 203 of 2009, also effective January 4, 2010, amended Section 94a of the State School Aid Act to require the creation and implementation of a "teacher identifier system" to "[e]nable individual pupil academic achievement data, including growth in academic achievement, to be correlated to each teacher who has taught the pupil." MCL 388.1694a(1)(i).

In response, the Michigan Education Association ("MEA") has developed prototype contract language regarding teacher evaluation and compensation which may appear at your bargaining table. This memorandum provides an overview of the requirements of School Code Sections 1249 and 1250, as well as the Teachers' Tenure Act evaluation requirements. In addition, this memorandum identifies collective bargaining issues for teacher evaluation and analyzes the MEA prototype language.

Thrun Law Firm Labor Attorneys

The purpose of this memorandum is to provide a general overview of the legal issues related to teacher evaluation and compensation. Because collective bargaining agreements and labor relations history are unique to each school, specific issues will likely arise that are beyond the scope of this memorandum. Please contact a Thrun Law Firm labor attorney for further assistance.

Donald J. Bonato	517.374.8823	dbonato@thrunlaw.com
Raymond M. Davis	517.374.8820	rdavis@thrunlaw.com
Eric D. Delaporte	517.374.8829	edelaporte@thrunlaw.com
Michael B. Farrell	517.374.8815	mfarrell@thrunlaw.com
Meg Hackett	517.374.8839	mhackett@thrunlaw.com
Kevin S. Harty	517.374.8832	kharty@thrunlaw.com
Roy H. Henley	517.374.8864	rhenley@thrunlaw.com
Robert G. Huber	517.374.8830	rhuber@thrunlaw.com
Martha J. Marcero	517.374.8842	mmarcero@thrunlaw.com
Joe D. Mosier	517.374.8825	jmosier@thrunlaw.com
David M. Revore	517.374.8816	drevore@thrunlaw.com
Lisa L. Swem	517.374.8846	lswem@thrunlaw.com

Statutory Overview

School Code Section 1249. Although the annual performance evaluation requirement in Section 1249 became effective January 4, 2010, most schools are just now gearing up to implement this mandate for the 2010-2011 school year. Teacher evaluation is not a new requirement and most schools already have in place collective bargaining agreement language that addresses the evaluation process. Section 1249 does *not*

require complete abandonment of the existing evaluation process. Instead, the evaluation process needs only be modified to comport with Section 1249. The degree of such modification, however, will depend upon a particular school's existing evaluation process and how it plans to comply with Sections 1249 and 1250.

Minimally, Section 1249 requires an *annual* performance evaluation system for all school teachers and administrators that:

- Is rigorous, transparent, and fair;
- Provides timely and constructive feedback; and
- Uses multiple rating categories that take into account data on student growth as a significant factor

Section 1249 further states that "student growth shall be measured by national, state, or local assessments and other objective criteria."

School Code Section 1250. Although Section 1250 also became effective on January 4, 2010, the compensation method does not apply until after the expiration of the collective bargaining agreement that was in effect on January 4, 2010. Accordingly, some schools may have more time to implement this statutory requirement.

Section 1250 requires schools to implement a compensation method for teachers and administrators that "includes job performance and job accomplishments as a significant factor." Echoing Section 1249's phraseology, Section 1250 provides that the assessment of job performance shall incorporate a "rigorous, transparent, and fair" evaluation system that evaluates performance, in part, on "student growth as measured by assessments and other objective criteria."

Tenure Act, Article II, Section 3. The Tenure Act was *not* amended by this legislation. Since 1993, the Tenure Act has required that probationary teachers be provided with an individualized development plan ("IDP"), which is "developed by appropriate administrative personnel in consultation with the individual teacher." The Michigan Court of Appeals has ruled that an IDP is not required in the teacher's first year of probationary employment, but should be developed before the second year of probation begins. *VanGessell v Lakewood Schs*, 220 Mich App 37 (1996).

A probationary teacher also must be provided with an "annual year-end performance evaluation," which is based on a minimum of two classroom observations held at least 60 days apart, unless the probationary teacher and the administration "mutually agree" on a shorter interval. The evaluation must include "at least an assessment of the teacher's progress" in meeting his/her IDP goals. The Tenure Act expressly recognizes that a collective bargaining agreement may provide for more performance evaluations and classroom observations. Also, the Tenure Act does *not* require a particular method for an evaluation, observation, or IDP. A school's failure to comply with these requirements of the Tenure Act is "conclusive evidence" that the teacher's performance for that school year was satisfactory.

Tenure Act, Article III, Section 3. The Tenure Act requires that a tenured teacher be provided with a performance evaluation at least once every three years. If the tenured teacher has received "a less than satisfactory performance evaluation," the teacher must receive an IDP. The performance evaluation must be based on a minimum of two classroom observations. Note, however, there is no requirement that the observations supporting an evaluation be at least 60 days apart, as there is for probationary teachers. The evaluation also must assess the teacher's progress in meeting his/her IDP goals. A collective bargaining agreement may provide for more evaluations or observations. Also, the Tenure Act does *not* require a particular method for the evaluation, observation, or IDP. Failure to comply with those requirements in a particular three-year period is "conclusive evidence" that the teacher's performance was satisfactory. As noted above, Section 1249 now requires annual evaluations for *all* teachers.

State School Aid Act, Section 94a. The Center for Educational Performance and Information ("CEPI") and the Michigan Department of Education must cooperate to create and implement a "teacher identifier system with the ability to match an individual teacher to individual pupils the teacher has taught." MCL 388.1694a(1)(i). Subject to applicable law regarding student privacy, the system shall:

- Make accessible annual state assessment records of individual pupils.
- Enable individual pupil academic achievement data, including growth in academic achievement to be correlated to each teacher who has taught the pupil.
- Enable school board members, teachers and school administrators to have access to the data so they can make informed decisions in order to improve instruction and pupil achievement.

Analysis of MEA Prototype Contract Language

In response to Section 1249, the MEA has developed prototype contract language which may be presented at your bargaining table. The Michigan Employment Relations Commission ("MERC") has ruled that evaluation criteria and procedures are mandatory bargaining subjects for compliance with the Public Employment Relations Act ("PERA"). *Spring Lake Schs*, 1 MPER ¶ 19,079 (1988). Accordingly, school officials must engage in good faith bargaining on those issues. There is, however, no legal requirement that the employer agree to the MEA prototype language as proposed. This section of the memorandum presents the MEA prototype language *in italics*, on a section-by-section basis, then comments on the prototype language.

103.1 The parties agree that it is the duty of the Administration to evaluate all bargaining unit members. The purpose of evaluation is to measure the work performance and professional learning of the bargaining unit member using transparent and fair standards, as negotiated.

Comment:

- There is no legal requirement to have a "purpose" provision.
- Evaluations have additional purposes.
- The phrase "duty of the Administration" could be interpreted to preclude the use of external evaluators, including contracted service providers.
- Section 1249 uses the phrase "job performance" not "work performance."

- The phrase "professional learning" is not referenced in Section 1249.
- Section 1249 uses the phrase "rigorous, transparent, and fair" (the prototype language omits the word "rigorous").

103.2 Definitions

A. Individual Professional Growth Plan (IPGP) - The IPGP is a plan for professional growth and effectiveness that may include:

- 1. School Improvement Plan Goals as identified by the professional team*
- 2. Student Growth Improvement Goals (required) developed by the professional team*
 - > Student growth shall include the measurement of one year's growth for students using multiple assessment tools (national, state or local) for an identified content area, graduation rates, student behavior, and student attendance, factoring in truancy, student transfers and transience, class composition, class size, and demographics.*
- 3. A Professional Development Plan to meet identified goals developed by the professional team.*
- 4. Indicators/Evidence of Success for meeting identified goals defined by professional team.*
- 5. A Monitoring Process and Timelines for assessing goal attainment identified by the professional team.*
- 6. Evaluation Tools to be used for assessing goal attainment identified by the professional team.*

Comment:

- There is no statutory requirement to have an "IPGP" or a "Professional Development Plan". The Tenure Act requires an IDP for all probationary teachers and for tenure teachers only in specified circumstances.
- The school improvement process is governed by School Code Section 1277. MCL 380.1277.
- The "composition" of a school improvement committee is a prohibited subject of bargaining. MCL 423.215(3)(c).
- The phrase "one-year's growth" needs clarification, *i.e.*, one school year, one calendar year.
- There is no reference to data available through the "teacher identifier system."
- Section 1249 requires that the teacher's job performance evaluation "take into account data on student growth as a significant factor." MCL 380.1249(c).

B. Professional Teams - Professional teams are defined as groups of teachers (all professional educators) and administrators who work collaboratively to focus on improving the teaching and learning environment as well as address specific instructional and learning needs within the district/building. Professional teams may include, but not be limited to, professional learning communities such as subject area departments, learning teams, interdisciplinary teams, grade-level teams, subject-area teams, faculty-wide teams, etc. Each educator shall be a member of a professional team.

Comment:

- There is no legal requirement for a "professional team".

- Check for provisions within your contract (or proposed provisions) which require additional compensation for teachers serving on committees or for performing group work outside of the regularly-scheduled work day.
- School officials also should anticipate bargaining proposals that request additional release time for "professional teams" or to utilize existing professional development structures for the work of these teams.

103.3 The district and/or building School Improvement Plan required by P.A. 25 of 1989 will serve as the common foundation from which the professional team's goals and bargaining unit member's IPGP goals are developed. The District shall provide both time and resources for the goal development with respect to the professional team and individual bargaining unit member.

Comment:

- The reference to "P.A. 25 of 1989" is incorrect and should be P.A. 25 of 1990, which, in part, enacted School Code Section 1277 (school improvement plan). MCL 380.1277.
- The "composition of" a school improvement committee is a prohibited subject of bargaining under PERA. MCL 423.215(3)(c).
- The prototype language also contains a vague (and potentially expansive) commitment to provide "time and resources" for the above purposes.

103.4 Each bargaining unit member shall be evaluated annually using the Individual Professional Growth Plan (IPGP) as its foundation. The evaluation instrument listed as Appendix __ of this Agreement shall assess the member's performance in meeting the goals as stated in the member's IPGP. The IPGP shall be completed by the end of September for each bargaining unit member.

Comment:

- Section 1249 requires that a teacher's evaluation be "*at least* annually". MCL 380.1249(a) (emphasis added). The collective bargaining agreement should not be limited to a single annual evaluation, particularly for teachers in need of remediation.
- There is no statutory requirement for an IPGP.
- There is no statutory requirement that an IPGP be completed by the "end of September".
- If schools use an IPGP as part of the evaluation process, that plan should be integrated with the Individualized Development Plan which the Tenure Act requires be issued to all probationary teachers and to tenured teachers who are in the process of remediation.

103.5 Each professional team will develop team goals, including criteria for determining evidence of success based on student growth and other factors as determined locally by the respective team. Team goals shall also include a detailed listing of responsibilities required to meet such goals and suggested timelines for meeting those goals. Each professional team will provide data and information to the designated administrator/evaluator in each building regarding the identified goals and the progress toward those goals.

Comment:

- Section 1249 refers to "the teacher's" job performance – which is a singular (not collective or team) reference (*i.e.*, 's).
- The "teacher identifier system" established under MCL 388.1694a(1)(i) correlates data to *individual* teachers.
- The prototype language is problematic because it delegates the development of criteria to determine success on student growth to the "professional team," as opposed to reserving ultimate managerial authority for that determination.
- The prototype language also attempts to equate success in arriving at "team goals" with the performance of a "detailed listing of responsibilities" for the achievement of those goals.

103.6 IPGP goals shall be developed jointly by the administrator and bargaining unit member, and include data on individual student growth. Said goals shall be based on the goals identified by the professional team(s) and/or school improvement plan, and other factors as determined by the district and association [Association note: Include any other factors that the Association wishes to include in the development of goals]. The individual bargaining unit member's IPGP shall include goals, a delineation of resources and responsibilities needed to meet the identified goals, the expected outcomes and indicators/measurements of success, and suggested timelines for goal attainment. The assessment of students who have not been present in the classroom or the school during the entire school year shall not be included in determining student growth data. Class composition, class size, and demographics will be considered in the determination of student growth data.

Comment:

- Development of an IPGP (which is not required) should be done (if at all) by the evaluating administrator "in consultation with" the teacher (which is consistent with the Tenure Act's IDP language), as opposed to being the product of a joint decision (as proposed in the prototype language).
- While it may be appropriate to incorporate reference to district and building school improvement goals, an IPGP (if utilized) also should include specific performance goals for the teacher. The prototype language omits this important segment and instead delegates that determination to the employer and the labor organization, presumably through a process of continued negotiation.
- There are obvious practical problems associated with the prototype language which requires consideration of absenteeism, class composition, class size, and "demographics" under the determination of student growth data. Any inclusion of such factors in the assessment of student growth should be empirically validated, and not based on generalizations or stereotyped assumptions about students.

103.7 All bargaining unit members shall be evaluated annually utilizing one of the evaluation forms (either formative or summative) listed as Appendix ____ of this Agreement.

A. It is recognized that instructional improvement is most likely to occur when the individual bargaining unit member identifies areas of growth for his/her own professional practice. Bargaining unit members are responsible for identifying annual individual goals for growth.

The formative evaluation process and form shall be utilized annually for bargaining unit members as follows:

1. Bargaining unit members with 0-3 years experience
2. Bargaining unit members who are experienced, but new to the district
3. Bargaining unit members holding a continuing contract for whom the evaluator deems it necessary to use the formative evaluation
4. For initial implementation of the IPGP framework, all bargaining unit members minimally for the first three (3) years

The purpose of the formative evaluation process is to provide an ongoing review and analysis of identified goals aimed at improving teaching and instruction, and student growth. The formative evaluation process is not intended to be punitive in nature, nor does it necessarily mean that the individual's work performance is unsatisfactory. As part of the formative evaluation process, the bargaining unit member shall complete the self-reflection form included as Appendix ____ in this Agreement. The completed self-reflection instrument shall be utilized by the bargaining unit member as part of the discussion with the evaluator during the formative evaluation cycle.

B. The summative evaluation process and form shall be utilized once every fourth (4th) year for:

1. Every bargaining unit member
2. Bargaining unit members whose work performance and effectiveness is deemed consistently satisfactory
3. Bargaining unit members who require additional assistance in area(s) identified for growth

The purpose of the summative evaluation is to summarize the overall development and effectiveness of the bargaining unit member's performance.

Comment:

- A "fourth year" evaluation cycle is out of sync with the Tenure Act's three-year evaluation cycle for tenured teachers.
- The phrase "all bargaining unit members" is overly expansive. Section 1249 only applies to "teachers," which does not include, *e.g.*, non-endorsed counselors, social workers, or school psychologists.
- The language delegating to bargaining unit members the responsibility to identify their "annual goals for growth" not only erodes administrative authority, but could have the effect of entirely removing teacher accountability for individual performance on this criterion.
- The prototype's description of the "formative" evaluation process should not be used for probationary teachers or for tenured teachers who are in the process of performance remediation.
- The prototype language declaring that the "formal evaluation process is not intended to be punitive in nature, nor does it necessarily mean that the individual's work performance is unsatisfactory," could preclude or limit adverse content in an employee's performance evaluation or use of that evaluation in a nonrenewal or discharge proceeding.
- If a more structured evaluation process is used (*e.g.*, the "summative" process described in the prototype language), it should be used annually for all probationary teachers, and at least once every three years for tenured teachers. Remember, schools are responsible for complying with the requirements of Section 1249, as well as all requirements of the Teachers' Tenure Act and any applicable collective bargaining agreement standards.

103.8 Bargaining unit members shall be evaluated only by a trained evaluator (administrator) who is an employee of the district. The evaluator shall hold a valid teaching certificate and have completed comprehensive training in evaluating job performance and effectiveness, using multiple rating categories within the last two (2) years. Said training shall include specific training on the evaluation instrument.

Comment:

- The phrase "administrator who is an employee of the district" expressly precludes the use of contracted service providers (*i.e.*, including non-employee contracted administrators) in performing evaluations.
- While training is important, it is neither required by the School Code nor the Tenure Act.
- Requiring the evaluator to "hold a valid teaching certificate" could unnecessarily preclude some persons from serving as an evaluator.
- A training requirement every two years is onerous and unnecessary.

103.9 Common professional training will be provided to assure that evaluators, administrators and bargaining unit members are thoroughly trained in all aspects of the evaluation process being used in this Agreement.

Comment:

- Section 1249 does not have a training requirement.
- The Tenure Commission has explained that the credibility of a teacher evaluation depends, in part, upon the evaluator's assessment skills, training, experience, and knowledge. *See, Henderson v Memphis Comm Schs* (STC 71-17-2-R). The prototype language, however, is problematic in that it ambiguously requires that both teachers and administrators be "thoroughly trained in all aspects of the evaluation process. . . ." The asserted lack of "thorough" training of an evaluator (or a teacher) could later be used to challenge the content of an adverse performance evaluation.

103.10 Each bargaining unit member shall be notified of his/her evaluator at least six (6) months prior to the commencement of the evaluation process.

Comment:

- There is no legal requirement to notify a teacher of the evaluator's identity, let alone six months before the evaluation process begins.
- The prototype language also could be interpreted to delay the designation of a substitute evaluator (if needed) or additional evaluators, a particularly important consideration for teacher competency cases. The Tenure Commission has consistently observed that judgments about teacher competence should be the product of ongoing contact and observations by numerous persons of varying backgrounds and experience. *See, e.g., Green v Detroit Bd of Educ* (STC 01-13).

103.11 A bargaining unit member may challenge the appointment of his/her evaluator at any time. When such challenge occurs, an alternate qualified evaluator will be provided for the bargaining unit member.

Comment:

- Neither the School Code nor the Tenure Act require a "challenge" process.
- The prototype language is problematic as it effectively gives the person being evaluated a veto over the evaluator's identity, even after the evaluation has been completed.

103.12 The parties agree that parents, students, or other District employees will not be used or provide input into the evaluation of bargaining unit members.

Comment:

- The competency criteria consistently relied upon by the Tenure Commission includes assessment of a teacher's relationships with parents, students, and other faculty. *See, e.g., Niemi v Bd of Educ of Kearsley Comm Schls* (STC 74-36); *Graham v Trenton Pub Schs* (STC 78-12); *Parr v Waverly Comm Schs* (STC 92-6) ("[t]he reputation and integrity of a school district also depends in part on teachers' relationships with parents."). To some extent, the content of a teacher's

evaluation may be based upon verified complaints or concerns made by parents, students, or other school employees about the teacher's performance. The prototype language would preclude this significant content from being incorporated into the evaluation.

103.13 Any charge concerning the professional competence of a tenured teacher arising out of the evaluation process shall be filed with the Board by April 30.

Comment:

- The Legislature removed the April 30 requirement for bringing charges against a tenured teacher. *See* Public Act 60 of 1993. Accordingly, there is no statutory time restriction or calendar limitation.
- This language improperly reduces the time period to assess performance and develop evidence of incompetency for a tenure proceeding. It also has the effect of limiting the "ample opportunities" for teacher performance improvement now required under Section 1249.

103.14 Within the first thirty (30) workdays of initial employment, each probationary bargaining unit member shall be provided an Individualized Development Plan (IDP). Appendix ____, which shall incorporate the goals of the agreed-upon Individual Professional Growth Plan (IPGP). A copy of each IDP shall be provided to the Association President. The IDP shall be reviewed, explained, and discussed with the probationary employee at a conference called by the evaluator for that specific purpose.

Comment:

- The Tenure Act only requires that a probationary teacher have an IDP. There is no requirement that an IDP be in place within the first 30 work days of initial employment.
- While an IDP for a first-year probationary teacher is recommended, the Michigan Court of Appeals has ruled that a school district may, but is not required to, provide an IDP to a teacher during that first year of probation. *Van Gessell v Lakewood Schs*, 220 Mich App 37 (1996).
- There is no legal requirement that a teacher's IDP be provided to the Association President. Rather, the Tenure Act only requires that the IDP be provided to the affected teacher, after consultation with that teacher. MCL 38.83a(1), MCL 38.93(1).
- The prototype language indicates that the probationary teacher's IDP must incorporate "agreed upon" goals from the IPGP. As noted above, it is preferable for the school to establish the individual growth goals and to incorporate those within the IDP. Further, the Tenure Act does not require that these goals be "agreed upon."
- An IDP for a probationary teacher must be developed "in consultation" with that teacher. *See Cummings v Bd of Education of Centerline Pub Schls* (STC 98-18); MCL 38.83a. Consequently, the prototype language suggesting that the IDP "shall be reviewed, explained, and discussed" with the probationary teacher at a conference called for that purpose omits the requisite consultation process to be used in development of the IDP itself.

105.15 The probationary evaluation cycle shall be defined as a pre-observation conference, work site observation(s), evaluation of progress toward individual and common goals utilizing multiple measures as outlined in the evaluation instrument, post observation conference(s) and a written summative evaluation.

Comment:

- The Tenure Act requires only that a probationary teacher receive an "annual year-end performance evaluation" which is based on at least two classroom observations held at least 60 days apart. MCL 38.83a(1).
- Section 1249 requires that all teachers (including both probationary and tenured teachers) be evaluated "at least annually."
- The Tenure Act requires that the probationary teacher's year-end performance evaluation "shall include at least an assessment of the teacher's progress in meeting" his/her IDP goals. MCL 38.83a(1).
- School officials should carefully consider whether it is administratively feasible to conduct pre-observation and post-observation conferences for each observation within an evaluation cycle. Neither the Tenure Act nor Section 1249 requires pre-observation or post-observation conferences for probationary or tenured teachers.

103.16 Each probationary employee shall be evaluated twice each school year during the bargaining unit member's probationary period. The first evaluation cycle shall be completed prior to the completion of the first fifteen (15) calendar weeks of the school year (or the first fifteen (15) calendar weeks of employment for those hired after the start of the school year). The second evaluation cycle shall be completed after the first twenty-three (23) calendar weeks of the school year and prior to the completion of the first thirty (30) calendar weeks of the school year (or after the first twenty-three (23) calendar weeks of employment and prior to the first thirty (30) calendar weeks of employment for those hired after the start of the school year). Each evaluation cycle shall include at least two (2) classroom/work evaluations that are at least sixty (60) calendar days apart. An observation is defined as a work station visit of at least forty-five minutes or one (1) class period, whichever is longer.

Comment:

- The Tenure Act only requires that a probationary teacher receive "an annual year-end performance evaluation" which is based on at least two classroom observations held at least 60 days apart. MCL 38.83a(1). It does not require that the employee be "evaluated" twice.
- The concluding sentence of the prototype language conceptually confuses "classroom work evaluations" with "observations" that may be used to support an evaluation.
- The Tenure Act also permits a "shorter interval" between the two classroom observations of a probationary teacher if "mutually agreed upon by the teacher and the administration." MCL 38.83a(1).
- The 60-day standard "is satisfied if the observations, in the aggregate, span the required 60 days." *Garcia v Eaton Rapids Pub Schs* (STC 99-13).
- School officials should carefully assess whether the school has the requisite number of administrative personnel to evaluate each probationary teacher *twice* annually. Further, the

observation windows created within the prototype language could be operationally restrictive for school administrators who now have to evaluate all teachers on an annual basis.

103.17 To begin the evaluation cycle, a pre-evaluation conference shall be held between the evaluator and the employee within the first sixty (60) days of the school year. The discussion shall be based on the individual's established professional growth plan. The purpose of the pre-conference is to review goal expectations (as set forth in the IPGP) and to provide a schedule for the evaluation cycle.

Comment:

- There is no statutory requirement for a pre-evaluation conference.
- A pre-evaluation conference for all probationary teachers could prove to be impractical given the annual evaluation requirement introduced by Section 1249.
- Any interchange between probationary teachers and their evaluators should focus on not only the goals of an IPGP (if utilized), but also upon the goals of the IDP required under the Tenure Act.
- The requirement in the prototype language to "provide a schedule for the evaluation cycle" could not only be impractical for evaluators, but also would limit the opportunity of evaluators to make unannounced observations that are consistent with negotiated evaluation procedures.

103.18 Should the evaluation indicate that an employee has any area that is not progressing toward the identified goals, the evaluator shall develop an Individualized Development Plan listed as Appendix ____ of this Agreement that:

- (1) *Identifies specifically the area(s) of concern*
- (2) *Provides the employee with specific written recommendations for improvement, which are stated in behavioral terms, are measurable and observable.*
- (3) *Develops a fair and workable timeline for such improvement. This timeline shall include follow-up meeting(s) to evaluate the area(s) of concern.*
- (4) *Provides a positive program of assistance that includes materials, resources, consultant services and sufficient time during the school day to implement the recommendation(s) of the evaluator.*

Comment:

- The Tenure Act has no pre-condition for an IDP for a probationary teacher. Rather, the Tenure Act requires an IDP for a probationary teacher who is employed by a school district for at least one school year. MCL 38.83a(1).
- The Tenure Act states that a tenured teacher who "has received a less than satisfactory performance evaluation" shall receive an IDP. MCL 38.93(1).
- The Tenure Commission has ruled that "a district is not precluded from implementing an IDP to assist a teacher who has some performance deficiency short of unsatisfactory performance." *In re Scharret* (STC 98-01).

- The Tenure Commission has ruled that the "evaluation process must be fair. It must provide the teacher with a clear understanding of his/her performance problems and provide to the teacher assistance in improving his or her performance." *Chester v Coldwater Schs* (STC 73-56-R).
- The Tenure Act only requires that the IDP be created by "appropriate administrative personnel in consultation with the individual teacher." MCL 38.83a(1), MCL 38.93(1). The Tenure Commission has ruled that the teacher need only be provided an "opportunity" for input into the IDP, which the District must seek, but not heed. *Cummings v Centerline Pub Schs* (STC 98-18).
- Section 1249 refers to removing ineffective teachers "after they have had ample opportunities to improve." MCL 380.1249(d)(iv).
- If a collective bargaining agreement establishes a minimum time period for remediation, the Tenure Commission will enforce that period as the district's "representation as to what constitutes a reasonable period of improvement." *Ramsay v Detroit Bd of Ed* (STC 82-89).

103.19 In the event a probationary teacher is not recommended for continuing employment, at least in part due to professional competence, the reasons for the non-renewal shall be consistent with the criteria found in the Individual Development Plan (Appendix ____) and the evaluation instrument (Appendix ____).

Comment:

- The Tenure Act requires that the probationary teacher's annual year-end performance evaluation "include at least an assessment of the teacher's progress in meeting" his/her IDP goals. MCL 38.83a(1).
- In reviewing the nonrenewal of a probationary teacher, the Michigan Supreme Court has ruled that: The Tenure Commission "may not assay a board's reasons for concluding the work unsatisfactory. The [Tenure Act] is followed when the notice of unsatisfactory work is timely given based on good, bad or unstated reasons." *Lipka v Brown City Schs*, 403 Mich 554, 559-60 (1970).
- The Michigan Supreme Court has observed: "[a] probationary period is provided in the [Tenure Act] and distinguished from tenure to afford a trial period during which a controlling board may make a subjective determination of whether a certain teacher satisfies that district's particular needs and policy. We should not require that such a procedure meet an objective standard applicable to all school districts." *Lipka v Brown City Schs*, 403 Mich 554, 558 (1970).
- The reference to the "Individual Development Plan" not only is inconsistent with the previous references within the prototype language to the "Individualized Development Plan", but also entirely omits reference to the IPGP.
- School officials also should audit the collective bargaining agreement to determine the applicability of a "just cause" standard for the nonrenewal or discharge of probationary teachers, as well as to determine whether such matters are excluded from the grievance procedure, including arbitration.

103.20 The remedy for failure of the Employer to follow the procedural requirements of this Article shall be the destruction of all reports, written evaluations and other associated documents; any discipline or discharge based in whole or in part on evidence contained in said reports, evaluations and other documents shall be rescinded; and the bargaining unit member will be deemed satisfactory for evaluation purposes.

Comment:

- There is no legal requirement to adopt this proposed language.
- This language is illegal to the extent that it would require suppression or expungement of a record of "unprofessional conduct." School Code Section 1230b(6) states that a school "shall not enter into a collective bargaining agreement . . . that has the effect of suppressing information about unprofessional conduct of an employee or former employee or of expunging information about that unprofessional conduct from personnel records. Any provision of a contract or agreement that is contrary to this subsection is void and unenforceable." MCL 380.1230b(6).
- The prototype language also would limit the ability of an arbitrator (or other tribunal interpreting the collective bargaining agreement) to fashion other remedies for any demonstrated violation of the contract's provisions.

103.21 Surveillance

A. All evaluation, monitoring or observation of an employee shall be conducted openly and with the full knowledge of the employee. The use of eavesdropping, E-mail/Internet software, closed circuit television, public address or audio systems, and similar surveillance devices shall be strictly prohibited.

Comment:

- School officials should review existing acceptable use agreements which employees have signed to have access to school technology. A common provision within a user agreement and acceptable use policy is that employees do not have a reasonable expectation of privacy as to their use of school internet or e-mail. The prototype language would restrict the school's ability to review aspects of a teacher's performance or conduct based on such matters as e-mail communications with parents, students, or use of school technology at inappropriate times or in an inappropriate manner.
- Remember also that to the extent the prototype language relates to decisions about use of technology to deliver educational programs and services, or to the impact of those decisions, it is a prohibited subject of bargaining under PERA Section 15(3)(h), MCL 423.215(3)(h).
- Similarly, schools routinely have hallway or external security cameras (without an audio component) which do not have the primary purpose of assessing employee performance. In some instances, employee conduct is captured as a byproduct of this security surveillance. Contract language should not limit the use of information secured in this matter which is pertinent to an evaluation of the employee's competence or conduct.
- The prohibition against use of "internet software" may be argued to preclude districts from utilizing the data available through the "teacher identifier system" in performing evaluations. MCL 388.1694a(1)(i).

B. Video Surveillance

1. Video cameras will be used for the sole purpose of monitoring the behavior of non-employees. Cameras will not be used to monitor, observe or investigate employee behavior, evaluate employee work performance, or as a basis to discipline employees. Cameras will only be utilized in hallways, cafeterias and the main office; exceptions shall only be by mutual agreement between the employer and the Association. Video recordings will be erased, deleted or recycled every ten (10) calendar days unless the recording is required for a student disciplinary hearing.

2. Video recordings will not be released to third parties without first notifying the Association and every employee who appears on the recording and providing him/her the opportunity to view the recording. The bargaining unit member shall receive a copy of the recording being released to a third party, prior to such release.

3. The Association shall have the right to review any video recording prior to the release of such to a third party and shall be furnished a copy of any video recording upon request.

Comment:

- There is no statutory prohibition against using video cameras for visual monitoring purposes. The use of equipment with audio recording capability, however, could be subject to federal and state statutory restrictions regarding electronic eavesdropping.
- Case law only restricts the use of video monitoring in areas where a person would have a "reasonable expectation of privacy," *e.g.*, bathrooms, locker rooms.
- Any erasure of video recordings should be consistent with the school's record retention policy.
- Whether video recordings could be released to third parties without first notifying the Association and "every employee" who appears on the video recording, *and* providing each employee the opportunity to review the recording before disclosure, impacts upon disclosures that are otherwise required to be made under the Freedom of Information Act and (depending on school policy) under the Family Educational Rights and Privacy Act.

Statutes

On the following pages the full text of the involved statutes are presented, including Revised School Code Sections 1249 (annual evaluation) and 1250 (compensation), State School Aid Act Section 94a (teacher identifier system), as well as Article II, Section 3 of the Tenure Act (probationary teachers) and Article III, Section 3 of the Tenure Act (tenured teachers).

THE REVISED SCHOOL CODE (EXCERPT)
Act 451 of 1976

380.1249 Performance evaluation system.

Sec. 1249. With the involvement of teachers and school administrators, the board of a school district or intermediate school district or board of directors of a public school academy shall adopt and implement for all teachers and school administrators a rigorous, transparent, and fair performance evaluation system that does all of the following:

- (a) Evaluates the teacher's or school administrator's job performance at least annually while providing timely and constructive feedback.
- (b) Establishes clear approaches to measuring student growth and provides teachers and school administrators with relevant data on student growth.
- (c) Evaluates a teacher's or school administrator's job performance, using multiple rating categories that take into account data on student growth as a significant factor. For these purposes, student growth shall be measured by national, state, or local assessments and other objective criteria.
- (d) Uses the evaluations, at a minimum, to inform decisions regarding all of the following:
 - (i) The effectiveness of teachers and school administrators, ensuring that they are given ample opportunities for improvement.
 - (ii) Promotion, retention, and development of teachers and school administrators, including providing relevant coaching, instruction support, or professional development.
 - (iii) Whether to grant tenure or full certification, or both, to teachers and school administrators using rigorous standards and streamlined, transparent, and fair procedures.
 - (iv) Removing ineffective tenured and untenured teachers and school administrators after they have had ample opportunities to improve, and ensuring that these decisions are made using rigorous standards and streamlined, transparent, and fair procedures.

History: Add. 2009, Act 205, Imd. Eff. Jan. 4, 2010.

THE REVISED SCHOOL CODE (EXCERPT)
Act 451 of 1976

380.1250 Compensation including job performance and accomplishments as factors; effect if collective bargaining agreement.

Sec. 1250. (1) A school district, public school academy, or intermediate school district shall implement and maintain a method of compensation for its teachers and school administrators that includes job performance and job accomplishments as a significant factor in determining compensation and additional compensation. The assessment of job performance shall incorporate a rigorous, transparent, and fair evaluation system that evaluates a teacher's or school administrator's performance at least in part based upon data on student growth as measured by assessments and other objective criteria.

(2) If a collective bargaining agreement is in effect for teachers or school administrators of a school district, public school academy, or intermediate school district as of the effective date of the amendatory act that added this subsection, and if that collective bargaining agreement prevents compliance with subsection (1), then subsection (1) does not apply to that school district, public school academy, or intermediate school district until after the expiration of that collective bargaining agreement.

History: Am. 2009, Act 205, Imd. Eff. Jan. 4, 2010.

THE STATE SCHOOL AID ACT OF 1979 (EXCERPT)
Act 94 of 1979

388.1694a Center for educational performance and information.

Sec. 94a. (1) There is created within the office of the state budget director in the department of management and budget the center for educational performance and information. The center shall do all of the following:

* * *

(i) In cooperation with the department, create and implement a teacher identifier system with the ability to match an individual teacher to individual pupils the teacher has taught. Subject to applicable law regarding student privacy, the system shall do all of the following:

(i) Make accessible annual state assessment records of individual pupils.

(ii) Enable individual pupil academic achievement data, including growth in academic achievement, to be correlated to each teacher who has taught the pupil.

(iii) Enable school board members, teachers, and school administrators to have access to the data so they can make informed decisions in order to improve instruction and pupil achievement.

History: Am. 2009, Act 203, Imd. Eff. Jan. 4, 2010.

TEACHERS' TENURE ACT (EXCERPT)

38.83a Teacher in probationary period; individualized development plan; performance evaluation; failure to comply with subsection (1) as evidence of satisfactory performance.

Sec. 3a. (1) If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least an annual year-end performance evaluation each year during the teacher's probationary period. The annual year-end performance evaluation shall be based on, but is not limited to, at least 2 classroom observations held at least 60 days apart, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. This subsection does not prevent a collective bargaining agreement between the controlling board and the teacher's bargaining representative under [PERA] from providing for more performance evaluations or classroom observations in addition to those required under this subsection. Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

(2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular school year is conclusive evidence that the teacher's performance for that school year was satisfactory.

History: Add. 1993, Act 59, Imd. Eff. June 11, 1993.

38.93 Teacher on continuing tenure; individualized development plan; performance evaluation; failure to comply with subsection (1) as evidence of satisfactory performance.

Sec. 3. (1) The controlling board of the school district employing a teacher on continuing tenure shall ensure that the teacher is provided with a performance evaluation at least once every 3 years and, if the teacher has received a less than satisfactory performance evaluation, the school district shall provide the teacher with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher. The performance evaluation shall be based on, but is not limited to, at least 2 classroom observations conducted during the period covered by the evaluation and, if the teacher has an individualized development plan, shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. This section does not prevent a collective bargaining agreement between the controlling board and the teacher's bargaining representative under [PERA] from providing for more performance evaluations or classroom observations in addition to those required under this section. Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

(2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular 3-year period is conclusive evidence that the teacher's performance for that period was satisfactory.

History: Add. 1993, Act 59, Imd. Eff. June 11, 1993.

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