



Memo

To: Michigan Association of School Administrators
Michigan Association of School Boards
Michigan Association of Intermediate School Administrators
Michigan Alliance for Student Opportunity

From: Thrun Law Firm, P.C.

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This law firm has reviewed House Bill 4820, which proposes amendments to Revised School Code Section 1248 (MCL 380.1248) and provides the following analysis.

I. *Beebee* Factors

Michigan law has a long history of requiring school officials to consider certain key factors in a teacher's performance when making important employment decisions. The five "*Beebee* factors" originated in a Court of Appeals decision, *Beebee v Haslet Public Schools*, 66 Mich App 17 (1976), rev'd 406 Mich 224 (1979), which considered the discharge of a tenured teacher for poor performance. The court held that when determining a teacher's fitness to teach, school boards must consider the teacher's:

- (1) knowledge of the subject area;
- (2) ability to impart that knowledge;
- (3) classroom management;
- (4) rapport with parents and other teachers; and
- (5) physical and mental ability to withstand the strain of teaching.

Since 1979, numerous tenure cases have applied the *Beebee* factors when considering a teacher's discharge for poor performance. See *Bd of Ed v Wolff*, 139 Mich App 148 (1984), *Sutherby v Gobles Bd of Ed*, 132 Mich App 579 (1984), *Nolte v Port Huron Area Sch Dist Bd of Ed*, 152 Mich App 637 (1986), *Barcheski v Bd of Ed*, 162 Mich App 388 (1987), *Hagerty v State Tenure Comm*, 179 Mich App 109 (1989), *Neil v Detroit Pub Sch*, 1997 Mich App LEXIS 1663 (1997), *Bradley v Crestwood Sch Dist*, 1998 Mich App LEXIS 2687 (1998), *Sepanski v Detroit Pub Sch*, 2014 Mich App LEXIS 1549 (2014), and *Halliburton v River Rouge Sch Dist Bd of Ed*, 2014 Mich App LEXIS 249 (2014).

If a school board cannot establish one or more of the *Beebee* factors, the Tenure Commission may reverse the discharge decision and reinstate the teacher with back pay.

The Michigan Legislature more recently expanded upon the application of the *Beebee* factors and codified them in two significant ways. First, in 2011 the Legislature enacted Section 1248, which provided a standard for the layoff and recall of teachers who are subject to the Teachers' Tenure Act. Before 2011, layoff and recall decisions were subject to bargaining and most collective bargaining agreements applied a "last in, first out" ("LIFO") approach by basing layoff and recall decisions on tenure status (tenured teachers were retained over probationary teachers) and seniority (the most senior teachers were retained over less senior teachers). Section 1248 replaced the LIFO approach by requiring that teacher performance and effectiveness, as measured by one of the five Michigan Department of Education ("MDE") approved teacher evaluation tools, determine which teachers would be subject to layoff and recall. Further, Section 1248 provided that length of service or tenure status cannot be considered when making layoff and recall decisions, except as a tiebreaker. Under Section 1248, individual teaching performance is determined by considering several factors, including:

- The teacher's demonstrated pedagogical skills, including at least a special determination concerning the teacher's knowledge of his or her subject area and the ability to impart that knowledge through planning, delivering rigorous content, checking for and building higher-level understanding, differentiating, and managing a classroom; and consistent preparation to maximize instructional time.
- The teacher's management of the classroom, manner and efficacy of disciplining pupils, rapport with parents and other teachers, and ability to withstand the strain of teaching.

See MCL 380.1248(1)(b)(i)-(iii).

In taking this action, the Legislature recognized that the *Beebee* factors, utilized for over 30 years in teacher tenure decisions, also provide the best measure for retaining and reinstating the most effective teachers during layoffs and recalls. The Legislature ensured that the primary focus when making important employment decisions would be on improving student educational outcomes by retaining effective teachers, rather than depending on seniority status or LIFO.

Four years later, the Legislature amended Revised School Code Section 1249 (MCL 380.1249), which outlines what elements must be in a school district's performance evaluation system, and again expanded the application of the *Beebee* factors with almost unanimous support from lawmakers.¹ Section 1249 requires that a teacher's evaluation must consider several factors, including the *Beebee* factors listed in Section 1248.²

¹ The amendment to MCL 380.1248, 2015 PA 0173, incorporated the *Beebee* factors into the teacher and administrator evaluation process passed the House 97-8 and the Senate 35-2.

² MCL 380.1249(2)(a)(iv) provides "The portion of a teacher's evaluation that is not measured using student growth and assessment data, as described under subparagraph (i), or using the evaluation tool developed or adopted by the school district, intermediate school district, or public school academy, as described under subparagraph (iii), **must incorporate criteria enumerated in section 1248(1)(b)(i) to (iii) that are not otherwise evaluated under subparagraph (i) or (iii).**" (Emphasis added).

For over 40 years, the *Beebee* factors have provided a “guidepost” for making important employment decisions concerning public school teachers in Michigan, including discharge decisions based on teacher performance and, more recently, layoff and recall decisions and teacher evaluations. The proposed amendment of Section 1248 would set Michigan back nearly half a century by removing the consideration of the *Beebee* factors from Section 1248 for layoff and recall decisions and Section 1249 (MCL 380.1249) for teacher performance evaluations. If House Bill 4820 is enacted in the upcoming months, it may impair a school district’s ability to keep the most effective teachers when schools are still dealing with the aftermath of the COVID-19 learning losses.

II. Other Considerations

There are several other issues in the proposed revision to Section 1248 that I address below for your consideration.

- The proposed amendment clarifies that “the provisions of this Section are subject to the Public Employment Relations Act . . .” This language means that filling a vacancy, placing a teacher in a classroom, and layoff and recall decisions will become mandatory bargaining subjects. Paragraph (1) provides that a collective bargaining agreement must include, at a minimum, the standards in this section. However, the three standards in this section are discretionary, not mandatory. Because the “procedures” are subject to bargaining, unions may demand that districts consider other factors, such as tenure status or dues-paying union membership, when making personnel decisions. (“Any relevant factors *may be used* for personnel decisions under this section, including, *but not limited to*, the following . . .”)
- Section 1248 currently applies to a “teacher” as defined under the Teachers’ Tenure Act. MCL 38.71 defines “teacher” as “a certificated individual employed for a full school year by any board of education or controlling board.” The proposed amendment changes the definition of “teacher” to align with the definition under MCL 380.1249, which is limited to a classroom teacher. MCL 380.1249(8) defines “teacher” as “an individual who has a valid Michigan teaching certificate or authorization or who is engaged to teach under section 1233b; who is employed, or contracted for, by a school district, intermediate school district, or public school academy; and who is assigned by the school district, intermediate school district, or public school academy to deliver direct instruction to pupils in any of grades K to 12 as a teacher of record.” Teachers in Michigan may serve in various roles other than classroom teachers. For example, tenured teachers often serve in non-classroom capacities such as instructional coaches, behavior specialists, counselors, or other ancillary staff. Limiting the application of MCL 380.1248 to just classroom teachers limits the school administration’s ability to place the most effective candidates in other non-classroom positions filled by teachers to focus on improving student educational outcomes.
- The proposed amendment changes the purpose of Section 1248, which was adopted to ensure that *layoff and recall decisions* were based on teacher effectiveness. Currently, Section 1248 does not address filling teacher vacancies or placing a teacher in a classroom. The proposed amendment broadens the application of Section 1248 to day-to-day operational decisions, which are currently at the sole discretion of the school district.
- The proposed amendment may be vulnerable to challenge under the Title/Object Clause of the Michigan Constitution. The Title-Object Clause provides that ‘No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or

amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.’ Const 1963, art 4, §24. A party may raise three types of challenges under the Title-Object Clause: (1) a ‘title-body’ challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge. The purpose of the Title-Object Clause is ‘to prevent the Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge.

- The term “placing a teacher in a classroom” is ambiguous. Teachers are “placed” in a classroom for several reasons. For example, a teacher may be assigned to a classroom to substitute for another absent teacher. Due to the shortage of substitute teachers in Michigan, classroom teachers are regularly taking on additional responsibilities where substitute teachers are not available and collective bargaining agreements provide for additional compensation in those situations. The proposed amendment would limit the administration’s authority to assign teachers to cover for an absent teacher or in other situations to ensure that students are properly supervised. If this type of language is approved, it could have a detrimental effect on a school district’s ability to properly staff classrooms and limit the options available to remedy this issue.
- The proposed amendment also addresses “procedures” (not policy) for “all personnel decisions under this section.” This language is broad as it applies in any situation where the district is attempting to fill a vacancy, place a teacher in a classroom, or make a layoff and recall decisions. While the proposed amendment does not define “all personnel decisions” these decisions would likely include timelines and procedures for posting vacancies, qualifications for the positions, hiring processes, hiring decisions, assigning work to a classroom teacher, evaluating performance, transferring, or reassigning employees, transferring or reassigning work, and determining teacher schedules. Without including a definition of the key terms, this will likely be determined in litigation between school districts and unions, having a significant impact on the budgets for those districts that are the test cases.
- The term “vacancy” should also be defined. A position in a school may be vacant for many reasons. For example, if a teacher is on leave of absence or transfers to another position for a semester, the position the employee left would be considered a vacancy. Typically, short-term vacancies or vacancies where the person who left the position is expected to return are left to the school district’s discretion regarding how to fill that vacancy. The proposed amendment does not distinguish between a temporary or permanent vacancy. As noted above, failing to include a definition of the key terms will likely result in litigation and divert money that could be spent in the classroom or on staff salaries to be spent on legal expenses.
- The term “clear and transparent” is subjective and will be litigated and subject to arbitration whenever a district acts according to these procedures. As referenced in our comments above about vacancy, the term “clear and transparent” should be defined because it applies to all personnel decisions. Again, this will result in money that could be spent in the classroom or on staff salaries being diverted to legal expenses.

Moving forward, lawmakers should consider the following:

- Recognize the importance of the *Beebee* factors when evaluating teachers and making important employment decisions, especially how they relate to the connection between effective teachers and student educational outcomes;
- Continue to define teachers using the definition in the Teachers' Tenure Act; and
- Continue the original purpose of Section 1248 (MCL 380.1248) - to retain the most effective teachers when making layoff and recall decisions to ensure focus on student educational achievement.

