# THE TABLES HAVE TURNED

## The New Landscape for Collective Bargaining in Michigan Schools

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MACKINAC CENTER
FOR PUBLIC POLICY


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The Mackinac Center for Public Policy

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By Steve Delie



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## Introduction

The Michigan Legislature passed significant, bipartisan education reforms during its 2009-2010 session.[1] These policies were inspired by President Obama's Race to the Top program, which awarded federal grants to states on a competitive basis. A key goal of the program was to encourage states to improve public schools by reforming policies related to how they train, evaluate, assign and pay teachers.[2]

Michigan applied three times for the competitive funding but failed on each attempt.[3] A strike against its application score was interference from the state's largest teachers unions, the Michigan Education Association and American Federation of Teachers-Michigan. They refused to endorse the proposed reforms, which would have boosted the state's chances.[4] Teachers unions also made known their plans to prevent districts from enacting the reforms by refusing to agree to them in their union contracts.[5]

In response, the Michigan Legislature enacted additional school reforms in 2011 meant to prevent unions from blocking the types of policies the Obama administration encouraged states to adopt. These reforms, among other things, gave school administrators more control over how they recruit, evaluate, assign and reward their teachers. The new legislation prohibited school districts from negotiating with teachers unions over subjects of bargaining related to these personnel issues.[6]

But in 2023, the Michigan Legislature reversed itself and repealed these changes.[7] Teachers unions will again be empowered to determine how school districts evaluate, place and reward teachers. They will likely push schools to readopt the policies that the Obama administration identified as problematic and encouraged states to reform.

Michigan is now at an inflection point. School officials will be asked to bargain over terms and conditions of employment previously left off the table. Some officials may not know that their existing collective bargaining agreements contain the formerly illegal terms that might automatically go back into effect. Other contracts have carved out the subjects of bargaining that were made illegal in 2011 but require those terms to be renegotiated immediately. No matter the state of their current contract, school officials should be prepared to address contract terms which they have not considered for more than a decade.

## Background

The Mackinac Center reviewed the collective bargaining agreements governing teachers working in Michigan's 200 largest school districts. These districts enroll nearly 70% of all public school students.* The purpose of this review is to help school administrators prepare for the various policy changes they may be facing in the near future. The review focused on terms that were prohibited subjects of bargaining in 2011 but are now legal for school boards to bargain over. Those terms include:

- Classroom observations.
- Teacher disciplinary procedures.
- Performance evaluations.
- Teacher layoff and recall procedures.
- Teacher placement decisions.
- Contracting out noninstructional services to private service providers.

These subjects were removed from the scope of collective bargaining in 2011, leaving them to the discretion of school administrators.† The 2023 repeal of these reforms renders them "permitted" subjects of bargaining again, which school administrators and unions may now negotiate as part of the collective bargaining process. In some school districts, however, negotiations might not be necessary for these terms to go back into effect.

One might expect that prohibiting school districts and unions from negotiating over certain subjects would result in those subjects being stripped from union contracts. But this is not the case: Few contracts appeared fully compliant with the law. Districts significantly varied in their implementation of the 2011 reforms. This is consistent with prior Mackinac Center research from 2014 finding that 60% of contracts did not completely remove prohibited language.[8] This raises questions about how committed districts were to the Race to the Top reforms. Did districts change their practices to retain and reward high-quality teachers, or did they continue to let their union contracts dictate these decisions?

Broadly speaking, the collective bargaining agreements reviewed contain terms that fall into one of three categories: compliant, questionable or noncompliant. A collective bargaining agreement was deemed compliant if it did not mention a prohibited subject of bargaining. Noncompliant contracts include those that refer explicitly to a prohibited subject, regardless of

* The 200 largest school districts in terms of enrollment counted more than 940,000 students in fall 2023, which is approximately 70% of the 1,357,200 counted statewide. "District FTE Pupil Counts" (MI School Data), https://perma.cc/K7LB-AB59.

† The Legislature made privatization a prohibited subject of bargaining in 1994, not 2011. For ease of reference, we have included it in the list of these reforms. For more, see: Robert P. Hunter, "Michigan's Public Employment Relations Act" (Mackinac Center for Public Policy, Aug. 24, 1999), https://www.mackinac.org/2322.

the substance of the contract term.* The questionable category signifies contract terms that are vague and open-ended, calling into question whether these prohibited subjects of bargaining are still practiced in these districts.

A common technique that is concerning — despite technically complying with the 2011 reforms — is keeping the prohibited policies in place for school employees who are not subject to the Michigan Teacher Tenure Act. Many of the 2011 reforms applied only to teachers subject to the state tenure law.[9] But teachers unions can include school employees who are not subject to this law, such as school librarians, counselors and social workers. Some districts agreed to contracts that retained the newly prohibited language just for these employees. Contracts that use this approach were generally deemed compliant with the law, barring additional terms that would lead them to be classified as questionable.

In addition to categorizing district compliance with the 2011 reforms based on those categories, we also identified contracts with clauses that either automatically revive prohibited terms or that would allow them to be easily reintegrated and expanded to all employees. Most contracts reviewed contained one of these terms. School administrators in these districts should be aware of these impending changes and should resist attempts to roll back reforms.

This lack of compliance might be due to a shortcoming of the 2011 reforms: There was no clear penalty for noncompliance. This is due, in part, to the fact that only school districts and unions have the standing to sue when a contract contains an illegal term.† Unions have also argued that the removal of a prohibited subject of bargaining from a collective bargaining agreement is, in fact, a negotiation over a prohibited subject of bargaining in and of itself. This argument is strained, as the Michigan Legislature obviously did not intend to enshrine these terms into collective bargaining agreements via the 2011 reforms.‡ Unions argued this point, nevertheless, and some districts may have agreed.§ Future reforms should consider adding a penalty for noncompliance, a mechanism for taxpayers to challenge illegal contracts, and a mandate to remove illegal language from contracts.

* As an example, the 2011 reforms rendered performance-based pay for teachers a prohibited subject of bargaining. Some of the collective bargaining agreements reviewed expressly provide for such merit pay systems, which were required by a 2010 state law. Despite this, these contracts are still classified as noncompliant, as they contain terms that were prohibited subjects of bargaining.

† The Mackinac Center previously brought a lawsuit challenging a collective bargaining agreement which contained illegal terms regarding privatization. While a judge agreed that the challenged language was illegal, the case was dismissed due to a lack of standing. Lindsey Smith, "Judge rules taxpayers, Mackinac Center, do not have standing in lawsuit over privatization" (Michigan Public Radio, March 2, 2011), https://perma.cc/32DJ-K5LP.

‡ The Michigan Employment Relations Commission called these attempts by unions to keep these prohibited subjects in teacher contracts "baseless" and "simply an attempt to delay and obfuscate the bargaining process." "MERC Clarifies Treatment of Prohibited Bargaining" (Thrun Law Firm, Sept. 29, 2015), https://perma.cc/ZT5J-TNTY.

§ This is an old union tactic. For example, a union official makes this argument in a letter from 1995 to a district superintendent, writing that "it is impossible to change or delete" prohibited subjects of bargaining "since that would involve bargaining. And bargaining is prohibited." La Rae G. Munk, "Collective Bargaining: Brining Education to the Table" (Mackinac Center for Public Policy, 1998), 17, https://www.mackinac.org/1437.

The following section describes the results of this review of teacher contracts in Michigan's largest 200 districts. The six prohibited subjects of bargaining mentioned above, a ban on school districts using public resources to collect union dues through payroll deduction, and language that would automatically revive illegal subjects were the focus of the research. Examples of particularly problematic language are provided. Where applicable, the various approaches to compliance with the 2011 reforms are discussed in greater detail. This report concludes by suggesting school districts review their existing contracts, familiarize themselves with previously prohibited terms, and negotiate firmly to preserve contract terms that prioritize improving teacher effectiveness and educational outcomes rather than union priorities such as reestablishing seniority-based rules.

## Review of contracts

### *Automatic revival terms*

While the bulk of this study focuses on specific contract terms, it should be noted that some contracts contain a general clause affecting each of these terms. These contracts typically include prohibited language, but with the express acknowledgement that those terms are unenforceable. But other language in these contracts requires the district to automatically revive these policies in the event the law changed. As a result, in some contracts, these terms automatically became district policy on Feb. 13, 2024, when the repeal of the 2011 reforms went into effect.

Clarkston Community Schools provides an example of a contract that will differ dramatically and automatically after that date. The district's current contract is mostly compliant with the 2011 reforms, because the district marked the prohibited terms in its collective bargaining agreement and recognized them as unenforceable. Clarkson simply struck the language, drawing a line through it, so the language in effect prior to these reforms remains in the contract, even if it is unenforceable. The district's contract is clear that these terms immediately become effective upon a change in the law:

> The prohibited subjects of bargaining … will be automatically re-inserted into the Master Agreement, or any successor agreement, if Michigan law changes such that a re-insertion of collective bargaining agreement provisions addressing prohibited subjects of bargaining is permissible.[10]

Presumably, no renegotiation is necessary for these terms to go into effect.[*] As a result, school districts with collective bargaining agreements containing similar language will soon be required to adhere to terms they have not considered for over a decade. Some school board members have never negotiated over these subjects, yet they will automatically be bound by them.

* In at least one district, the automatic revival of previously prohibited terms is likely to lead to arbitration. Grosse Pointe Public Schools has carved out prohibited subjects for teachers and has noted a conflict about the effect of repealing prohibited subjects. The district maintains that reinserting these terms requires renegotiation, while the local union claims the terms will automatically go into effect. "Master Agreement 2021-2023: The Grosse Pointe Public School System, The Grosse Pointe Education Association/MEA-NEA" (Grosse Pointe Public School System, Sept. 13, 2021), 9, https://perma.cc/79HH-GKPK.

Districts with contract language similar to this are particularly vulnerable to legal challenges from their union, as failure to adhere to these revived terms is likely to lead to arbitration over what is required by the contract. Perhaps more importantly, the restoration of prohibited subjects can fundamentally alter the way in which a district operates. School administrators have long had the autonomy to make decisions about teacher discipline, layoff and recall, and performance evaluations. Automatically reviving previously prohibited language may require these administrators to significantly change the practices and procedures they have developed to provide their schools with the highest quality teachers available.

School boards and their legal counsel should carefully evaluate their contracts to determine whether their collective bargaining agreements contain these blanket revival terms. Where they do, the district should exercise caution about proceeding in the usual course. Going forward, these districts should consider each of the following individual terms and attempt to negotiate ones that are designed to promote better student performance and greater district control.

### *Payroll deduction of union dues*

A 2011 law prohibited school districts from using public resources to collect dues on behalf of unions through payroll deductions. Like the prohibited subjects of bargaining reviewed in this study, this law was repealed in 2023. It read:

> (1) A public employer or an officer or agent of a public employer shall not do any of the following:
>
> [...]
>
> (b) Initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. **A public school employer's use of public school resources to assist a labor organization in collecting dues or services fees from wages of public school employees is a prohibited contribution to the administration of a labor organization.**[11] [Emphasis added].

The logic behind this reform is simple: Taxpayer dollars meant to fund public education should not be used to financially support a private and politically active organization, especially one that it is perfectly capable of collecting its own membership dues. This was reinforced by the U.S. Supreme Court's 2018 decision in Janus vs. AFSCME, in which the Court determined that public sector unions, such as teachers unions, engage in political speech when negotiating terms and conditions of employment for government workers.

In Janus, the Supreme Court was asked to review whether laws requiring employees to pay government unions in order to keep their jobs violated the First Amendment. Prior to the decision, government workers had the right to opt out of paying the portion of dues that their union spent on direct political activity, known as nonchargeable expenses, but they were still forced to pay the portion of dues supposedly only supporting the nonpolitical activity of a union.

The Supreme Court rejected this approach in the Janus case by determining that all activities conducted by government unions constituted political activity.

The Court reasoned that even negotiating over wages or work hours is political in nature because those activities directly impact governmental decisions on spending and policy. It ruled that government workers could not be forced, under threat of losing their employment, to pay dues or fees to a union. Requiring that support would violate the First Amendment rights of public employees because they would be forced to support political activity. This essentially brought right-to-work protections to all government workers across the country, and this protection continues even after the repeal of Michigan's right-to-work law.*

The 2023 changes to Michigan's collective bargaining law — the Public Employment Relations Act — now again allow districts to redirect public resources meant for educating students to organizations whose function is inherently political. Many public schools will soon find themselves being pressured to act as a union's bill collector. The de facto result is that Michigan taxpayers will subsidize political activity through school payroll deductions.

Unfortunately, some school districts appear poised to subsidize unions. A number of districts have language in their collective bargaining agreements that either unlawfully continued to permit payroll deduction of union dues or automatically resumes deducting dues now that the prohibition has been repealed. But even districts without this problematic language will now be asked to bargain over whether they will use taxpayer dollars to subsidize inherently political activity through payrolls. As a matter of principal, this is no different than school districts collecting campaign contributions for certain political candidates or using public funds to endorse a school millage, both of which violate Michigan law.[12]

In our review, 6% of contracts contained terms that appear to violate the state law prohibiting districts from collecting union dues through payroll deductions. Another nearly 40% contained terms which were questionable or could be interpreted as allowing for the practice. The rest of the contracts, just over half, appeared compliant with the law. Just over a third of these contracts contained language that either automatically revived these dues deductions or which could easily be adapted to do so.

Often, terms allowing for these dues deductions were preceded by references to other payroll deductions, such as for insurance premiums, retirement savings or annuity payments.† It is

* The Janus case was decided on constitutional grounds and, therefore, overrules any contrary public sector bargaining federal or state statutes. The 2023 law repealing Michigan's right-to-work protections expressly acknowledges this, stating that the law does not go into effect unless Janus is repealed, or a federal constitutional amendment permitting agency fees is adopted. Thus, public sector workers cannot be forced to join a union, or to pay dues or agency fees. MCL § 423.210(5)(a).

† Generally, rules of statutory construction would indicate that any other mutually agreed-upon deductions be of the same or a similar class to those which are specifically listed. Under this canon of construction, dues deductions would typically be outside the scope of deductions that could be authorized. Given an outside party's lack of standing to sue, however, a determination that dues deduction is sufficiently similar to the listed deductions would be challenging.

possible that these open-ended terms could be used to seamlessly revive payroll deductions for union dues, without even the need to renegotiate the collective bargaining agreement.

Troy School District provides an example of this questionable language:

> Deductions for financial institutions, tax-deferred annuities, United Foundation, and other deductions will continue as authorized by individual teachers. Other deductions may be arranged by mutual agreement between the Board and the [union].[13]

Some contracts go even further and appear to explicitly violate the law. Warren Consolidated Schools, for instance, operates under a collective bargaining agreement that explicitly requires teachers to pay a union or face termination.[14] Perhaps recognizing that this requirement is contrary to both Michigan's right-to-work law and the Janus ruling, the union agrees to indemnify the school board for any legal liability and fees incurred if the district illegally terminates an employee for refusing to pay the union. Although this provision violates the First Amendment rights of teachers, employees reading this agreement are likely to believe that they are required to support the union. School districts should not agree to unenforceable contract terms, particularly when those terms clearly violate the law and mislead employees about their legal rights.

Other districts have already waived the right to negotiate over dues deduction upon repeal of the 2011 reforms. Detroit Public Schools' bargaining agreement provides a clear example of language that automatically reinstates dues deductions without the need for renegotiation:

> Consistent with and as limited by current practice, the District shall make payroll deductions upon written authorization from bargaining unit members to the extent permitted by law. In the event that there is a change in law which would authorize payroll deductions for Union dues and/or fees, the District shall allow and effectuate such deductions consistent with applicable law.*

School officials should review their existing collective bargaining agreements for this language. Districts should not be in the business of subsidizing political activity, whether in the form of payroll deduction or otherwise. Deducting dues on behalf of a union also creates the risk of litigation. Public sector workers across the country have sued over such practices, with school districts frequently being named as defendants.[15] Schools wishing to avoid these issues should refuse to deduct union dues through their payroll systems.

* "Agreement between the Detroit Public Schools Community District and the Detroit Federation of Teachers, July 1, 2021-June 30, 2023" (Detroit Public Schools Community District, Sept. 24, 2020), https://perma.cc/H6DJ-5HKY. The reference in the contract to "Union dues and/or fees" is misleading, as it suggests to a reader that an employee's rights are tied to the existence of Michigan's right-to-work law. The Janus decision protects public sector employees from being forced to pay these fees as a matter of constitutional law, but employees who are not aware of that decision may conclude that they are required to pay agency fees based on the language of this collective bargaining agreement.

### *Performance-based pay*

The 2011 reforms prohibited a school district from negotiating over the "method of compensation for its teachers."[16] Michigan school districts traditionally agreed to use a "single-salary schedule" to determine teacher salaries. Unions demand this policy, which sets pay based only on a teacher's level of education and years of experience. Neither a teacher's ability to drive student learning gains, nor any other factors may be used to determine compensation under this system.

The Mackinac Center highlighted some of the shortcomings of single-salary schedules in 2008:

> Without the possibility of earning more money for high-quality performance, teachers may be indirectly encouraged to meet only minimum performance levels, such as maintaining order in the classroom or keeping peace with parents. This outcome is even more likely when teachers are observed only a few times per year by supervisors, and their individual performance is not measured by student test score performance gains. Single-salary-schedule compensation policies have ensured that teachers are paid the same amount whether their students improve or not, and across-the-board pay increases are often guaranteed simply for showing up each year. Unfortunately … student achievement in Michigan is not high, and it has not improved compared to the national average despite high and rising state spending. In this context, alternative pay structures make sense. They reward the key people — effective teachers — who can improve public education in the state.[17]

The following year, the Michigan Legislature and Gov. Jennifer Granholm passed a law requiring a school district "to 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."[18] The Legislature further strengthened this requirement as part of the 2011 reforms, explicitly forbidding school districts and unions from negotiating over performance-based compensation.[19]

In adopting these changes, the Legislature made clear that while teacher compensation was to be based on performance, the exact method of performance-based compensation was to be left to a school district's discretion. Unfortunately, few school districts complied with this law. There were no ramifications for violating it. Districts continued using a single-salary schedule to determine teacher pay and did not make job performance "a significant factor" in determining teacher salaries.

Some districts did create performance-based awards for teachers, but these were small stipends and fell well short of the statutory requirements. The stipends rarely amounted to any more than a small percentage of a teacher's salary, with the remaining portion still determined by nonperformance factors. Some districts arguably made a mockery of the statute, agreeing to give highly rated teachers performance bonuses of just $1.[20] While those gimmicks have largely been abandoned, some districts carry on offering paltry performance-based pay. Western School

District in Jackson County, for instance, currently offers a one-time payment of $50 for teachers who are rated effective or highly effective. Of those districts offering performance bonuses, few exceeded $500.

Even districts that offer merit-based pay often undermine it. Many contracts use teachers' effectiveness ratings from their formal evaluations to determine which teachers qualify for performance pay. This might be reasonable, but districts tend to give all teachers ratings that would qualify them for the stipend. In 2018, for example, an absurd 98% of teachers in Michigan were rated "effective" or "highly effective," likely qualifying them for any merit-based award offered in their respective districts.[21]

In our review, about 22% of contracts contained terms that discussed the prohibited subject of merit pay. Another 2% contained terms that were questionably related to the topic or could be interpreted as limiting a district's discretion on this matter. Just over 75% were compliant with the law by either not discussing the prohibited subject, carving out employees subject to the Teacher Tenure Act, or expressly acknowledging that merit pay was to be left to the district's complete discretion. Overall, 6% of contracts contained language that either automatically revived terms that had been removed due to the 2011 reforms or could easily be adapted to do so.

But nearly all districts still use a single-salary schedule. This seems to violate both the spirit and the letter of the 2009 law. It requires districts to use performance as "a significant factor" in determining teacher compensation. A district using a single-salary schedule is choosing to make educational attainment and years on the job the significant factors that determine teacher pay. The 2009 merit pay law was also repealed in 2023, effective July 1, 2024.[22]

School boards should, nevertheless, consider the importance of prioritizing teacher performance over seniority. Performance-based pay can be highly flexible and tailored to include not just student proficiency scores but also learning growth, supervisor and peer evaluations, and overall group performance. A holistic approach to evaluating teachers, incorporating more than one of these elements, allows districts to identify and reward high-performing teachers.

### *Classroom observations*

Another subject that was supposed to be removed from the purview of collective bargaining in 2011 was classroom observations of teachers. The state's labor law eliminated the parties' ability to bargain over:

> Decisions about the format, timing, or number of classroom observations … decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.[23]

Prior to these reforms, it was common for collective bargaining agreements to tightly regulate the frequency and mechanics of teacher observations. Many districts kept these procedures in place for employees not regulated by Michigan's Teacher Tenure Act, who are frequently carved out of the bargaining unit to operate under pre-2011 contract language.

Novi Public Schools' current collective bargaining agreement provides an illustrative example, with observations for nontenure employees still heavily regulated. This includes restricting observations to "a reasonable amount of time" (recommended between 20 and 30 minutes), requiring a post-observation conference with the administration within five days of the observation, providing teachers the chance to formally object to an observer's written findings and allowing employees to ask for a different evaluator.[24]

In our review, 5% of contracts contained terms that discussed classroom observations. Just more than 10% contained language that was questionably related to the topic or that could be interpreted as restricting a district's discretion over observations. About 85% of contracts appeared compliant with the law by either not discussing this prohibited subject, carving out classroom teachers or expressly acknowledging that the term was a subject to be left to the district's discretion. Overall, 24% of contracts contained language that either automatically revived terms that had been removed due to the 2011 reforms or could easily be adapted to do so.

Instead of simply reviving these formerly illegal provisions, districts should negotiate to allow school administrators to set the terms of observations at their discretion. Maintaining control over how administrators observe teachers in action will help districts identify high-performing teachers and ways to help all teachers improve. Overly prescriptive observations rules often make the process more performative than it is useful.

### *Performance evaluations*

The 2011 reforms also prohibited districts from negotiating over how teachers would be evaluated. Prior to reform, school districts and unions would often agree to terms that provided little incentive for administrators to conduct thorough evaluations, were highly favorable to teachers and allowed them to challenge their ratings. A common practice was to agree to rate teachers as effective by default, even if no evaluation had been conducted. How often teachers were evaluated was often restricted, creating a situation in which teachers might receive years of effective ratings without undergoing any job performance evaluation. Taken together, these restrictions led to fewer evaluations and less accountability.

In our review, 6% of contracts contained illegal terms about evaluations. Another 10% contained terms that were questionably related to performance evaluations or that could be interpreted as limiting a district's discretion. About 83% appeared compliant with the law by either not discussing a prohibited subject, carving out teachers subject to tenure or expressly acknowledging that the term was a subject to be left to the district's complete discretion. Overall, 38% of contracts contained language that either automatically revived a district's old evaluation practices or could easily be adapted to do so.

Lakeview Public Schools in St. Clair Shores provides an example of this type of contract. The contract requires the district and union to mutually agree on an evaluation framework for employees not subject to the teacher tenure law. Evaluations are limited to a single review each year. Employees must be notified in advance of any observation or monitoring of the employee's performance. An employee who is found to be ineffective can demand a conference with the administration and rebut the rating with the help of a union official. Employees cannot be reevaluated from an effective rating to an ineffective rating outside the annual evaluation unless new evidence is discovered or there is a significant change in the employee's performance. Underperforming employees are given a performance improvement plan, but that plan is limited to no more than three areas of improvement, regardless of whether more areas of improvement are needed. This agreement also specifically indicates that "the performance of all [employees] is presumed to be effective."[25]

It is highly likely that terms similar to those in the Lakeview contract will be the default bargaining position for unions now that the 2011 reforms have been repealed. In fact, some of these terms are specifically required by law. Public Act 224 of 2023, signed into law in November 2023 and effective in July 2024, sets the default rating for a teacher who is not formally evaluated as "effective." That law makes it harder to identify the best teachers by reducing the number of rating classifications from four to three: teachers can only be effective, developing or needing support. There are no more "highly effective" or "ineffective" teachers in Michigan, per state law.[26]

These changes are problematic because they may both conceal areas where teachers can improve and allow poorly performing teachers to carry on teaching without creating a plan for them to improve. If this system were to be partnered with contract terms that allow a teacher with an

effective rating to be evaluated only once every three years, a single missed performance review could result in a sub-standard teacher being retained for at least three years, with the district having little opportunity to remove him or her.

Districts, particularly those with overspending problems, may be tempted to agree to more flexible evaluation terms, as they require less administrative overhead and a smaller investment of staff time to administer. But school administrators should not lose sight of the importance of regularly and accurately rating teachers. A teacher's performance directly impacts how effectively children in the classroom can learn. If administrators' ability to measure teacher performance is hindered, districts cannot provide the accountability needed to rid themselves of underperforming teachers. None of those outcomes is beneficial to ensuring Michigan's public schools are fulfilling their role of properly educating children. School administrators should be mindful of this primary concern.

### *Discipline*

One of the most important 2011 reforms may be one of the most ignored: restrictions on negotiating over disciplinary procedures for teachers. Under the state's labor law, public schools are prohibited from negotiating over:

> Decisions about the development, content, standards, procedures, adoptions, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. … [A] public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard.[27]

These restrictions apply only to teachers subject to the Teacher Tenure Act, just like many of the other 2011 reforms. That law defines a teacher as "a certificated individual employed for a school year by any board of education or controlling board."[28] Read plainly, these restrictions essentially foreclose negotiations relating to all disciplinary procedures, processes or decisions.

They go further, however, by also barring districts from adopting a disciplinary policy that uses something other than the "arbitrary and capricious" legal standard. By so doing, the Legislature made clear that discipline cannot be overturned by a lesser standard.

Compliance with these restrictions varied considerably. In our review, 23% of contracts discussed the prohibited subject of discipline. Just more than 30% contained terms which were questionably related or that could be interpreted as limiting a district's discretion. Just shy of 50% of the contracts appeared compliant with the law by either not discussing the prohibited subject, carving out teachers or expressly acknowledging that discipline would be left to the district's complete

discretion. Overall, 63% of contracts contained language that either automatically revived pre-2011 discipline procedures or that could easily adapted to do so.*

In enacting teacher discipline reforms during the Obama administration, the Legislature sought to empower school officials with the tools they needed to improve their teaching corps. Administrators could now identify and reward valuable teachers, while removing those who persistently underperform. That authority and those tools are now in jeopardy, as unions will likely demand that districts revert to the old legal standard, known as "reasonable and just cause." This was the most common standard used by districts prior to the 2011 reforms. It makes it so difficult for school officials to remove poorly performing teachers that it dissuades many districts from even trying.[29]

Under this standard, arbitrators determine whether discipline is appropriate based on a seven-factor test that gives little deference to school administrators. An employee who is disciplined can challenge it as inappropriate, and for that discipline to be upheld, it must typically pass the seven tests established in a 1966 legal decision.[30] Those tests include:

1. Did the employee know his or her conduct could lead to discipline?
2. Was the employer's rule related to the function of the business and reasonably expected of the employee?
3. Did the employer conduct a proper investigation before issuing discipline?
4. Was the employer's investigation fair?
5. Did the investigation result in substantial proof of wrongdoing?
6. Is the employer applying its rules in a nondiscriminatory manner?
7. Was the discipline reasonable, based on the seriousness of the offense and the employee's track record?†

The problem with this approach is that it leaves the ultimate decision regarding teacher discipline to an unelected and unaccountable arbitrator. Typically, arbitrators are chosen by the parties, and reflect a compromise over the preferred decision maker. But if an arbitrator makes an unreasonable decision, there is little that can be done by the administration or the public to challenge that decision. Arbitrators' decisions are given extremely broad discretion on appeal and are rarely overturned by courts.

* Some of these carve-outs were not counted as being compliant with state law, which is why a larger portion contained carve-outs than were compliant. Noncompliant carve-outs were ones that attempted to apply the contract's disciplinary procedures only if the employee could not seek a remedy under the Teacher Tenure Act. That does not comply with the intent or letter of the law of the 2011 reforms.

† These are paraphrases of the seven tests. For the original wording, see "In re Enterprise Wire Co and Enterprise Independent Union," 46 LA 359 (March 28, 1966), https://perma.cc/UE8S-R6PT. It should be noted that while these tests are at least somewhat facially reasonable, they become problematic in their application. While a full discussion of the just-cause standard is outside the scope of this study, arbitrators retain considerable discretion when evaluating the reasonableness of discipline, which can lead to significant restrictions on a district's ability to manage its employees.

Taxpayers are also excluded from the process. If the public believes a school administrator's decisions are unreasonable, they can voice their dissent through the political process by electing new school board members. Thus, those administrators are accountable to the public. There is no such relief available when an arbitrator makes a just-cause determination — the best citizens can do is elect new school board members in the hopes they select better arbitrators. Michigan should not be delegating decisions about the proper level and type of discipline for public school teachers to politically insulated entities. As the Janus ruling reminds us, these decisions about public school policies are inherently political, so they should include the means for voters to hold decisionmakers accountable.

The unaccountable nature of arbitrators is not the only problem with mandatory arbitration. Many collective bargaining agreements specifically limit arbitrators' ability to deviate from the text of that agreement, which, generally speaking, is a positive thing. But this poses a risk for contracts that have specific terms regarding what discipline is to be issued in a specific circumstance.

Take, for instance, a restriction that can be found in the Bay City Public Schools teachers' contract. Under that contract, public school employees could be under the influence of alcohol on school grounds five times before being terminated. They could also possess or be under the influence of illegal drugs three times before being fired. These employees could even be caught selling or manufacturing drugs, alcohol or tobacco twice before facing that penalty.[31] An arbitrator charged with reviewing discipline under these terms would have no discretion to deviate from them, even if the discipline issued would otherwise be upheld as satisfying a just-cause standard under a different collective bargaining agreement.

Bay City's contract has been amended so that this provision only applies to employees not subject to the state's tenure law. It also specifically cites the 2011 reforms as the reason that these terms are no longer effective for teachers. Despite this, they remain in an appendix to the district's master agreement, meaning they could easily be revived now that bargaining over discipline for all school employees is permissible.

These, and similar disciplinary terms, impact not only the learning environment but also student safety. Given the absence of guard rails in the repeal of the 2011 reforms, discipline poses a new risk to the education of Michigan's children. Districts should carefully review their current collective bargaining agreements to ensure that they are aware of any new disciplinary standards that will automatically go into effect thanks to the repeal of the 2011 reforms. School officials should protect their authority to discipline ill-behaving school employees.

### *Privatization*

One policy that the 2023 changes overturned concerns a long-standing, money-saving practice by public school districts: privatization. Districts often contract out for services like custodial, transportation and food services. In 1994, the Legislature forbade unions and school districts from negotiating over whether districts would contract out for these noninstructional services. Unions oppose this practice because employees in these privatized services are no longer public employees and cannot be easily unionized. That means fewer members and less dues revenue for unions.

Privatizing is popular with school officials because it helps them balance their budgets. When school employees are responsible for performing these services, the costs are generally higher, as districts are required to pay about a third of employee salaries to fund the state's school employee retirement system.[32] This drives up costs, which, coupled with declining enrollment, can create significant financial strain on schools. Districts can lower costs while still providing the level of service expected by students, parents and the broader community by contracting out.

Since 1994, districts have embraced privatization. The Mackinac Center surveys districts annually to estimate privatization rates. About 70% of districts used private subcontractors for at least one major noninstructional service for the past eight years. Almost half (45%) of districts contract for food services, half (51%) subcontract custodial services and nearly a third (28%) contract out for transportation needs. This is a significant increase since 2001, when the Center first researched this question. Only about 30% of districts contracted out at that time.[33]

The widespread adoption of privatization may have led to relatively strong compliance with the prohibition against bargaining over these decisions. Of the contracts reviewed, 6% contained terms that discussed privatization. Another 6% contained language that was questionably related to the topic or could be interpreted as hampering a district's discretion. The rest of the contracts, nearly 90%, were compliant with the law by either not discussing a prohibited subject or expressly acknowledging that the term was to be left to the district's discretion. Only 2% of contracts contained language that either automatically revived these terms or could easily be adapted to do so.

Districts would be wise to ensure they maintain the option to contract with outside parties. As of the Mackinac Center's most recent survey, fewer than 2% of districts were unsatisfied with outsourcing. Privatization also serves taxpayers. Districts can avoid unnecessary costs while still providing comparable or even improved services.[34]

### *Layoff procedures*

The 2011 reforms also expanded school districts' ability to control the staffing and placement of teachers. State law forbade school districts and unions from bargaining over:

> Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position.[35]

This change, in conjunction with other reforms to state law, attempted to restrict the use of seniority as the primary factor in layoff and recall decisions.* Until this amendment, union contracts required teachers to be laid off based solely on their seniority status, or how long they had been employed. How effective they were at helping their students meet the state's academic standards was not considered. The result was "last in, first out:" that is, newer teachers, no matter how talented or valuable, would be laid off first. Recalls, where districts hire back employees who were laid off, also follow seniority ranks. So the youngest teachers are not just the first fired but also the last rehired.

A seniority-based layoff system often requires districts to lay off more employees than they might otherwise. Employees with the least years of service are also the lowest paid, due to the rigid structure of the single-salary schedule. Thus, districts cutting personnel to save costs would be forced to lay off more teachers to make ends meet, compared to a system where other factors could be considered, such as teacher effectiveness.†

In this review, 11% of contracts contained prohibited language related to layoffs. Another 9% contained terms that were questionable or that could be interpreted as limiting a district's discretion. The rest of the contracts, about 80%, appeared compliant with the law by either not containing language about layoffs, carving out teachers subject to the tenure law or expressly acknowledging that layoffs would be left to the district's discretion. About 40% of contracts contained language that either automatically revived pre-2011 layoff terms or could be easily amended to restore seniority-based personnel decisions for all employees.

It should be noted that it is unclear whether the 80% of districts classified as compliant with the law have actually stopped basing personnel decisions on seniority. As with the merit pay and teacher evaluation requirements, there is no prescribed penalty for districts that fail to follow the law. If district officials wished to preserve a seniority-based system implicitly, it would be difficult

* See MCL § 380.1248, which was also modified in 2011. This statute prohibited districts from using "length of service or tenure status" as "the primary or determining factor in personnel decisions."

† It should be noted that a system of layoffs based on salary alone would be equally problematic. Higher paid teachers are generally those with more years of service, and as a result, are generally older. A purely merit-based layoff system avoids the pitfalls of both the seniority- and salary-based options, as both rely on factors heavily correlated with age.

to verify that they were doing so, as any number of justifications could be offered for why generally younger and less-experienced employees were the first laid off. Barring a record that is clear on the issue, extensive Freedom of Information Act requests would be necessary to obtain the facts needed to argue that a layoff had been conducted based on seniority. And even if this information were obtained, it is unlikely that anyone other than a district employee could challenge the layoff as improper. Regardless, these districts at least facially comply with existing law.

School districts should not renegotiate to allow seniority as the sole or even the primary factor when evaluating personnel for layoffs. The most important work a school district can do is to put good, effective teachers into classrooms and retain them. Using seniority to act as a proxy of effectiveness, particularly when coupled with the changes to the teacher evaluation process discussed above, seriously jeopardizes districts' ability to provide the highest quality education possible. Michigan's students should be taught by the most effective teachers available, without regard for how long they have been teachers.

### *Teacher placement*

Another subject removed from the realm of bargaining by the 2011 reforms was the issue of teacher placement. Specifically, schools and unions could not bargain over "[a]ny decision made by the public-school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit."[36] By restricting negotiations over placement, these reforms prevented unions from negotiating contract terms that would limit a school district's discretion to assign teachers where they are most needed.

In our review, 5% of contracts still included prohibited language about teacher placement. Another 9% contained terms that were questionably related to the subject or could be interpreted as limiting the district's discretion. About 86% were compliant with the law by either not discussing the prohibited subject, carving out Teacher Tenure Act employees or expressly acknowledging that placement was to be left to the district's discretion. Overall, 29% of contracts either automatically revived the old placement rules or could be easily adapted to do so.

Following the repeal of teacher placement as a prohibited subject, it is likely that unions will try and negotiate terms that will once again require districts to make all placement decisions based on seniority. Generally speaking, this means that teachers with more years on the job will have first choice in placements, while younger teachers will get shuffled around. As a result, school officials will have a more difficult time ensuring that each classroom features a motivated, adequately trained and highly effective teacher. These terms would undermine schools' ability to make key decisions about how to most effectively use a teacher's skill set and are likely to result in worse student performance.

## Remaining prohibited bargaining subjects

Districts should be aware that state law still prohibits bargaining over several topics. School officials and unions are still prohibited from negotiating over several subjects, including:

- Who the policyholder is for an employee group insurance benefit.*
- The starting day of a school year.
- How many hours of pupil instruction to provide each year.
- The make-up of certain school improvement committees.
- Whether to participate in Schools of Choice and to what extent.
- Whether to authorize a charter school.
- The use of volunteers in schools.
- Decisions concerning the use and staffing of pilot programs.
- Decisions about the use of technology for instructional and support services.
- Compensation or additional work assignments provided to reimburse employees for monetary penalties under state law.[37]

These subjects, while certainly important, are less likely to impact the day-to-day learning environment students will experience. They are also unrelated to teacher accountability or performance. While it is unfortunate that the repeal of the 2011 reforms will prevent districts from promoting those goals as effectively, the continued defense of these subjects continues to be important.

## Recommendations and conclusion

School districts are going to face a significantly different collective bargaining environment in the immediate future, with teachers unions likely to push for terms that have not been lawful considerations for over a decade. Districts should be aware that converting prohibited subjects of bargaining into permitted ones does not necessarily render them mandatory subjects of bargaining. Mandatory subjects of bargaining are limited to those affecting "wages, hours, and other terms and conditions of employment." Districts are legally obligated to bargain in good faith over these subjects and must negotiate any changes to them. The parties must agree on these terms or face an impasse.[38]

Of the formerly prohibited subjects of bargaining covered in this review, only the subjects of privatization and dues deduction are likely not to be considered mandatory subjects of bargaining. These instead are likely permissive subjects. Districts will probably be asked to negotiate over

* This does not, however, prohibit negotiations over the types and levels of benefits and coverages for that insurance, or a change in type or level of benefit, policy specification, or insurance coverage prior to them being changed.

these terms, but they need not agree to change their existing language, if there is any. Districts are in a strong position to stick with their current language, which has been the common practice of the parties for more than 10 years. Since the parties have no obligation to bargain over these terms, neither party can insist, on the threat of impasse, on the inclusion of a permissive term.

Districts should be cautious about agreeing to permissive terms, as they could lead to unexpected controversy. As an example, a common permissive term is that teachers and other school employees may wear buttons or similar accessories demonstrating union membership.* While these terms are facially uncontroversial, some teachers' unions have used these badges to display support for controversial social and political issues, which, in turn, exposes school districts to criticism.[39]

Districts should always negotiate with a focus on educational outcomes and accountability. Should a district choose to alter terms in the teacher contract, it should ensure that any changes from existing language promote these goals. Districts should fight hard to preserve the authority to regularly observe and evaluate all teachers, as well as the ability to reward high-performing teachers and terminate teachers demonstrating poor performance.

It is also important to remember that the Legislature prohibited certain subjects of bargaining for a reason. At the time, a broad-based, bipartisan campaign for education reform made a compelling case for giving school administrators the authority to ensure that classrooms were staffed with high-quality teachers. Having to bargain over these terms makes that objective more difficult. With that in mind, school boards should do everything they can to retain the ability to adequately inspect and evaluate the quality of the teachers in their classrooms. Nothing a school district does matters more for improving overall student achievement.

Districts should immediately review their existing contract terms to understand their current obligations and identify any terms that might be automatically revived. They should also prepare to bargain over the language and terms previously removed from the contract. Board members should focus their bargaining sessions on winning terms that better focus on student performance. Adopting previous language verbatim will be tempting and encouraged by unions, but school board members should take the opportunity to rethink what type of policies concerning teacher pay, placement, evaluation and the like will promote academic excellence.

* Chippewa Valley Schools provides an example of this term, as it states that "[n]o teacher shall be prevented from wearing insignia, pins, or other [union] identification either on or off school premises." "Master Agreement between the Chippewa Valley Schools Board of Education and the MEA-NEA Local 1" (Chippewa Valley Schools, May 3, 2023), https://perma.cc/X8GZ-6SJS.

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