

**COLLINS & BLAHA, P.C.**

**ATTORNEYS AT LAW**

**SUITE 170**

**31440 NORTHWESTERN HIGHWAY  
FARMINGTON HILLS, MICHIGAN 48334**

**TELEPHONE 248/406-1140**

**FACSIMILE 248/406-8416**

**GARY J. COLLINS  
WILLIAM J. BLAHA  
LORIE E. STEINHAUER†  
AMBERLY ACUFF BRENNAN  
JOHN C. KAVA  
JEREMY D. CHISHOLM  
SCOTT D. CORBA  
JULIA M. MELKIC**

†ALSO ADMITTED IN  
THE DISTRICT OF COLUMBIA

**JACQUELINE R. ZABLOCKI  
PATRICIA M. POUPARD  
ETHAN P. SCHULTZ  
AHMAD A. CHEHAB  
DANIEL R. BAKER  
GARRETT W. ROBINSON**

**OF COUNSEL  
NEIL H. GOODMAN  
ROBERT J. GAVIN**

May 5, 2020  
via Electronic Mail

**Confidential  
Attorney-Client Privilege**

Melissa Baker, Executive Director  
Metropolitan Detroit Bureau of School Studies  
391 College of Education, Wayne State University  
Detroit, Michigan 48202

**Re: Executive Order 2020-65 and New Year-End Evaluation Requirement**

Dear Ms. Baker:

On April 30, 2020, Governor Whitmer issued Executive Order 2020-65, which addresses the suspension of in-person instruction for students in grades K-12 for the remainder of the 2019-2020 school year. Executive Order 2020-65 is identical in many ways to its predecessor, Executive Order 2020-35. However, Executive Order 2020-65 rescinds Executive Order 2020-35, and makes some changes to the prior order, **including a significant change to school districts' obligations with respect to teacher evaluations.**<sup>1</sup> Previously, Executive Order 2020-35 waived the requirement for school districts to perform teacher and administrator performance evaluations, as generally required by MCL 380.1249. Executive Order 2020-65 now waives that requirement **only for teachers "not on an individual development plan on March 13, 2020."** Executive Order 2020-65, § IV, ¶ H (emphasis added). Executive Order 2020-65 also has several additional paragraphs on how performance evaluations for those teachers on an individual development plan ("IDP") must be conducted. These are discussed fully below.

Therefore, school districts must provide a year-end performance evaluation for the 2019-2020 school year to any teacher with an IDP pursuant to sections 38.83a or 38.93 of the Teachers' Tenure Act (the "Tenure Act"). The Tenure Act requires school districts to provide an IDP for the following teachers: (1) all probationary teachers; and (2) all teachers who received a rating of ineffective or minimally effective on their most recent annual year-end performance evaluation. Executive Order 2020-65 recognizes that school districts may not be able to comply with all statutory requirements for year-end performance evaluations this year, and so it provides some flexibility for the evaluations that must be conducted this school year for teachers on IDPs.

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<sup>1</sup>See the redlined version of Executive Order 2020-65, attached, which reflects the differences between Executive Order 2020-35 and Executive Order 2020-65.

## I. Requirement to Conduct Evaluations for Teachers on IDPs

Executive Order 20220-65 requires school districts to provide annual year-end evaluations to teachers on IDPs pursuant to MCL 38.83a and 38.93:

Any teacher who has an individualized development plan, pursuant to section 38.83a or section 38.93 of the Teachers' Tenure Act, MCL 38.83a, 38.93, **shall be provided an annual year-end performance evaluation** by the employing school district. [Executive Order 2020-65, § IV, ¶ 10 (emphasis added).]

The Tenure Act, MCL 38.83a requires a teacher to be provided with an IDP “each year during the teacher’s probationary period.” MCL 38.93 provides that if a teacher “has received a rating of ineffective or minimally effective on an annual year-end evaluation, the school district shall provide the teacher with an individualized development plan . . . .” that a probationary teacher have an individualized development plan. MCL 38.83a. Therefore, all probationary teachers must be provided with year-end evaluations, executed in accordance with Executive Order 2020-65. In addition, the Tenure Act requires school districts to provide IDPs to all teachers who received a rating of ineffective or minimally effective on their 2018-2019 year-end performance evaluation, and therefore they must be evaluated pursuant to Executive Order 2020-65.

## II. Criteria for Year-End Performance Evaluations

Executive Order 2020-65 explains the manner in which a school district must perform evaluations during the 2019-2020 school year:

(a) Except as provided in section IV.12 of this order, **a teacher’s annual year-end performance evaluation shall be determined based on the teacher’s performance at least through March 13, 2020**, consistent with section 1249 of the School Code, MCL 380.1249, and sections 38.83a and 38.93 of the Teachers’ Tenure Act, MCL 38.83a and 38.93, as affected by this and other orders.

(b) Except as provided in section IV.12 of this order, a teacher’s annual year-end performance evaluation **may account for the teacher’s performance after March 13, 2020 through the end of the 2019–2020 school year**, consistent with section 1249 of the School Code, MCL 380.1249, and sections 38.83a and 38.93 of the Teachers’ Tenure Act, MCL 38.83a and 38.93, as affected by this and other orders, **including efforts made by the teacher to prepare and provide remote student instruction** given the limitations resulting from the COVID-19 pandemic and accompanying response efforts. [Executive Order 2020-65, § IV, ¶ 10(a), (b) (emphasis added).]

Thus, a teacher’s performance prior to the start of the COVID-19 school closure *must* be used in the teacher’s performance evaluation. A school district has the option of including a teacher’s performance after the school closure began on March 13, 2020 in the teacher’s evaluation.

Executive Order 2020-65 also provides that performance evaluations shall not consider criteria that requires data or information not available due to the school closure, an executive order, or the state of emergency/state of disaster resulting from the COVID-19 pandemic:

Strict compliance with rules and procedures under sections 38.83a, 38.83b, and 38.93 of the Teachers' Tenure Act, MCL 38.83a, 38.83b, and 38.93, and section 1249 of the School Code, MCL 380.1249, is temporarily suspended such that **annual year-end performance evaluations** under section IV.10 of this order **shall give no consideration to criteria requiring data or other information unavailable** because a school district, student, teacher, or administrator acts in conformance with this executive order or other orders or response efforts prompted by the COVID-19 state of emergency and/or state of disaster. [Executive Order 2020-65, § IV, ¶ 11 (emphasis added).]

For example, ordinarily, a teacher's evaluation must "take into account student growth and assessment data," as follows:

- (i) . . . Beginning with the 2019-2020 school year, 40% of the annual year-end evaluation must be based on student growth and assessment data.
- (ii) For core content areas in grades and subjects in which state assessments are administered, 50% of student growth must be measured using the state assessments, and the portion of student growth not measured using state assessments must be measured using multiple research-based growth measures or alternative assessments that are rigorous and comparable across schools within the school district, intermediate school district, or public school academy. Student growth also may be measured by student learning objectives or nationally normed or locally adopted assessments that are aligned to state standards, or based on achievement of individualized education program goals. [MCL 380.1249(2)(a).]

However, the student growth and assessment data ordinarily used by the District for purposes of teacher evaluations may not be available because the assessments were not conducted, or the data was not reviewed and calculated. School districts may determine that administering a post-test would be unfair, given the weeks of school missed by the student and changes to the curriculum resulting from the implementation of the Continuity of Learning Plan. If student growth and assessment data is not available, then teacher evaluations should be completed without this data, using the information that is available.

### **III. Other Important Provisions of Executive Order 2020-65**

#### **A. Time Toward Probationary Period**

Executive Order 2020-65 makes clear that a probationary teacher employed this year can still count this year toward completion of his or her probationary period:

Strict compliance with rules and procedures under sections 38.83a, 38.83b, and 38.93 of the Teachers' Tenure Act, MCL 38.83a, 38.83b, and 38.93, and under section 1249 of the School Code, MCL 380.1249, is temporarily suspended to the extent necessary to allow a teacher rated as highly effective or effective on their annual year-end performance evaluation for the 2019–2020 school year under sections IV.10 and IV.11 of this order **to accrue time toward completing the teacher's probationary period** under Article II, sections 38.81 through 38.84, of the Teachers' Tenure Act, MCL 38.81 through MCL 38.84. [Executive Order 2020-65, § IV, ¶ 12 (emphasis added).]

#### **B. Option to Complete Evaluations for Other Teachers**

Executive Order 2020-65 also clarifies that nothing in the order prohibits a school district from completing an annual year-end performance evaluation for teachers who are not on an IDP. The order provides that if an evaluation is completed for the 2019-2020 school year for such a teacher, a school district must comply with ¶ 10(a) and (b), quoted above in Section II. In addition, such evaluations are not subject to any rules or procedures of the Tenure Act or Revised School Code that require data or other information unavailable because of the school closure, other executive order, or the state of emergency/state of disaster resulting from the COVID-19 pandemic.

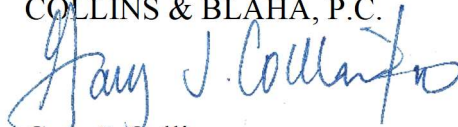
#### **IV. Conclusion**

Therefore, a school district must provide 2019-2020 annual year-end evaluations for all teachers on an IDP. Pursuant to the Tenure Act, a school district must provide all probationary teachers and teachers who were rated ineffective or minimally effective on the last year-end performance evaluation with an IDP. The 2019-2020 year-end performance evaluations *must* account for the teacher's performance prior to the school closure on March 13, 2020. In addition, these evaluations *may* take into consideration a teacher's performance under the Continuity of Learning Plan following the March 13, 2020 school closure; whether to consider this information is within each school district's discretion.

Should you have any further questions or concerns regarding this matter, please do not hesitate to contact our office.

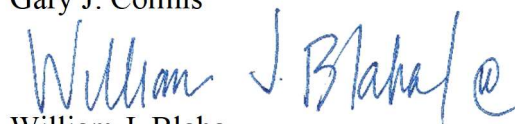
Sincerely,

COLLINS & BLAHA, P.C.



Gary J. Collins

Gary J. Collins



William J. Blaha

William J. Blaha