

ADDENDUM
11/28/2012

Items in the addendum represent topics that
bargaining, and will be revisited if legislation

ARTICLE V

B. Salary advancements, either through step increments
dependent upon satisfactory evaluations of performance
considered automatic. It is hereby

ROADBLOCKS TO REFORM?

A REVIEW OF UNION CONTRACTS IN MICHIGAN SCHOOLS

AUDREY SPALDING



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Roadblocks to Reform?

A Review of Union Contracts in Michigan Schools

By Audrey Spalding

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Executive Summary

This paper is a survey of how Michigan school districts responded to laws passed in 2011 that significantly changed the rules for collective bargaining with teachers unions.

These new laws were intended to give school officials better ability to retain and reward high-performing teachers by prohibiting districts from collectively bargaining over teacher placement, layoff and evaluation policies, among other things. School officials can now act unilaterally with respect to these policies, and school labor attorneys have advised school districts to fully remove all language pertaining to these subjects from their collective bargaining agreements.

The reforms did not take immediate effect — districts were required to adhere to the new laws when their then current collective bargaining agreement expired. As such, the implementation of the 2011 reforms has been staggered, with each district implementing the changes on their own unique schedule.

This paper surveys the contracts of Michigan's 200 largest school districts and assesses how these districts attempted to comply with the 2011 reforms. It finds that about 60 percent of the districts that were subject to the 2011 reforms did not wholly remove prohibited language from their collective bargaining agreements or agreed to immediately reinstate this language if state law were to change. Some districts agreed to union contracts that made no changes to the prohibited language but to note it did not apply for certain employees, and other districts seem not to have attempted to comply with some provisions of the law in a discernable way.

In light of these findings, policymakers may want to conduct a thorough review of school district compliance with the 2011 reforms, and may consider adding penalties for noncompliance — a feature that is missing from current state law. By failing to remove language pertaining to prohibited subjects of bargaining, many school districts are providing conflicting information to the public, school employees and school principals. These contracts give the impression that these districts may still be acting in a way that appears to conflict with the intent of the 2011 legislative reforms.

Introduction

In July 2011, the Michigan Legislature passed a series of reforms designed to make it easier for school officials and principals to retain and reward effective teachers. Since teacher quality has a significant impact on student learning, these laws could have a large impact on the educational performance on the 1.5 million Michigan students who attend public schools.¹ Among other things, the reforms included:²

- ♦ Giving districts full control over teacher placement policies;
- ♦ Requiring districts to establish new teacher evaluation practices that incorporate student learning growth;
- ♦ Forbidding districts from using seniority as the determining factor when layoff or recall decisions are made;
- ♦ Allowing districts to remove ineffective teachers more easily by relaxing tenure rules.

The Legislature gave districts full control over teacher placement by prohibiting districts and their unions from negotiating over related policies. Specifically, districts were given the autonomy to create their own teacher placement, evaluation and layoff and recall policies without having to get approval from the local union. These prohibited subjects of bargaining were to become “the sole authority of the public school employer to decide.”³

These reforms did not take immediate effect, and districts were required only to adhere to the new laws when their then current collective bargaining agreements expired.⁴

Given the extent of these reforms, district unions may have been reluctant to renegotiate contracts. However, Public Act 54, passed earlier in 2011, provided a financial incentive for unions to renegotiate by prohibiting any increases in teacher salary, including automatic “step increases,” if the district was operating under an expired contract.⁵ Moreover, employees would be required to pay for any increase in benefit costs, such as health insurance premiums, after a contract expired.

With varying contract expiration dates among school districts, implementation of the July 2011 reforms has been staggered, with districts implementing the collective bargaining reforms at different times. With the added incentive for unions to negotiate new contracts, however, many districts renegotiated contracts that expired after July of 2011, making the new state laws described above in effect for them.

More than two years since the reforms became law, no analysis of these important reforms has been conducted, leaving policymakers and the public with little notion of what these reforms may have accomplished.

There is reason to suspect that the implementation of these reforms has been uneven: None of the new laws summarized above proscribed disciplinary action for districts that failed to comply. In other words, school and union officials faced no repercussions if they continued using policies that failed to adhere to the new laws.

Initial evidence of this behavior can be seen in the Mackinac Center’s 2012 survey of school districts’ use of “merit pay,” which was required by a 2009 law.⁶ It required districts to make job

performance “a significant factor in determining compensation,” though the law did not impose any penalties on noncompliant districts.⁷ The survey found that about 80 percent of districts continued to pay teachers based on seniority and academic credentials, not teaching effectiveness. Plus, many of the districts that gave teachers performance-based pay provided only small amounts — a couple districts paid high-performing teachers just \$1 in merit bonuses.⁸

This paper surveys the most recent teachers union contracts of Michigan’s 200 largest school districts in an attempt to understand how districts implemented the 2011 reforms pertaining to teacher quality. This paper is not an all-encompassing legal review of those contracts, but rather a limited policy survey. The examples reported in this paper are presented as evidence of the types of difficulties that exist in implementing the 2011 reforms. Whether districts identified within these pages are actually in violation of the law is beyond the scope of this report.

The implications of these findings for school-level administrators are discussed. School principals may find themselves receiving conflicting information about their ability to manage teachers in their buildings. For example, principals may work in a district with a collective bargaining contract that still states teacher placement decisions must be based on seniority. This conflicts with state law, and may be addressed in a “letter of agreement” between the district and union or an appendix or other addition to the teacher contract. This paper may help some of these school leaders understand what policies they are allowed to pursue based on the 2011 reforms.

Finally, policymakers may also be interested in the findings of this report. If school districts are not implementing the 2011 reforms in ways that policymakers originally envisioned, the entire theoretical justification for these reforms — providing school leaders with the tools to improve teacher quality — may be in jeopardy. Policymakers may need to consider whether additional action is needed to fully implement these reforms.

Summary of 2011 Reforms

On July 19, 2011, four public acts were signed into law that directly impacted school district collective bargaining regarding teacher placement, evaluation and termination. These reforms were aimed at making it easier for school districts to retain the most effective teachers. Graphic 1 summarizes each law.

Public Acts 100, 101, 102 and 103 served as an attempt to revamp the entire collective bargaining process. The first three of these acts allow districts to improve teacher quality by raising the bar for teachers to acquire tenure, prohibiting the reliance on seniority alone to determine layoff or recalls and by lowering the barriers of removing an ineffective teacher.⁹

These three laws have the potential to dramatically change teacher hiring and retention policies, and in turn, improve the overall quality of teaching in Michigan. Evidence suggests that teacher termination for poor performance was limited prior to these reforms. For example, according to MLive.com, only nine teachers, out of more than 100,000, had their tenure revoked and were dismissed as a result of verdicts by the Michigan Teacher Tenure Commission during the 2009-10 school year.¹⁰ Though not every teacher termination is appealed up to the tenure commission, this still provides some evidence that very few tenured teachers were removed from classrooms based on their performance.

Public Act 103 is related to the three other aforementioned acts. It prohibits districts from collectively bargaining over many of the policies addressed in the other three laws. Specifically, Public Act 103 prohibits districts, among other things, from bargaining over how they place, evaluate and dismiss teachers.¹¹ This law impacts large portions of collective bargaining agreements, and, based on the results of this survey, has the most varied level of implementation of the surveyed 2011 reforms.

Graphic 1: Summary of Public Acts 100, 101, 102 and 103 of 2011

Public Act	Summary
100	Allows school boards to discharge or demote tenured teachers for reasons that are not “arbitrary or capricious.”
101	Increases limitations on tenure, including requiring teachers to undergo a five-year probationary period before gaining tenure and must receive a “highly effective” or “effective” rating during his or her last three annual evaluations.
102	Prohibits the use of seniority as the determining factor for teachers when making layoff or recall decisions; individual performance will be used to make retention decisions; student growth must be the “predominant” factor in the assessment of individual teachers.
103	Adds prohibited subjects of bargaining, including teacher placement, evaluation, performance-based compensation and classroom observation, among other things.

Not only do these reforms impact what is permissible to collectively bargain, labor attorneys advise that districts can act unilaterally concerning any prohibited subjects of bargaining.¹² Moreover, district officials can refuse to discuss the prohibited subjects of bargaining when negotiating a new contract, even though these subjects might exist in the previous contract.¹³

Based on a plain reading of Public Act 103, one might reasonably expect that districts could only abide by the new law by removing these subjects from their contracts completely. In fact, presentations given by labor attorneys to the Michigan Association of School Boards and to the Michigan Negotiators Association recommend that school officials do just that.¹⁴

Some districts, perhaps facing pressure from their teachers union, might prefer to preserve provisions of their contract that contain prohibited language in order to reach an agreement. In the past, some districts have argued that local control allows them to decide whether to include unenforceable and prohibited subjects within their contract — an argument the Mackinac Center Legal Foundation has excoriated as “a gross misreading of the statute.”¹⁵

Though collectively bargaining over these issues is prohibited, non-binding discussion is not.¹⁶ The Michigan Supreme Court has noted that a prohibition of discussion would amount to a violation of free speech.¹⁷ But, discussion is not bargaining: According to the Court, those prohibited subjects are “illegal subjects of bargaining” and school districts should not be collectively bargaining over them.¹⁸

Since teacher evaluations, placement and retention are very common subjects of collective bargaining and could be found in teachers union contracts for the last several decades, Public

Act 103 represents a significant change in the relationship between school officials, union negotiators and teachers.

Contract Survey Results

The 200 largest districts on the basis of enrollment were surveyed.* In total, these districts enroll more than 1 million pupils — meaning that their policies affect nearly 70 percent of all Michigan public school students.†

Of the contracts reviewed, 130 were agreed to after the 2011 reforms took effect. Contracts that were agreed to before July 19, 2011 were reviewed as well, as they provide a control variable of sorts — they are examples of the type of contract language that was common in collective bargaining agreements prior to the reforms.

The first section, “Contract Confusion,” discusses some of the methods school districts used to change their contracts in response to the 2011 reforms. There were a variety of approaches, but many of them wound up preserving prohibited language in union contracts.

The sections that follow describe the implementation of two of the major components of reform: Seniority-based placement and retention policies and teacher evaluations. Many of the implementation issues that are discussed regarding one of these policies are consistent throughout the same contract. In other words, readers can safely assume that districts used similar tactics when dealing with other prohibited subjects of bargaining aside from those addressed in this survey.

Contract Confusion

At least 77 school districts — 60 percent of those surveyed that are subject to the 2011 bargaining reforms — had teacher contracts that contained language that could be interpreted to be prohibited by Public Act 103. Of these, at least 11 stated in the contract that the prohibited language would *immediately take effect* if the 2011 reforms were ever overturned or reversed. These districts are listed in Graphic 2.

* Districts were ranked by their 2012-13 student enrollment fall headcount. “2012-13 Pupil Headcount Data (MSDS)” (Center for Performance and Information, 2014), accessed Feb. 7, 2014, <http://goo.gl/ieFqds>. This survey did not include districts that were dissolved, combined, or newly established.

† The surveyed districts enrolled 1,067,549 students of Michigan’s 1,529,887 public school students in 2012-13. “2012-13 Pupil Headcount Data (MSDS)” (Center for Performance and Information, 2014), accessed Feb. 7, 2014, <http://goo.gl/ieFqds>.

Graphic 2: Sample of Agreements to Reinstate Language Prohibited by Public Act 103

School District	Language
Allen Park	"Should the law that determined these prohibited subjects be found unconstitutional, or as nullified through the Protect-Our-Jobs ballot initiative, then these provisions shall become immediately enforceable." ¹⁹
Avondale	"Should a court or administrative agency of competent jurisdiction issue a decision that all or part of [PA] 103 is unconstitutional or otherwise not legally effective, then those provisions set forth below ... shall immediately be in full force and effect ..." ²⁰
Bay City	"If a court or agency of competent jurisdiction concludes by January 31, 2017 that PA 103, in whole or in part, is unlawful, then the lawful provisions revert back to the Master Agreement and are enforceable to Teachers." ²¹
Berkley	"Should a court or administrative agency of competent jurisdiction issue a decision that all or part of PA 103 is unconstitutional or otherwise not legally effective, then those provisions ... shall immediately be in full force and effect ..." ²²
Chippewa Hills	"[I]f PA 103 is amended or a competent appellate court of appropriate jurisdiction concluded that (1) PA 103 in [sic] unenforceable, in whole or part ... then the passage(s) encompassed by such a court opinion shall be enforced as currently provided in the CBA." ²³
Crestwood	"Should a court or administrative agency of competent jurisdiction issue a decision that all or part of PA 103 is unconstitutional or otherwise not legally effective, then those provisions set forth below that were not enforceable ... shall immediately be in full force and effect ..." ²⁴
Fitzgerald	"Should future legislative action, court decision, or voter initiative make bargaining of the below articles permissible for all teachers, including tenured teachers, or allow the rights of ancillary member [sic] in this contract to be bargained for all teachers, including tenured teachers than [sic] that language and these articles shall take immediate effect and apply to all teachers ..." ²⁵
Fruitport	"This language remains within this document should the related legislation be reversed. Additionally, there may be instances where this language could guide decision making in the event that all other means for decision making have been exhausted, and/or may have direct impact on some non-teaching FEA members." ²⁶
Grand Haven	"In the event that...all or part of [Public Acts 102 and 103] are repealed or modified, or should [the "Protect-Our-Jobs" ballot initiative] be adopted in November 2012 then the applicable portions of the omitted and/or modified language ... shall be reinstated into the CBA." ²⁷
Hastings	"The parties have agreed that if, due to changes in law or based on an unappealed decision from a court of competent jurisdiction, the removed language item(s) shall become effective as an enforceable part of the bargaining agreement immediately." ²⁸
L'Anse Creuse	"In the event Public Act 103 is repealed or amended or declared illegal, unconstitutional or enforceable for any reason, the provisions of the parties agreement that are now inapplicable to those placed in positions requiring certification will again become applicable to such bargaining unit members." ²⁹

This particular practice raises an important question: Are districts technically still bargaining over these prohibited subjects when they agree to allow them to take immediate effect in the event of some future change in the law? Language promising to act in the future seemingly implies that the district and union reached some sort of agreement concerning policies that Public Act 103 makes illegal subjects of bargaining.

A more common way districts attempted to deal with Public Act 103 was to continue to include language pertaining to the prohibited subjects in the contract, but then note that these provisions only apply to a certain group of "teachers." Public Act 103 specified that districts were prohibited from bargaining over policies that pertained to employees whose employment was regulated by

the Teachers' Tenure Act — in other words, classroom teachers.³⁰ The typical teachers union contract, however, also applies to employees who are not teachers — most commonly school social workers, psychiatrists, therapists and librarians.

In most cases, contracts were changed by simply replacing the word “teacher” with “ancillary staff,” “non-certified professional staff,” or some other term to distinguish employees whose employment is regulated by the Teachers' Tenure Act and those whose is not. The rest of the language, in most cases, remained completely unchanged.

The Midland Public Schools contract provides an example of this tactic. It highlights in yellow certain language judged to be prohibited by the 2011 reforms. In a note at the end of the contract's preamble, the contract states, “[T]he provisions of this agreement that are highlighted in the successor agreement apply only to the following members of the bargaining unit: Social Workers, Psychologists, and Therapists.”³¹

The Gull Lake school district contract is similar. The contract makes no mention of Public Acts 102 or 103, but does note that some policies only apply to certain employees. The language in the contract that would probably be considered a prohibited subject of bargaining under the 2011 reforms applies only to the “non-teaching professional staff member.” When the contract is referring to a permissible subject of bargaining, the group of employees discussed are “teachers.”³²

The Trenton school district's approach to implement the 2011 reforms is similar but less clear. It maintains language in the main text of the contract that bases teacher layoffs strictly on seniority — what would appear to be a clear violation of Public Act 102.³³ Not until 50 pages later, in a “letter of understanding,” does the reader learn that the layoff section “...appl[ies] only to bargaining unit members who are not subject to the Michigan Teacher Tenure Act.”³⁴

Clearly, this letter of understanding is extremely important to fully understand the Trenton district's actual policy on personnel decisions, as it attempts to completely alter language as it exists in the main section of the contract.

A sample of 45 contracts that used similar strategies while attempting to conform to the 2011 reforms is provided in Appendix B.

School districts dealt with the implications of the 2011 reforms in other ways. Some contracts left the prohibited language in place, but italicized, highlighted or struck it through. Some noted that the edited language was not enforceable, while others gave no explanation for why this particular language was modified in this way.³⁵ Others moved language pertaining to these prohibited subjects of bargaining to a separate appendix or “letter of agreement,” and then added a note that the language contained in those sections is prohibited.³⁶ Most of the actual language remained unchanged. A sample of these cases are provided in Appendix C.

Attempting to implement the 2011 reforms in this manner raises some additional questions. For example, are districts still technically bargaining over these prohibited subjects when they leave this language in the contract, even if they set it off with highlights or move it into a separate section? Since the contract is only valid if it is approved by both the school board and the union, is the union actually approving of the language that is supposed to be prohibited?

Regardless of whether this is technically bargaining or not, school districts that maintain language pertaining to prohibited subjects of bargaining are creating confusion for both school administrators and teachers who must abide by the contract. It would be relatively easy for someone to mistakenly assume that the highlighted or italicized language that appears in the contract is still in effect.

Further, some district's disclaimers are unclear about the implications of the new prohibited language. Take Plymouth-Canton's 2011-2012 contract, for example. The title page of the contract contains this statement: "The shaded areas are the employers' interpretation of the letter of understanding regarding Public Act 103 and does not reflect an agreement of the parties."³⁷

To the lay reader, and especially someone unfamiliar with Public Act 103, this statement does not appear to provide any indication that "shaded areas" are in fact prohibited subjects of bargaining and that district officials have full discretion over practices related to those topics. More than 70 paragraphs of the Plymouth-Canton contract are shaded in gray, including two entire pages.

Finally, some contracts imply that the district will continue to abide by the policies outlined that the 2011 reforms attempted to change, despite the law and despite these provisions being prohibited subjects of bargaining. The West Branch-Rose City contract, for example, includes a separate section containing prohibited subjects of bargaining, but labels that section: "Informational items-informational only: not bargained."³⁸ However, the teacher observation instrument and professional development plan included for informational purposes in 2012 is exactly the same as those presumably bargained over in the 2010 contract.³⁹ Fruitport Community Schools' contract identifies prohibited language with italics, and a note on the district's collective bargaining agreement states that "...there may be instances where this language could guide decision making in the event that all other means for decision making have been exhausted..."⁴⁰

Use of Seniority to Determine Layoff Decisions

Both Public Act 102 and Public Act 103 impact the way districts make personnel decisions. Traditionally, school districts have agreed that seniority will be the basis for decisions regarding which teachers will be laid off, recalled or involuntarily transferred to a different position within the district. This "last in, first out" policy means that teachers with less experience are automatically laid off first, regardless of performance.

Public Act 102 states that "individual performance" will be the "majority factor" when it comes to decisions regarding the layoff and recall of teachers. The law does allow for seniority to be used as a tiebreaker if "all other factors distinguishing those employees from each other are equal."⁴¹ In addition, Public Act 103 specifies that the development of layoff, recall and transfer policies are prohibited subjects of bargaining.⁴²

Among the surveyed districts, Public Act 102's allowance to use seniority as a tiebreaker appears to have been used widely to preserve seniority-based language. Some districts have language that appears to define "equal" very broadly, suggesting that the vast majority of teachers could be considered "equal," and seniority would still be the de facto method for making personnel decisions. Of the 130 contracts agreed to after the 2011 reforms took effect,

all but one defined seniority or maintained language that said seniority will dictate some part of layoff, recall or transfer decisions.

As mentioned above, in many cases, the districts that preserved seniority-based personnel policies slightly modified previous contract language to apply these policies only to employees not included in the 2011 reforms, but still covered under the teachers union contracts.

This bears mentioning since these districts are continuing to make seniority-based retention and placement decisions for other non-teaching staff members — exactly the behavior the legislature hoped to stop for teachers. Using a personnel decision-making system that rewards effectiveness rather than years on the job could be just as useful for these non-teaching employees as it could be for classroom teachers.⁴³

Since district officials can, according to the Michigan Association of School Boards, unilaterally strip out prohibited language, it is interesting that nearly every surveyed contract contains language regarding seniority-based policies.⁴⁴ Districts may have kept this language in their contracts in an attempt to make it easier to revert back to the old system of personnel decision-making. If the 2011 reforms were ever changed or overturned, districts could just remove the small disclaimer stating the seniority-based policies only applied to non-teachers, and seniority would once again dictate teacher placement, layoff and recall decisions.

Though some districts did modify their language more extensively, many collective bargaining agreements made clear that seniority would still be used as a factor to determine layoff, recall and transfer decisions in any manner that could be considered permissible under the law. Most districts continue to tally seniority, even if it no longer applies to staffing decisions for teachers.

Some districts continue to use seniority to make decisions about hiring new teachers. Godwin Heights, in a contract signed in September 2012, included an interview form that noted, “In the event candidates interviewing for said position are considered to be equal ... seniority shall be utilized to determine the successful candidate.”⁴⁵ This may still be technically legal, but excerpted here to show just how much emphasis the district continues to place on seniority.

For supplemental positions, such as coaching, the contract states: “In the event a supplemental [position] ... does not require specific training, it will not be necessary to conduct an interview. The position will be awarded by: 1) seniority [within the position] and 2) service years in the district.”⁴⁶

Other districts appear to have simply left language regarding seniority-based personnel policies completely unchanged. The West Ottawa district’s teachers union contract lays out a process for filling vacancies that is simply a process of offering the position to the most senior teacher who applies. For other open teaching positions, aside from teachers who received an “unsatisfactory” rating on their most recent performance evaluation, the contract notes that positions will be filled in order of seniority.⁴⁷

During the 2011-12 school year, West Ottawa rated just five teachers as “minimally effective” or “ineffective” — meaning that for 99 percent of teachers, seniority will control who will be assigned to a vacancy.⁴⁸ This is an example of defining “equal” quite broadly as mentioned above. For layoffs, the contract states that non-certificated teachers will be laid off first,

followed by probationary teachers, and then tenured teachers in order of seniority. If two employees have worked the same number of years, seniority will be determined by the “highest last four digits of their social security numbers.”⁴⁹

The L’Anse Creuse district follows a similar policy. The district’s contract states:

The first teachers laid off will be those evaluated as ineffective. The next laid off will be those evaluated as minimally effective two consecutive years of more [sic]. All others will be considered as equals and length of service or tenure status shall be the tiebreaker.⁵⁰

As in West Ottawa, 99 percent of L’Anse Creuse teachers were rated effective or highly effective — meaning that layoffs at the district will be primarily based on seniority, despite the 2011 reforms.⁵¹

The West Ottawa district did attempt to deal with the requirements of Public Act 103 with a “letter of agreement,” which was signed on Aug. 24, 2011.⁵² The letter states that “substantial revisions” would be needed to make the collective bargaining agreement “consistent” with Public Act 103. Instead of modifying the contract, however, the letter states that “If any provision ... is inconsistent with the Revised School Code, the Michigan Teachers’ Tenure Act or the Public Employment Relations Act, those statutes will prevail and the inconsistent or conflicting provisions ... will not be followed or enforceable.”⁵³

In cases such as those highlighted above, school leaders and employees are left to interpret collective bargaining agreements with seemingly conflicting provisions. West Ottawa principals are also apparently expected to interpret state law in order to understand how to make legal staffing decisions.

Evaluation of Teachers

The development of a “performance evaluation system,” including decisions about its content and format, is a prohibited subject of bargaining per Public Act 103.⁵⁴ As with seniority-related provisions, several districts kept previous evaluation language unchanged in their collective bargaining agreements, but reference to it in a later “letter of agreement” or moved it to an appendix. Several districts also maintained the exact same evaluation policies in place, but then just noted that they only apply to a certain group of employees — those whose employment is not regulated by the Teachers’ Tenure Act.

The L’Anse Creuse district seemingly continues to bargain over teacher evaluations and use a method that seems to conflict with Public Act 102. A separate appendix of the district’s contract lays out the policies that will be used for teacher evaluations and classroom observations. It states, for example, that non-tenure teachers will be evaluated once a year, while tenure teachers with four or more years of employment at the district will be evaluated once every three years.

This appendix in the L’Anse Creuse contract explicitly notes that the district will continue “to consult with the Association in the preparation or modification of all teacher evaluative forms, policies, and procedures.”⁵⁵ It also states: “All of the following language [regarding teacher evaluations] continues to apply to all bargaining unit members until September 1, 2014.” It is

unclear how the district interpreted the law to allow for this type of action, since Public Act 103 of 2011 went into effect for any contract signed after July 19, 2011.⁵⁶

In a contract signed in September of 2012, the Woodhaven-Brownstown collective bargaining agreement states that “[o]ne week’s notice shall be given prior to all formal evaluations,” and that “no teacher evaluation shall be based solely on student test scores.” Further, the contract specifies how long in-class observations will last and a process for contesting the evaluation, noting that “adverse evaluation[s]” are also subject to the grievance procedure.⁵⁷

In an apparent attempt to comply with the 2011 reforms, Woodhaven-Brownstown notes in a “memorandum of understanding” that teacher evaluation is a prohibited subject of bargaining and “will no longer apply to those employees covered by the Teacher Tenure Act.”⁵⁸ Similar to how the West Ottawa district deals with seniority-based personnel decisions, Woodhaven-Brownstown’s policy places the burden on school leaders and employees to understand state law in order to comprehend how the district’s teacher evaluation system works.

Avondale, in a similar fashion, specifies almost every part of the teacher evaluation process without qualification. All observations of a teacher must be conducted openly, and classroom and instructional skills must be observed during an official review. Evaluations can be challenged, and specific processes are discussed for teachers who have a “deficiency in teaching performance.”⁵⁹

The Avondale teachers’ contract does later mention Public Act 103 in a “letter of understanding,” noting that various provisions of the contract do not comply with the 2011 reforms, and then lists the noncompliant portions of the contract by article number, including almost the entire section concerning teacher evaluation. The letter of understanding then states that “these provisions continue in full force and effect for those bargaining unit members who are not subject to the Teacher Tenure Act.”⁶⁰

The Eaton Rapids district kept language it judged to be noncompliant, but struck-through most of the actual text. The struck-through text includes who will conduct the evaluation, the number of evaluations and the format of the evaluation, along with the evaluation form itself. However, the contract does not say why the language is struck through, or how to interpret the struck-through language.⁶¹ If this language is meant to be wholly unenforceable and ineffectual, it seems the district would have done better just to remove it altogether and avoid any possible confusion keeping this language in the contract may create.

In contrast to how many surveyed districts implemented reforms affecting seniority-based personnel policies, several districts did entirely remove language regarding teacher evaluation practices. Okemos, for example, simply notes that “It shall be the administration’s responsibility to evaluate the bargaining unit member’s performance. The Board of Education shall adopt evaluation processes and procedures as set forth in [state law].”⁶²

Portage similarly stripped evaluation language out of its contract, replacing it with “The Association recognizes the responsibility and right of the Administrative staff to evaluate teachers.”⁶³ Tecumseh, Grand Haven, Oxford, Lakeshore (Stevensville), Plainwell and Haslett went one step further, and removed all references to teacher evaluation (although some did note that copies of teacher evaluation reports would be included in a teacher’s personnel file).⁶⁴

District Case Studies

The contracts of the Bay City, Plymouth-Canton and Allen Park school districts are analyzed below to provide a more detailed illustration of the various methods districts have employed to keep otherwise impermissible language in their contracts. These three districts also demonstrate an inconsistent interpretation of the 2011 reforms. Language that one district appears to consider permissible is considered impermissible by another.

Bay City

Prohibited language relating to teacher placement evaluations and seniority-based layoff recall decisions is contained within a 23-page appendix, added to the collective bargaining agreement between the Bay City Education Association and Bay City Public Schools.⁶⁵ At the beginning of the appendix is the following language:

As a result of Public Act 103 of 2011, the following provisions of the parties' collective bargaining agreement were removed to this appendix as being not enforceable, "prohibited" subjects of bargaining as applicable to Teachers within the bargaining unit. If a court or agency of competent jurisdiction concludes by January 31, 2017 that PA 103, in whole or in part, is unlawful, then the lawful provisions revert back to the Master Agreement and are enforceable to Teachers. These provisions, however, remain in full force and affect [sic] for those bargaining unit members not subject the [sic] Teachers' Tenure Act unless otherwise indicated.⁶⁶

A case could be made that the Bay City school district is in fact bargaining over these prohibited subjects, since the district and the union agreed to make these provisions enforceable if Public Act 103 becomes unlawful by Jan. 31, 2017. By specifying the date, the district and union are, at least indirectly, bargaining over when these policies may go into effect.

A brief summary of Bay City's prohibited items shows just how much the district's previous contract limited school administrators from making staffing decisions. According to the district's prohibited language appendix:

- ♦ Assignments will be based on seniority.⁶⁷
- ♦ Layoff decisions will be made based on seniority⁶⁸
- ♦ Recall decisions will be made based on seniority.⁶⁹
- ♦ Evaluations must take into account student socioeconomic status, administrative support class size and facilities, among other things.⁷⁰
- ♦ Adverse evaluations are subject to grievances.⁷¹

Though the district states that prohibited subjects of bargaining have been relegated to this appendix, it appears as if some prohibited subjects remained in the main contract. The contract

lists the various factors that will be used to determine how vacancies will be filled and includes the “length of satisfactory service to the District,” i.e., seniority.⁷²

Allen Park

Bay City is not the only school district to agree to a contract that stipulates that prohibited language will be automatically reinserted and enforceable if the 2011 reforms are no longer state law. Allen Park Public Schools’ 2013-14 contract acknowledged the prohibited subjects of bargaining, but continued to include the language in the main text of the contract, but displayed it in italics. The contract noted:

Should the law that determined these prohibited subjects be found unconstitutional, or as nullified through the Protect-Our-Jobs ballot initiative, then these provisions shall become immediately enforceable.[‡]

Within the Allen Park collective bargaining agreement language stating that least-senior teachers will be laid off first was italicized. However, the district kept language stating that laid off employees would be “given preference” over substitute teachers when open positions are available to fill, and these positions will be filled based on seniority.⁷³

Moreover, Allen Park kept language stipulating that no teachers would be laid off unless there is a “substantial decrease” in student enrollment or district revenues, or a “substantial increase” in district expenses. While Allen Park appears to believe that this language is compliant with the 2011 reforms, the Plymouth-Canton district does not — near verbatim language was identified in light gray text in that district’s contract, indicating that Plymouth-Canton believed it was in violation of Public Act 103.⁷⁴

One can certainly see why Plymouth-Canton thought language like this might be impermissible. Public Act 103 prohibits bargaining over “decisions about the development, content, standards, procedures, adoption, and implementation of ... policies regarding personnel decisions ... resulting in the elimination of a position ...”⁷⁵

Plymouth-Canton

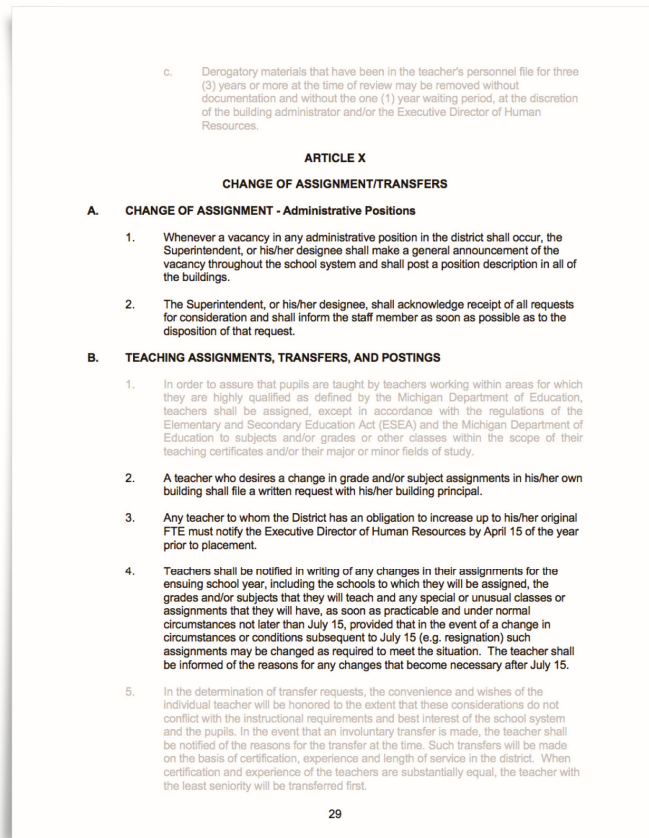
Various portions of the 2011-12 Plymouth-Canton school district’s teachers’ 2012 union contract are shaded light gray. The contract states on its first page: “The shaded areas are the employers’ interpretation of the letter of understanding regarding Public Act 103 and does not reflect an agreement of the parties.”⁷⁶

Graphic 3 (below) is a page taken from the collective bargaining agreement. Of the eight paragraphs contained on this page, three are in gray. The portions in gray discuss the removal of

‡ “Agreement between the Allen Park Board of Education and the Allen Park Education Association” (Allen Park Public Schools, Aug. 26, 2013), 4, accessed Feb. 11, 2014, <http://goo.gl/FUdY5c>. “Protect Our Jobs” was a 2012 ballot proposal that would have prevented state law from modifying any provision of a public sector collective bargaining agreement. For more on this issue, see: Tom Gantert, “Union-Backed ‘Protect Our Jobs’ Ballot Initiative Would Wipe Out Reforms Unions Already Supported,” *Michigan Capitol Confidential* (Mackinac Center for Public Policy, July 17, 2012), accessed Feb. 12, 2014, <http://goo.gl/bcpzFr>. The district did note explicitly, however, that the italicized language should be considered as deleted text if the collective bargaining agreement went to arbitration.

“derogatory materials” in a teacher’s personnel file, and the use of seniority to determine which teachers are subject to involuntary transfer.

Graphic 3: Page 29 of Plymouth-Canton’s 2011-12 Teachers Union Contract



If graying out prohibited subjects of bargaining is sufficient to comply with the 2011 reforms, Plymouth-Canton would simply be one of many districts that chose to comply with the law in this way (although its description of what language highlighted in gray means, as mentioned earlier, is quite obtuse). However, in Plymouth-Canton’s case, the contract also provides conflicting information about what language is still in effect and which is not.

The following sentence appears twice in the teachers’ union contract: “All monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher.” In one instance, it is highlighted in gray, apparently indicating that it is a prohibited subject of bargaining and presumably unenforceable. In another instance, however, it is not set off in any way, and gives all the appearance of being a regular part of the contract and fully enforceable.⁷⁷

Implications for School Leaders

Given the large percentage of districts that chose to keep language in teachers union contracts regarding prohibiting subjects of bargaining per Public Act 103, school leaders may not actually be fully aware of the latitude they have to improve the quality of the teaching in their schools. This survey suggests that further review is needed to determine whether districts are following their

contracts and continuing to use seniority-based personnel and teacher evaluation policies — arguably some of the most important decisions school administrators can make to boost student performance — that appear to conflict with Public Acts 100, 101, 102 and 103 of 2011.

To avoid confusion, school leaders should follow the advice provided by Michigan labor attorneys: During contract negotiations, remove prohibited language. As attorneys put it in a presentation at a meeting of Michigan Association of School Board members: “Just say ‘no.’”⁷⁸

Administrators may be able to make decisions unilaterally regarding prohibited subjects of bargaining even if their current contract — agreed to after the 2011 reforms took effect — says otherwise.⁷⁹

School leaders facing a confusing contract with contradictory provisions may need to consult an attorney if they are unable to make effective decisions based on the contract language. This is unfortunate, because it places additional and unnecessary costs on schools.

Finally, by prohibiting these subjects of bargaining, the state has given administrators the freedom to establish more effective policies. School administrators do not have to adopt policies that are simply carbon copies of previous contract language. School districts can implement policies intended to truly reward and encourage high-performing teachers. Instead of rewarding teachers based on years on the job, as was the prevailing policy prior to the 2011 reforms, administrators could creatively use placement and transfer priority as a method to encouraging outstanding performance.

Implications for Policy Leaders

This survey suggests that simply expecting school districts to unilaterally change the way that they collectively bargain results in a hodgepodge of outcomes, some of which seem to conflict with the goals of the Legislature. This type of response is not unprecedented; there are previously documented accounts of districts bargaining over other prohibited subjects of bargaining, such as the decision to contract out noninstructional services.⁸⁰

The most important takeaway for policymakers is that implementation and enforcement of new policies are critical to effectively make change. Policymakers should consider whether the types of attempts to comply with the 2011 reforms outlined above are sufficient, and if not, they should consider attaching some sort of financial penalty on districts that fail to comply with state law.

A different law that was passed in 2011 provides a good example of how an enforcement mechanism could work. Public Act 152, which limits the amount school districts can spend on employee health insurance, contains a specific penalty for noncompliant districts. Under the law, districts found to be noncompliant will have their state aid reduced by 10 percent.⁸¹ Based on the survey of the same districts used to evaluate Public Acts 100, 101, 102 and 103 of 2011, most districts appear compliant with Public Act 152’s requirements. It is possible that this is due to the strict financial penalty contained within the law.

The widespread compliance with Public Act 152 of 2011 observed as part of this survey stands in stark contrast with how districts attempted to comply with the new prohibited subjects of bargaining regarding teacher placement and evaluation. In an attempt to increase compliance,

policymakers could provide minor funding for a random review of a select number of collective bargaining agreements each year by qualified attorneys, with fines for districts found to be noncompliant.

The state could also allow taxpayers to challenge noncompliant districts on the grounds that taxpayer funds are being misused. This would open up districts to the threat of challenge, and could encourage compliance.

At minimum, policy leaders could take a thorough look at contracts that appear the least compliant in an effort to understand why so many districts chose to bargain in some way over prohibited subjects. Why, for example, would a district administrator agree to keep prohibited language within a contract with a clause stating that it would take immediate effect if the 2011 reforms were struck down?

Policymakers may also want to consider why so many district administrators failed to strip out noncompliant language. There may be incentives in current policy that encourage such behavior. Perhaps district officials were unaware of their ability to remove prohibited language and were out-maneuvered by coordinated strategies used by union officials.

Conclusion

In this survey of school district contracts, it is apparent that implementation of the 2011 collective bargaining reforms has been varied, at best. At worst, district officials appear to have worked with their local unions to preserve contract provisions, and perhaps practices, which are prohibited by state law.

At bare minimum, this survey demonstrates the need for further research into this area. Clearly, the passage of a law aiming to change school district collective bargaining does not assure uniform and full compliance. Some amount of review is necessary to determine the actual extent of implementation.

While districts were generally compliant with health insurance spending reforms, there are plenty of instances where compliance with the 2011 collective bargaining reforms was questionable. This certainly is cause for the consideration of financial penalties against districts that are found to be noncompliant.

District personnel decisions, especially concerning the use of teachers, are critically important towards the goal of improving student performance in Michigan's public schools. If districts are continuing to use outdated methods to make personnel decisions, fewer Michigan students will have the opportunity to be taught by a truly high-performing teacher.

Appendix A: Surveyed Districts

**Graphic 4: Surveyed Districts With Teachers
Union Contracts Signed After July 19, 2011**

School District	Enrollment 2012-13	School District	Enrollment 2012-13
Airport	2,583	Flushing	4,113
Allegan	2,663	Fowlerville	2,915
Allen Park	3,781	Fraser	5,335
Allendale	2,509	Fremont	2,229
Alma	2,227	Fruitport	2,963
Ann Arbor	16,635	Garden City	4,591
Avondale	3,534	Gaylord	3,156
Bay City	8,276	Godwin Heights	2,213
Berkley	4,617	Grand Haven	6,046
Berrien Springs	2,247	Grand Ledge	5,071
Bloomfield Hills	5,465	Greenville	3,811
Brighton	6,031	Gull Lake	2,941
Byron Center	3,581	Hamilton	2,630
Cadillac	3,061	Hamtramck	2,897
Cedar Springs	3,371	Harper Creek	2,613
Charlotte	2,670	Haslett	2,713
Chelsea	2,495	Hastings	2,812
Chippewa Hills	2,181	Holland	4,039
Chippewa Valley	16,408	Hudsonville	6,186
Clarkston	7,921	Huron	2,434
Clintondale	3,351	Imlay City	2,157
Coldwater	2,886	Ionia	3,029
Comstock Park	2,228	Jenison	4,760
Coopersville	2,477	Kalamazoo	12,538
Crestwood	3,463	Kearsley	3,303
Croswell-Lexington	2,275	Kelloggsville	2,232
Dearborn Heights #7	2,813	Lake Orion	7,576
Detroit	49,168	Lake Shore (Macomb)	3,682
DeWitt	3,029	Lakeshore (Berrien)	2,869
Dowagiac	2,301	Lakeview (Macomb)	3,881
East Grand Rapids	2,997	Lakeview (Calhoun)	3,902
Eaton Rapids	2,607	L'Anse Creuse	11,526
Edwardsburg	2,728	Lansing	12,180
Escanaba	2,507	Lapeer	5,839
Farmington	11,069	Lincoln Park	4,822
Fitzgerald	2,871	Lowell	3,797

School District	Enrollment 2012-13	School District	Enrollment 2012-13
Ludington	2,223	Saline	5,249
Marquette	3,087	Sault Ste. Marie	2,451
Marshall	2,258	South Lyon	7,340
Marysville	2,696	Southgate	5,193
Mason (Ingham)	3,049	Spring Lake	2,453
Melvindale-North Allen Park	2,854	St. Joseph	2,819
Midland	8,017	Sturgis	3,286
Milan	2,418	Tecumseh	2,974
Monroe	6,136	Three Rivers	2,719
Mt. Pleasant	3,463	Trenton	2,634
Niles	3,810	Troy	12,367
North Branch	2,436	Van Buren	5,154
Northview	3,444	Van Dyke	2,901
Northville	7,232	Vicksburg	2,638
Northwest	2,818	Walled Lake	15,077
Oak Park	4,374	Warren Consolidated	15,266
Okemos	3,938	Warren Woods	3,336
Orchard	2,586	Waterford	10,707
Otsego	2,341	Waverly	2,787
Owosso	3,217	Wayland	2,822
Oxford	5,231	West Bloomfield	6,215
Paw Paw	2,274	West Branch-Rose City	2,182
Plainwell	2,722	West Ottawa	7,365
Plymouth-Canton	17,998	Western	2,945
Portage	8,746	Whitehall	2,160
Reeths-Puffer	3,783	Woodhaven-Brownstown	4,905
Riverview	2,863	Wyandotte	4,373
Rochester	14,952	Wyoming	4,555
Rockford	7,913	Zeeland	5,719

Source: Center for Educational Performance and Information.

Appendix B: Districts Redefining “Teacher”

Graphic 5: Sample of Surveyed School Districts Redefining “Teacher”

School District	Definition of new employee group
Allegan	“Ancillary staff” ⁸²
Allendale	“Ancillary staff” ⁸³
Byron Center	“Ancillary staff” ⁸⁴
Chelsea	“Non-certified professional staff” ⁸⁵
Chippewa Valley	“Teachers who are not regulated by the Michigan Teacher Tenure Act” ⁸⁶
Comstock Park	“Ancillary staff” ⁸⁷
Coopersville	“Ancillary staff” ⁸⁸
Dearborn Heights	“Non-teacher certified employee” ⁸⁹
East Grand Rapids	“Student service professionals” ⁹⁰
Fitzgerald	“Ancillary staff” ⁹¹
Flushing	“[B]argaining unit members whose employment is not subject to the Teacher Tenure Act” ⁹²
Gaylord	“Ancillary staff” ⁹³
Godwin Heights	“Non-tenure eligible” ⁹⁴
Gull Lake	“Non-teaching professional staff members” ⁹⁵
Holland	“Non-classroom professional” ⁹⁶
Hudsonville	“Ancillary staff” ⁹⁷
Ionia	“Professional staff member” ⁹⁸
Kalamazoo	“Ancillary staff” ⁹⁹
Kearsley	“Non-teaching professional staff member” ¹⁰⁰
Kellegsville	“[P]rohibited subjects of bargaining ... do not apply to teachers eligible for tenure status” ¹⁰¹
Lapeer	“Non-certificated, non-classroom professional” ¹⁰²
Lowell	“Ancillary staff” ¹⁰³
Marquette	“Excluding teachers” ¹⁰⁴
Marshall	“Non certified professional staff” ¹⁰⁵
Midland	“Social Workers, Psychologists, and Therapists” ¹⁰⁶
Milan	“[E]mployees ... NOT regulated by the Teachers’ Tenure Act” ¹⁰⁷
Monroe	“Non-teachers” ¹⁰⁸
Northview	“Ancillary staff” ¹⁰⁹
Northville	“Ancillary staff” ¹¹⁰
Northwest	“Employees holding positions not governed by the Tenure Act” ¹¹¹
Plymouth-Canton	“ <u>NOT</u> teachers” ¹¹²
Reeths-Puffer	“Non-teaching professional staff member” ¹¹³

District Name	Definition of new employee group
Rockford	Employees “covered by section 15(3)(k) of PERA” ¹¹⁴
South Lyon	“Non-teaching professional staff member” ¹¹⁵
Spring Lake	“Individuals not subject to the Michigan Teacher Tenure Act” ¹¹⁶
St. Joseph	“[Teachers] NOT COVERED BY THE TENURE ACT...” ¹¹⁷
Trenton	“[B]argaining unit members who are not subject to the Michigan Teacher Tenure Act” ¹¹⁸
Walled Lake	“Non-tenured track teacher” ¹¹⁹
Warren Consolidated	“[M]embers of the Association ... not regulated by...MCL 38.71 to 38.191” ¹²⁰
Warren Woods	“[E]mployees ... not regulated by the Teacher Tenure Act” ¹²¹
Waterford	“Non-certificated teachers” ¹²²
Waverly	“Specialists” ¹²³
West Bloomfield	“[B]argaining unit members ... not regulated by the Michigan Teacher’s Tenure Act” ¹²⁴
Western	“Non-teaching professional staff member” ¹²⁵
Woodhaven-Brownstown	Prohibited subjects do not apply to employees “covered by the Teacher Tenure Act” ¹²⁶

Appendix C: Contracts Containing Prohibited Language

Graphic 6: Sample of Surveyed Contracts Containing Prohibited Language per Public Act 103

School District	Prohibited Language
Brighton	Evaluation of teachers specified and seniority-based decision making ¹²⁷
Clarkston	Vacancies and placement ¹²⁸
Clintondale	Seniority-based decision making ¹²⁹
Eaton Rapids	Language struck through without rationale or explanation ¹³⁰
Farmington	Seniority-based decision making ¹³¹
Fraser	Evaluation and seniority-based decision making ¹³²
Fruitport	Guiding of decision making ¹³³
Garden City	Seniority-based decision making ¹³⁴
Hamtramck	Seniority-based decision making ¹³⁵
Huron	Seniority-based decision making ¹³⁶
Jenison	Seniority-based decision making ¹³⁷
Lakeview	Seniority-based decision making ¹³⁸
Marysville	Specified evaluation and seniority-based decision making ¹³⁹
Mason (Ingham)	Seniority-based decision making ¹⁴⁰
Melvindale-North Allen Park	Seniority-based decision making ¹⁴¹
Oak Park	Seniority-based decision making ¹⁴²
Riverview	Evaluation and observation rigidly specified ¹⁴³
Rochester	Seniority-based decision making ¹⁴⁴
Rockford	Seniority-based decision making ¹⁴⁵
Sault Ste. Marie	Evaluation of teacher procedures specified ¹⁴⁶
West Ottawa	Seniority-based decision making ¹⁴⁷
Wyandotte	Seniority-based decision making ¹⁴⁸
Wyoming	Seniority-based decision making, evaluation and classroom observations rigidly specified ¹⁴⁹

About the Author

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Prior to her time at Show-Me, Spalding was an education reporter for the Columbia Missourian, where she was a co-recipient of the 2008 Missouri Press Association's Community Service Award for her efforts to highlight school district expenditures.

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- 144 “Master Agreement between Rochester Community Schools Board of Education and the Rochester Education Association, MEA/NEA” (Rochester Community Schools, 2012), 27, accessed Feb. 28, 2014, <http://goo.gl/FvPv7G>. A separate appendix on page 75 includes the language as well and states that if the law is modified or struck down, the district and union will renegotiate.
- 145 Language included in main contract does state that “Sections of the Article are unenforceable by law and thus non-grievable for certified staff,” though it does not provide any further guidance in how to interpret this language. “Agreement Between Rockford Board of Education Rockford Public Schools and Kent County Education

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147 Contract states that provisions that are “inconsistent” with the law will not be followed, but does not identifying them. “Master Agreement for the West Ottawa Public Schools and the West Ottawa Education Association” (West Ottawa Public Schools, Aug. 30, 2011), 13–17, 88, accessed Feb. 11, 2014, <http://goo.gl/359HIB>.

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