

# CLARK HILL

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January 22, 2013

Robert F. Moore, Jr.  
Deputy Superintendent, Finance & Operations  
Oakland Schools  
2111 Pontiac Lake Road  
Waterford, MI 48328-2375

***Re: Proposed Agency Fee Agreement***

Dear Mr. Moore,

This is in response to your request for a legal review of the proposed Agency Fee Agreement submitted by the Berkley Education Association to the Berkley School District.

While the provisions of Public Act 349 of 2012 enacted on December 11, 2012, make such agency fee agreements illegal, this statute does not go into effect until March 28, 2013. Accordingly, it is possible for a public school district to lawfully enter into such an agreement, provided the agreement is reached, including ratification by both parties, by March 27, 2013. In this case, such an agency fee agreement would remain in effect until it expires. A public school district could not lawfully enter into such an agreement after March 27, 2013.

This being said, there are two major concerns raised by the proposed Agency Fee Agreement:

- 1) That it is a stand-alone agreement and not part of a comprehensive collective bargaining agreement covering other terms and conditions of employment; and
- 2) That the agreement extends for a period in excess of nine years, which is far in excess of a typical collective bargaining agreement, which most often only has a duration of one, two or three years. In fact, a collective bargaining agreement only serves as a contract bar to another union's attempt to organize employees covered by the agreement for a maximum of three years.

There are a number of organizations that support litigation against employers which are viewed as taking action inconsistent with state right-to-work laws, such as the National Right to Work Legal Defense Foundation. Indeed, you forwarded to us a flyer from the Foundation of Michigan Freedom raising the risk of litigation against public school districts as well as school board members for actions taken that are inconsistent with the new "Right-To-Work" statutes.

The two concerns noted above could well be the grounds of litigation against districts which enter into the proposed agreement.

For example, a stand-alone agency fee agreement that is not an integral part of a new collective bargaining agreement that incorporates other changes to terms and conditions of employment is subject to legal challenge as being unenforceable and void as a matter of public policy, as such an agreement could be characterized as nothing more than a school board's efforts to simply circumvent state law as established by the Legislature. This same argument could also be made with respect to the nine-plus years of the agreement's duration, which again far exceeds the contract-bar maximum of three years.

In addition, the long duration of the agreement could be challenged as violating the principle that one legislative body cannot bind the power of a successive legislative body, as such an agreement would take away the ability of future boards of education to permit school employee bargaining unit members the choice to not pay an agency fee to the local union.

If a district wishes to minimize the risk of such litigation while nonetheless agreeing to an agency fee arrangement, then we recommend the following:

- 1) That the agency fee agreement be included as an integral part of an entire collective bargaining agreement, as is typically now the case, rather than a stand-alone agreement;
- 2) That the agency fee agreement be part of a package of several bona fide changes in the terms and conditions of employees under a new and/or extended collective bargaining agreement;
- 3) That the length of the agency fee agreement be of the same duration as the majority of other non-economic provisions in the new and/or extended collective bargaining agreement; and
- 4) That the length of the agency fee agreement going forward (to be distinguished from retroactive application to time that has already passed) be somewhat consistent with the length of previous collective bargaining agreements either in the district or region, which rarely if ever exceed the three-year period of a contract bar going forward.

Apart from the concerns raised above, we did not find any legal problems with the terms of the proposed Agency Fee Agreement as presented.

We note that because of the continuation of the litigation and federal court injunction enjoining Public Act 53 of 2012, which prohibited public school districts (and only public school districts) from making payroll deductions for union dues or agency fees, a district could separately provide for voluntary payroll deductions for union dues or agency fees which would remain enforceable regardless of how the litigation over PA 53 of 2012 is finally resolved.

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We also note that whether or not to agree to an extension of an agency shop agreement before Public Act 349 of 2012 goes into effect is a decision for the school board of each public school district.

Finally, we note that because this legislation is new to the state, there is no binding judicial precedent on which to base an opinion on the issues discussed, and therefore our opinion is based upon our current judgment as to how a legal challenge may be made to the proposed agreement.

We would be pleased to discuss these matters with you in more detail if you wish.

Very truly yours,

CLARK HILL PLC

John L. Gierak

JLG/tlf

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## AGENCY FEE AGREEMENT

The Board of Education of the Berkley School District ("Employer") and the Berkley Education Association, MEA/NEA ("Association") desire to prevent the divisiveness and interference with employee relationships that may occur when some members of the collective bargaining unit receive the benefits of representation by the Association without paying their fair share for those benefits. The Employer and Association acknowledge that Public Act 349 was not given immediate effect so that they may decide whether to enter into an agreement excluded from the prohibitions of PA 349 prior to the effective date of PA 349. In consideration of the benefits to both the Employer and Association of an agency shop arrangement, the parties hereby agree as follows:

A. Each bargaining unit member shall, as a condition of employment, on or before thirty-one (31) days from the date of commencement of professional duties, join the Association or pay a service fee to the Association equivalent to the amount of dues uniformly required of members of the Association, less any amounts not permitted by law; provided, however, that the bargaining unit member may authorize payroll deduction for such fee. In the event that a bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the Employer shall, at the request of the Association, deduct the service fee from the member's salary and remit the same to the Association under the procedure provided below.

B. The procedure in all cases of non-payment of the service fee shall be as follows:

1. The Association shall notify the member of non-compliance by certified mail, return receipt requested, explaining that he or she is delinquent in not tendering the service fee, specifying the current amount of the delinquency, and warning him/her that unless the delinquent service fees are paid or a properly executed deduction form is tendered within fourteen (14) days, he or she shall be reported to Employer and a deduction of service fee shall be made from his or her salary; and

2. If the member fails to comply, the Association shall give a copy of the letter sent to the delinquent member and the following written notice to Employer at the end of the fourteen (14) day period:

The Association certifies that (name) has failed to tender the periodic service fee required as a condition of employment under the Agency Fee Agreement and demands that under the terms of this Agreement, Employer deduct the delinquent service fee(s) from the collective bargaining unit member's salary. The Association certifies that the amount of the service fee includes only those items authorized by law; and

3. Employer, upon receipt of said written notice and request for deduction, shall act pursuant to Section A above. In the event of compliance at any time prior to deduction, the request for deduction will be withdrawn. The Association, in enforcing this provision, agrees not to discriminate among bargaining unit members.

4. If during the term of this Agency Fee Agreement it shall become unlawful for the Employer to deduct the service fee from the pay of a bargaining unit member, then the Employer shall terminate the employment of the bargaining unit member for failure to comply with this Agency Fee Agreement. If discharge shall become an unlawful remedy, the Association shall have the right to pursue any other lawful remedies.

C. With respect to all sums deducted by Employer pursuant to this Section, Employer agrees promptly to disburse said sums directly to the Association.

D. A member paying the service fee provided for herein, or whose service fees have been deducted by Employer from his or her salary, may object to the use of the service fee for matters not permitted by law. The procedure for making such objections is that officially adopted by the Association. A copy of the Association Policy Regarding Objections to Political-Ideological Expenditures will be provided by the Association upon a request of a bargaining unit member.

E. The Association agrees, upon timely request, to defend Employer, its officers, agents or employees in any suit brought against all or any of them regarding the Employer's enforcement of the terms of this Agency Fee Agreement, and to indemnify Employer, its officers, agents or employees, for any costs or damages which may be assessed against all or any of them arising out of the enforcement of this Agency Fee Agreement, provided, however, that:

1. Neither the duty to defend nor the duty to indemnify shall arise where the damages and costs, if any, have resulted from the negligence, misfeasance or malfeasance of Employer, its officers, employees or agents,

2. The Association has the right to choose the legal counsel to defend any such suit or action, after consultation with Employer; and

3. If Employer, its officers, agents or employees elects to select its or their own counsel in any such suit, then the Association shall have no duty to indemnify those defendants it does not represent in the suit; provided, however, that if the Association, through counsel it selects after consultation with Employer, does represent Employer, its officers, agents or employees in such suit, such defendants may additionally hire their own counsel to assist in the defense of any such suit at their own expense; and

4. The Association, after consultation with Employer, has the right to decide whether to defend any said action or to appeal the decision of any court or other tribunal regarding the validity of this Section; and

5. The Association, in defense of any such suit, shall have the right to compromise or settle any monetary claim made against Employer, its officers, employees or agents under this Agency Fee Agreement, after consultation with Employer.

F. Persons becoming members of the collective bargaining unit during the course of a school year shall have their service fee prorated over the school year.

G. The Association will certify, at least annually to Employer, fifteen (15) days prior to the date of the first payroll deduction for dues or service fees, the amount of said dues and the amount of the service fee to be deducted by Employer, and that said service fee includes only those amounts permitted by the Agency Fee Agreement and by law.

H. Should any of the provisions of this Agency Fee Agreement be found contrary to law by a court or administrative agency of competent jurisdiction, it is the intent of the Employer and Association that only the portion of the Agency Fee Agreement found contrary to law shall be stricken and all other parts or portions of this Agency Fee Agreement shall remain in full force and effect. A determination that a portion of this Agency Fee Agreement is contrary to law shall not affect the terms and conditions of the collective bargaining agreement, which shall remain in full force and effect for the life of that agreement.

I. This Agency Fee Agreement shall be effective immediately upon ratification, which in no event shall be later than March 26, 2013, and shall continue in full force and effect while the Association remains the exclusive collective bargaining representative until its expiration on June 30, 2022. Should a court or administrative agency of competent jurisdiction determine that the length of this Agency Fee Agreement is contrary to law, then it is the intent of the parties that this Agency Fee Agreement continue in effect for the longest period of time allowed by law. Should this Agency Fee Agreement be determined to be unlawful and no longer in effect, then any agency fee agreement contained in another agreement between the parties shall immediately go into full force and effect for the length of time allowed by that agreement.

Berkley Education Association, MEA/NEA

Board of Education of Berkley School District

By: \_\_\_\_\_

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Date: \_\_\_\_\_

Date: \_\_\_\_\_