

## **IEERB Practitioner's Guide to Bargaining & Impasse**

The Indiana Education Employment Relations Board is a neutral agency that oversees relations between public school teachers and the schools they serve.

Indiana Code ("I.C.") Article 20-29 establishes the framework for teacher collective bargaining in Indiana, which is supplemented by IEERB's administrative rules, 560 Indiana Administrative Code ("I.A.C.") 2. IEERB staff has developed this Guide to provide additional guidance and tips to practitioners regarding teacher collective bargaining.

**The following Guide is for GUIDANCE ONLY on collective bargaining and impasse under I.C. Art. 20-29 and 560 I.A.C. 2. IEERB is a neutral agency and cannot provide legal advice; nor does this Guide bind IEERB or its Board in any way.** This Guide is not intended to take the place of careful review of I.C. Art. 20-29 and 560 I.A.C. 2 or as a substitute for legal advice. Some of this Guide may not be relevant to a school employer or exclusive representative based on the ratification date of a current collective bargaining agreement. There were several changes to collective bargaining made in the 2015 Session of the Indiana General Assembly. The main changes are found in this Guide, but we also encourage you to familiarize yourself with the text of the law, which can be found on IEERB's website. This Guide may not reflect the most recent agency or court decisions. At the time this Guide was updated, the following Board Orders were appealed and are pending in court: *Jay Classroom Teachers Association v. Jay School Corporation and Indiana Education Employment Relations Board*, F-13-01-3945, pending in the Indiana Court of Appeals, Cause No. 49A05-1412-PL-586, and *Board of School Trustees, Anderson Community School Corporation v. Anderson Federation of Teachers, Local 519, AFT, and Indiana Education Employment Relations Board*, U-14-05-5275, pending in Marion County Superior Court, Cause No. 49D06-1504-PL-012264. It is recommended that you check with IEERB on the status of these cases before relying on them.

This Guide is IEERB-only guidance. Guidance or information from other agencies involved with CBAs or collective bargaining have been provided for information only and may not reflect the views of IEERB. Please note that this Guide pertains to teacher collective bargaining laws and rules; however, the parties are still subject to other state and federal laws and rules not mentioned or analyzed here.

**This Guide supersedes prior IEERB guidance on bargaining and impasse.** IEERB may, from time to time, issue updates. Please check IEERB's website at [www.in.gov/ieerb](http://www.in.gov/ieerb) for applicable law and rules, the current bargaining timelines, Last Best Offer (LBO) requirements, and additional guidance. You also can register for free IEERB updates through the IEERB Bulletin.

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## **Overview**

Bargaining collectively is the performance of the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to negotiate in good faith concerning the mandatory subjects of bargaining and to execute a written contract, known as a collective bargaining agreement (“CBA”), relating to the settlement of bargained subjects. The obligation to bargain collectively does not require the school employer or the exclusive representative to agree to a proposal of the other or to make a concession to the other. Informal negotiations may be held prior to August 1. However, formal collective bargaining between a school employer and the exclusive representative cannot begin before August 1.<sup>1</sup>

IEERB shall declare impasse after September 30 if:

- the parties notify IEERB of impasse, or
- the parties are, or are supposed to be, under the terms of their CBA, in collective bargaining for all or part of a contract and have not submitted a ratified CBA to IEERB.

Within 15 days of the Declaration of Impasse, IEERB shall appoint a mediator. Mediation will consist of 1-3 sessions and last up to 30 days. Mediation will end with the submission to IEERB of a ratified contract, or the exchange of Last, Best Offers (“LBOs”). Within 15 days of the end of an unsuccessful mediation, IEERB will appoint a fact-finder. The fact-finder will have up to 30 days to investigate the parties’ LBOs and pick one to be the parties’ CBA.<sup>2</sup> The parties will then have 30 days to appeal the fact-finder’s decision to the IEERB Board. Check IEERB’s website for the current bargaining timeline.

## **Research**

IEERB’s research division provides public access to collective bargaining agreements as well as data relevant to collective bargaining. IEERB collects collective bargaining data (salary, wages, and salary and wage related benefits) and collective bargaining agreements through the Gateway portal and publishes these data through Gateway Report Builder, which can be accessed at [https://gateway.ifionline.org/report\\_builder](https://gateway.ifionline.org/report_builder). School employers are responsible for submitting their data, and IEERB does not verify the data.

IEERB Search is an advanced search engine and document retrieval system that contains collective bargaining agreements, IEERB representation and unit determinations,

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<sup>1</sup> Specifically, I.C. § 20-29-6-12 provides that parties shall not formally bargain before August 1 in the first year of the state budget biennium; or August 1 in the second year of the state budget biennium if either the parties agreed to a one-year contract during the first year of the state budget biennium or the contract provides for renegotiating certain financial items during the second year of a two-year contract.

<sup>2</sup> Prior to July 1, 2015, fact-finding lasted up to 15 days.

unfair labor practice decisions, fact-finding cases, and relevant opinions from the Attorney General. IEERB Search is available at <https://ieerbsearch.ieerb.in.gov/login.aspx>.

## **Collective Bargaining**

### I. Overview

The mandatory subjects of bargaining listed in I.C. § 20-29-6-4 are salary, wages, and salary and wage related fringe benefits, including accident, sickness, health, dental, vision, life, disability, retirement benefits, and paid time off as permitted to be bargained under I.C. § 20-28-9-11. Salary and wages include the amounts of pay increases available to employees under the compensation plan adopted under I.C. § 20-28-9-1.5, but do not include the teacher evaluation procedures and criteria, any components of the teacher evaluation plan, rubric, or tool, or any performance stipend or addition to base salary based on a performance stipend to an individual teacher under I.C. § 20-43-10-3.<sup>3</sup>

Indiana Code §§ 20-29-6-4.5 and 20-29-6-4.7 provide that the following are impermissible subjects of bargaining:

- school calendar;
- teacher dismissal procedures and criteria;
- restructuring options;
- the school's ability to work with educational entities regarding postsecondary or dual credits;
- teacher evaluation procedures and criteria;
- any subject not required to be bargained; and
- a matter than another statute specifies is not subject to collective bargaining, including master's supplemental payments pursuant to I.C. § 20-28-9-1.5 and any performance stipend or addition to base salary based on a performance stipend to an individual teacher under I.C. § 20-43-10-3.<sup>4</sup>

The parties may bargain wages for ancillary duties, but may not bargain compensation in addition to salary for normal teaching duties. Normal teaching duties are duties that are completed as part of one's direct teaching function.<sup>5</sup> Additionally, it is unlawful for a school employer to enter into any agreement that would place the employer in a position of deficit financing.

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<sup>3</sup> Performance stipends and additions to base salary based on performance stipend were added to list of prohibited subjects in 2015.

<sup>4</sup> The addition of discussion items relating to teacher salary is a change made in 2015.

<sup>5</sup> See *Indiana Education Employment Relations Bd. v. Nettle Creek Classroom Teachers Assoc.*, 26 N.E.3d 47, 56 (Ind. App. Ct. 2015); see also *Jay Sch. Corp.*, F-13-01-3945 at 21-22 (IEERB Bd. 2013), *on appeal*, Cause No. 49A05-1412-PL-00586.

Beyond simply bargaining, the parties must reduce any agreement to writing. CBAs must include agreed-upon mandatory subjects of bargaining (thus, any side agreements or memoranda of understanding (MOUs) regarding subjects of bargaining must be attached to, and are considered part of, the CBA). For example, wage payment agreements must be attached to CBAs. *See Jay Sch. Corp.*, F-13-01-3945 at 20 (IEERB Bd. 2013), *on appeal on other grounds*, Cause No. 49D02-1402-PL-003406. Language necessary for the formation of a collective bargaining agreement includes a ratification section, the CBA term, a recognition clause, and definitions. Additionally, a grievance procedure may be included in a collective bargaining agreement.<sup>6</sup> Pursuant to I.C. § 20-29-6-2, the following cannot be in a CBA:

- impermissible subjects of bargaining (as set forth in I.C. § 20-29-6-4.5(a)),
- provisions that conflict with any right or benefit established by federal or state law,
- provisions that conflict with school employee rights in I.C. § 20-29-4-1 and I.C. § 20-29-4-2,
- provisions that conflict with school employer rights set forth in I.C. § 20-29-4-3,
- restructuring options, and
- a school's ability to work with educational entities regarding postsecondary or dual credits.

IEERB encourages the parties to carefully review any tentative agreements in their entirety prior to ratification and submission to ensure compliance. IEERB is not able to provide legal advice on CBA content or compliance. For more information on particular provisions that the IEERB Board has evaluated, see IEERB's website. For legal advice, contact your local counsel.

Once the parties have reduced their agreements to writing, the CBA must be ratified and signed by the governing body of the school employer and the exclusive representative. **Once it is ratified, a CBA must be uploaded to Gateway at <https://gateway.ifionline.org> and posted online by the school employer.**<sup>7</sup> The exclusive representative may email the ratified CBA to IEERB at [ratifiedcontract@ieerb.in.gov](mailto:ratifiedcontract@ieerb.in.gov). The CBAs posted online must be identical to the one sent to IEERB and must include all side agreements or MOUs regarding subjects of bargaining. IEERB shall declare impasse after September 30 if:

- the parties notify IEERB of impasse, or
- the parties are, or are supposed to be, under the terms of their CBA, in collective bargaining for all or part of a contract and have not submitted a ratified CBA to IEERB.

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<sup>6</sup>A school employer and an exclusive representative are prohibited from mutually agreeing to binding arbitration concerning teacher dismissals. *See* I.C. § 20-28-7.5-7.

<sup>7</sup> *See* I.C. § 20-29-6-6.1(a), 560 I.A.C. 2-5-1 (parties must submit ratified contracts to IEERB); I.C. § 20-29-6-19 (providing that not later than 14 business days after the parties have reached an agreement under this chapter, the school employer shall post the contract upon which the parties have agreed on the school employer's Internet web site).

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IEERB may return CBAs if they are not signed, lack a valid term, or are incomplete (e.g., attachments or agreements referred to in the CBA are not actually attached).

See I.C. Ch. 20-29-6, 560 I.A.C. 2-4, and IEERB precedent (to the extent it is still good law) for more information.

## II. Public Schools Subject to Collective Bargaining

In general, parties subject to collective bargaining under I.C. Art. 20-29 include school employee organizations (as defined by I.C. § 20-29-2-14), school corporations (as defined by I.C. § 20-29-2-12) and charter schools established under I.C. Art. 20-24. Certain school entities and their exclusive representatives are subject to special rules as explained below.

### A. Special Management Teams Assigned Under Indiana Code Section 20-31-9-4

These special management teams are not considered a school employer under I.C. § 20-29-2-15. The special management team shall make all personnel decisions in the school. In operating the school as a turnaround academy under I.C. Ch. 20-31-9.5, a special management team is not bound by a contract entered into under I.C. Art. 20-29. See I.C. § 20-31-9.5-1 for more information.

### B. Innovation Network Schools

For any collective bargaining agreement under I.C. Art. 20-29 entered into after July 1, 2015, a governing body is not bound by its collective bargaining agreement for employees of an innovation network school established under I.C. Ch. 20-25.7-4. Employees of an innovation network school may organize and create a separate bargaining unit to collectively bargain with the innovation network team under I.C. Art. 20-29.<sup>8</sup> See I.C. § 20-25.7-4-7 for more information.

Employees who participate in the pilot program under I.C. Ch. 20-25.7-6 are members of the bargaining unit of the innovation network school, if any. However, salary increases may not be collectively bargained for these employees, but are determined according to the plan approved under I.C. § 20-25.7-6-5. See I.C. § 20-25.7-6-6 for more information.

### C. Certain Transformation Zone Schools

This section applies to schools that are part of a transformation zone as the result of three consecutive years of being in the lowest performance category or designation and are not operated by a special management team. The school corporation is not subject to I.C. Art. 20-29 in these schools unless the school corporation voluntarily recognizes an exclusive representative under I.C. § 20-29-5-2. If the school corporation voluntarily recognizes an exclusive representative under I.C. § 20-29-5-2, the school corporation may authorize a school within the transformation zone to opt out of bargaining allowable subjects or discussing discussion items by

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<sup>8</sup> Similar rules apply to innovation network schools organized under former I.C. Art. 20-25.5.

specifying the excluded items on the notice required under I.C. § 20-29-5-2(b). Such notice must be provided to IEERB at the time of the notice's posting. See I.C. § 20-31-9.5-9.5 for more information.

### III. Bargaining Status Form

IEERB annually collects bargaining information from all parties who collectively bargain under I.C. Art. 20-29. The Bargaining Status Form is in two sections: Pre-Impasse and At-Impasse. IEERB uses the Gateway portal to collect and manage the Pre-Impasse Section. Both the school employer and exclusive representative will be given a username and password to complete this Section. Information submitted on the Pre-Impasse Section, or the failure of a party to submit it, may be used in IEERB's determination of impasse.

When parties are at impasse, IEERB will email the second section of the Bargaining Status Form, At-Impasse, to both parties. Both parties must return this Section to [Impasse@ieerb.IN.gov](mailto:Impasse@ieerb.IN.gov). If a party would like to argue at fact-finding that the school employer's revenue available for bargaining from the school funding formula<sup>9</sup> will be different than the Indiana Department of Education's ("DOE") Certification for general fund revenue pursuant to I. C. § 20-29-6-12.5(b) ("DOE Certification"), the party must list that amount on the At-Impasse Section. Failure of a party to list its estimated school funding formula revenue operates as a waiver to use a different number for the financial implication factor during fact-finding.<sup>10</sup>

### IV. Whether Parties Must Bargain

Generally, parties must bargain if part or all of their CBA is expired or will expire prior to the next bargaining season or the parties have a mandatory reopener. In certain cases, IEERB may contact the parties to request information as to why parties are not bargaining. Parties may agree not to reopen a mandatory reopener. To avoid declaration of impasse, the parties must submit a **joint, written, and ratified statement** that the parties have agreed not to reopen the CBA.

Parties with a calendar-year CBA shall bargain a successor CBA in the year in which the CBA expires. Parties with calendar-year contracts may continue the terms of their current CBA until the end of the fiscal year in which the CBA expires if they send a **joint, written, and ratified statement** to IEERB indicating such. Parties with CBAs that would not allow them to bargain a successor CBA pursuant to the new timelines should contact IEERB. In general, unless the CBA so provides, bargaining a successor CBA will not affect the terms of the current CBA, which will continue until its expiration.

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<sup>9</sup>According to DOE's certification, this is the same as state tuition support.

<sup>10</sup> See *Jay Sch. Corp.*, F-13-01-3945 at 10-12 (IEERB Bd. 2013), *on appeal*, Cause No. 49A05-1412-PL-00586.

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## V. Compliance

IEERB now evaluates compliance of CBAs. See I.C. § 20-9-6-6.1. To learn more about the process or rubric, see IEERB's Handbook to CBA Compliance.

## VI. Salary and Other Direct Compensation

### A. Compensation Plans

Indiana Code § 20-28-9-1.5 provides that salary increases or increments must be based upon a combination of the following factors:

- (1) Education and experience. Specifically, a combination of:
  - a. the attainment of either: additional content area degrees beyond the requirements for employment; or additional content area degrees and credit hours beyond the requirements for employment, if required under an agreement bargained under I.C. Art. 20-29; and
  - b. the number of years of a teacher's experience taken together may account for not more than 33% of the calculation used to determine a teacher's increase or increment.
- (2) Evaluation. Specifically, the results of an evaluation conducted under I.C. Ch. 20-28-11.5.
- (3) Leadership. Specifically, the assignment of instructional leadership roles, including the responsibility of conducting evaluations under I.C. Ch. 20-28-11.5.
- (4) Student needs. Specifically, the academic needs of students.

There is no specific format for compensation plans.<sup>11</sup> A teacher rated ineffective or improvement necessary under I.C. Ch. 20-28-11.5 may not receive any raise or increment for the following year if the teacher's employment contract is continued. The amount that would otherwise have been allocated for the salary increase of the teachers rated ineffective or improvement necessary shall be allocated for compensation of all teachers rated effective and highly effective based on the factors listed above. CBAs also should indicate how newly hired teachers will be compensated. Finally, compensation plans must include a salary range. A salary range is the lowest and highest base salaries for full-time bargaining unit members not including any increases for that year.

Compensation plans must be submitted with CBAs as part of the compliance review. IEERB will provide a copy of the compensation plan to DOE who will publish the plan on its website and report any noncompliance to the State Board of Education. The State Board of Education is responsible for taking appropriate action to ensure compensation plan compliance. DOE publishes a model compensation plan on its website at <http://www.doe.in.gov/effectiveness/compensation-systems>.

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<sup>11</sup> See *Carmel Clay Schs.*, F-12-01-3060 at 4 (IEERB Bd. 2013); *Jay Sch. Corp.*, F-13-01-3945 at 14-18 (IEERB Bd. 2013), *on appeal on other grounds*, Cause No. 49A05-1412-PL-00586.



Additionally, compensation plans are available for review through Gateway at [https://gateway.ifionline.org/report\\_builder](https://gateway.ifionline.org/report_builder) or IEERB Search at: <https://ieerbsearch.ieerb.in.gov/login.aspx>. **Please note that IEERB's posting signifies neither the CBA's compliance with applicable laws and rules, nor IEERB's endorsement of the CBA.** IEERB strongly recommends that compensation plans be carefully reviewed to ensure they are compliant, complete, and understandable prior to ratification and submission. For more information, see I.C. § 20-28-9-1.5.

#### A. Other Increases for Normal Teaching Duties

In general, all teacher increases for normal teaching duties must go through the compensation plan. However, there are some notable exceptions. Although education can be part of the compensation plan (as allowed under I.C. § 20-28-9-1.5 and capped at 33%), school employers also may provide a supplemental payment to a teacher in excess of the salary specified in the school corporation's compensation plan if the teacher has earned a master's degree from an accredited postsecondary education institution in a content area directly related to the subject matter of: (1) a dual credit course; or (2) another course; taught by a teacher. In addition, a supplemental payment may be made to an elementary school teacher who earns a master's degree in math or reading and literacy. This supplement is not subject to collective bargaining. This supplement may be in the CBA if there is an accompanying statement that the payment was not bargained.

Another exception involves performance awards pursuant to I. C. § 20-43-10-3(g). The performance grant received by a school employer pursuant to I. C. § 20-43-10-3 shall be allocated among and used only to pay cash stipends to all teacher who are rated as effective or as highly effective and employed by the school as of December 1. The lead school corporation or interlocal cooperative administering a cooperative or other special education program or administering a career and technical education program, including programs managed under I.C. Ch. 20-26-10, I.C. Ch. 20-35-5, I.C. Art. 20-37, or I.C. Ch. 36-1-7, shall award performance stipends to and carry out the other responsibilities of an employing school corporation under this section for the teachers in the special education program or career and technical education program.

The amount of distribution from an annual performance grant to an individual teacher is determined at the discretion of the governing body of the school employer. The governing body shall differentiate between the amount of the stipend awarded to teachers rated effective and highly effective. The school employer shall complete the appropriation process for all stipends from a performance grant to individual teachers before December 31 of the state fiscal year in which the performance grant is distributed to the school corporation and distribute all stipends from a performance grants to individual teachers before the immediately following January 31. Any part of the performance grant not distributed as stipends to teachers before February must be returned to DOE on the earlier of the date set by DOE or June 30 of that state fiscal year. This stipend is not bargained. This supplement may be in the CBA if there is an accompanying statement that the payment was not bargained.

Finally, in addition to the stipend, an amount determined under the policies adopted by the governing body but not exceeding 50% of the amount of the stipend to an individual teacher in a particular state fiscal year becomes a permanent part of and increases the base salary of the teacher receiving the stipend for school years beginning after the state fiscal year in which the stipend is receivable. These increases are payable from funds other than the performance grant and are not bargained. These increases may be in the CBA if there is an accompanying statement that the increases were not bargained.

#### B. Payment for Ancillary Duties

Parties may bargain compensation for ancillary duties or those duties performed by a teacher outside of normal teaching duties. *Nettle Creek*, 26 N.E.3d at 56. Payment for these duties may be in the form of an hourly wage or a stipend.

#### C. Payment for Co-curricular & Extra-Curricular Duties

The parties must bargain compensation for co-curricular and extra-curricular duties performed by the teacher. Payment for these duties may be in the form of an hourly wage or a stipend.

### VII. Memoranda of Understanding

Parties bargain in the fall and must incorporate all agreed-upon subjects of bargaining into a collective bargaining agreement. Sometimes, however, the parties ratify an agreement, subsequent to a ratified collective bargaining agreement, that changes or modifies the collective bargaining agreement. This type of agreement is called a memorandum of understanding (MOU). An MOU is considered part of the CBA, and therefore must be submitted to IEERB with the CBA.

As the parties may not formally bargain until August 1, an MOU outside the bargaining timeline is generally impermissible. However, IEERB may find an MOU permissible in the following circumstances:

- (1) Newly discovered information or an unanticipated event that was not known or available at the time the parties ratified the original CBA.
- (2) Non-rule policy guidance issued by the board addressing unanticipated circumstances impacting multiple bargaining parties and allowing parties to bargain and ratify a limited MOU outside of the bargaining timelines.

Because an MOU modifies an existing CBA, the MOU must be submitted to IEERB to determine whether the MOU is compliant. See IEERB's Handbook to CBA compliance for more information.

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## VIII. Exchanging Collective Bargaining Information

A free flow of information is essential to a good bargaining relationship.<sup>12</sup> IEERB encourages parties to voluntarily and readily exchange bargaining information. Parties have a duty to timely provide “information about mandatory subjects of bargaining for purposes of making future bargaining proposals, current bargaining proposals, or for contract administration.” *Id.* This duty is separate from schools’ disclosure duties pursuant to the Access to Public Records Act.<sup>13</sup> *Id.* See IEERB precedent for more information on disclosure requirements.

## IX. Expiration of Collective Bargaining Agreements

Collective bargaining agreements may not extend past the end of a state budget biennium (June 30 of odd-numbered years). Upon the expiration of the current contract that is in effect, except for performance stipends and additions to base salary provided under I.C. § 20-43-10-3, the school employer shall continue under the terms of the current contract that is in effect, with no increase or increment in salary, wages, or benefits for any bargaining unit employee until a new contract is executed, unless continuation would put the school employer in a position of deficit financing.<sup>14</sup> For more information, see I.C. §§ 20-29-6-4.7, 20-29-6-16.

## X. Best Practices

Being prepared and actively engaging in collective bargaining will help all the parties resolve matters more quickly and efficiently. Here are some tips to help you prepare:

- Review the law, rules, and guidance provided by IEERB and your attorney.
- Exchange collective bargaining information.
- Start informally bargaining early, and determine what, if any, issues may be quickly resolved.
- Prepare a history of general fund revenue and expenditures.
- For each issue, determine the overall cost compared to available funds.
- For each issue, determine the source of the funding, and whether it will be available if the parties go to fact-finding.

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<sup>12</sup> *Lebanon Community Schs.*, U-10-13-0665, 2012 WL 3549830, at \*3 (IEERB HE Order, Mar. 27, 2012).

<sup>13</sup> APRA, I.C. § 5-14-3 et seq., allows all persons, including associations, access to public records from a public agency. The Public Access Counselor provides advice and assistance concerning Indiana’s public access laws to members of the public and government officials and their employees. For more information on APRA, including requirements, exclusions, timelines, etc., go to [www.in.gov/pac](http://www.in.gov/pac).

<sup>14</sup> The section also provides that if an agreement has not been reached on the items to be bargained collectively by November 1, as provided in I.C. § 6-1.1-17-5, the parties shall continue the terms of the current contract that is in effect, and the school employer may issue tentative individual contracts and prepare its budget on that basis. During this period, the school employer may not unilaterally change the terms or conditions of employment that are issues in dispute.

- For each contested issue, be sure you can articulate the reason for your position and counter any reasons against it that may be offered by the other side.
- Be open to creative solutions that address the interests of both parties.
- Begin researching comparable information.<sup>15</sup> Comparable information for public employees may be found on Gateway at <https://gateway.ifionline.org>.

### **Discussion**

Discussion is the performance of the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to discuss, provide meaningful input, or exchange points of view, with respect to the following subjects:

- curriculum development and revision;
- textbook selection; teaching methods;
- hiring, evaluation, promotion, demotion, transfer, assignment, and retention of certificated employees;
- student discipline;
- expulsion or supervision of students;
- pupil/teacher ratio;
- class size or budget appropriations;
- safety issues for students and employees in the workplace, except those items required to be kept confidential by state or federal law; hours;
- pre-evaluation planning session;
- superintendent's aggregate performance evaluation results (prior to presentation at the school board);
- supplemental pay for certain master's degrees;
- funding for a plan of remediation;
- performance grants/stipends to teachers pursuant to I.C. § 20-43-10-3; and
- additions to base salary based on performance grants pursuant to I.C. § 20-43-10-3.<sup>16</sup>

The obligation to discuss does not require either party to enter into a contract, agree to a proposal, or make a concession related to the mandatory subjects of discussion.

Discussion is an important and mandatory part of labor relations. Best practices include taking discussion seriously; preparing reasons for proposals; setting an agenda; actively listening; and being open to alternate suggestions.

The 2015 Session of the Indiana General Assembly added several subjects to discussion. As there are additional subjects, and given that this is the first year that these

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<sup>15</sup>One of the factors in fact-finding involves comparisons of wages and hours of the employees involved with wages of other employees working for other public agencies and private concerns doing comparable work, giving consideration to factors peculiar to the school employer. See the Fact-Finding section below for more details.

<sup>16</sup> The items listed after "hours" were added to the list of discussion topics in I.C. § 20-29-6-7 in 2015.

subjects will be discussed, we suggest that the parties plan on extra time for discussion in the 2015 bargaining season.

See I.C. §§ 20-29-2-7, 20-29-6-6, 20-29-6-7, 20-29-6-8, and IEERB precedent (to the extent it is good law) for more information.

### **Miscellaneous Topics**

#### **I. Committee Appointments**

Pursuant to I.C. § 20-29-5-7, the percentage of teacher positions the exclusive representative may appoint to serve on a statutory or locally created school or district wide committee may not exceed the percentage of teachers who are members of the exclusive representative. Committees under this section may not address subjects of bargaining. This section does not apply to the bargaining team for the exclusive representative.

#### **II. Collective Bargaining/Discussion Meetings**

Pursuant to I.C. § 5-14-1.5-6.5, whenever a governing body, or any person authorized to act for a governing body, meets with an employee organization, or any person authorized to act for an employee organization, for the purpose of collective bargaining or discussion, any party may inform the public of the status of collective bargaining or discussion as it progresses by release of factual information and expression of opinion based upon factual information.<sup>17</sup>

#### **III. Miscellaneous Issues**

The obligation to bargain collectively or discuss a matter does not prevent a school employee from petitioning the school employer, governing body, or superintendent for a redress of the employee's grievances, either individually or through the exclusive representative. It also does not prevent the school employer or superintendent from conferring with a citizen, taxpayer, student, school employee, or other person considering the operation of the schools and the school corporation. Nothing prevents a superintendent or the superintendent's designee from making recommendations to the school employer. See I.C. §§ 20-29-6-9, 20-29-6-10 for more information.

By September 15 of each school year, the local president or other officer or designee of the exclusive representative shall certify by affidavit to the school employer the number of teachers in each school and in the entire school corporation who are members of the exclusive representative. See I.C. § 20-29-5-7(e) for more information.

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<sup>17</sup> See, e.g., *Carmel Clay Schs.*, U-12-04-3060, at 4 (IEERB Bd. 2013).

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## Impasse

### I. Declaration of Impasse

IEERB shall declare impasse after September 30 if:

- the parties notify IEERB of impasse, or
- the parties are, or are supposed to be under the terms of their CBA, in collective bargaining for all or part of a contract and have not submitted a ratified CBA to IEERB.

Parties must inform IEERB of their bargaining status through Bargaining Status Form: Pre-Impasse Section. Any updates should be sent to [impasse@ieerb.in.gov](mailto:impasse@ieerb.in.gov).

IEERB will send a Declaration of Impasse to the contacts listed on the parties' Pre-Impasse Section. Once impasse is declared, it will continue unless and until IEERB receives either a ratified CBA or a fact-finder's report.

Upon receipt of the Declaration of Impasse, each party is required to complete the second section of the Bargaining Status Form, entitled At Impasse. Both parties must return this Section to [impasse@ieerb.in.gov](mailto:impasse@ieerb.in.gov). This Section will provide IEERB with the name, position, address, e-mail address, and phone number of its chief spokesperson, and of the individual to whom billing invoices should be submitted. Moreover, as noted above, if your party would like to argue at fact-finding that the school employer's revenue available for bargaining from the school funding formula will be different than the DOE Certification, you MUST list that amount on the At-Impasse Section. Failure of a party to list its estimated school funding formula revenue operates as a waiver to use a different number for the financial implication factor during fact-finding.

Each party is required to immediately submit a change in contact information occurring during impasse. Unless otherwise indicated in the rules, all correspondence for impasse procedures shall be via e-mail. Parties or the IEERB may, in addition to e-mail, correspond via mail, facsimile, or hand delivery. Receipt of an e-mail is presumed upon dispatch.

See 560 I.A.C. 2-4 for more information.

### II. Suspension of Impasse Procedures

#### A. Stays for Certain Pending Unfair Practice Complaints

Impasse procedures (including declaration of impasse, mediation, and fact-finding) shall be suspended where an unfair practice complaint is filed and the complaint:

- (1) requests a stay of impasse procedures; and
- (2) alleges that:
  - a. the school employer violated I.C. § 20-29-7-1(a)(1) by interfering with, restraining, or coercing school employees in the exercise of the rights guaranteed in I.C. Ch. 20-29-4; or

- b. the school employer violated I.C. § 20-29-7-1(a)(5) by refusing to bargain collectively with an exclusive representative as required by I.C. Art. 20-29; or
  - c. the school employee organization or the organization's agents violated I.C. § 20-29-7-2(1)(A) by interfering with, restraining, or coercing school employees in the exercise of the rights guaranteed in I.C. Art. 20-29; or
  - d. the school employee organization or the organization's agents violated I.C. § 20-29-7-2(3) by refusing to bargain collectively with a school employer if the school employee organization is the exclusive representative; and
- (3) alleges that a stay is required because the case implicates impasse procedures.

The stay will continue until a determination of the unfair practice complaint is made. The complaint shall be given priority over other unfair practice complaints. The Board or its agent may proceed with the impasse procedures where:

- (1) the complaining party in the unfair practice complaint does not request a stay; or
- (2) the complaining party in the unfair practice complaint later requests that impasse procedures proceed; or
- (3) the Board or its agent determines that a stay is inappropriate given the nature of the allegations.<sup>18</sup>

#### B. Stay for Pending Compliance Appeals

IEERB may grant a stay of impasse procedures pending the Board's final order in an appeal of:

- (1) a compliance officer's Compliance Report and Recommendation, or
- (2) a compliance officer's denial of written approval required to ratify a subsequent CBA or MOU.

See IEERB's emergency compliance rules for more information.

### III. End of Impasse

Impasse will end with either a fact-finder's report or the submission to IEERB of a ratified CBA. If the parties settle prior to the initiation of fact-finding, IEERB will issue an End of Impasse Notice.

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<sup>18</sup> See *Carmel Clay Schs.*, U-12-04-3060, at 4 (IEERB Bd. 2013).

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## Mediation

### I. Pre-Impasse Mediation

The General Assembly's approval of mediation to settle collective bargaining disputes is clear from the statute's requirement for mediation once impasse is declared. *See* I. C. § 20-29-6-13. However, the parties only have 60 days to formally bargain, and 30 days to mediate once impasse is declared. *See id.* IEERB seeks to encourage and, if requested, facilitate additional opportunities for the parties to engage in mediation prior to the declaration of impasse. As such, IEERB has established guidelines for pre-impasse mediation – mediation during formal collective bargaining. *See* IEERB NPD Doc. No. 2015-1: Pre-Impasse Mediation.

At any time after August 1 and before September 30, the parties may mutually request that the Board appoint a mediator. This request must be in the form, and in the manner, requested by IEERB staff. The mediator shall be appointed from IEERB's staff or ad hoc panel. IEERB shall honor mutual appointment requests. In the event the requested mediator is unwilling or unable to take the appointment, the parties shall determine whether they agree on a different mediator or whether IEERB shall appoint the mediator. All costs of the pre-impasse mediation, including mileage and other travel expenses approved by IEERB, shall be borne equally by the parties. Parties failing to attend scheduled mediation sessions shall be charged the entire amount for the missed session, including the mediator's mileage and other travel expenses, any preparation by the mediator for the session, the mediator's time in traveling to and from the session, and any reasonable time spent by the mediator at the session waiting for the party who failed to show. IEERB shall pay the mediator, and then bill the parties. Invoices are due within 30 days of receipt. The number of mediation sessions will be determined by the parties. Pre-impasse mediation will end no later than September 30. The mediator conducting pre-impasse mediation will not conduct impasse mediation between the same parties in the same bargaining season unless mutually requested by the parties.

### II. Impasse Mediation

Once impasse is declared, IEERB will appoint a mediator within 15 days. Mediation is mandatory, and the cost is split by the parties. It will consist of 1-3 sessions and last up to 30 days. During mediation, the mediator will attempt to help the parties reach a settlement, but cannot force a settlement. If for any reason either party does not feel that mediation will be successful, please let the mediator know immediately so the mediator can decide how to proceed.

#### A. Mediators

The Chairperson appoints impasse mediators from its staff or ad hoc panel. Persons serving as mediators shall:

- have no interest in the outcome of the proceeding;
- be impartial;
- have knowledge of rules and regulations relating to collective bargaining and impasse;



- be qualified as determined by the Chairperson consistent with applicable laws and rules; and
- not be an employee of, or related to, either party or attorneys involved in the proceeding.

At no cost to the parties, IEERB provides training to its mediators on the laws and rules of teacher collective bargaining. IEERB strives to appoint quality mediators who will best facilitate settlement and uses several factors in making appointments, including but not limited to, mutual party requests, appointee background, nature of dispute, and appointee availability. The Chairperson may appoint co-mediators or team mediators. Parties may jointly request a mediator if they wish. A list of approved ad hoc panelists can be found on IEERB's website at <http://www.in.gov/ieerb/2390.htm>. Such a request will be taken into consideration by IEERB, but may not be granted.

As part of the mediator appointment, IEERB will:<sup>19</sup>

- inform the parties of the mediator rate and billing/collection procedure;
- advise the parties that the mediator does not represent either or both of the parties;
- define and describe the process of mediation to the parties;
- disclose the nature and extent of any relationships the Board is aware of that the mediator has with the parties and any personal, financial, or other interest that may result in bias or a conflict of interest;
- advise the parties to consider independent legal advice;
- advise the parties that mediation must result in either a settled and ratified collective bargaining agreement or the exchange of LBOs;
- advise the parties that neither a mediator nor a mediator's work product is subject to process; and
- set the latest date mediation will end ("End Date").

Information disclosed by a party to a mediator in the performance of mediation functions shall not be disclosed by the mediator voluntarily or by compulsion outside of the mediation process. All files, records, reports, documents, or other papers prepared by a mediator, aside from a final report pursuant to I.C. § 5-14-1.5-6.5, shall be confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by the mediator, on behalf of any party to any cause pending in any type of proceeding.

A mediator, co-mediator, or team mediator appointed by the Board has immunity in the same manner and to the same extent as a judge having jurisdiction in Indiana.

## II. Impasse Mediation Process

The mediator shall inform the parties of:

- the nature and extent of any relationships the mediator has with the parties;

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<sup>19</sup> Pre-impasse mediator appointments will include all relevant information.

- any personal, financial, or other interest that may result in bias or a conflict of interest; and
- the date, time, and location of the mediation session(s) reasonably in advance of the session.

The person listed by the parties as the chief negotiator will be the main point of contact by the mediator, unless a party notifies the mediator of a change.

Mediation begins on the date of the mediator appointment and will last until the earlier of:

- the End Date;
- the date set by the mediator after at least one mediation session;
- the date mutually agreed upon by the parties after at least one mediation session; or
- submission to IEERB of a ratified collective bargaining agreement.

If mediation does not result in a ratified collective bargaining agreement, the mediator shall set a date – which can be no later than the End Date – for the parties to exchange LBOs.

Receiving information from the parties outside of a session, particularly prior to the first session, will help the mediator devise a mediation strategy based on the particular case, and will likely lead to a quicker (and cheaper) resolution. Therefore, the following are recommendations regarding exchange of information. A party may engage in a private and confidential discussion with the mediator about the bargaining impasse via telephone outside of a mediation session. During this discussion, the party may inform the mediator of:

- the legal and factual contentions of the party;
- the party's settlement posture;
- the negotiations to date;
- the parties' collective bargaining history; or
- other relevant information the party believes will help settlement.

Additionally, or alternatively, a party may submit to the mediator a confidential statement of the bargaining impasse, not to exceed five pages, during the mediation time period. The statement may include the information listed above. A confidential statement may be supplemented by exhibits or evidence that must be made available to the opposing party or representative at the time the mediation statement is sent to the mediator. A confidential statement is privileged and confidential unless the submitting party submits a written statement to the mediator providing otherwise.

Mediation will consist of 1-3 sessions. When possible, the school employer shall host the mediation sessions. The mediation session will last until either the mediator deems it improper, unproductive, or unconscionable to continue, or by mutual agreement of the parties. At least one individual with authority to enter into a tentative agreement from each party must be present at all times during a mediation session unless excused by the mediator. Mediations shall be private unless the mediator and both parties agree otherwise.

During the mediation time period, the mediator shall inform IEERB staff immediately if: mediation will end earlier than the End Date; the parties have reached a tentative agreement; or LBOs will be exchanged. The mediator also will report the number of hours worked and expenses incurred during mediation. The current hourly rate for mediators is \$800/7.5.

**IEERB will pay the mediator, and then send the parties an invoice reflecting the shared cost. This invoice will be due 30 days from receipt.** For more information on the collection process, please contact IEERB's conciliation director.

See I.C. § 20-29-6-13 and 560 I.A.C. 2-4 for more information.

### III. Best Practices for Impasse Mediation

Successful mediation requires time and effort by the parties and the mediator. This time and effort can pay off in a big way – if you settle and ratify a CBA, not only are you done with impasse, but you will not have to participate in fact-finding (and may not have to draft an LBO, depending on when settlement occurs), which may involve significant time and money. Below is some additional information on what to expect from mediation to help parties prepare.

After receiving a Declaration of Impasse from IEERB, parties will receive a Mediator Appointment, which will name the appointed mediator and provide information on the process.

Within the mediation period (up to 30 days), the parties must attend at least one mediation session,<sup>20</sup> and may attend up to three. If the parties settle, the CBA must be ratified within the mediation period. Therefore, **parties in mediation should plan for possible ratification within the mediation timelines.** IEERB will issue an End of Impasse notice when it receives a ratified CBA. If the parties do not settle and ratify a CBA, they will have to exchange LBOs by the date given by the mediator within the mediation period. As such, **parties beginning mediation should familiarize themselves with the LBO requirements and begin preparing their LBOs**, if they haven't already. See Last, Best Offers section, below.

In addition to receiving information as indicated above, the mediator also may proffer information on his or her general style of mediation. For example, many mediators will start with a joint session where the parties present an opening statement and then split the parties into separate rooms for the remainder of the session. Other mediators will have no joint sessions; others will not separate the parties. Moreover, the mediations may differ from session to session. If not provided, the parties may ask the mediator what the parties can expect from the first mediation session, including whether they will be asked to provide opening statements. Opening statements generally consist of concise statements regarding a party's position on disputed issues.

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<sup>20</sup> Parties must attend at least one mediation session prior to exchanging LBOs. Parties do not have to attend a mediation session if they settle, ratify, and submit to IEERB a CBA prior to the first mediation session.

Regardless of the format of mediation, the parties should be prepared to explain to the mediator and the other party their positions on the disputed issues and the support for that position. To do that, the parties will have to know and understand the basics of the law and procedures, the cost and source of funding for their proposals, and the reason their position should be adopted (a good place to start are with the factors a fact-finder takes into consideration in making a determination).<sup>21</sup> Also, knowing – and being able to articulate – why your position is important to you may help the mediator work with the parties toward a solution that addresses the interests of both parties.<sup>22</sup>

Parties may need to request information from the other side in order to be prepared for mediation. Such information should be requested as far in advance as possible to give the other party time to respond. For more information, see the section entitled Collecting Information for Bargaining, above.

Varying interests may not only be represented on opposite sides of the table, but also on the same side of the table. The mediator is there to mediate between the parties, not within the parties. As such, meeting with the team who will attend mediation for your party prior to mediation to sort through and decide on issues will help to show a unified front and ultimately may facilitate settlement.

The takeaway: preparing for mediation and taking it seriously will help all the parties resolve matters more quickly and efficiently. Here are some tips to help parties prepare:

- Review the law, rules, and guidance provided by IEERB and your attorney.
- Exchange collective bargaining information.
- Be as flexible as possible with scheduling.
- Be prepared to provide the mediator with requested information to help the mediator understand the nature of impasse prior to the start of mediation.
- Be prepared to stay at mediation for as long as it takes to settle, or for the session to become unproductive.
- Key bargaining team members should attend mediation sessions.
- Determine which issues are contested.
- For each contested issue, determine the overall cost compared to available funds.
- For each contested issue, determine the source of the funding, and whether it will be available if the parties go to fact-finding.

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<sup>21</sup> The factors a fact-finder uses in fact-finding include: the financial impact on the school employer and whether any settlement will cause the school employer to engage in deficit financing; the public interest; past memoranda of agreements and contracts between the parties; and comparisons of wages and hours of the employees working for other public agencies and private concerns doing comparable work, giving consideration to factors peculiar to the school employer.

<sup>22</sup> Remember that CBAs must still be compliant with other laws, such as federal and state wage payment and collection laws.

- For each contested issue, be sure you can articulate the reason for your position and counter any reasons against it that may be offered by the other side.
- Be open to creative solutions that address the interests of both parties.

### **Last, Best Offers**

An LBO is comprised of the contract terms a party would like to have as the parties' CBA, as well as supporting documents and information. If parties at impasse do not settle during mediation, they must exchange LBOs and send a copy to IEERB. During the fact-finding process, the fact-finder will choose one party's LBO as the parties' CBA.

#### **I. Requirements**

An LBO shall be presented to the opposing party at the end of mediation if the parties have not settled and ratified a CBA. The LBO also must be submitted to IEERB via email at [impasse@ieerb.in.gov](mailto:impasse@ieerb.in.gov) within two days after mediation has ended.<sup>23</sup> The LBO shall be submitted in the format required by IEERB and include all information and documents required by IEERB.<sup>24</sup> Prior to October 1 of each year, IEERB will post on its website the required format, information, and documents for an LBO for that year's bargaining season. This information also will be sent to the parties with the Declaration of Impasse. Check IEERB's website for the latest LBO Requirements.

#### **II. Certifications**

Before August 1 of the first year of the state budget biennium, the DOE shall provide the parties with an estimate of the general fund revenue available for bargaining in the school corporation from the school funding formula. Within 30 days after the date of the fall count of ADM of the school year in the first year of the state budget biennium, the DOE shall provide the parties with its DOE Certification, which will entail a certification of estimated general fund revenue available for bargaining from the school funding formula.<sup>25</sup>

A school employer that has passed a general fund operating referendum under I.C. Ch. 20-46-1 must have that amount certified by the department of local government finance

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<sup>23</sup> The LBO submitted to IEERB must be identical to the LBO presented to the opposing party at the end of mediation. If the volume of any supporting documentation precludes electronic delivery, the supporting documentation may be submitted to IEERB in hard copy or an electronic format within 24 hours of the submission of the LBO.

<sup>24</sup> In addition to other requirements set forth by IEERB, each party's LBO shall contain a signed verification stating that all information is correct and that the LBO does not place the employer in a position of deficit financing.

<sup>25</sup> As discussed above under the Bargaining Status Form section, if a party would like to argue at fact-finding that the school employer's revenue available for bargaining from the school funding formula will be different than the DOE Certification, the party must list that amount on the At-Impasse Section. Failure of a party to list its estimated school funding formula revenue operates as a waiver to use a different number for the financial implication factor during fact-finding.

("DLGF Certification") before the conclusion of bargaining.<sup>26</sup> For more information, see I.C. § 20-29-6-12.5 or contact DOE or DLGF.

### III. Deficit Financing

Deficit financing is defined as actual expenditures exceeding the employer's current year actual general fund revenue for a budget year. It is unlawful for a school employer to enter into a CBA that would place it in deficit financing. A CBA that provides for deficit financing is void to that extent, as is an individual teacher's contract executed under the CBA.

At fact-finding, the parties must show how the school employer can afford their proposals.<sup>27</sup> In determining deficit financing, the fact-finder and the Board will compare the cost of the proposal and non-proposal costs (non-bargaining unit member costs plus non-bargained bargaining unit member costs) from the general fund with general fund revenue.<sup>28</sup> Specifically,

**DOE Certification**  
**+ DLGF Certification**  
**+ General Fund Miscellaneous Revenue**  
**- General fund non-LBO costs (e.g., costs of non-bargaining unit members, utilities and non-bargained costs of bargaining unit members)**  
**= money available to fund an LBO.**

Such determinations will be made on the **state fiscal year, from July 1 – June 30.**<sup>29</sup>

See I.C. §§ 20-29-2-6, 20-29-6-3; and IEERB cases cited in footnotes.

### IV. IEERB Staff Review

IEERB staff will review submitted LBOs to ensure that the LBOs are in the required format and contain the required information and documents. Such review will be firewalled from all IEERB Board members. If a party has substantially, but not fully, complied with the LBO requirements, IEERB staff will notify the submitting party, who will have twenty-four hours to provide the requested format, information, or documents. If IEERB staff determine a party's LBO to be substantially non-compliant, the party may make an offer of proof within the timeframe provided by IEERB. IEERB's review will contain only an initial assessment. The fact-finder will determine what actions, if any, are appropriate. Failure to substantially comply with the requirements of an LBO, or to submit an LBO as requested by IEERB, could result in

<sup>26</sup> Prior to July 1, 2015, certifications had to be obtained before the start of bargaining.

<sup>27</sup> *Jay Sch. Corp.*, F-13-01-3945, at 5 (IEERB Bd. 2013), *on appeal*, Cause No. 49D02-1402-PL-003406.

<sup>28</sup> *Nettle Creek Sch. Corp.*, F-11-02-8305, at 14 (IEERB Bd. 2012), *on appeal*, Cause No. 49A02-1402-PL-78; *Carmel Clay Schs.*, F-12-01-3060, at 2 (IEERB Bd. 2013).

<sup>29</sup> *Carmel Clay Schs.*, F-12-01-3060, at 2 (IEERB Bd. 2013).

rejection of the submitted LBO and acceptance of the opposing party's LBO. Fact-finder determinations on LBOs may be appealed to the Board through the normal appeal process explained below.<sup>30</sup>

#### V. Career Centers, Special Education Cooperatives, and Other Special Cases

A school employer, or an exclusive representative who bargains with a school employer, that does not receive a DOE Certification pursuant to I. C. § 20-29-6-12.5, or for whom the LBO Requirements may need to be modified, may request a conference with IEERB staff. The request must be made in writing at any time from the start of formal bargaining until two weeks after a mediator appointment. After receiving a request, IEERB staff shall hold a conference with the parties to determine the funding mechanisms particular to the school employer. Within one week of the conference (or the issuance of the year's LBO requirements, whichever is later), IEERB staff shall issue a non-binding advisory opinion on the revenue available to the parties for use in their LBO and any modified LBO Requirements.

#### VI. Joint LBOs

IEERB rule 560 I.A.C. 2-4-4(b) provides that parties who settle during fact-finding must submit identical LBOs to the fact-finder. Joint LBOs may be filed at any time during fact-finding, but should be filed as soon as practicable, and as much notice as possible should be given to the fact-finder. Joint LBOs must include the proposed collective bargaining agreement and deficit financing verifications. The fact-finder may require the parties to submit any other information the fact-finder deems necessary to rule on the joint LBO.<sup>31</sup>

#### VII. Best Practices

Completing an LBO requires the submission of financial information and documents. IEERB recommends that parties have this information prior to the start of mediation. Regardless, parties without these documents should ensure that these documents are requested with enough time for the other party to produce them, in addition to the time it will take the requesting party to analyze and explain them in the LBO. Parties also may want to request information beyond what is required for the LBO in order to sufficiently explain their LBO. For more information, see the Collecting Information for Bargaining section above.

Although it is necessary to have financial information and documents, a good LBO will go further and explain the proposed CBA terms in relation to the financial documents and information. This will likely take time and preparation. As such, IEERB recommends that parties not wait until the last minute to start preparing their LBO. Moreover, such preparation may be helpful in negotiations, including at mediation.

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<sup>30</sup> See 560 I.A.C. 2-4-3.1; *Carmel Clay Schs.*, F-13-04-3060, at 3-4 (HE Order 2013), *aff'd in relevant part by Carmel Clay Schs.*, F-13-04-3060 (IEERB Bd. 2013).

<sup>31</sup> See *Flat Rock Hawcreek*, F-13-02-0370 (HE Order 2013).

Once you have exchanged LBOs, IEERB recommends reading and analyzing the other party's LBO not only to prepare for fact-finding (explained in more detail below), but also to determine whether settlement is possible. Parties may settle and ratify a CBA prior to the appointment of a fact-finder. Parties that do so will be issued an End of Impasse notice.

See I.C. §§ 20-29-6-15.1, 20-29-8-7; and 560 I.A.C. 2-4-3.1 for more information.

### **Fact-Finding**

If mediation is unsuccessful, IEERB will appoint a fact-finder within 15 days from the end of mediation, and fact-finding will commence. The purpose of fact-finding is to provide a final solution on collective bargaining whenever the parties are unable by themselves, or through a mediator, to timely settle a CBA. The fact-finder will conduct an investigation, which may include a public hearing, into the parties' LBOs. The fact-finder must select one party's LBO as the binding contract terms. The parties shall split the cost of the fact-finding. Fact-finding may not last longer than 30 days from the date of the fact-finder appointment.<sup>32</sup> As such, it is important that the parties work with the fact-finder and make themselves available for a hearing. **The fact-finder may unilaterally set the hearing time and date.**

#### I. Fact-Finder

The fact-finder may be aided in the fact-finding process by a financial consultant appointed by IEERB. This consultant will have a background in finance, and aid the fact-finder in the financial aspects of the parties' LBOs. The financial consultant will contact the parties through the fact-finder and will not make a determination on the LBOs. The Chairperson appoints fact-finders and financial consultants from its staff or ad hoc panel. Persons serving as fact-finders and financial consultants shall:

- have no interest in the outcome of the proceeding;
- be impartial;
- have knowledge of rules and regulations relating to collective bargaining and impasse;
- be qualified as determined by the Chairperson consistent with all applicable laws and rules; and
- not be an employee of, or related to, either party or attorneys involved in the proceeding.

At no cost to the parties, IEERB trains fact-finders and financial consultants on the laws and rules of teacher collective bargaining. IEERB attempts to find a good fit between the parties and the fact-finder and financial consultant based on several factors including, but not limited to, mutual party requests, appointee background, nature of dispute, and appointee availability. A list of approved ad hoc panelists can be found on IEERB's website at

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<sup>32</sup> This is a change in 2015. The prior fact-finding timeline was 15 days.



<http://www.in.gov/ieerb/2390.htm>. Mutual requests will be taken into consideration by IEERB, but may not be granted.

## II. Hearing

The school employer is responsible for providing a room for the fact-finding hearing and equipment and necessary materials for recording of the proceedings. Additionally, IEERB will provide, at its expense, either recording equipment or a court reporter. Three copies of all written materials presented during the hearing (e.g., PowerPoint presentations) should be given to the fact-finder at the start of the hearing.

**Order of Presentations.** During the public hearing, each party shall present fully its LBO, including the fiscal rationale for the offer. Unless otherwise determined by the fact-finder (pursuant to a party's motion, the parties' agreed motion, or at the fact-finder's initiation), the school employer, as the keeper of the school's records, will present first.

**Content of Presentations.** Each party has a maximum of two hours to make its case in the fact-finding hearing.

After the initial presentations, the parties shall take part in the rebuttal. The parties have one hour each for rebuttals. The fact-finder may extend the parties' time equally if necessary for the fact-finder's determination. Unless the parties and the fact-finder agree to a different procedure – which must be consistent with all applicable laws and rules – the party who presented first shall make the first rebuttal. The parties shall alternate rebuttals, with the party who presented second closing rebuttals. During rebuttals, the parties may introduce new facts and respond to arguments made by the opposing party. New arguments, however, shall not be allowed. A fact-finder should either disregard new arguments or allow the opposing party extra time to respond. A fact-finder may, but is not required to, provide additional time for closing arguments. If closing arguments are made, the party who presented second should present last.

### Sample Hearing:

- **Opening of Hearing** by Fact-Finder
  - Introductions
  - Ground rules and expectations
  - Hearing agenda
  - Swearing in of all fact givers
  - Conclusion
- **Initial Presentations** (each side gets two hours total unless extended by fact-finder)
  - School employer presents on why its LBO should be chosen – 1 hour
  - Exclusive representative presents on why its LBO should be chosen – 1 hour
  - School employer presents on why the exclusive representative's LBO should not be chosen – 45 minutes

- Exclusive representative presents on why the school employer's LBO should not be chosen – 45 minutes
- **Break**
- **Rebuttals** (each side gets one hour total unless extended by fact-finder)
  - School employer responds to exclusive representative's arguments – 30 minutes
  - Exclusive representative responds to school employer's arguments – 30 minutes
  - School employer responds to exclusive representative's rebuttal – 15 minutes
  - Exclusive representative responds to school employer's rebuttal – 15 minutes
- **Close of Hearing** by Fact-Finder

Parties must designate at least one person who can provide facts and answer factual questions posed by the fact-finder. All such persons must be sworn in (by oath or affirmation), which may take place at the beginning of the hearing, or at any other time during the hearing prior to the presentation of facts. Representatives do not need to be sworn in unless presenting facts not otherwise in the record.

Cross-examination is not allowed. The fact-finder or financial consultant, but not a party, may ask a party questions before, during, or after, a party's presentation or rebuttal.

Fact-finding hearings are open to the public. However, no public testimony or comments will be allowed at the hearing, or at any phase of the fact-finding process.

Fact-finding hearings are not subject to the Indiana Administrative Orders and Procedures Act or the Indiana Rules of Evidence. However, parties should provide foundation for all evidence, as well as information indicating authenticity. Parties may make objections that will be ruled upon by the fact-finder.

### III. Fact-Finder's Order

The fact-finder must select one party's LBO as the binding contract terms. The fact-finder's order:

- may be restricted to those issues the fact-finder deems significant;
- is restricted to only those items permitted to be bargained and included in the collective bargaining agreement;
- must not put the employer in a position of deficit financing; and
- may not impose terms beyond those proposed by the parties in their LBOs.

The fact-finder may use evidence from the parties, the Board, the Board's staff, or any other state agency. The fact-finder shall consider the following factors:

- the public interest;
- the financial impact on the school employer and whether any settlement will cause the school employer to engage in deficit financing;

- past memoranda of agreements and contracts between the parties; and
- comparisons of wages and hours of the employees involved with wages of other employees working for other public agencies and private concerns doing comparable work, giving consideration to factors peculiar to the school employer.

The fact-finder and financial consultant will submit their hours worked and expenses incurred during fact-finding. The current hourly rate is \$1,200/7.5 for fact-finders and \$500/7.5 for financial consultants. **IEERB will pay the bill, and then submit an invoice to the parties reflecting the split cost. The invoice will be due 30 days after receipt.** For more information on the collection process, please contact IEERB's conciliation director.

#### IV. Appeal Process

To obtain Board review of a fact-finding report, a request must be made by the school employer or the exclusive representative within 30 days after receipt of the report. The request must be in writing and state the specific nature of each objection to the report.<sup>33</sup>

Any party in opposition to the appeal may file an answering brief within 15 days of the filing of the written appeal with IEERB. No additional briefs may be filed unless requested by the Board.

The Board will decide the matter upon the record, with or without oral argument. The Board also will determine whether to use a financial consultant. The Board will give notice to the parties of the financial consultant if possible. At the Board meeting, the financial consultant may be asked questions or to engage in discussion on the case. The parties shall be given an opportunity to challenge or rebut any statements made by the financial consultant. The Chairperson shall determine the amount of time given to the parties to respond.

The appealing party must bear the cost for preparation of a hearing transcript.

Parties may appeal the Board's final order to a court of competent jurisdiction within the applicable statute of limitations.

See I.C. Ch. 20-29-6; I.C. Ch. 20-29-8; and 560 I.A.C. 2-4 for more information.

#### V. Best Practices

Fact-finding can be a time-consuming – and costly – process. The good news is that your LBO, which had to be exchanged prior to the start of fact-finding, is the basis of the fact-

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<sup>33</sup> The notice of appeal can be oral or in writing but must state the nature of the objection to the report. If the request is oral, a written confirmation of the request must be received by the Board within two days.

finding process. As such, assuming that you crafted a complete LBO that is easily understood by third parties, most of the legwork will have been done by the time fact-finding has started.

As the LBO will already be prepared, perhaps the biggest preparation during fact-finding will be the presentation at the hearing. Not only is this a chance to explain your case more thoroughly to the fact-finder, but it may be the first chance you have to rebut the other party's LBO. As such, in the presentation, you will want to focus on the reasons your LBO should be accepted, as well as explaining why the other party's LBO should not be accepted. This argument should be based on the statutory factors a fact-finder must consider, and be supported by evidence to the extent possible.

The takeaway: preparing for fact-finding will help your case and reduce costs. Here are some tips to help you prepare:

- Review the law, rules, and guidance provided by IEERB and your attorney.
- Read carefully and analyze the other party's LBO.
- Determine if there is a chance for settlement after reviewing the LBOs.
- Determine which issues are contested after reviewing each LBO.
- For each contested issue, determine the overall cost compared to the available revenue.
- For each contested issue, articulate the reason for your position and counter any reasons against it that will be offered by the other side.
- Be as flexible as possible with scheduling a hearing.

### **Conclusion**

IEERB encourages all practitioners to become familiar with the law and rules regarding collective bargaining, and to be prepared for – and take seriously – discussion, bargaining, mediation, and fact-finding.

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## **Bargaining and Impasse Glossary**

**Bargain Collectively** – The performance of the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to negotiate in good faith concerning the mandatory subjects of bargaining; and to execute a written contract, incorporating any agreement relating to the mandatory subjects of bargaining. The obligation to bargain collectively does not require the school employer or the exclusive representative to agree to a proposal of the other or to make a concession to the other. See I.C. §§ 20-29-2-2, 20-29-6-1, 20-29-6-4, 20-29-6-6.

**Bargaining Unit** – A group of school employees that the employer has recognized, or IEERB has certified, as appropriate to be represented by an employee organization for the purpose of collective bargaining. See I.C. § 20-29-5-1; 560 I.A.C. 2-2-1.

**Collective Bargaining (mandatory subjects of)** – Salary; wages; and salary and wage related fringe benefits, including accident, sickness, health, dental, vision, life, disability, retirement benefits, and paid time off as permitted to be bargained under I.C. § 20-28-9-11. Salary and wages include the amounts of pay increases available to employees under the compensation model adopted under I.C. § 20-28-9-1.5, but do not include the teacher evaluation procedures and criteria, any components of the teacher evaluation plan, rubric, or tool, or any performance stipend or addition to base salary based on a performance stipend to an individual teacher under I.C. § 20-43-10-3. See § I.C. 20-29-6-4.

**Collective Bargaining Agreement (CBA)** – Any and all agreements between the school employer and exclusive representative on any aspect of the bargaining relationship, including, but not limited to, the mandatory subjects of bargaining, a grievance procedure, a compensation plan, and any memorandum of understanding ratified subsequent to the collective bargaining agreement. A CBA may not extend past the end of a state budget biennium. Once a CBA has been ratified, it must be sent to IEERB and posted on the school employer's website. See I.C. Ch. 20-29-6; 560 I.A.C. 2-5-1.

**Compensation Plan** – The local plan under which salary increases or increments will be determined pursuant to I.C. § 20-28-9-1.5(b).

**Compliance Officer** – The staff member or ad hoc panel member appointed by the board pursuant to I.C. § 20-29-6-6.1(b) to review a collective bargaining agreement and make a written recommendation regarding the collective bargaining agreement's compliance with I.C. Art. 20-29, including any penalty for noncompliance.

**Committee Appointments** – The percentage of teacher positions the exclusive representative may appoint to serve on a statutory or locally created school or district wide committee may not exceed the percentage of teachers in the school employer who are members of the exclusive representative. Committees under this section may not address subjects of bargaining. This section does not apply to the bargaining team for the exclusive representative. See I.C. § 20-29-5-7.

**Deficit Financing** – Actual expenditures exceeding the employer's current year actual general fund revenue for a budget year. It is unlawful for a school employer to enter into any agreement that would place it in a position of deficit financing. A contract that provides for deficit financing is void to that extent, and an individual teacher's contract executed under the contract is void to that extent. In determining deficit financing during fact-finding, the fact-finder and the Board will compare the cost of the proposal and non-proposal costs (non-bargaining unit member costs plus non-bargained bargaining unit member costs) from the general fund with general fund revenue. *Nettle Creek Sch. Corp.*, F-11-02-8305, at 14 (IEERB Bd. 2012), *on appeal*, Cause No. 49A02-1402-PL-78; *Carmel Clay Schs.*, F-12-01-3060, at 2 (IEERB Bd. 2013). Such determinations will be made on the state fiscal year, from July 1 – June 30. *Carmel Clay Schs.*, F-12-01-3060, at 2. See I.C. §§ 20-29-2-6, 20-29-6-3.

**Discussion** – The performance of the mutual obligation of the school employer through its superintendent and the exclusive representative to meet at reasonable times to discuss, provide meaningful input, or exchange points of view, with respect to the following subjects: (1) curriculum development and revision; (2) textbook selection; (3) teaching methods; (4) hiring, evaluation, promotion, demotion, transfer, assignment, and retention of certificated employees; (5) student discipline; (6) expulsion or supervision of students; (7) pupil/teacher ratio; (8) class size or budget appropriations; (9) safety issues for students and employees in the workplace, except those items required to be kept confidential by state or federal law; (10) hours; (11) pre-evaluation planning session; (12) superintendent's aggregate performance evaluation results (prior to presentation at the school board); (13) supplemental pay for certain master's degrees; (14) funding for a plan of remediation; (15) performance grants/stipends to teachers pursuant to I.C. § 20-43-10-3; and (16) additions to base salary based on performance grants pursuant to I.C. § 20-43-10-3. The obligation to discuss does not require either party to enter into a contract, agree to a proposal, or make a concession related to the mandatory subjects of discussion. See I.C. §§ 20-29-2-7, 20-29-6-7, 20-29-6-8.

**Employee Rights** – School employees may: form, join, or assist employee organizations; participate in collective bargaining with school employers through representatives of their own choosing; and engage in other activities, individually or in concert; to establish, maintain, or improve salaries, wages, salary and wage related fringe benefits, and other matters set forth in I.C. §§ 20-29-6-4, 20-29-6-5. Additionally, school employees may not be required to join or financially support a school employee organization through the payment of fair share fees, representation fees, professional fees, or other fees. See I.C. §§ 20-29-4-1, 20-29-4-2.

**Employer responsibilities and authority** – School employers have the responsibility and authority to manage and direct on behalf of the public the operations and activities of the school corporation to the full extent authorized by the law, including but not limited to the following: (1) direct the work of the school employer's employees; (2) establish policy through procedures established in

I.C. § 20-29-6-4 and I.C. § 20-29-6-5; (3) hire, promote, demote, transfer, assign, and retain employees; (4) suspend or discharge employees in accordance with applicable law through procedures established under state law; (5) maintain the efficiency of school operations; (6) relieve employees from duties because of lack of work or other legitimate reason through procedures established in I.C. §§ 20-29-6-4, 20-29-6-5, 20-29-6-7; and (7) take actions necessary to carry out the mission of the public school as provided by law. See I.C. § 20-29-4-3.

**Exclusive Representative** – The school employee organization that has been certified by IEERB, or voluntarily recognized by the school employer, to be the exclusive representative of the school employees in the appropriate bargaining unit, or persons authorized to act on the organization's behalf. See I.C. § 20-29-2-9.

**Expiration (of Collective Bargaining Agreement)** – Collective bargaining agreements may not extend past the end of a state budget biennium. Upon the expiration of the current contract that is in effect, except for performance stipends and additions to base salary provided under I.C. § 20-43-10-3, the school employer shall continue under the terms of the current contract that is in effect, with no increase or increment in salary, wages, or benefits for any bargaining unit employee until a new contract is executed, unless continuation would put the school employer in a position of deficit financing. If an agreement has not been reached on the items to be bargained collectively by November 1, as provided in I.C. § 6-1.1-17-5, the parties shall continue the terms of the current contract that is in effect, and the school employer may issue tentative individual contracts and prepare its budget on that basis. During this period, the school employer may not unilaterally change the terms or conditions of employment that are issues in dispute. The only parts of the contract that must continue are those contained in the contract and listed in I.C. § 20-29-6-4. See I.C. §§ 20-29-6-4.7, I.C. 20-29-6-16.

**Fact-Finder** – The individual appointed by IEERB to conduct the fact-finding process.

**Fact-Finding** – Mandatory impasse process that will provide a final solution when parties cannot timely settle their collective bargaining agreement on their own or with the help of mediation. The fact-finder, appointed by IEERB, will conduct an investigation, which may include a public hearing, into the parties' Last, Best Offers. The fact-finder must then select one party's LBO as the binding contract terms. The fact-finder's order is restricted to only those items permitted to be bargained and included in the collective bargaining agreement. The order must not put the employer in a position of deficit financing and may not impose terms beyond those proposed by the parties in their LBOs. The fact-finder shall consider the following factors: public interest; the financial impact on the school employer and whether any settlement will cause the school employer to engage in deficit financing; past memoranda of agreements and contracts between the parties; and comparisons of wages and hours of the employees involved with wages of other employees working for other public agencies and private concerns doing comparable work, giving consideration to factors peculiar to the school employer. The parties will split the cost. Fact-finding may not last longer than 30 days. See I.C. § 20-29-6-15.1; I.C. Ch. 20-29-8; 560 I.A.C. 2-4.

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- Financial Consultant** – The individual appointed by IEERB to aid the fact-finder or the Board in the financial aspects of the fact-finding or appeal process.
- Impasse** – When the parties are unable by themselves to timely settle and ratify a collective bargaining agreement. IEERB shall declare impasse after September 30 if either the parties notify IEERB of impasse, or the parties are, or are supposed to be under the terms of their CBA, in collective bargaining for all or part of a contract and have not submitted a ratified CBA to IEERB. See I.C. § 20-29-6-13 and 560 I.A.C. 2-4-1.
- Last, Best Offer (LBO)** – The contract terms a party would like to have as the parties' CBA, as well as supporting documents and information. If parties at impasse do not ratify a CBA during mediation, they must exchange LBOs and send a copy to IEERB. An IEERB-appointed fact-finder will conduct an investigation, which may include a public hearing, into the parties' LBO. The fact-finder must then select one party's LBO as the binding contract terms. LBO requirements for any given year will be posted on IEERB's website prior to October 1<sup>st</sup> and will be sent to parties upon declaration of impasse. See I.C. Chs. 20-29-6, 20-29-8; 560 I.A.C. 2-4.
- Mandatory Reopener** – A reopener provision that requires the parties to bargain part of the CBA during the term of the CBA.
- Mediation** – An attempt by an impartial third party, called a mediator, to help parties settle disputes. Mediation services are provided by IEERB. Mediation is mandatory in impasse cases. In impasse cases, mediation will last up to 30 days, the cost will be split by the parties, and the mediation will result in either a ratified collective bargaining agreement or the exchange by the parties of their LBOs. See I.C. § 20-29-6-13; 560 I.A.C. 2-4-3; 560 I.A.C. 2-4-3.1.
- Mediator** – An impartial third party who helps school employers and their exclusive representatives settle disputes.
- Memorandum of Understanding (MOU)** – Any agreement ratified by the school employer and the exclusive representative, subsequent to a ratified collective bargaining agreement, that changes or modifies the collective bargaining agreement.
- Negotiator** – An individual who represents the employer or exclusive representative in collective bargaining negotiations to reach an agreement. Often committees or teams represent each party, and one of the committee members acts as chief negotiator or spokesperson for the group.
- Permissive Reopener** – A provision in the CBA that permits the parties to bargain a portion of the CBA during the CBA's term.
- Ratification** – Formal approval by the governing body of the school employer and the exclusive representative of a tentative agreement, generally a newly negotiated collective bargaining agreement. Agreements reached through collective bargaining under I.C. Art. 20-29 are binding as a contract only if ratified by the governing body of the school employer and the exclusive representative. See I.C. § 20-29-6-6.



**Reopener** – A CBA provision that requires or permits parties to bargain a portion of the CBA during the CBA's term.

**Salary and wage related fringe benefit** – A benefit, other than direct salary or compensation, received by a school employee from a school employer, including but not limited to health insurance, retirement plans, and paid time off.

**Salary range** – The lowest and highest base salaries for full-time bargaining unit members not including any increases for that year. A salary range must be included as part of a compensation plan. The salary range contains only the base salary for direct teaching functions – it does not include payments for ancillary, co-curricular, or extra-curricular duties or activities. See I.C. § 20-29-6-6.1.

**School Corporation** – A local public school corporation established under Indiana law. The term includes any: school city, school town, consolidated school corporation, metropolitan school district, township school corporation, county school corporation, united school corporation, community school corporation, and public career and technical education center or school or school for children with disabilities established or maintained by two or more school corporations. See I.C. § 20-29-2-12.

**School Employee** – A full-time certificated person in the employment of a school employer, but not including supervisors, confidential employees, employees performing security work, and noncertificated employees. A certificated employee means a person whose contract requires that the person hold a license or permit from the division of professional standards of the department of education under I.C. Art. 20-28; or who is employed as a teacher by a charter school established under I.C. Art. 20-24. See I.C. §§ 20-29-2-4, 20-29-2-13.

**School Employee Organization** – An organization that has school employees as members and one of its primary purposes is representing school employees in dealing with their school employer. See I.C. § 20-29-2-14.

**School Employer** – The governing body of a school corporation or charter school established under I.C. Art. 20-24, and a person or persons authorized to act for the governing body of the school employer in dealing with its employees. Governing body is defined as a board of school commissioners; a metropolitan board of education; a board of trustees; any other board or commission charged by law with the responsibility of administering the affairs of a school corporation; or the body that administers a charter school established under I.C. Art. 20-24. See I.C. §§ 20-29-2-10, 20-29-2-15.

**Scope (of bargaining)** – The range of issues made bargainable by I.C. Ch. 20-29-6.

**Term (of a CBA)** – The dates a collective bargaining agreement is in effect. Collective bargaining agreements may not extend past the end of a state budget biennium, which occurs on June 30 of odd-numbered years (e.g., June 30, 2015). See I.C. § 20-29-6-4.7(b).