

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

OPINIONS  
DIVISION

August 10, 2018

Paul B. Watkins, Jr., Esq.  
5 University Office Park  
2094 Old Taylor Road, Suite 200  
Oxford, Mississippi 38655

Re: Clarification of Opinion on Authority of School District to make retroactive salary payment

Dear Mr. Watkins:

Attorney General Jim Hood has received your request for an opinion and assigned it to me for research and reply.

### Background and Discussion

In a prior opinion to you dated July 20, 2018, this office opined that whether a school district could pay back pay to a teacher arising out of the teacher's failure to obtain an advanced teaching license turned on whether the school district had committed an administrative error such that the teacher was not paid money actually owed. Although we expressed our doubt as to whether the facts in your letter amounted to administrative error, we nonetheless noted that question was ultimately one of fact which had to be determined in the first instance by the school district. Aside from our inability to make such factual determinations, we stated that there were certain facts not available to this office which might be relevant. We expressly noted that the teacher's reason for not applying for and obtaining the license to which she was otherwise entitled might be relevant.

In your recent request letter, you state:

The teacher earned a master's degree in higher education in December 2007. When she applied for an education license to teach grades 7-12 in 2008, the Mississippi Department of Education determined that her field of study did not qualify her for a Class AA license. An MDE representative

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recently told the teacher that a policy change in 2009 made the teacher eligible to apply for a Class AA license. The teacher apparently did not learn of this policy change until 2018, at which time she applied for and received a Class AA license. The teacher is now seeking back pay based on her contention that the District made an "administrative mistake" by not directly notifying her of the MDE policy change that made her eligible for an upgraded license.

I have found no authority requiring the District to notify its certified employees when MDE makes changes to its licensure requirements. The District cannot confirm whether MDE informed the District about the 2009 policy change.

As your letter notes, the relevant change was a change in MDE policy. The gist of your inquiry is whether the school district had a duty to disclose the MDE policy change. The facts, however, are that the school district cannot ascertain whether it even knew of the MDE policy change. Like you, we are aware of no specific statutory authority that requires a school district to advise a teacher of changes to an MDE licensing policy. However, we are not aware of the specific policy nor can we state definitively whether it does, or could, touch on the obligation of a school district. We assume by your letter that no such requirements are found in the policy. Even assuming some issue was raised by the MDE policy, our office would not interpret or apply an agency policy by official opinion.

Moreover, we cannot state as a matter of law that there is no set of circumstances under which a duty to disclose could arise. A duty of disclosure is to some degree based on the dealings and relationships between the parties. For example and with regard to a duty to disclose in a business transaction, the Mississippi Court of Appeals has stated:

. . . [A] party to a business transaction is under a duty to disclose facts basic to the transaction if the party knows the other is about to enter into it under a mistake as to them, and the other party could reasonably expect a disclosure of those facts. 37 Am.Jur.2d Fraud and Deceit § 206 (2001). "[S]ilence in a business transaction is not equivalent to fraud unless it is accompanied by deceptive conduct or the suppression of material facts causing actual deception." Id. Where the parties do not stand in a confidential or fiduciary relationship with one another, an affirmative act of concealment is necessary. *Van Zandt v. Van Zandt*, 227 Miss. 528, 539, 86 So.2d 466, 470 (1956). Stated differently:

Where one party to a contract or transaction has superior knowledge or knowledge which is not within the fair and reasonable reach of the other party and which he or she could not discover by the exercise of reasonable diligence

or has means of knowledge which are not open to both parties alike, he or she is under a legal obligation to speak, and his or her silence constitutes fraud. Where the fact concealed is peculiarly within the knowledge of one party and of such a nature that the other party is justified in assuming its nonexistence, there is a duty of disclosure, and a deliberate suppression of such a fact constitutes fraud.

Accordingly, where a party conceals a material fact knowing that the other party is acting on the assumption that no such fact exists, the concealment is as much a fraud as though the existence of the fact were expressly denied or the reverse of it expressly stated. A duty to disclose is found where one party to a transaction knows that the other is about to enter into the transaction under a mistake as to the material facts, and that the other party because of the relationship \*135 between them, the customs in the trade, or other objective circumstances, would reasonably expect a disclosure of such facts.

*Poe v. Summers*, 11 So. 3d 129, 134–35 (Miss. Ct. App. 2009). Assuming that this standard would even apply to the school district and the teacher, the intensive factual nature and required factual determinations necessary to reach an answer preclude this office from opining whether a duty existed between the school district and the teacher.

### **Issues Presented**

The three questions in your letter were:

- (1) Does the District have a legal duty to inform its certified employees when the Mississippi Department of Education changes its criteria for licensure eligibility?
- (2) Is the fact that the District did not notify the teacher of such change they type of “administrative mistake” that would justify an award of back pay?
- (3) If so, is the District required to make such a payment?

For the reasons noted above, we cannot by official opinion answer your first question. With regard to your second question, this office cannot determine whether a specific act is or is not “administrative error.” Moreover, we read question number two as asking this office to determine if a duty existed, and if so, whether the duty was breached by the school district. We do not by official opinion either validate or invalidate past actions. Moreover, an opinion in such a matter would be equivalent to an opinion on liability for the school district’s failure to disclose. Your letter also notes that the teacher is claiming entitlement to back pay. We are unsure whether this is a formal claim, but in any event,

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given that the issues require a resolution as to the validity of prior acts, we cannot opine in this matter. We note that our office has consistently opined that local governments have a duty to assert applicable statute of limitations defenses. We have previously opined that the assertion of such a defense is not discretionary and may not be waived. MS AG Op., Dobbins (Nov. 14, 2003).

If we can be of assistance in this matter, feel free to contact us.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Ricky G. Luke  
Assistant Attorney General

OFFICIAL OPINION