

Matthew G. Bevin
Governor



Derrick Ramsey
Secretary
Education and Workforce
Development Cabinet

Wayne D. Lewis, Ph.D.
Commissioner of Education

KENTUCKY DEPARTMENT OF EDUCATION

300 Sower Boulevard • Frankfort, Kentucky 40601
Phone: (502) 564-3141 • www.education.ky.gov

March 27, 2019

Re: Teacher “Sick Outs” and Response to District Document Production

Dear Superintendents,

In the past month, Kentucky experienced a high number of teacher absences that caused some districts to close school since February 28, 2019, when protests regarding education legislation began. These “sick outs” have impeded students’ learning, created tremendous inconveniences for thousands of families, and caused classified staff (many not participating in the “sick outs”) to lose pay on days their districts closed. On March 12, high school juniors in Jefferson County were denied the opportunity to take their ACT college entrance exam, as scheduled, because of the “sick out.”

On March 14, and pursuant to my authority under KRS 156.010 and 156.210, I requested documents from your districts related to the recent teacher “sick outs.” Specifically, I asked for:

1. The names of all teachers that called in sick for February 28, March 5-7, and/or March 12-14, 2019 and the day(s) for which each teacher called in sick;¹
2. Any and all affidavits or certificates of a reputable physician stating that the employee was ill or caring for an ill family member on the day(s) the employee called in sick, as required by KRS 161.155 for the granting of any sick leave; and
3. Documentation of the district’s policies, procedures, and/or protocols for collecting sick leave affidavits or certificates and verifying qualification for the granting of sick leave.

Several districts requested and received an extension until March 25, 2019, to respond. As of March 25, 2019, all 10 districts responded to the requests.

The following is intended to summarize the Department’s findings from a review of the submissions, to explain current law, and to issue guidance to districts to address these “sick outs” going forward.

¹ A March 16, 2019, email from Kentucky Department of Education General Counsel Deanna Durrett clarified that for request #1, we were seeking only the names of all teachers that called in sick for any of the listed dates when the high number of reported teacher absences caused the district to close on one of those days.

SUMMARY OF FINDINGS

A review of the documents reveals the following:

- As a result of a high number of teacher sick leave requests, eight districts (Bath, Boyd, Carter, Fayette, Letcher, Madison, Marion, and Oldham) closed for one day. Bullitt County closed for three days, and Jefferson County closed for six days.
- The number of sick leave requests for many of the districts was abnormally high and – coupled with the widespread and public rallying cries of teacher advocacy groups for teachers to organize in Frankfort on the days in question – suggests a possible illegal work stoppage under KRS 336.130.² For example, in Jefferson County Public Schools (“JCPS”), there are approximately 500 certified employee absences on any given day. On the days the district closed, sick leave requests numbered in the thousands (even in excess of 2,000 for February 28). Similarly, Fayette County’s hundreds of sick leave calls for February 28 resulted in the district not having enough substitute teachers to safely continue with the instructional day and forced the district to close.
- For many districts, when it became clear the district would not have enough substitute teachers to safely continue with the instructional day, the school day was cancelled pursuant to KRS 158.070(3)(f)(2), which allows school closures for a “local emergency which would endanger the health or safety of children[.]”³
- KRS 161.155 provides that “[s]ick leave shall be granted to a teacher or employee if he or she presents a personal affidavit or a certificate of a physician stating that the teacher or employee was ill, that the teacher or employee was absent for the purpose of attending to a member of his or her immediate family who was ill, or for the purpose of mourning a member of his or her immediate family.” Yet, all 10 districts reported that they did not collect affidavits or physician certificates from teachers that called out sick for days when the district ultimately closed. Since the district closed, the day was a “non-contract” day for teachers, so no sick leave was actually taken, and teachers were not required by district policy to submit an affidavit or physician certificate in accordance with KRS 161.155.
- All 10 districts provided policy documents that state that an affidavit or physician certificate is required for granting of sick leave in accordance with KRS 161.155. Most districts’ policies require the affidavit or certificate of a physician “upon return to work.”

Thus, the essential problem, as identified from the documents, is that when enough teachers call in sick (whether honestly or dishonestly), the districts ultimately do not require proof of illness or utilization of a sick leave day. Rather, they declare a “local emergency” per KRS 158.070 and report the day as a “non-contract” day. Consequently, teachers can organize *en mass* to (dishonestly) call in sick and force an “emergency” without providing verification of illness as intended by law and without having to use one of their personal leave days pursuant to KRS 161.154 to engage in personal political activity.

² In a statement by Brent McKim, President of Jefferson County Teachers Association, made at 8:02pm on March 11, 2019, Mr. McKim acknowledged that the district closures in Jefferson County were “work stoppages.” See <https://www.facebook.com/brent.mckim/videos/10157273438908117/>.

³ See also 702 KAR 7:140, which provides, “The regularly scheduled student attendance day shall not be shortened after the school calendar has been adopted by the local board of education and approved by the department except in cases of emergency declared by the local school district superintendent in accordance with policies of the local board of education.”

While the majority of teachers in these districts, regardless of their position on policy, were ready and willing to go to work, the actions of a subset of teachers dictated a decision for entire districts that hurt many students, parents, and district employees. For the sake of our students, first and foremost, this situation must be addressed.

GOVERNING LAW

In recent days, there have been claims that teachers have a right to engage in “sick outs” and that any action to prevent them would violate teachers’ First Amendment rights. This is patently false. While teachers have a First Amendment right to engage in political advocacy, they do not have a right to organize a work stoppage by lying about being sick. Rather, teachers can and should use a personal day granted to them by KRS 161.154 or engage in political advocacy outside of work hours.

KRS 336.130 explicitly prohibits public employee strikes or work stoppages, and Kentucky courts have long recognized that public employees do not have a right to engage in a strike or work stoppage.⁴ In addition, the statute governing teacher sick leave makes clear that this leave shall be taken for true illness or care of an ill family member by requiring an affidavit or physician certificate to support claims of illness. Clearly, the intent of the law is to prevent dishonesty and abuse of sick leave.

It is important to note that teachers engaging in “sick outs” can be subject to individual consequences – a fact recognized by the Kentucky Education Association’s own president on March 13.⁵

Teachers engaged in work stoppages can be issued personal citations by the Kentucky Labor Cabinet. KRS 336.990 provides that any person who violates KRS 336.130 “shall for each offense be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).” This fine is issued and enforced by the Secretary of the Labor Cabinet.

In addition, lying about sick leave can also result in consequences for a teacher’s employment and certification. KRS 161.790 provides that a teacher contract can be terminated by a superintendent for “insubordination” or “neglect of duty.”⁶ The Education Professional Standards Board (“EPSB”) also can take action against an educator’s certificate for violations of KRS 161.120(1) and the Professional Code of Ethics for Kentucky Certified School Personnel. Anyone can file a complaint with the EPSB regarding the conduct of a certified educator, and the EPSB may revoke, suspend, or refuse to issue or renew a teacher’s certificate; impose probationary or supervisory conditions upon a teacher’s certificate; or issue a written reprimand or admonishment if the EPSB finds a teacher has committed any act that constitutes “fraudulent, corrupt, dishonest, or immoral conduct,” or if a teacher has demonstrated “neglect of duty” or violated “any statute relating to schools or the teaching profession[.]” Indeed, the EPSB has taken action regarding falsification of sick leave requests in the past.

Thus, not only does lying about sick leave set a poor example for our students, but it also carries the potential for personal consequences under the law.

⁴ See *Jefferson County Teachers Ass’n v. Bd. of Educ. of Jefferson County*, 463 S.W.2d 627, 628 (Ky. 1970) (“Under the common law, it is recognized that public employees do not have the right to strike or to engage in concerted work stoppages.”); *Abney v. City of Winchester*, 558 S.W.2d 622, 623 (Ky. 1977) (“It is well settled that a public employee has no inherent right to strike.”); *Bd. of Trustees of Univ. of Ky v. Pub. Emp. Council No. 51 Am. Fed. of State*, 571 S.W.2d 616, 619 (Ky. 1978) (“The right to strike on the part of public employees is not protected by either the Federal or the Kentucky Constitution, nor has the legislature granted such right to public employees.”).

⁵ See https://www.wdrb.com/in-depth/even-with-closures-teachers-who-call-out-sick-could-face/article_fdb54fdc-45b8-11e9-b163-03b314265f83.html.

⁶ See *Bd. of Educ. of Laurel Cty. v. McCollum*, 721 S.W.2d 703, 704 (Ky. 1986).

GUIDANCE TO DISTRICTS

I have stated publicly – and I reiterate here – that I support teachers engaging in the political process, if done in accordance with the law. I supported the negotiated agreement between Jefferson County Public Schools and the Jefferson County Teachers Association, which permitted hundreds of teachers a day from the district to protest in Frankfort while schools remained open. The problem, however, is that this agreement was not followed. Many teachers chose to engage in a “sick out,” closing the district and denying students their instructional day.

The Kentucky Board of Education (“KBE”) has the authority to promulgate regulations on the pay of teachers during absence because of sickness, *see* KRS 158.070(1)(f)(2), and on the use of student attendance days as a result of a local emergency, *see* KRS 158.070(4)(a). Consequently, I have considered recommending to the KBE that a regulation be promulgated that addresses the loophole created by *en mass* violations of KRS 161.155 and the declaration of local emergencies under KRS 158.070. Such a regulation could require that requests for sick leave made pursuant to KRS 161.155 be accompanied by an affidavit at the time the sick leave request is made.

Such a regulation, however, would place an additional burden on all Kentucky teachers based on the dishonest actions of a subset. Because the vast majority of Kentucky teachers have not been dishonest in requesting sick leave and the vast majority of Kentucky school districts have found ways to permit some teachers to politically engage in Frankfort while keeping schools open, at this time, I decline to recommend a regulatory change to the KBE.

Rather, I believe districts must address this problem head-on. Local district superintendents have a responsibility to ensure the law is being followed by district employees. KRS 160.370 provides that “[a]s executive officer of the board, the superintendent shall see that the laws relating to the schools, the bylaws, rules, and regulations of the Kentucky Board of Education, and the regulations and policies of the district board of education are carried into effect.” In addition, KRS 161.120(2) places a mandatory duty on superintendents to report to the EPSB conduct of certified employees that may warrant action against the certificate.

In Bullitt County, Superintendent Bacon has authorized a delegation to go to Frankfort on the final day of the legislative session (March 28, 2019), in an effort to keep schools open. Again, I support such efforts, and I encourage additional measures to guard against interruptions to the educational process.

It is my recommendation that all districts institute policies that close the loophole between KRS 161.155 and KRS 158.070 and make clear the following:

- Teachers desiring to miss work to engage in political advocacy must request and receive approval to use personal leave under KRS 161.154 – not sick leave under KRS 161.155.
- Teachers requesting sick leave for the purpose of closing the district amounts to an illegal work stoppage. If a district suspects that sick leave has been requested to create a work stoppage, the district will preserve the list of teacher sick leave requests and submit this list to the Secretary of Labor, upon request, for investigation and possible civil penalties pursuant to KRS 336.050, 336.130, 336.985, and 336.990.
- Teachers found to have falsified sick leave requests will be disciplined by the district up to and including possible termination under KRS 161.790 and/or will be reported by the superintendent to the EPSB pursuant to KRS 161.120.

To conclude: These school closures come at a tremendous cost to families, classified district employees, tax payers, and – most importantly – our children. If district closures because of work stoppages continue and districts are unwilling or unable to address this problem, I will explore further action to do so, including recommending that the Labor Cabinet issue citations for teachers engaged in illegal work stoppages. At this time, however, I will allow local districts an opportunity to address this issue first.

Sincerely,

A handwritten signature in blue ink, reading "Wayne D. Lewis, Jr." in a cursive style.

Wayne D. Lewis, Jr.
Commissioner of Education