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Amendments to ISSRA Regulations

Effective June 19, 2013, the *Illinois School Student Records Act* (*ISSRA*) regulations are amended to provide for revised definitions of "health-related information," "permanent record," and "school student record," as well as a revised definition of the responsibilities of the designated "official records custodian."

The regulatory amendments add that **"health-related information"** also includes documentation regarding the acknowledgement by a student athlete and his/her parents of the school district's concussion policy adopted pursuant to 105 ILCS 5/10-20.53 and 34-18.45.

The definition of a **"permanent record"** has been modified to provide that while scores on college entrance exams are included in a student's permanent records, parents may request, in writing, the removal of any score received on college entrance examinations from the student's academic transcript.

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866

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Accordingly, the notice requirements of the regulations have also been amended to include notification to students and their parents of the right to request removal of such scores from a transcript by submitting a written request stating the name of each examination and the date(s) of the scores to be removed.

The definition of **"school student record"** now also includes any information received pursuant to Section 22-20 of the *School Code* (report by law enforcement agency) and Sections 1-7 and 5-905 of the *Juvenile Court Act of 1987* (law enforcement records transmitted to the appropriate school official by a local law enforcement agency under a reciprocal reporting system). In addition, **video or other electronic recordings** created and maintained by law enforcement professionals working in the school or for security or safety reasons or purposes are excluded from student records. The regulatory amendments have revised this exclusion by providing that the content of such video or other electronic recordings **may become part of a "school student record" to the extent that school officials use and maintain this content for a particular reason (*e.g.*, disciplinary action, compliance with a student's IEP) regarding a specific student.** Further, video or other electronic

recordings which become part of a student's records are not a public record under *FOIA* and will be released only in conformance with the *ISSRA* and *FERPA*.

Finally, Section 375.40(g) of the *ISSRA* regulations has been amended to add that the official records custodian must take **all reasonable measures to protect student records** through administrative, technical, and security safeguards against risks, such as unauthorized access, release or use.

New Guidance on Braille Instruction

In response to concerns voiced by parents and advocates about a significant decrease in Braille instruction, the U.S. Department of Education's Office of Special Education Programs (OSEP) has

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issued guidance to reaffirm the importance of Braille and Braille instruction for blind and visually impaired students.

OSEP reiterates in this *Dear Colleague Letter* that Braille instruction is a requirement under the Individuals with Disabilities Education Act (*IDEA*) and that a student's need for Braille instruction should be considered on a case-by-case basis and without undue delay. OSEP explains that the *IDEA* mandates that Braille instruction be provided to a student with blindness or visual impairment unless the individualized education plan (IEP) team determines that Braille is not appropriate for that particular student. The IEP team's determination must be based on an evaluation, which should be thorough and rigorous and include various modalities, a data-based media assessment, and a functional visual assessment. OSEP emphasizes that the evaluation must assess the student's current and ***future*** needs.

OSEP explains that when Braille instruction is required to receive a free and appropriate public education (FAPE), the IEP team must ensure that systematic, regular instruction is provided by appropriately trained personnel, and that sufficient instructional time is allotted for the student to become proficient in Braille. Further, an IEP team may not deny

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Braille instruction to a student due to shortages of trained personnel, availability of alternative reading media, or the amount of time needed to provide Braille instruction. Several OSEP-funded programs and other resources available to school personnel for providing appropriate interventions, services, instruction, and materials to students with blindness and visual impairments are referenced in this *Dear Colleague Letter* as well.

Recent Opinions Concerning Illinois Sunshine Laws

Over the last few months, the Illinois Appellate Court and the Illinois Attorney General have issued several opinions concerning Illinois' Open Meetings Act ("OMA") and Freedom of Information Act ("FOIA"). These opinions address several important issues including the format for electronic document production, what matters may be discussed in closed

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session, the propriety of closed session votes on personnel matters, the interplay between the Illinois School Student Records Act and FOIA, and final action on non-agenda items. The Appellate Court decisions are binding legal authority on other parties; the Attorney General opinions, while they may be cited as persuasive authority, are not binding upon non-parties.

Here is a brief summary of each opinion.

ELECTRONIC DOCUMENT FORMAT

Fagel v. Illinois Department of Transportation

A citizen served the Illinois Department of Transportation with a FOIA request asking that it provide him with information concerning the State's "Red Light Running Camera Enforcement System" in an electronic "Excel Format." The Department e-mailed a "locked" Excel document which prevented the citizen from "manipulating" the data contained in the spreadsheet. Unsatisfied with the Department's response, the citizen asked the Attorney General to review his request which it did. The Attorney General sided with the Department and determined that it had complied with its obligations under FOIA.

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The citizen subsequently filed suit. A Circuit Court Judge determined that the Department violated FOIA and entered an order requiring the Department to provide him with an "unlocked" version of the Excel document. The Department appealed that order.

The Appellate Court agreed with the Circuit Court Judge and upheld the ruling noting that Section 6 of FOIA requires public bodies to respond to request by providing documents in the form requested when it is feasible to do so. The Appellate Court decided that, because providing a locked document prevented the citizen from making full use of the Excel spreadsheet so in effect, the Department had not responded to the request. The Court also found that it was "feasible" for the Department to provide the citizen with an unlocked version of the spreadsheet because the Department maintained the spreadsheet in an unlocked format and provided the Attorney General with an unlocked version. Finally, the Appellate Court agreed with the Circuit Court Judge that FOIA does not contain an exception to Section 6's requirement based on a fear, real or imagined, that the information contained in the document may be "manipulated" by the recipient.

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The Department's position was not only rejected by the Appellate Court, it proved to be expensive as well because the Appellate Court also upheld the Circuit Court judge's award of attorney's fees to the citizen in the amount of more than $12,000.

THREATENED LITIGATION EXCEPTION FOR CLOSED SESSION

Public Access Opinion 13-008

Closed session discussions are permissible under Section 2(c)11 of OMA when a public body determines that litigation is probable or imminent. The President of the Board of Trustees of the New Lennox Public Library District alleged that the Board violated OMA when it held a closed session to discuss three letters that it had received from the Illinois Library Employee Plan threatening to file suit if it did not receive reimbursement for claims that it had paid. The Attorney General disagreed, determining that the letters received by the Board containing threats to file suit provided a basis for the Board to conclude that litigation was imminent or probable. Therefore, it was proper for the Board to hold a closed session meeting to discuss "strategies, postures, theories and possible

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consequences of potential litigation." However, the Attorney General found that the Board violated the Act because it failed to enter into the closed session minutes the basis for its finding that litigation was probable or imminent.

Public Access Opinion 12-013

A citizen alleged that the Finance Committee of the Washington County Board violated OMA when it held a closed session discussion of its landfill ordinance after receiving a letter from a company questioning the legality of the ordinance, inviting the Board to meet to discuss it and, stating that if the matter is not resolved, the company "may" file suit.

The Attorney General concluded that the closed session discussion violated Section 2(c) 11 of the Act because the Board did not have a reasonable basis to believe that litigation was imminent or probable as the letter indicated that litigation could possibly be filed as opposed to expressing a definite intent to file a lawsuit. The Attorney General also opined that, even if there was a reasonable basis for believing that litigation was imminent or probable, the Board did not discuss litigation strategies, theories or probable

consequences. Instead, it discussed the substance of the ordinance and whether or not it should meet with the company.

FINAL ACTION IN OPEN SESSION

Lawrence v. Williams

A three-member school district electoral board held a hearing on objections to candidate petitions and voted to sustain the objections. After the meeting where this vote was taken but before the board's next meeting, a written opinion was prepared and signed by all three members. However, at the next and final scheduled meeting of the board where the written decision was issued, only one member was present, short of a quorum. The Election Code requires that electoral board decisions be served upon the parties in open meetings. The Appellate Court voided the electoral board's decisions, not only because of the Election Code violation, but also because the issuing of the written decision was a legally mandated "final action." Under OMA, such a final action could only take place at a public meeting where a quorum is present.

Public Access Opinion 13-006

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A citizen alleged that the Edgar County Airport Advisory Board violated OMA when it conducted a straw vote to determine who would fill a Board vacancy. The Advisory Board discussed filling the vacancy and identified four people who were interested in being appointed to the position. Thereafter, it distributed paper ballots with the names of the four candidates to the Advisory Board members and asked them to circle their choice and place the ballots in a coffee can. After counting the ballots the person with the most votes received the recommendation to the County Board for appointment to the Board.

The Attorney General concluded that this process violated OMA. The Attorney General determined that despite the fact that the Advisory Board's straw vote was nonbinding, it still constituted a "final action" within the meaning of OMA inasmuch as the County Board adopted the recommendation. Since the straw vote was a "final action," the Advisory Board members were obligated to reveal their choice to the public and make a record of how each of them voted.

Public Access Opinion 13-007

An individual alleged that the Board of Education

of the Springfield Public School District violated OMA when six of its seven members signed an undated separation agreement with the District's Superintendent in closed session without any public discussion as to its terms and before the Board publicly voted on it. The School Board contended that it acted properly because it ultimately held a public vote approving the agreement.

The Attorney General decided that the execution of the separation agreement in closed session was a "final action" and that Section 2(e) of OMA prohibits a public body from taking final action on a matter in closed session without a public recital of the matter under consideration. The Attorney General also concluded that a violation of Section 2(e) of the Act is not cured by the fact that the Board subsequently ratified the closed session action by through a public vote.

Public Access Opinion 13-003

The Illinois Federation of Teachers alleged that Western Illinois University Board of Trustees violated OMA when it voted to terminate a tenured faculty member in closed session. Prior to the closed session vote, the Board engaged in

closed session discussions during which one member questioned whether the vote had to take place in open session. Despite these concerns, the Board's vote took place in closed session.

The Attorney General decided that the University did indeed violate the Act. While the Board was entitled to discuss "appointment, employment, compensation, discipline, performance, or dismissal of specific employees," the vote to terminate the faculty member was a "final action" that was required to take place in open session in accordance with Section 2(e) of OMA.

AGENDA NOTICE SPECIFICITY

Public Access Opinion 13-002

A citizen complained that Chicago Park District Board violated OMA when it voted to increase the price of admission to the Art Institute of Chicago without any reference in its agenda to the fact that this matter would be voted on. The Attorney General agreed that it did.

Noting that Section 2.02(c) of OMA requires public bodies to post board meeting agendas listing the items which it

intends to consider at the meeting not less than 48 hours before the meeting takes place, the Attorney General determined that the vote to increase the admission fee violated OMA because the agenda failed to contain any reference to the "general subject matter" of fee increases. The Attorney General also rejected the Park District's contention that the fact that a District Board Committee listed the admission fee increase on its agenda constituted substantial compliance with Section 2.02(c) of the Act.

REDACTING NAMES FROM STUDENT RECORDS

Access Opinion 12-014

A citizen alleged that Pleasantdale School District 107 violated FOIA when it failed to comply with her request for a "raw data for the current 4th graders' Math scores on the 2011 Fall Illinois Test for Basic Skills" with the names of individual students redacted. The request also asked the School District to color code the placement level of each child in an Excel or Word document.

The Attorney General determined that the School

District violated Section 3 of FOIA. In doing so, the Attorney General rejected the School District's claim that it did not have the records the citizen sought and that it would have to create a new document to comply with the request. The Attorney General noted while FOIA does not require the School District to compile data that it does not ordinarily keep, redacting the names of the students and scrambling information does not constitute the creation of a new document.

The Attorney General also rejected the School District's contention that the requested test score data was automatically exempt from disclosure under FOIA because its release would constitute a violation of the Illinois School Student Records Act. The Attorney General concluded that once the identifying information has been redacted, the document is no longer a "student record" and must be disclosed.

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As you can see, the requirements of OMA and FOIA are numerous and nuanced. Nevertheless, public bodies are required to comply with them and face significant consequences should they fail to do so. If you have any questions, contact

PETRARCA, GLEASON, BOYLE & IZZO, LLC
ATTORNEYS AT LAW

one of our attorneys at our Flossmoor Office at 708-799-6766 or our Oak Brook Office at 630-928-1200.

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866