Published July 2, 2025

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STUDENT HEALTH RECORDS: HELPFUL NEW FEDERAL GUIDANCE

In December 2019, the United States Department of Health and Human Services and the United States Department of Education issued joint guidance on the application of the Family Educational Rights and Privacy Act(FERPA) and the Health Insurance Portability and Accountability Act of 1996(HIPAA) to student health records. The newly issued guidance updates the departments' most recent joint guidance on the subject, which was last released in November 2008. The following is a brief refresher of the intersection of the two laws as they apply to elementary and secondary schools, and some portions of the guidance that we feel may help you navigate the intricacies of these laws. For

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your reference, the guidance is available here: https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/index.html
and
https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records

As a reminder, most public elementary and secondary schools are not subject to HIPAA because they are not "covered entities" as that term is defined under HIPAA. In general, covered entities are health plans, health care clearinghouses, and health care providers that transmit health information electronically in covered transactions, such as billing a health plan electronically for services. Even if a public elementary or secondary school meets the definition of a covered entity under HIPAA, the health

information contained in student records is likely an "education record" under FERPA, which is expressly excluded from HIPAA's privacy rules. Therefore, FERPA, not HIPAA, will be more likely to govern the disclosure parameters of student health records in your school. Nevertheless, the guidance provides clarification on certain instances in which disclosure of protected health information under HIPAA and education records covered by FERPA may occur without obtaining the student or parent's written consent.

The guidance's first noteworthy point of clarification is that HIPAA allows health care providers to disclose protected health information to school nurses and other school health staff for treatment purposes. For example, if a school nurse is unsure about

the way a student's medication should be administered, HIPAA allows the student's physician or other health care provider to guide the nurse on how the medication is administered without parental consent. In the same vein, FERPA allows school officials to verify information contained in a record with a third party. Therefore, if a dean wants to confirm a doctor's note excusing a student's absence, FERPA allows the dean to disclose the contents of the note with the purported doctor who wrote the note without parental consent.

FERPA also allows school nurses and other school officials to disclose information in a student's education records to the student's physician without consent if a health or safety emergency exists and the physician's knowledge of the records

is necessary to protect the health or safety of the student or others. For example, if a student's school health records confirm that a student has an allergy to a medication used to treat seizures, and the student is rushed from school to a hospital because of a seizure, a school official may share with the hospital that the student is allergic to the particular medication before the student arrives at the hospital.

Additionally, HIPAA allows health care providers to disclose protected health information to anyone if the provider has a good faith belief that: (1) the disclosure is necessary to prevent or lessen a serious and imminent threat; and (2) the person to whom the disclosure is made is reasonably able to prevent or lessen

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the threat. This open avenue of communication under HIPAA could be valuable when school threat assessment teams are assessing a potential student threat. FERPA has a similar exception to disclosure without consent if the disclosure of personally identifiable information in an education record is necessary to protect the health or safety of the student or others.

Finally, FERPA allows schools to disclose personally identifiable information in education records to law enforcement officials who are **not** school employees if the law enforcement officials: (1) perform a service for which the school would otherwise use employees (*e.g.* to ensure safety); (2) are under the school's direct control with respect to the use and

maintenance of the education records (*e.g.* such as through a memorandum of understanding that establishes data use restrictions and data protection requirements); (3) are using the information for the purposes for which the disclosure was made (*e.g.* to promote safety), and adhering to FERPA's limits on re-disclosure of the information; and (4) meet the criteria specified in the school's annual notification of FERPA rights for being "school officials" who have been determined to have "legitimate educational interests" in the education records.

There are many other clarifications in the December guidance and, as you know, HIPAA and FERPA invite many practical complexities concerning information management.

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If you have any questions or concerns regarding the guidance itself, how the guidance may impact the Illinois School Student Records Act, or any other student records issues, please feel free to contact your attorney at Hauser, Izzo, Petrarca, Gleason, and Stillman.

TIME OUT AND PHYSICAL RESTRAINT: ISBE ISSUES GUIDANCE AND FREQUENTLY ASKED QUESTIONS ON EMERGENCY

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REGULATIONS

The Illinois State Board of Education has issued Guidance and Frequently Asked Questions on the Emergency Regulations for the Use of Time out and Physical Restraint, dated December, 2019, responding to questions about the Emergency Rules (effective November 20, 2019 and amended with regard to prone and supine restraint on December 4, 2019). Some highlights of the document are summarized below. The Guidance can be located on ISBE's website at https://www.isbe.net/Documents/Guidance-FAQs-Time-out-restraint.pdf#search=guidance%20rules

The Guidance clarifies questions about the definition of time out and physical restraint. Time out does **not** include, and the ISBE time-out and physical restraint form therefore is **not** required for:

- In school

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suspension
- Evacuating other students from a classroom
- Staff or student directed sensory or calming breaks
- Use of study carrels or other stable, non-enclosed partitions in the classroom

The Guidance likewise describes circumstances that are **not** physical restraint:

- Physical escort (temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location).
- Orthopedic and supported positioning equipment are not restraints so long as these are not

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used for discipline or for school staff members' convenience.

- Weighted vests, blankets, and similar items are not restraints if used under the direction of an OT or PT, and for the purposes and within the parameters in the student's IEP or Section 504 Plan.

Staff members who restrain a student must ensure that the student's mode of communication (e.g. PECS, augmentative communication) is readily available during the physical restraint and that staff members are able to communicate effectively with the student.

If physical restraint is contraindicated, the school should contact emergency personnel, including but not limited to police, and the student's parent to intervene. Additionally, the school may consider a change in placement.

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With regard to the required review of the student's behavior interventions and placement after three incidents of time out or restraint, the Guidance provides that:

- The three instances of time out or physical restraint "reset" once a meeting is held and another meeting is not needed until another three incidents occur.
- The review does not require a full IEP or Section 504 meeting. Parents may waive ten days' notice of the meeting, waive the requirement that they attend the meeting or waive the meeting altogether. However, if the parent waives the meeting, the team must still conduct the review and complete the required documentation if amending the student's IEP or Section 504 Plan.

Additionally, when staff members review the use of prone or

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supine restraint, a full IEP meeting is not required.

In addressing questions about the required ISBE form to report time out or physical restraint, ISBE indicates that:

- The parent may be provided the ISBE required documentation in person, by email or by mailing the form within 24 hours.
- An evaluation by a nurse is required only when a student, parent or staff member reports a staff or student injury.
- Listing names of staff members involved in the time out or restraint is sufficient; their signature on the form is not required.
- Time out ends, for purposes of documentation, when the student is no longer an imminent risk to

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self or others, but other ongoing interventions and postvention should be documented as well as their length.

- If a student is subject to physical restraint during transportation, the district or cooperative is ultimately responsible for completing and submitting the required documentation, but may delegate responsibility to the bus company so long as documentation is simultaneously submitted to the district or cooperative.

For further information on the Emergency Rules and amendment and ISBE Guidance, please join us at one of our Legal Breakfasts, in Oak Brook on January 22, 2020 and in Tinley Park on January 23, 2020. You may also call one of our attorneys at 708-799-6766 (Flossmoor Office) or 630-928-1200 (Oak Brook office).

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GOVERNOR SIGNS BILL AFFECTING UNION MEMBERSHIP

On December 20, 2019, Governor Pritzker signed Senate Bill 1784 into law – creating Public Act 101-0620. Among other effects, the Public Act amends the Illinois Public Labor Relations Act and Illinois Educational Labor Relations Act to include provisions impacting union members' dues deduction authorizations. The Act, which took effect immediately, is the Illinois legislature's response to the United States Supreme Court's decision in *Janus v. AFSCME Council 31*. You will recall that, as a result of *Janus*, persons who are part of a bargaining unit represented by a

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public union – but are
not union members – cannot be required to pay union dues or "fair share" fees
to support benefits the non-members may enjoy from the union's collective
bargaining.

The Public Act's most significant upshot is that it permits unions and union members to agree to "reasonable limits" on the right of union members to revoke their dues deduction authorizations. The Act provides that a dues authorization may include a period of irrevocability that exceeds one year. The Act also provides that a dues authorization that is irrevocable for automatically renewing one-year periods and contains at least an annual 10-day window for the employee to revoke the authorization, is deemed to be reasonable. Authorized payroll deductions of dues must remain in effect until: (1) the employer is notified that an employee revoked their deduction authorization in accordance with the terms of the authorization; or (2) the employee is no longer employed by the employer in the same union; however, if the employee is re-employed by the same

employer within one year in a position represented by the same union, the dues deduction authorization is automatically reinstated. Therefore, a union member can resign from union membership at any time. But, if the member's resignation does not satisfy the requirements contained in his/her authorization (e.g., it occurs outside of any stated window to revoke), the Act requires employer to continue making dues deductions until the employee "properly" revokes the authorization (e.g., submits a written revocation during the revocability window).

We believe that this portion of the Act can be challenged on constitutional grounds given the *Janus* decision. In the meantime, most employers affected by the Act will be faced with several predicaments if an employee resigns from a union but does not properly revoke his/her dues deduction authorization: (1) follow the Act and continue deducting dues; (2) refuse to continue deducting dues, which will likely result in an unfair labor practice charge per the Act; and/or (3) bargain with the union over "reasonable limits" on employees' right to revoke a dues authorization, which, if the limits are unfavorable to the employee, could result in a First Amendment lawsuit in which the

employer could be named as a defendant.

Thankfully for employers, the Act states that a union must indemnify an employer for any damages and reasonable costs incurred for any claims made by employees for deductions made in good faith reliance on the union's information to the employer regarding dues deductions. This "hold-harmless" provision of the Act makes it a little more palatable for an employer to follow the law and continue dues deductions when required by the terms of an authorization. However, that would not preclude an employee from legally challenging the employer's continuing deductions. As stated above, that is not to say that an employer's other options are more pleasant.

The Act also:

- Prohibits various items of private information, as well as information concerning an individual's

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membership status in a union
and deduction information, from being disclosed under the Public Labor
Relations Act, Illinois Educational Labor Relations Act, Pension Code, and
Freedom of Information Act.

- Prohibits employers from disclosing certain
information about union members to third parties. The Act requires employers to
provide the union with a written copy of a request for prohibited information
(or a summary of an oral request), and a copy of any response to the request
within five business days of sending the response.

- Requires employers to give unions a list of its
members, along with extensive information about the members, once a month
unless another time frame is agreed to by the employer and

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union (before,
employers were obligated to furnish this list upon request).

- Requires employers to give the union extensive information about new hires no later than 10 calendar days from the date of the
union member's hire.

- Codifies the rights of union members, under certain circumstances, and "without charge to pay or leave time" of the
employee to: (1) meet during the workday to investigate and discuss grievances;
(2) meet during lunch and "other non-work breaks," and before and after the
workday to discuss certain collective bargaining and internal union matters;
(3) meet with newly hired employees for up to one hour either within the first

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> two weeks of the hire's employment in the union, or at a later date and time if mutually agreed upon; and (4) use the employer's mailboxes and bulletin boards to communicate with union members regarding collective bargaining matters, grievance investigations and other workplace-related complaints, and internal union matters. This access to employees is to be "conducted in a manner so as not to impede normal operations."

The Act does not prohibit employers and their unions agreeing in a bargaining agreement to provide the unions with greater access to bargaining unit employees. Consequently, employers with bargaining agreements containing provisions that address any of these items in a more restrictive manner may find that those provisions are no longer enforceable.

If you have any questions or concerns regarding the Public Act's

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implications for your management/union relationships, please feel free to contact your attorney at Hauser, Izzo, Petrarca, Gleason & Stillman.

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