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Student Residency: HB 4606 Would Make Significant Changes in Hearing Procedures

Student residency has long been a concern of school districts in Illinois. The current process for determining disputed residency issues is performed under the authority of the board of education and the final decision rests with the board. School Code Section 10-20.12b specifically states that, "[t]he board of education's decision is final." Courts could review the decision, but have generally given deference to the board's factual findings.

Now, however, House Bill 4606, passed by both houses and awaiting consideration by the Governor, would make significant changes to Section 10-20.12b. Under these changes, in addition to the current notice to the person who enrolled pupils of their right to a hearing, a district must detail the specific reasons why it believes that the pupil is a non-resident of the district. If a hearing is requested, at least three days prior

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to the hearing each party must disclose to the other party all written evidence and testimony that it may submit during the hearing, as well as a list of witnesses that may be called to testify. Further, the hearing notice must inform the person requesting the hearing that any written evidence and testimony or witnesses not disclosed to the other party at least three days prior to the hearing will be barred.

But the most significant change made by the bill pertains to the finality of the board's decision. House Bill 4606 requires a district to inform the person who enrolled the pupil that he or she may petition the regional superintendent of schools who "exercises supervision and control of the board to review the board's decision." (This review would be performed by the appropriate intermediate service center in suburban Cook County.) During this review process, the pupil may continue attending the schools of the district. It is the burden of the person who enrolled the student to file the petition. At the school district's expense, within five calendar days after receipt of the petition, the superintendent is charged with delivering to the regional superintendent the written decision of the board, any written evidence and testimony that was

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submitted to the parties during the hearing, a list of all witnesses who testified during the hearing and written minutes or a transcript of the hearing. The board may also file a written response to the petition with the regional superintendent. The regional superintendent's review is limited to this written record; no new evidence may be submitted. The regional superintendent must render a written decision as to whether or not there is clear and convincing evidence that the pupil is a resident of the district and eligible to attend district schools on a tuition-free basis. The regional superintendent must specify in detail the rationale behind the decision. The decision of the regional superintendent of schools is final, subject only to judicial review.

House Bill 4606 does not alter the current School Code definitions of residency or legal custody and does not remove the enrolling person's burden of going forward with evidence of residency.

House Bill 4606 will now be sent to the Governor's desk for signature. If it becomes law, the effect of its changes may be far-reaching, most notably in how a regional superintendent of schools exercises the authority to review a board's residency

decision.

If you have questions regarding your district's obligations regarding student residency, please contact one of our attorneys in Oak Brook at (630) 928-1200 or Flossmoor, (708) 799-6766.

Fund Transfer Authority Extension Bill Approved

One of the most useful tools for school district fund management has been the power of school boards to transfer money between the major operating funds under Section 17-2A of the School Code. While that section still contains the significant limitation that any such transfer be for "one-time, non-recurring expenses", for several years the General Assembly has seen fit to include a temporary waiver of this limitation. House Bill 5529, which would extend that waiver for another 3 years, until June 30, 2019, was passed overwhelmingly last week,

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and will be sent to Governor Rauner for his consideration. Please keep in mind, however, that even if the Governor chooses to sign the bill, there may be at least a temporary lapse in this fund transfer authority if he does not sign the bill before June 30.

With revenue restrictions such as specific tax rate limits, the Property Tax Extension Limitation Law ("PTELL" or the "tax cap"), and delays and reductions in State aid on one hand, and unbalanced needs and the threat of tax rate objections on the other, it is important for school officials to retain flexibility in their ability to move money among the various limited purpose funds of the school district. Section 17-2A allows school boards, after a published notice and a public hearing, to transfer money from the Educational, Operations and Maintenance, or Transportation Fund to any of the other of those major operating funds which might at that time be more in need of the money. In past years, the General Assembly has gradually removed most of the limitations on this authority, but the one restricting the transfers for the purpose of meeting nonrecurring expenses remained, subject to a waiver with a sunset provision. That sunset has been consistently pushed back

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over the last 13 years, which is all the General Assembly has done again this year with regard to Section 17-2A.

House Bill 5529 also pushed back the sunset on school boards' authority to make another type of fund transfer. School Code Section 17-2.11 governs the raising of revenues for life safety projects and the use of those revenues. When there are moneys left unspent from revenues generated for specific life safety projects, school districts generally have only two options: (1) use those moneys for other life safety projects or (2) transfer the moneys to the Operations and Maintenance Fund and do a commensurate abatement of the tax levy for that fund. But there has been a temporary provision allowing school boards a third option: transfer the leftover life safety revenues to the Operations and Maintenance Fund for other, non-life-safety building repair work without having to do a tax abatement. This kind of transfer requires a published notice and public hearing like a Section 17-2A transfer, but the authority to exercise this third option had been set to expire this June 30. House Bill 5529 extends the life of this authority to June 30, 2019.

If you have questions regarding this Bill, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor

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Employee Overtime: New Department of Labor Rule May Impact School District's Bottom Line

On May 18, 2016, the United States Department of Labor issued its final rule updating the overtime regulations under the Fair Labor Standards Act ("FLSA"). The new rule goes into effect on December 1, 2016, and applies to all employees of state and local governments, including school districts, who are not exempt from overtime pay.

Those employees who were previously entitled to overtime pay (*e.g.,* custodians) remain entitled to overtime pay. Teachers and

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most administrative employees remain exempt from overtime pay. The new rule affects those employees who were previously exempt from overtime pay due to a combination of their job duties and their salary (*i.e.,* executive employees, administrative employees, professional employees, computer employees, and outside sales employees). The new rule raises the threshold salary those employees must earn to remain exempt from overtime pay.

Under the current FLSA regulations, an exempt employee, other than a teacher, must earn at least $455 per week (equivalent to $23,660 annually for a full time employee) and perform job duties that satisfy one of the exemptions (*i.e.,* executive employee, administrative employee, professional employee, computer employee, or outside sales employee) in order to be exempt from overtime pay. The new rule raises the threshold annual salary for those employees from $23,660 to $47,476.

Thus, after December 1, 2016, a previously exempt employee, other than a teacher, must earn at least $47,476 and retain her/his previously exempt job duties to remain exempt from overtime pay. School districts will need to contend with several categories of employees who will become eligible for overtime

pay under the new rule, such as administrative assistants and computer employees, that don't earn the applicable salary to remain exempt. This threshold salary will be adjusted every 3 years.

Because the new rule goes into effect December 1, 2016, these changes can impact the bottom lines for school districts beginning with the 2016-2017 school year. The increased overtime expenses of nonexempt employees should be considered as you develop your annual budgets. Also, inasmuch as the minimum salary threshold will adjust every three years, with the next change to come on January 1, 2020, school districts will need to account for future increases as they take effect in the middle of fiscal years.

As a reminder, recent rules issued by the Illinois Department of Labor pursuant to the Illinois Wage Payment and Collection Act require all employers, including school districts, to keep a daily record of hours worked by all employees. Failure to do so will deprive employers of the evidence needed to defend an overtime pay dispute.

If you have questions regarding this topic, please contact one

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of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

Transgender Student Rights. . . A Little More Clear?

On May 13, the U.S. Department of Education and U.S. Department of Justice issued a joint Dear Colleague Letter on Transgender Students. The Dear Colleague letter cemented in policy what the agencies had previously determined through a series of decisions and settlements. The letter asserts that a school that fails to comply with Title IX, the 1972 law that prohibits discrimination on the basis of sex, jeopardizes its federal funding.

The Dear Colleague Letter is wide-ranging. It makes clear that schools must provide a safe and non-discriminatory environment,

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must use pronouns and nouns consistent with a student's gender identity, and must provide sex-segregated activities and facilities. Importantly, a school cannot require a student to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. But, it may make individual-user options available to all students who voluntarily seek additional privacy, whether they are transgender or not. The Dear Colleague Letter also notifies schools that they must ensure that transgender students' education records do not disclose confidential information.

The Department of Education also released an "Examples of Policies and Emerging Practices for Supporting Transgender Students," a compilation of policies and practices that schools across the country are already using to support transgender students. This is a helpful document for districts considering adoption of transgender policies.

Neither the Dear Colleague Letter nor the Policies and Practices document have the effect of law, but both agencies assert that their interpretations of Title IX are consistent with courts' and other agencies' interpretations of Federal laws prohibiting

sex discrimination.

In fact, the Dear Colleague Letter comes right on the heels of a recent U.S. Court of Appeals decision in a case involving the right of a transgender student to use a facility consistent with his gender identity.

In December, we told you about a federal case in the Eastern District of Virginia that was garnering substantial national attention. (*Unsettled: Transgender Student Civil Rights*, https://petrarcagleason.com/unsettled-transgender-student-civil-rights-2/). In *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), a transgender student, by his next friend and mother, brought an action against the school board under the Equal Protection Clause of the U.S. Constitution and Title IX, challenging the school board's restroom policy requiring students to use restrooms consistent with birth sex, rather than gender identity. The court determined that the policy was constitutional. U.S District Judge Robert G. Doumar concluded that the Board's interest in protecting the privacy of students outweighed any hardship that may be imposed on the transgender student.

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Judge Doumar reviewed the Department of Education's regulations implementing Title IX, which permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. He also contemplated how the Department had delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote in a Dear Colleague Letter: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."

Judge Doumar was not persuaded by the Dear Colleague Letter. Instead, the Court determined that established Department Regulations supersede the legal authority of a guidance document.

The student, Gavin Grimm, who was born as a female but identifies as a male, appealed to the U.S. Court of Appeals for the 4th Circuit, and won. In backing Grimm, the Court of Appeals

took the opposite approach. It deferred to the Department's interpretation of its own regulation and ruled that transgender students should have access to the bathrooms that match their gender identities rather than being forced to use bathrooms that match their biological sex.

This ruling obviously aligns to the Department of Education's interpretation of its own regulations, the Dear Colleague Letter, and its enforcement efforts to date. A perfect example is the matter which was recently resolved between OCR and the Board of Education of Township High School District 211. In that case, a biological male alleged the District discriminated against her by denying her access to the girls' locker rooms because of her gender identity and gender nonconformity. Although the District treated her as a female in all other respects, it refused to allow her to change in the female locker rooms, instead providing a separate private area in which she could change. In its findings, OCR concluded that the District violated the Student's rights under Title IX by requiring her to use separate, private locker rooms to change and shower. The District and OCR ultimately settled the matter. For more information on the settlement, see our previous posting (*Board*

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Enters Settlement Agreement with OCR to Resolve Claims of Transgender Discrimination, https://petrarcagleason.com/board-enters-settlement-agreement-with-ocr-to-resolve-claims-of-transgender-discrimination/)

Despite these developments, neither the OCR findings nor the 4th Circuit's decision or the Dear Colleague letters are binding authority in Illinois. As such, the law remains unsettled as it relates to transgender students in Illinois. Earlier this month, however, a group of students and their parents sued Township High School District 211 and the federal government in the Northern District of Illinois in response to the settlement reached between OCR and that district. A final decision in that matter – although it is still far away – may provide more direction and guidance on the rights of Illinois' transgender students.

We are also following the litigation between the federal government and the State of North Carolina. In that case, the question is whether a North Carolina law that bans transgender people from using public bathrooms consistent with their gender identity, and bans cities from passing anti-discrimination

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ordinances protecting LGBT people, is constitutional. Although the case does not specifically apply to students, the resolution of the matter will be insightful and perhaps will serve as a preview to the Supreme Court's ultimate determination of the matter.

Until we have final clarity, given the Dear Colleague Letter, OCR's determination and the 4th Circuit's ruling, districts should tread lightly if considering policies arguably discriminatory to transgender students. Courts have not yet opined on a policy that would require a transgender student to use a private, unisex bathroom although the Department of Education has been clear that this approach violates Title IX. In District 211, the Department of Education specifically noted the ostracism the student in District 211 felt when the District presented her with that option.

If you have questions regarding developments on this topic, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

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New Special Education Rules

Effective January 13, 2016, regulations governing special education in Illinois have been updated by the Illinois State Board of Education (ISBE). In the new special education rules, codified within Title 23 of the Illinois Administrative Code, ISBE made several significant alterations to the special education process and has also addressed minor changes in terminology and updated deadlines for certain policy enactments:

- The regulations now include a definition of “dyslexia”: “a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problem in

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reading comprehension and reduced experience that can imped growth of vocabulary and background knowledge." (Section 226.126). This change was made pursuant to Public Act 98-705, which required ISBE to adopt rules incorporating an international definition of dyslexia into the regulations.

- The regulations have been revised such that implementation of an IEP shall begin no later than 10 ***school*** days (instead of 10 calendar days) after parents receive notice that an IEP has been developed or revised (Section 226.220(a)).

- Beginning at age 14½, the IEP for students ***must*** address independent living skills. (Section 226.230(c)). Previously, the School Code required that the IEP only include independent living skills "where applicable." This new requirement reflects Public Act 98-517, which removed the term "where applicable" from the School Code provisions regarding transition services.

- Parents may file a request for a due process hearing within 10 days after mediation to invoke "stay put."

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(Section 226.560). Previously, to obtain the benefit of stay put, a parent was required to file due process within 10 days of the IEP team decision to change the student's placement. This new provision allows the parent additional time to secure stay put.

- Districts must submit a written response to an ISBE complaint within 60 days after receiving the complaint. This response must be submitted not only to ISBE, but also to the parent, individual or organization that filed the complaint. (Section 226.570(c)).

- If a district receives a parent's consent for evaluation with fewer than 60 school days remaining in the school year, the district must make the eligibility determination and complete the IEP meeting prior to the first day of the following school year. (Section 226.110(d)). This provision was previously included in the School Code, but not in the regulations.

- At the conclusion of the IEP meeting, a district is required to provide written notice to the parent as to the eligibility determination reached (previously this was to

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be provided within 10 school days after the meeting). (Section 226.110(f)).

- Within 10 days after receiving a report of an independent evaluation conducted at either public or private expense, the district must provide written notice stating the date the IEP Team will meet to consider the results. (Section 226.180(d)).
- The regulations align the Qualifications of Evaluators (Section 226.840), List of Qualified Workers (Section 226.850), and List of Other Employees Qualifying for Reimbursement (Section 226.860) with the Illinois educator licensure requirements.

In addition to these substantive changes, many of the changes in the new special education rules are terminology updates in an attempt to standardize the use of terms in Illinois:

- "Intellectual disability" (replaces "cognitive disability")
- Present levels of "academic and functional" performance (replaces "educational" performance)
- "Career and technical counselor" (replaces "vocational

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counselor")

Districts must now have updated policies and procedures in place to address:

- Work load limits for special educators (Section 226.735)
- A child's response to scientific, research-based interventions (Section 226.130)

Additionally, written policies and procedures demonstrating compliance with the special education rules no longer need to be submitted to ISBE for approval. Now, these policies and procedures must be kept on file and made available to ISBE upon request. (Section 226.710).

The full version of the updated special education rules can be accessed through this link.

If you have questions regarding the recent changes to the Illinois special education regulations, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

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Hospital Exemption Law Held Unconstitutional

In an opinion issued on January 5, 2016, the Illinois Appellate Court has held that the law which allows hospitals to obtain property tax exemptions under easy-to-meet standards is invalid as inconsistent with the terms of the Illinois Constitution. The decision in the case of *The Carle Foundation v. Cunningham Township* is significant for school districts with non-profit hospitals within their boundaries because it could mean substantial increases in property tax revenues and relief for residential taxpayers.

This decision comes in a case which is just one front in the long-running war about hospital property tax exemptions. In 2010, the Illinois Supreme Court in the case of *Provena Covenant Medical Center v. Department of Revenue* made it clear that even hospitals which do not issue stock (and therefore are "non-

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profit" under federal income tax law) can only qualify for exemption from local property taxes if they are primarily used for charitable purposes. In response to this decision, the General Assembly in 2012 added Section 15-86 to the Property Tax Code. That law allows non-profit hospitals to qualify for property tax exemptions simply by showing that the value of certain defined "beneficial services" are greater than the value of the property taxes the hospital owners would have to pay if the property were taxable. There are several legal problems with this framework, including the fact that previous court decisions have determined that some of the beneficial services included in the law which are to be credited against the hospital owners' estimated tax liability are not genuinely "charitable" and the Illinois constitution allows only the courts to decide what is charitable and what is not. As a practical matter, the law removed many very valuable properties from local governments' tax bases and, consequently, increased the burden on all other taxpayers.

Section 15-86 has been challenged as inherently flawed in multiple arenas. The *Carle Foundation* case itself involves a hospital in Champaign County which local tax assessments

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officials have been trying to put onto the tax rolls for several years. In two declaratory judgment cases brought against the State in Cook County Circuit Court, that court in 2015 ruled that the law was not invalid on its face, but only because the law might be read to retain some of the courts' standards about what is charitable. The decision in one of those cases, *Oswald v. Hamer*, is now on appeal and is expected to produce later this year an opinion either in conflict with or in concert with the *Carle Foundation* decision. Finally, our firm currently represents an interested school district in a case in which the Illinois Department of Revenue is considering the application of Skokie Hospital/NorthShore University HealthSystem for tax exempt status under provisions of the Property Tax Code including Section 15-86. There, we have been arguing that Section 15-86 is either unconstitutional or must at least be read to still require the hospital to demonstrate that is primarily charitable in use, something which most non-profit hospitals in the State are unlikely to be able to do.

The *Carle Foundation* opinion dealt with many intricate procedural issues. But once the court decided that it had no choice but to look squarely at the validity of Section 15-86, it

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had no problem concluding that the law was inconsistent with the Illinois Constitution's requirement that the General Assembly could grant tax exemption only to properties which are used primarily for charitable purposes.

The legal struggle over Section 15-86 is far from over. But once the Department of Revenue starts denying exemptions to these multi-billion dollar businesses and they return to your districts' tax bases, such properties should be treated as "new property" under the Property Tax Extension Limitation Law. Then the property taxes paid may be used to provide badly needed new revenue and to accomplish a more equitable distribution of the tax burden in your community.

If you have questions regarding this opinion or anything relating to the property tax exemptions, please contact one of our attorneys in Oak Brook (630-928-1200) or Flossmoor (708-799-6766).

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Open Meeting Act – Appellate Court Reverses Attorney General's Rulings on Final Action and Public Recital

In an opinion issued on December 15, 2015, the Illinois Appellate Court rebuffed the Illinois Attorney General (AG) with regard to her office's rulings on the propriety of the procedures by which a school board approved a severance agreement. The decision in the case of *Board of Education of Springfield School District No. 186 v. The Attorney General of Illinois* is significant because it restores some common sense in this area of law, demonstrates that the courts will not always rubber stamp the Attorney General's opinions on Open Meetings Act issues, and because it calls into question some of that office's recent opinions.

The case involved the approval by the Board of Education of Springfield School District 186 of a severance agreement with

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its superintendent. At its meeting on February 4, 2013, the Board discussed the agreement in closed session and six of the seven members signed it, but no public action was taken at that meeting. For the March 5 board meeting, the publicly posted agenda listed approval of the agreement and a link to the entire agreement on the district's website. Then the Board publicly voted six-to-one to approve the agreement. After complaints from a private citizen, the AG investigated and issued binding opinions ruling that (1) the signing of the agreement in the closed session of the February meeting constituted an illegal final action, and (2) the March vote came without adequately informing the public of the nature of the matter under consideration.

Upon administrative review, the Sangamon County Circuit Court reversed the AG on both points and an appeal was taken. The Appellate Court agreed with the Circuit Court and upheld its reversal of the AG's rulings.

> The provisions of the Open Meetings Act at issue are both in Section 2(e):
>
> "No final action may be taken at a closed meeting. Final

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> action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." 5 ILCS 120/2(e).

With regard to the February signing, the Appellate Court found that this action was part of a proper closed session consideration of a personnel action which was not finally approved until the March meeting. The court noted other reported court decisions which had permitted a preliminary closed session vote so long as that was followed by formal open session vote.

With regard to the public recital preceding the March vote, the court first observed the lengths to which the District had made information about the proposed agreement available to the public before the Board's vote, including the language of the posted agenda item and the website link. At the March meeting itself, the Board president introduced the agreement consistent with the general terms of the agenda and recommended approval by the Board. This, the Appellate Court held, was enough to inform the public about the "general nature of the final action". It was not necessary, as the AG would have it, to provide a detailed

explanation about the significance or impact of the proposed final action. Such details were simply not required under the plain provisions of the Act. (What is not so clear is whether the court was suggesting that the details in a written agenda and on a website can cure, or in some way mollify, an inadequate verbal recitation about a final action during the public meeting itself.)

We believe that the AG's rulings in this case, if allowed to stand, would have been difficult to apply because they did not provide meaningful standards for public officials to follow. Did the AG mean to suggest that board members could never sign a document in advance of a formal action to ratify the action? If they did sign first, how could they fix the error? And in voting to approve a contract, how much had to be said about the contract's terms to inform the public? Which terms were important enough to mention? Would reading the contract verbatim be necessary? Would it be enough? It is hard to imagine how boards should have been advised to proceed had the AG's position in this case been vindicated.

This case is also important because of the court's independent review of the AG's rulings. The AG had argued that, because of

her legal role in administering and enforcing the Open Meetings Act, her rulings were entitled to substantial weight before the court. However, the Appellate Court determined that such deference only applied where there had been disputed factual findings or where a statutory provision was ambiguous. Here, where the facts were not in dispute and the statutory language seemed clear to the court, no deference was owed and the court was free to disagree with the AG, as in fact it did. This point highlights the fact that, while school officials should be aware of the AG's interpretations of the Open Meetings Act, the Freedom of Information Act, and other laws, those interpretations are merely advisory and may well differ from how the courts will eventually view an issue.

To provide a very pertinent example, the AG has ruled that the public recital requirement of Section 2(e) of the Open Meetings Act requires that a school board specifically identify an employee by name when taking a personnel action with regard to that employee. (See Public Access Opinion 13-016 and our Priority Briefing, *Naming Names: PAC Issues an Opinion Requiring Employee Names in Board Actions*, issued October 2013.) But in light of this Appellate Court opinion, we view it unlikely that

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a court would actually uphold the AG's position on the need to publicly name the employee. The language of the Act, after all, says nothing about identifying employees by name. Of course, board members should be made aware of the issue and, from a legal perspective, it would still be safer at this point to verbally name the employee before the vote. However, after the *Springfield* case, the risk of being found in violation of the Act if employees are not named is significantly smaller.

If you have questions regarding this opinion or anything relating to the Open Meetings Act, please contact one of our attorneys in Oak Brook (630-928-1200) or Flossmoor (708-799-6766).

Board Enters Settlement

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Agreement with OCR to Resolve Claims of Transgender Discrimination

Last month, we reported on the findings made by the U.S. Department of Education's Office for Civil Rights (OCR) in the closely-watched investigation into a suburban high school District's treatment of a transgender student (*Unsettled: Transgender Student Civil Rights*, https://petrarcagleason.com/unsettled-transgender-student-civil-rights-2/). The Student, a biological male, identifies as a female. The Student's OCR complaint alleged the District discriminated against her by denying her access to the girls' locker rooms because of her gender identity and gender nonconformity. Although the District treated her as a female in all other respects, it refused to allow her to change in the female locker rooms, instead providing a separate private area in which she could change. In its findings, OCR concluded that the District violated the Student's rights under Title IX by requiring her to use separate, private locker rooms to change

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and shower. OCR's findings required the District to negotiate a settlement agreement with OCR within 30 days or risk formal enforcement action, which could include further litigation and the loss of approximately $6 million in federal funding.

On Wednesday, the Board of Education of Township High School District 211 approved the terms of a resolution agreement with OCR. Under the resolution agreement, the District has agreed to take the following actions:

- Based on the Student's representation that she will change in a private changing station, the District will allow the Student access to the girls' locker rooms.
- The District will install and maintain sufficient privacy curtains in the locker rooms to accommodate the Student and other students who desire additional privacy.
- If any student using the girls' locker rooms requests additional privacy, the District will provide that student with access to a reasonable alternative, which may include the use of another private area, a separate schedule of use, or assignment of a locker near the office of a teacher or coach.
- The District will coordinate with hosts of off-campus,

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District-sponsored activities to ensure that the Student has access to female facilities in a manner consistent with the District's use of privacy curtains.

- The District will ensure that any school records containing the Student's birth name or assigned sex are treated as confidential, personally identifiable information and are maintained separately from the Student's current records.
- In order to assist the District in implementing the terms of the agreement, the District will hire a consultant with expertise in child and adolescent gender identity, including transgender and gender nonconforming youth.
- If requested by the Student and her parents, the District will establish a support team to ensure she has access and opportunity to participate in all programs and activities and is otherwise protected from gender-based discrimination at school.
- The District will revise its notice of nondiscrimination on the basis of sex to comply with the requirements of Title IX.
- The District will provide OCR with a copy or detailed description of all gender-based discrimination or

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> harassment complaints that occur during the reporting period. OCR anticipates closing its monitoring of the resolution agreement by June 30, 2017.

The full text of the *Agreement to Resolve* can be found at: http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf.

As districts move forward and establish policies related to transgender students, it is important to keep in mind that this is an evolving area of the law which elicits strong opinions from the general public, parents, and students. U.S. Department of Education (DOE) guidance, OCR's findings in this investigation, and this settlement agreement all indicate a consistent DOE policy: transgender students must be treated consistent with their gender identity, and complaints of discrimination will be investigated under Title IX.

Notwithstanding this conclusion, the issue of the privacy of the general student body weighed against non-discriminatory transgender policies remains unsettled. The language of the settlement agreement is open to differing interpretations. District 211 maintains the position that this Agreement provides

that the Student may only have access to the girls' locker rooms *if she changes and showers behind a privacy curtain*. A logical extension of DOE policy, which is supported by civil rights organizations such as the American Civil Liberties Union (ACLU), leads to the opposite interpretation: that it would be discriminatory to *require* the Student to use a privacy curtain. OCR recognizes the privacy concerns of other students in these situations. Its findings indicated that the District could have initially resolved this issue in a non-discriminatory manner based on the Student's desire to change behind a privacy curtain. However, OCR's approval of the ambiguous terms of the Agreement leave us with no definitive answer to this issue. Thus, districts should proceed carefully, taking into account the concerns of individuals on both sides of this issue. A district cannot deny access to gender-specific areas, but it should take measures to protect the privacy of all individuals within these areas.

If you have questions regarding your district's policies toward transgender students, please contact one of our attorneys in Oak Brook (630-928-1200) or Flossmoor (708-799-6766).

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40th Anniversary of the Individuals with Disabilities Education Act

In commemoration of the 40th anniversary of the IDEA (November 29, 1975), the U.S. Department of Education (DOE) has released new guidance clarifying its expectation that a child's annual IEP goals are to be aligned with state academic content standards for the grade in which the child is enrolled.

Under the IDEA, a child with a disability is entitled to a free appropriate public education (FAPE), which requires, in part, that a child's IEP be designed to enable the child to make progress in the general education curriculum. To ensure that children with disabilities are held to high expectations, and are prepared for college, careers, and independence, IEPs must be reasonably calculated to enable the child to make progress in the general education curriculum based on state academic content

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standards for the grade in which the child is enrolled.

However, the DOE cautions that the alignment of IEP goals to state academic standards should guide, *but not replace*, the individualized decision-making required in the IEP process. Additionally, for those children with the most significant cognitive disabilities whose performance must be measured against alternative academic achievement standards, those alternate standards must align with the state's grade-level content standards and be clearly related to grade-level content. Where a child's present levels of academic performance are significantly below the grade level in which the child is enrolled, the IEP Team should estimate the child's growth toward the state standards for the grade in which the child is enrolled and the time period covered by the IEP.

The full text of the Department of Education's guidance can be accessed at: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

For Illinois school districts, the Illinois State Board of Education (ISBE) provides additional information on the

alignment of Common Core state standards with IEP goals. ISBE recommends that districts consider: (1) using Common Core as a foundation for the goals, but not use the standard itself as the goal; (2) aligning Common Core standards in the IEP goals with the child's current grade level, regardless of the child's performance or instructional level; and (3) for developing instructional programs for children with significant cognitive disabilities, consulting the Illinois Common Core Essential Elements documents for English Language Arts and Mathematics (found at: http://www.isbe.net/assessment/dlm.htm). ISBE's *Documenting Common Core State Standards on the Individualized Education Program* can be accessed at: http://www.isbe.net/spec-ed/pdfs/guidance-ccss.pdf.

In addition to the guidance document, the DOE has released several resources to aid parents and educators in helping students succeed in school, careers, and life:

- **Best Practices from the Field** (http://ccrs.osepideasthatwork.org/), which includes resources on effective IEPs, instructional practices, assessments, student engagement, school climate, home and school partnerships, and post-school transition.

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- **Classroom Strategies for Teachers** (https://www.osepideasthatwork.org/evidencebasedclassroomstrategies), which offers evidence-based, positive, proactive, and responsive classroom behavior intervention and support strategies.
- **Positive Behavioral Interventions and Support Implementation Blueprint for Educators** (https://www.pbis.org/blueprint/implementation-blueprint), which outlines teaching behavioral expectations throughout schools.
- **Tip Sheets for Parents** (http://www.parentcenterhub.org/repository/age-of-majority-parentguide/), which provides information on financial management, healthcare, and independent living and is designed to help children with disabilities successfully reach adulthood.

If you have questions regarding your district's implementation of Common Core and the IDEA, please contact one of our attorneys in Oak Brook (630-928-1200) or Flossmoor (708-799-6766).

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Unsettled: Transgender Student Civil Rights

In a case garnering significant national attention, the U.S. Department of Education's Office of Civil Rights (OCR) has determined that an Illinois district has violated the civil rights of a transgender high school student. Over the last several years, Township High School District 211 has permitted transgender students to use the bathroom of their identified gender, to play on sports teams of that gender, and to use their identified gender on school records. But the District has refused to let the student at the center of an investigation, Student A, have equal access to the school's locker rooms and this, according to OCR, is a violation of Student A's civil rights.

Student A is a biological male living as a female. She had requested the opportunity to change clothes privately within the

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girls' locker rooms in an area such as a restroom stall, but the District refused, citing the privacy concerns of all its students. It said that (1) permitting Student A to be present in the locker room would expose female students to being observed in a state of undress by a biologically male individual; and (2) it would be inappropriate for young female students to view a naked male in the locker room in a state of undress. Instead, it devised a number of alternative arrangements, including installing four privacy curtains in unused areas of the locker room and another one around the shower. Under the District's plan, Student A would be mandated to use the privacy curtains. OCR stated that it found the District's privacy concerns unavailing in this case. It determined that the District has violated Title IX, the federal law that prohibits discrimination on the basis of sex, because the student would be compelled to use the privacy curtains.

In its November 2, 2015, letter, OCR stated:

"Still the District refuses to provide access to Student A to any part of the girls' locker rooms, unless it requires her to use the private changing areas. The evidence shows that, as a result of the District's denial of access to the girls' locker

> rooms, Student A has not only received an unequal opportunity to benefit from the District's educational program, but has also experienced an ongoing sense of isolation and ostracism throughout her high school enrollment at the School."

In previous cases in California and Missouri, federal officials had been able to reach settlements giving access to transgender students in similar situations. But in this instance, OCR and the District have not yet come to an agreement, prompting the federal government to threaten sanctions. OCR gave the District just 30 days to reach a solution or face enforcement, which could include administrative law proceedings or a Justice Department court action. The District could lose some or all of its Title IX funding.

OCR's determination in the District 211 case is in stark contrast to a federal opinion issued in September.

In *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), a transgender student, by his next friend and mother, brought an action against the school board under the Equal Protection Clause and Title IX, challenging the school board's restroom policy requiring

students to use restrooms consistent with birth sex, rather than gender identity. The court determined that the policy was constitutional. It should be noted that this case did not involve locker rooms. Nonetheless, U.S District Judge Robert G. Doumar took the opposite approach from OCR. Judge Doumar concluded that the Board's interest in protecting the privacy of students outweighed any hardship that may be imposed on the transgender student. Judge Doumar was also not persuaded by a January 7, 2015, Dear Colleague Letter that stated that under Title IX, a school must generally treat transgender students consistent with their gender identity. Instead, the Court determined that established DOE Regulations supersede the legal authority of a DOE guidance document. The student has indicated that he will appeal.

These cases involve a rapidly evolving area of the law where, as noted, the results thus far are not always consistent and represent just a handful of recent decisions by courts and government agencies. The adjudicators intensively review the specific facts of each case. If you have questions regarding these cases or about the rights of transgender students, please contact one of our attorneys in Oak Brook (630.928.1200) or

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