Published April 15, 2026

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Illinois Supreme Court Clarifies Role Of The School Board In Tenured Teacher For Cause Dismissal Hearings After Senate Bill 7

On December 1st, the Illinois Supreme Court issued an opinion in a case eagerly anticipated by Illinois school attorneys, administrators, and school board leaders. In *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, the Illinois Supreme Court for the first time addressed the modifications to Section 24-12 of the Illinois School Code as enacted through Senate Bill 7. The Supreme Court's analysis of the new Senate Bill 7 provisions is critical because it provides for greater deference by the courts to the decisions of school boards.

Prior to the passage of Senate Bill 7, the termination of a

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tenured teacher was left to the decision of a hearing officer appointed by the Illinois State Board of Education. Senate Bill 7, however, while retaining the function of a hearing officer limits the hearing officer's role in a cause dismissal to the issuance of a "report to the school board [with] findings of fact and a recommendation as to whether or not the teacher shall be dismissed for cause." The hearing officer's report is to also include a recommendation regarding "whether the conduct at issue occurred, whether it was remediable and whether the proposed dismissal should be sustained." The school board then has forty-five (45) days to review the hearing officer's findings and recommendation and to "modify or supplement the findings of fact if, in its opinion, the findings of fact are against the manifest weight of the evidence." The decision of the school board is defined by statute as the "final administrative decision" that is subject to review by the courts.

The Illinois Appellate Court in *Beggs* determined that a local school board could not modify the factual determinations of a hearing officer unless it determined that the findings were against the manifest weight of the evidence. The findings of

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the hearing officer were given significant deference by the Appellate Court on review rather than those of the school board. This interpretation by the Appellate Court essentially rendered the modifications to the School Code through Senate Bill 7 ineffective and meaningless.

The Illinois Supreme Court reversed the Appellate Court's holding regarding the deference due the hearing officer and the role of the school board in the dismissal process. In direct contravention to the Appellate Court's interpretation of the statute, the Supreme Court determined that the unambiguous provisions in the Senate Bill 7 amendments "clearly indicate[d] the legislature's intent to vest the [school board] with discretion to depart from the hearing officer's findings." The Supreme Court then further clarified that a reviewing court would not review the modifications of the board of education to determine whether or not the findings of the hearing officer were against the manifest weight of the evidence but, instead, it would accept the findings of the school board as long as they were supported by the record. This interpretation is important because it clarifies that under the revised version of Section 24-12 of the School Code, a local school board is the final

decision-maker with regard to factual determinations and is free to depart from the findings of a hearing officer.

In addition, the Illinois Supreme Court determined that the school board's final order is the order which is subject to administrative review by the courts. This means that the factual and legal determinations of the school board will be given deference by a reviewing court rather than those of the hearing officer. Ultimately, a reviewing court will review the record to determine if the factual determinations of the school board are supported by the record (i.e., against the manifest weight of the evidence) and will then determine whether the school board's decision to dismiss the teacher as based upon those facts is "arbitrary, unreasonable or unrelated to the requirements of service."[1] This standard of review is highly deferential to the decision of the school board and provides it with the deference shown by the courts to other administrative agencies.

While the Illinois Supreme Court's interpretation of Section 24-12 as modified by Senate Bill 7 unequivocally provides the local school board with more authority in the context of a tenured teacher dismissal, it should not be interpreted as an

indication that the evidentiary burdens necessary to terminate the employment of a tenured teacher have evaporated. Indeed, the teacher in *Beggs* was ultimately ordered reinstated by the Supreme Court. The Supreme Court determined that two (2) of the three (3) charges levied against the teacher were not supported by the record and were therefore not considered by the Court. In addition, the Supreme Court determined that the third charge, which the school board was able to prove, standing alone was not sufficient to warrant termination as it was deemed arbitrary, unreasonable or unrelated to the requirements of service.

As this holding teaches, the termination of tenured teachers should not be a decision which is taken lightly and should always be done in conjunction with legal advice early in the decision-making process. If your district is considering the termination of a tenured teacher, please contact one of our attorneys so that we may guide you through the process and ensure that any charges which are undertaken are sufficient to warrant termination under existing precedent.

If you have any questions, please contact one of our attorneys in Flossmoor at (708) 799-6766 or in Oak Brook at 630-928-1200.

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[1] The Supreme Court also rejected the argument that the school board is inherently a partisan entity. Quoting previous court decisions, it stated that, "board members are assumed to be people 'of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'"

Nationwide Injunction Halts New Department of Labor Overtime Rule (for now)

On November 22, 2016, a federal judge in the United States District Court for the Eastern District of Texas issued a preliminary injunction enjoining the U.S. Department of Labor from implementing and enforcing its final rule updating the

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overtime regulations under the Fair Labor Standards Act ("FLSA"). The injunction is effective on a nationwide basis until further order of the court, and applies to Illinois school districts and joint agreements. A copy of the order can be accessed at https://www.texasattorneygeneral.gov/files/epress/Overtime_-_PI_Grant_(11-22-16).pdf?cachebuster%3A93=&utm_content=&utm_name=&utm_term.

The final rule, which was to take effect on December 1, 2016, more than doubled the salary threshold at which white-collar workers are exempt from overtime pay, from $23,660 (annually) to $47,476 (annually). White-collar workers include full-time, bona fide executive, administrative or professional employees, and computer employees. Neither the final rule nor the preliminary injunction impacts teachers; teachers are exempt from overtime requirements regardless of their salary. The final rule and the preliminary injunction also does not affect other categories of employees.

As a result of the injunction, school districts and joint agreements will continue to determine the eligibility of employees such as administrative assistants and computer

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employees under the current FLSA rules. Those employees who were previously entitled to overtime pay (e.g. custodians) remain entitled to overtime pay. Teachers and most administrators remain exempt from overtime pay.

It must be stressed that the preliminary injunction is not a final order, and can be modified or dissolved at any time. School districts and joint agreements should use whatever additional time is given by this injunction to continue their plans for implementing the final rule, so as not to be caught off-guard.

Also keep in mind that Illinois Department of Labor rules issued 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, regardless of which FLSA rules are in effect.

If you have any questions, please contact one of our attorneys in Flossmoor at (708) 799-6766 or in Oak Brook at 630-928-1200.

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Transportation Taxes and Fees Lockbox Amendment

Transportation Taxes and Fees Lockbox Amendment: Possible Impact on School District Levies

On the ballot for next week's general election is a proposed amendment to the Illinois Constitution which would limit how certain revenues from transportation sources are used. Referred to by its supporters as the "Safe Roads Amendment" – this proposal defines certain transportation-related revenues and then restricts the usage of those revenues to transportation-related purposes.

While publicity about this amendment has focused – properly in our view – on revenues derived from such taxes and fees as license plate fees, tolls, vehicle sticker charges, and the like, some have questioned whether the restricted-use revenues might also include the transportation levy imposed by school

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districts as part of their authority to impose property taxes for various purposes under the School Code. **In our opinion, the amendment would not limit the use of school district transportation levies because those levies are "derived from" the ownership of real estate,** and not from revenues from the "registration, title, or operation or use of vehicles" or related to "the use of highways, roads, streets, bridges, mass transit, intercity passenger rail, ports, airports, or to fuels used for propelling vehicles, or derived from taxes, fees, excises, or license taxes relating to any other transportation infrastructure or transportation operation" – under the language of the proposed amendment.

Nonetheless, if this amendment passes, we fully expect this issue to be raised through tax rate objections or otherwise, and to be resolved ultimately by the courts. Therefore, in an abundance of caution, if you had planned to transfer moneys from your district's Transportation Fund to the Educational Fund or to the Operations and Maintenance Fund later in this fiscal year, **you may wish to consider making that transfer now**. Such a transfer requires due public notice and hearing under School Code Section 17-2A. The amendment, if it passes on November 8,

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is likely to be certified on November 28 or sooner, giving you just a few weeks to start the transfer process before the constitutional amendment would go into effect.

Of course, even if you make an immediate fund transfer, that action would not help with your ability to transfer transportation fund revenues to other operating funds in future years, as school districts frequently have in the past. Whatever the result of this referendum and however the courts might interpret it, what is really needed is an amendment to the Property Tax Code removing specific fund rate limits in tax-capped counties. Such a move would not increase any tax burdens or district revenues, but would allow districts the flexibility to use tax revenues for whatever purposes serve the best interests of the district, its students and families, and its taxpayers.

If you have any questions, please contact one of our attorneys in Flossmoor at (708) 799-6766 or in Oak Brook at 630-928-1200.

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Travel Expenses of District Officials to be Regulated

The General Assembly recently enacted the Local Government Travel Expense Control Act (Public Act 99-0604). The Act, which takes effect on January 1, 2017, requires "public agencies" (including school districts, community college districts, and units of local government other than home rule units) to either adopt a resolution or pass an ordinance regulating the reimbursement of their employees and board members for all travel, meals and lodging expenses incurred for official business. Some school districts or joint agreements may already have similar controls in place; the Act makes such controls mandatory.

According to the new law, the regulation must: 1) specify the types of official business for which travel, meal, and lodging expenses are allowed; 2) establish a maximum allowable

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reimbursement for travel, meal and lodging expenses; and 3) create a standardized form, subject to disclosure under the Freedom of Information Act, for submission of travel, meal, and lodging expenses which requires the employee or official to provide the following documentation in writing before any reimbursement can be made:

- an estimate of the cost of travel, meals or lodging if expenses have not been incurred or a receipt of the cost of travel, meals or lodging if the expenses have already been incurred
- the name of the individual who received or is requesting the travel, meal or lodging expense
- the job title or office of the individual who received or is requesting the travel, meal or lodging expense; and
- the date or dates and the nature of the official business in which the travel, meal or lodging expense was or will be expended

Beginning on June 29, 2017 (180 days after the effective date of the law), no public agency may approve or pay any travel, meal or lodging reimbursement unless the prescribed regulations have been implemented. The Act also prohibits any reimbursement

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whatsoever for "entertainment," which is defined to include, at least, "shows, amusements, theatres, and sporting events." The Act permits public agencies to include provisions in their expense regulation that allows for the approval of expenses which exceed the maximum allowable travel, meal and lodging expenses in emergencies and other "extraordinary circumstances."

Beginning on March 1, 2017 (60 days after the effective date of the law), a public roll call vote is required to approve all expenses for board members and to approve those expenses of employees which exceeds the regulation. Note that this requirement goes into effect 4 months before the mandate for the regulations themselves.

This new law addresses both reimbursements to officials and direct payments to third parties on behalf of those officials. Regulations adopted pursuant to this law should also meet the requirements of Section 10-22.32 of the School Code (which authorizes the advancement to school board members of the anticipated actual and necessary expenses incurred in attending meetings sponsored by the ISBE, regional superintendents of schools, certain meetings sponsored by school board associations that comply with Article 23 of the School Code, and meetings

sponsored by a national organization in the field of public school education).

While the Act does not change the types of expenses for which employees and board members may be reimbursed, it does impose significant new policy, reporting, and voting requirements on school districts and school boards for such reimbursements. If you have any questions, contact our attorneys at 708-799-6766 or 630-928-1200.

Search of Student Cell Phones: Recent Decision Favoring Schools

One difficult issue facing public school officials is under what circumstances are searches of the personal items of students legally permissible. Nowhere is this more difficult than when

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the personal item in question is the content of electronic messages and images on a cell phone. The law in this area is still evolving, as a recent case out of California demonstrates.

In the case of *In re Rafael C.,* which was first issued on March 25 and then modified on April 21, 2016, a California Appellate Court ruled that school officials did not violate a student's Fourth Amendment rights regarding search and seizure when school administrators searched his cell phone in connection with an ongoing school investigation. The matter evolved from school administrators' discovery of a firearm on campus in a trash can. Administrators, suspecting a particular student, seized and searched his cell phone. During the cell phone search, the administrators located photographs within text messages sent by the student, including one in which the student appeared to be holding the firearm that was found on campus. The student was subsequently charged with and brought before a juvenile court for possession of an assault weapon. During the juvenile matter, the student sought to suppress evidence from the student's phone, claiming the search was improper. The juvenile court found the search to be reasonable, however, and denied the student's motion.

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The California court reviewed whether or not the search of the student and the student's cell phone was constitutional, including whether the school had sufficient reasonable suspicion to conduct the search. As described in a previous Priority Briefing, here, the Fourth Amendment to the United States Constitution protects our right to be secure in our "persons, houses, papers and effects against unreasonable searches and seizures…" and requires that law enforcement obtain a search warrant supported by probable cause "particularly describing the place to be searched…" In applying the Fourth Amendment to schools, the United States Supreme Court ruled in the 1985 case of *New Jersey v. T.L.O.* that even though students have a reasonable expectation of privacy in their persons and personal belongings, school officials, unlike police officers, do not have to have probable cause, but only a reasonable suspicion, that a student is in possession of fruits and/or instrumentalities of criminal activity, and/or contraband, to conduct a warrantless search of a student. Moreover, searches by school officials are subject to a two-part "reasonableness" test. Provided that school officials are, first, able to point to factual circumstances which justified their decision to seize a student's phone and, second, limit the scope of their search

of its content to the circumstances which justified the seizure in the first place, the Supreme Court's ruling should have no impact on their authority to conduct warrantless searches of student's phones. But, as with any item of personnel effects, justification for the initial search alone does not necessarily justify a highly intrusive examination of the item's contents.

In *In re Rafael C.* the court determined that the search of the student and the cell phone were reasonable in inception, scope and intrusion. Facts leading the court to its determination of reasonableness include that the firearm was discovered on campus, the student had been present in the area, the student had been acting suspiciously and ignored instructions from school administrators, and the student was fingering his pocket where the cell phone was located during questioning. The court also noted that the school administrators feared that there might be other guns on campus and that the student may be using the cell phone to communicate with accomplices. Based on these facts, the court determined that the school administrators had reasonable grounds for suspecting the search would turn up evidence that the student was violating or had violated the law or school rules and that the school had sufficiently limited the

search in scope and intrusion.

Importantly, the court also decided that a warrant was not needed to search the student's phone, thereby rejecting the application of *Riley v. California*, a recent United States Supreme Court determination, to school matters. In *Riley*, the United States Supreme Court determined a law enforcement officer violated the Fourth Amendment when he viewed the digital contents of a suspect's cell phone without consent and without obtaining a warrant. We discussed the *Riley* case in an earlier Priority Briefing, found here. In this matter, however, the California court differentiated *Riley* from school matters by citing the pivotal United States Supreme Court decision, *T.L.O. v. New Jersey*: "The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." The California court found that *Riley* did not address the particular factual situation before it – namely, a search of a student's cell phone by school administrators – and therefore it was not proper to

consider in this case.

We emphasize that, despite the outcome of *In re Rafael C.*, the law regarding search of student cell phones is not settled. It is important to note that this decision from the California Appellate Court is not binding on Illinois courts. There is no case law in the state or federal courts of Illinois that directly addresses the issue of reasonableness of student cell phone searches in a post-*Riley* context. Courts in other jurisdictions have arrived at different conclusions than the California Appellate Court. Until the case law is settled in Illinois or nationally, school officials must continue to be careful to balance the interests of the school/government against the student in determining whether or not a search will be reasonable under the Fourth Amendment. Further, the decision in *In re Rafael C.* clearly addresses matters involving a search by a school administrator and not a school resource officer; therefore, schools are cautioned to use additional discretion and care in any matters involving school resource officers.

Given the uncertainty in this area, school administrators should consult with legal counsel when considering a search of a cell phone. If you have any questions, please contact one of our

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attorneys at our Flossmoor ((708) 799-6766) or Oak Brook ((630) 928-1200) offices.

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

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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 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

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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 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

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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, 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

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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 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

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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 (708.799.6766).

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

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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 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

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$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

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

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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, 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

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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

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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.

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

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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 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 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).

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,

Published April 15, 2026

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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 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

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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." (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

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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 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

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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 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

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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).