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REQUIREMENT TO PROVIDE WRITTEN MATERIALS THREE DAYS BEFORE IEP MEETINGS DELAYED UNTIL JULY 1, 2020

On December 6, 2019, the Governor signed into law Public Act 101-0598 (SB 460) which modifies the new requirement in Public Act 101-0515 that schools provide all written materials that will be discussed by the IEP team at Eligibility and IEP meetings to parents three school days before the meeting. This provision delays the three school-day disclosure requirement until July 1, 2020.

No revisions were made to the requirements regarding related service logs or compensatory services.

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If you have questions regarding SB 460 or P.A. 101-0515, please call one of our attorneys in Flossmoor at 708-799-6766 or in Oak Brook at 630-928-1200.

ISBE ISSUES AMENDMENT TO EMERGENCY RULES ON PHYSICAL RESTRAINT

Reacting to concerns about the ability to maintain student safety without the ability to use prone restraint, the Illinois State Board of Education has issued an amendment to the emergency regulations to provide for the emergency use of prone restraint.

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According to the Emergency Amendment, prone restraint may be used if all of the following criteria are met:

1. The school district or other entity has determined that the student has no medical or psychological limitations that contraindicate the use of prone or supine restraint.
2. The school district or other entity determines that the situation is an emergency, in which immediate intervention is necessary to protect the student or others from imminent danger of causing serious physical harm to the student or others and less intrusive measures have been tried and were ineffective. The prone or supine restraint must be the least restrictive and

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intrusive intervention to address the emergency.

3. The prone or supine restraint does not impair the student's ability to breath or communicate.
4. Personnel using prone or supine restraint have completed required training.
5. One school professional, not involved in the holding of the student, and trained in identifying signs of distress, observes the student during the entire incident.
6. The number of staff involved in restraining the student cannot exceed the number of people necessary to safely hold the student.
7. The prone or supine restraint ends immediately when the threat of imminent serious physical harm ends, and the restraint shall not last longer than 30 minutes,

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unless authorized by a school administrator after the school administrator consults with a psychologist, social worker, nurse or behavior specialist.

8. If a student is restrained in a prone or supine restraint in at least 2 separate incidents within a 30-school day period, school personnel who initiated, monitored and supervised the incidents shall review the effectiveness of the procedures used. A psychologist, social worker, nurse or behavior specialist must be included in this review. The review must include, but is not limited to conducting or reviewing a functional behavior analysis, developing additional or revised positive behavior interventions, considering actions to reduce restraint and/or modifying the student's IEP or behavior plan. The team must also review any known medical or psychological limitations that contraindicate the use

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of restraint and, if applicable, must document any prohibition on restraint in the student's IEP or behavior plan.

If you have questions regarding the Emergency Amendment to the Emergency Regulations, please call one of our attorneys in Flossmoor at 708-799-6766 or in Oak Brook at 630-928-1200.

GUIDANCE: ISBE EMERGENCY RULES ON TIME OUT AND PHYSICAL

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RESTRAINT

Effective November 20, 2019, the Illinois State Board of Education issued emergency regulations, 23 IAC 1.285, regarding requirements for the use of time out and physical restraint. ISBE also issued a Physical Restraint and Time Out Form to be completed after each instance of time out or physical restraint and submitted to the parent and to ISBE. Below is a summary of the important revisions to the regulations and our guidance regarding some questions that we have received from clients.

Revisions to Time Out and Physical Restraint

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- Time
  out and Physical Restraint may only be used for "therapeutic purposes" to
  maintain a safe environment for learning and to preserve the safety of students
  and others.

- The
  emergency regulations eliminate the use of "isolated time out" and broadly
  define time out as a "behavior management technique that involves the monitored
  separation of a student from classmates with a trained adult for part of the
  school day, usually for a brief time, in a non-locked setting."

- A
  trained adult must be present with the student during time out and if there is

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a door in the time out enclosure, it cannot be locked. Enclosures for time out must satisfy all health/life safety requirements. Every 15 minutes the trained adult must assess whether the student has ceased the behavior for which time out was imposed.

- The adult monitoring the student in time out or applying physical restraint must be trained in de-escalation techniques, restorative practices and behavior management practices.

- Prone restraint is no longer permitted.

- Although

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the regulations continue to provide that physical restraint may only be used
when a student poses a physical risk to him/herself or others, the ISBE form
describes the reasons for restraint or time out as "imminent danger" to self,
other students or staff members.

- After
3 incidents of time out or physical restraint, school personnel must determine
if a student without an IEP or Section 504 plan should be referred to a problem
solving team or for an evaluation under IDEA or Section 504. For a student with an IEP or Section 504
plan, the team must determine whether an IEP or Section 504 meeting should be held
to develop or revise a behavior intervention plan, review the effectiveness of
behavior interventions, or to consider a change of placement for the student.

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Notification and Reporting Requirements

- The new ISBE Physical Restraint and Time Out Form must be completed after each incident of physical restraint or time out, must be sent to the parent within 24 hours and to ISBE within 48 hours.

- ISBE is also requiring districts, cooperatives and other educational facilities to submit to ISBE physical restraint and time out data for the 2017-2018, 2018-2019 and 2019-2020 school years by December 20, 2019.

Other Requirements:

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- The regulations amend policy requirements for districts, cooperatives and other educational facilities that employ physical restraint and time out.

- The regulations establish a Complaint procedure in which a parent, advocate or other individual may complain to ISBE that a district, cooperative or nonpublic facility is violating the physical restraint and time out regulations.

The Emergency Regulations are unclear in some areas and at times contradictory. They are effective for 150 days and we will be monitoring any changes or further guidance from ISBE. Below are some questions and concerns that some of our clients have raised about the

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regulations, with
answers that include our current interpretation of the ISBE regulations and
form:

Questions Regarding Time Out and Physical Restraint Emergency Rules:

1. How does ISBE define “imminent danger”?
   “Imminent” is not defined by ISBE in the regulations or on the form. The regulations continue to indicate that physical restraint may be used only if the student poses a “physical risk” to himself, herself or others. When a legislature does not define a term, courts look to the term’s ordinary meaning. According to the dictionary, imminent means that something will happen very soon. Danger is a synonym for risk. So, we interpret this to mean that the risk of physical harm to the student or others will happen very soon and therefore the time out or restraint is necessary.

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2. What constitutes “time out?”
   The definition of “time out” in the regulations is very broad and includes a “behavior management technique” that involves the monitored separation of a student from classmates with a trained adult for part of the school day in an unlocked setting. The regulation also provides, however, that “time out” is used as a means of maintaining a safe environment for learning to the extent necessary to preserve the safety of students and others. Furthermore, the ISBE form to be completed for restraint and time out requires staff to check one of two reasons for a restraint or time out: (a) imminent danger to self or (b) imminent danger to another student or to staff.

a. If a student chooses to take a break, but they are separated from their peers, is that considered a “time out”? Does that require the completion of the form, notification of parents, and submission to ISBE?
   This seems to be an accommodation to the student. Using the broad definition in the regulation, this is a monitored separation of the student from his classmates. However, if the student is not choosing to take a break at

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a time when the student is exhibiting behavior that results in imminent danger to him or herself or others, we believe that the ISBE form would not need to be completed. If the student were to request a break three times, that would not seem to be a situation where we would hold an IEP meeting to change interventions or placement. To the contrary, the student's strategy is effective and positive. This situation does not seem to fall within the intention of the regulations or the ISBE form.

b. If students become disruptive in a classroom and the classroom is cleared except for the disruptive student, is that considered a "time out"? Does that require the completion of the form, notification of parents, and submission to ISBE?
This is a situation that seems to fit within the intent of the regulations. Presumably a classroom is cleared because the student is exhibiting behavior that results in imminent danger to him or herself or others. The room is cleared to maintain a safe environment and to preserve the safety of the student and others. We recommend completing the ISBE form in this situation.

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c. If a student leaves the classroom and processes with a social worker in their office or an alternate location, is that considered a “time out”? Does that require the completion of the form, notification of parents, and submission to ISBE?
   Similar to example a above, unless the student’s behavior is causing imminent danger, we would not consider this situation to be within the intent of the regulations and would not complete the form.

d. Is the use of a barrier, such as a divider or study carrel, that separates a student from their peers within a classroom considered a “time out”? Does that require the completion of the form, notification of parents, and submission to ISBE?
   As with examples a and c above, we don’t believe this is within the intent of the regulations unless the student’s behavior is causing imminent danger. Use of a barrier may be an accommodation to a student, for example to lessen distractions caused by other students.

e. Is a “chill zone” within a classroom considered a “time out”? Does that require the completion of the form,

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notification of parents, and submission to ISBE?
We see this in the same way as example a. Additionally, depending on how the "chill zone" is set up, it may not be a separation from peers. Also, typically a "chill zone" is available to all students in the classroom.

f. Is a student going to or sitting in the Principal's office to do work considered a "time out"? Does that require the completion of the form, notification of parents, and submission to ISBE?
Again, we do not consider this to be within the intent of the regulations unless the student's behavior that caused the removal to the principal's office resulted in imminent danger. However, in a Dear Colleague Letter on disciplining students with disabilities, OCR cautioned that repeatedly sending a student to the principal's office may be considered an in-school suspension, i.e. exclusionary discipline.

g. Is an in-school suspension considered a "time out"? Does that require the completion of the form, notification of parents, and submission to ISBE? Where is the line drawn between "time out" and "in-school suspension"?

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In school suspension is a discipline matter. Time out and physical restraint may not be used for discipline. Rather than completing a time out/restraint ISBE form for a suspension, complete your form for a 1-3 day suspension or a suspension over 3 days, as applicable.

3. How does ISBE define a “trained adult?”
   The regulations require that any adult supervising a student in time out or applying physical restraint must be trained in de-escalation, restorative practices and behavior management practices.

4. What is required to demonstrate training in “restorative practices”?
   The regulations do not define the components of training in restorative practices. For what it’s worth, the Illinois Unified Code of Corrections defines training in restorative practices to include “programs and activities based on a philosophical framework that emphasizes the need to repair harm through a process of mediation and peace circles in order to promote empowerment and reparation.”

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5. What is required to demonstrate training in “behavior management”?
   The regulations provide only the components of de-escalation/restraint training (unchanged from the previous version of the regulations). What is required for training in behavior management in not defined. It is unclear whether training in PBIS, for example, satisfies this requirement.

6. Who should be maintaining these student records and submitting them to ISBE? Is it the location where it occurred or the resident district who maintains student records?
   The location where the restraint or time out occurred should maintain the records and submit them to ISBE. The regulations state that the “entity serving the student” is to send the form to the parent and to ISBE. See 1.280 (g)(2) and (h).

7. With regards to reporting to parents and ISBE the use and required documentation, does that mean all incidents that occur on a Friday must be submitted before everyone leaves for the day to comply with the “24 hour” and “48 hour”

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timelines?

This is unclear from the regulations. Reg. 1.285 (f)(3) provides that the ISBE restraint/time out form must be completed by the beginning of the school day following the episode of restraint or time out. Completing the form by Monday morning would comply with this section of the regulations. Yet, sections (g) and (h) of the regulations require sending the form to parents within 24 hours and to ISBE no later than 48 hours after the use of restraint or time out. The ISBE form requires that written parent notification occur within 24 hours of the incident. The most conservative approach would be to complete and send the Form by the end of the day on Friday. However, Line 11 of the ISBE form provides options to check for notification to parents, including a) phone call, b) email, c) other and d) required written parent notification, therefore contemplating that there may be situations in which parents are contacted by multiple means. A possible solution is that if paperwork cannot be completed timely, or if completion of the form by the beginning of the next school day exceeds the 24 hour parent notification period, that a designated team member

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contact the parent by email (so that the notification is written), explain that a restraint or timeout occurred and the information that will be documented on the form and tell the parent that the form will be sent to the parent on Monday.

The other thing to note is that ISBE does not indicate the means by which the written notification must be sent to the parent. Letter to Breton (OSEP 2014) indicates that IEPs and progress reports may be sent to parents through email as long as the parent and district agree and security measures are in place. If the team wants to send restraint/time out forms through email, parent permission should be obtained and measures should be in place to ensure that there is confidential transmission of the emailed form to the parent.

8. What does “non-therapeutic” timeout mean? Must you have a meeting after every third “therapeutic” time out, since it only says after “non-therapeutic” timeouts?
   Presumably, a non-therapeutic time out or restraint is one that is performed to administer discipline to a student and this is not permitted by the regulations. The

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regulatory requirement to hold a meeting when there are three "non-therapeutic" time outs or restraints does not make sense. However, the ISBE restraint/time out form, in line 15, provides options for meeting discussions upon the third incident of restraint or time out (as opposed to non-therapeutic restraints or time outs), so a meeting is required after 3 incidents. The form provides the choices to hold a problem-solving meeting or a domain meeting for a student not already eligible for an IEP or Section 504 Plan, or a meeting to review interventions for students with an IEP or Section 504 Plan. An "other" choice is given, which, according to the regulations, could include a meeting to determine if a change in placement is necessary.

9. Are resident districts liable for the actions of a therapeutic day school's adherence to the new legislation? There is a new complaint process in which the parent can file a complaint with ISBE against the facility that performed the time out or restraint. In that case, ISBE would investigate the facility. However, if a parent files a request for a due process hearing, that hearing

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request must be filed with the Superintendent of the school district in which the student resides. If the parent alleged that the restraint/time out denied the student a FAPE, the district could be held liable, for example for compensatory services. When a district places a student out of district, the district is required to monitor the placement to ensure that FAPE is being provided.

10. If a dean momentarily restrains a student in the hallway to break up a fight, is this a physical restraint that should be documented on the ISBE form and sent home to parents?
    The regulations continue to include the exception that, pursuant to Section 10-20.33 of the School Code, physical restraint does not include momentary periods of physical restriction by direct person-to-person contact, without the aid of material or mechanical devices, accomplished with limited force and designed to: 1) prevent a student from completing an act that would result in potential physical harm to himself, herself, or another or damage to property; or 2) remove a disruptive student who is

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unwilling to leave the area voluntarily.

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"Public Act 101-531: New Procedures and Obligations Regarding Abuse Investigations and Employee Criminal Backgrounds"

On August 23, 2019, Governor Pritzker signed Public Act 101-0531

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which takes effect immediately. As further described in this briefing, the Public Act changes several areas of the School Code. Most notably, the Public Act significantly changes the procedure for investigating sexual abuse allegations made against a school district's staff members, vendors, or volunteers. The Public Act also makes several additional changes that impact school districts' hiring processes; applicant and employee background checks; staff mandated reporting obligations under the Abused and Neglected Child Reporting Act; and, the suspension of a teacher's license for improperly resigning.

Sexual Abuse Investigations

The Public Act adds Section 22-85 to the School Code. This section

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requires boards of education to
adopt a policy and procedure governing the investigation of alleged incidents
of sexual abuse upon a child by an employee, school vendor or volunteer
("school staff member") either on or off school grounds. This procedure must include the following:

1. If any mandated reporter at a school
becomes aware of an allegation of sexual abuse by a school staff member, he/she
must "immediately" contact DCFS after obtaining the "minimal information
necessary to make a report".

2. Any incident of alleged sexual abuse
reported to DCFS or local law enforcement which is accepted for investigation
must also be referred by the "entity that received the report" to the local

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Children's Advocacy Center. This requirement applies to "schools in a county with an accredited Children's Advocacy Center." We recommend that you become familiar with your local Children's Advocacy Center's contact information and reporting protocols.

3. The school will need to designate a contact person to communicate with the local Children's Advocacy Center. This can be the school's Title IX officer, a school resource officer or the employee selected to lead the investigation into the allegation.

4. After a complaint is accepted for investigation by DCFS or local law enforcement:

a. The school **may not** interview the alleged victim regarding

the details
of the incident until after completion of a forensic interview of the victim by
the Children's Advocacy Center; and

b. If asked by DCFS or local law enforcement,
the school must provide any evidence the school has gathered to local law
enforcement or DCFS provided said disclosure does not violate State and federal
law.

The Public Act
also creates a process by which school personnel may view the electronic
recordings of the alleged victim, or to interview the alleged victim if there
are delays in the forensic interview or if the school determines that the
information learned from the forensic interview is insufficient

to complete the
school's investigation.

Finally, every two
(2) years each district must review all existing policies and procedures that
it has concerning sexual abuse investigations to ensure compliance with Section
22-85.

Given some of the
procedural requirements to conduct this interview, we recommend you work with
your attorneys to ensure compliance with the new statutory obligations.

**Hiring
and Background Checks**

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Under
the Public Act, the following actions are now required of local school
districts:

1. Each
   employee must be checked every five (5) years of employment through the
   Statewide Sex Offender Database and the Murderer and Violent Offender Against
   Youth Database. We recommend that each
   District complete this check of all employees who have been employed with the
   District for more than five (5) years within the next sixty (60) days and keep
   records of the check. You can then
   establish a rolling review for all employees employed less than five (5) years
   so that this is completed on an annual basis.

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- Each district must "consider" the status of a person with an indicated finding of abuse or neglect by DCFS or another child welfare agency prior to hire. This does not preclude the hiring of individuals with an indicated finding but only requires that the finding be considered. We recommend keeping information outlining the steps taken in considering the employment of such an individual and the reasons that a decision was made to hire such a person.

- If the district becomes aware that an employee has a prohibited conviction under Section 21B-80 or which requires registration under the Statewide Sex Offender Database or the Murderer and Violent Offender Against Youth Database, the district Superintendent is required to notify the State

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Superintendent in
writing of the conviction or registration within fifteen (15) business days.

Prohibited
Criminal Offenses

The following prohibited convictions have
been added to the School Code by the Public Act:

1. Luring
   of a Minor – 720 ILCS 5/10-5.1
2. Involuntary
   Sexual Servitude of a Minor – 720 ILCS 10-9(c)
3. Solicitation
   to Meet with a Child – 720 ILCS 5/11-6.6
4. Sexual
   Relations within Families – 720 ILCS 5/11-11
5. Aggravated

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Battery – 720 ILCS 5/12-3.05

6. Aggravated
   Domestic Battery – 720 ILCS 5/12-3.3
7. Criminal
   Street Gang Recruitment on School Grounds – 720 ILCS 5/12-6.4
8. Hate
   Crime – 720 ILCS 5/12-7.1
9. Female
   Genital Mutilation – 720 ILCS 5/12-34
10. Inducement
    to Commit Suicide – 720 ILCS 5/12-34.5
11. Sexual
    Conduct or Sexual Contact with an Animal – 720 ILCS 5/12-35

It is our opinion that you are not required to terminate any current employees who were employed prior to August 23, 2019 who have been convicted of one of these

newly added offenses prior to their employment.
Any new applicants for employment would not be eligible for employment
if they have any of these convictions.
In addition, any current employees who are convicted of one of these
offenses subsequent to August 23, 2019 would also be ineligible for employment.

Mandated
Reporting

The Public Act
requires that all mandated reporters employed by a district annually review
ISBE developed materials and DCFS developed materials on reporting
obligations. We recommend that an annual
sign-off sheet or similar acknowledgement be created which documents compliance

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with this provision.

The Public Act
also permits the immediate termination of non-licensed employees based upon a
negligent or willful failure to report an instance of suspected child abuse and
further permits the suspension of any licensed employee for the same
conduct.

Another major
change made by the Public Act is that the State Superintendent is required to
immediately suspend the license of any employee “charged” with any offense
prohibited under Section 21-80 of the School Code. While the Public Act does not require it, we
recommend that a school district report any employee charged with a prohibited offense

to the State Superintendent, so that she may fulfill her role in this process.

Teacher Resignations

The Public Act modifies Section 24-14 of the School Code, which deals with resignations by teachers. As you are likely aware, a tenured teacher may only resign after providing thirty (30) days written notice upon the secretary of a board of education or obtaining the board's consent. Moreover, no teacher (probationary or tenured) may resign during a school term in order to accept another teaching position without the board of education's concurrence. As amended, if a teacher resigns improperly the Board of Education may pass a resolution reflecting that the teacher's

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resignation was not in conformity with Section 24-14 and serve it upon the State Superintendent. The State Superintendent is then required to convene an informal evidentiary hearing within ninety (90) days after the date of the resolution. If it is determined at this hearing that the resignation was not in conformity with the School Code, the teacher's license "shall" be suspended for a period of one (1) year. A teacher may also agree to a "lesser licensure sanction" in lieu of such a hearing and finding, at the State Superintendent's discretion. We are happy to work with your District to create a resolution that is in conformity with the requirements of the State Superintendent should you have any resignations which are unauthorized.

As you can see, the changes made by the Public Act are numerous and will impact

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several areas
of the day-to-day operations of local school districts. If you have questions regarding the Public
Act or would like recommendations on implementing its new requirements, please
call one of our attorneys in Flossmoor at 708-799-6766 or in Oak Brook at
630-928-1200.

HB 3586: New Disclosure Requirements for IEP Meetings and Related Service Logs

On August 23, 2019, the Governor signed into law HB 3586, which requires districts to provide additional disclosure and

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notification to parents of students who are or may be eligible for special education services into law. The Public Act is effective immediately.

The Act requires that the school district provide certain documents to parents before IEP eligibility meetings and IEP review meetings:

What documents must be provided to the parent before an IEP meeting? The District must provide the parent with "all written material that will be considered by the IEP team at the meeting" so that the parent may participate in the meeting as a fully-informed team member.

Written material includes, but is not limited to:

- All evaluations and collected data that will be considered at

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the meeting

- If the student already has an IEP, a copy of all IEP components that will be discussed by the IEP team, other than the components related to the educational and related services proposed for the student and the student's educational placement.

How soon before an IEP meeting must the documents be provided to the parent?

The documents must be provided to the parent no later than three school days prior to the student's eligibility meeting or IEP meeting. However, if the IEP meeting is scheduled in three days after parents waive the ten-day notice requirement, the documents must be provided to the parent as

soon as possible.

The law also establishes new requirements for producing related service logs to parents and for reporting missed related services:

What information must service logs include? Service logs must record the type of related service provided and the minutes of service provided.

When must related service logs be provided to the parent?

Related service logs must be provided:

- At the student's annual review; and
- At

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any time at the request of the parent

What notice must the school district provide the parent about production of logs?

The District must inform parents within 20 school days from the start of the school year or upon the establishment of an IEP of the parent's ability to request a copy of related service logs.

What reporting is required if related services are missed?

If related services required by the IEP are not provided within ten school days after a "date or frequency" set forth by the student's IEP, the District, within 3 school days, must provide the parent with notice of the District's noncompliance with the student's IEP

and include information about the parent's ability to request compensatory services in the notice. "School days" do not include days when the child is absent from school for reasons unrelated to a lack of IEP services.

HB 3586 also requires all districts to utilize Response to Intervention when determining whether a student is eligible for special education. It amends the definition of student "temporary records" to include information contained in service logs.

If you have questions regarding HB 3586 or would like recommendations on implementing these new requirements, please call one of our attorneys in Flossmoor at 708-799-6766 or in Oak Brook at 630-928-1200.

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Prevailing Wage Amendments Ease School District Duties for Determining Rates, Maintaining Records

Effective this year, school boards will no longer have to adopt Prevailing Wage Act resolutions in June. Recent amendments to the Act made this change and others but did not modify the Act's central provision that public bodies must require their contractors for public works to pay the locally prevailing wages.

Public Act 100-1177, passed last year but not effective until June 1, 2019, amended the Prevailing Wage Act ("PWA"). PWA generally requires that all contractors on public works in Illinois pay no less than the wages prevailing in each trade in the locality. Public bodies must include a requirement for the

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payment of prevailing wages in their solicitation and specifications for bids, public works contracts, and purchase orders. These requirements remain.

To effectuate the prevailing wage requirement, PWA had imposed certain mandates on school districts and other public bodies. Among these mandates was the obligation to determine the applicable rates by board action in June of each year. While that determination could be made after holding public hearings, the simplest and most common practice has been for governing boards to approve a resolution adopting those rates which the Illinois Department of Labor has determined to be the average rates for the various building trades in the county where the public body is located. That resolution then had to be filed with the Department. However, beginning this year, public bodies do not have to approve any resolution; instead, the prevailing wage rates as administratively determined by the Department will apply automatically.

Another mandate for school districts and other public bodies under PWA has been to receive and maintain copies of monthly certified payroll records provided by the contractors to evidence the wages actually paid. These records were then

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subject to inspection upon request by interested parties. The PWA amendments will relieve public bodies of this records-retention function, but not immediately. Instead, the Department of Labor will be creating no later than April 1, 2020, an electronic database where contractors will have to upload their payroll records. Once that database is in operation, local districts will no longer have a duty to receive, maintain, and grant access to those records.

The PWA amendments made other revisions to the law which do not directly impact school districts. These include tying the definition of “prevailing” more directly to collectively bargained rates and imposing new reporting duties on the Department of Labor regarding the participation of minorities and females on public works.

If you have any questions about these amendments or the PWA generally, please contact one of our attorneys at 708/799-6766 (Flossmoor) or 630/928-1200 (Oak Brook).

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Reminder About Board Organizational Meetings

Pursuant to law, every school board must hold its organizational meeting no later than 28 days after the consolidated election. Further, new board members cannot be seated until after the official canvass of the results by the county election authority. The deadline for the canvass is not until 21 days after the election.

Therefore, the effective window period to hold all school board organizational meetings this year begins no earlier than Tuesday, April 23, and ends no later than Tuesday, April 30, 2019.

If your Board does not have a regular meeting scheduled during that week-long period, a special meeting must be called.

The only tasks which must be performed at the organizational meeting are these:

1. Swear in and seat newly elected board members. The

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prescribed oath for board members, which has been greatly expanded, can be found in an amendment to Section 10-16.5 of the School Code: http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=100-1055&print=true&write=

2. Elect board officers, including president, vice president and secretary.
3. Set the board's regular meeting schedule.

Other business may be, but need not be, conducted at the organizational meeting.

If you have any questions about organizational meetings or the transition to new board terms, please contact one of our attorneys at 708/799-6766 (Flossmoor) or 630/928-1200 (Oak Brook).

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TRS Requires Submission of Grandfathered Contracts And Collective Bargaining Agreements By March 29, 2019

TRS has just issued Employer Bulletin 19-12 dated February 2019, which is available on the TRS website at: https://www.trsil.org/employers/employer-bulletins/FY19-12. This bulletin requires that all TRS employers submit all grandfathered individual employment contracts and collective bargaining agreements ("CBAs") to the TRS CBA/Contract Collection Portal by **March 29, 2019**. Grandfathered contracts and CBAs are those entered into prior to June 4, 2018, which provide for salary (*i.e.*, TRS credible earnings) increases greater than 3%. According to the TRS Bulletin, if the employer's grandfathered contracts and CBAs are not submitted as required, any increase in a member's TRS creditable earnings for 2018-19 and future years will be subject to the 3% limitation on creditable earnings used to determine a member's final average

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salary upon retirement. The CBA/Contract Collection Portal is accessed at https://employer.trsil.org/subsections/employeraccess/security/signIn.aspx.

Should you have any questions regarding this obligation, please contact our attorneys in our Flossmoor Office at 708-799-6766 or our Oak Brook Office at 630-928-1200.

Proposed New Regulations on Sexual Harassment and Sexual Violence From The U.S. Department of Education

On Friday, November 16, 2018, the U.S. Department of Education issued proposed Regulations that would alter what constitutes

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sexual harassment, what triggers a duty to respond, due process afforded to individuals and procedural responses to complaints, among other things. The Regulations are available for public comment for 60 days.

During President Obama's administration in 2011, the Department of Education issued policy guidance addressing Title IX's protections against sexual violence and harassment, including procedural requirements that applied to resolve complaints. The 2011 guidance was in lockstep with the Obama administration's increased enforcement of investigating violations through the Office for Civil Rights and the Department of Justice. Again in 2014 and 2015, the Obama administration issued additional guidance to address policies, practices, roles and responsibilities for investigating complaints and following Title IX.

Upon her appointment to the position of Secretary of Education, Betsy DeVos signaled that she would take up issues relating to Title IX, and started doing so in September 2017 when she revoked the 2011 and 2014 guidance documents. Since that time, the U.S. Department of Education has utilized guidance from 2001 and 2006, as well as an interim guidance document. Last Friday,

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DeVos released proposed Title IX Regulations that would, for the first time, address the issue of sexual violence and harassment through binding regulation. If implemented, the Regulations would change multiple current aspects and practices of Title IX, including what constitutes sexual harassment, what triggers a duty to respond, due process afforded to individuals and procedural responses to complaints.

Changes of Note

School Obligations Triggered by Actual Knowledge: Under previous guidance, a school had an obligation to investigate and address sexual harassment when the school should have known about the harassment – something called constructive notice. **Proposed Regulation Section 34 C.F.R. 106.44 provides that schools would only have an obligation based on actual knowledge of sexual harassment.** Actual knowledge is notice of sexual harassment or allegations of sexual harassment to an official of the school who has authority to institute corrective measures on behalf of the school. Accordingly, it is only when a school makes an intentional decision not to respond to third-party discrimination that the school can be said to subject another to discrimination. Stated another way, constructive notice is no

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longer sufficient to establish obligations or claims of discrimination under Title IX.

Limitation on Responsibility for Response: **Section 34 C.F.R. 106.44 would act to limit the responsibility of schools for responding to sexually harassing and violent conduct to only that which occurs within the school's education program or activity.** The Regulation Notice suggested that in determining whether conduct occurs within a school's education program or activity, the school should consider whether the conduct occurred in a location or context under the purview of the school, whether the school exercised oversight, or whether the circumstance was funded, sponsored or promoted by the school.

Delineation of a Deliberate Indifference Standard: **The Regulations would implement a standard whereby schools must respond in a manner that is not deliberately indifferent.** Deliberate indifference is defined as a response to sexual harassment in a manner that is clearly unreasonable in light of the known circumstances. Previous guidance held a school responsible if it knew or should have known about the harassment.

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Formal Complaint Procedures: **Proposed section 34 C.F.R. 106.45 would address required grievance procedures for complaints of sexual harassment.** The procedures include (a) treating complainants and respondents equally, (b) requiring an objective evaluation of all evidence, (c) selecting a complaint investigator who does not have a conflict of interest or bias for or against complainants or respondents, (d) an equal opportunity for parties to present witnesses and other evidence, and (e) a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made. The Regulation also would have schools describe in policy or procedure the standard of evidence to be used to determine responsibility, but only permits schools to use a preponderance of the evidence standard (what is used in most civil litigation) if the school uses that standard for other conduct violations that have the possibility of similar disciplinary outcomes as a sexual harassment violation.

Notice of Allegations and Procedures: The Regulations would require that all parties receive notice of the allegations and grievance procedure utilized for an investigation. The notice of the allegations must include sufficient details such as the

identities of all parties involved and the conduct allegedly constituting sexual harassment.

Hearing or Written Question/Answer: 34 C.F.R. 106.45(b)(3) would require schools to afford the parties with the opportunity for a live hearing or an opportunity to submit written questions, provide answers to questions and allow limited follow-up between the parties. This requirement emphasizes an opportunity for additional due process of cross examination before a finding is made. Importantly, Sections 106.45(b)(3)(vi) and (vii) would prevent harassing or irrelevant questions about a complainant's sexual behavior or predisposition.

Inspection of Evidence: The Regulations would provide both parties an equal opportunity to review evidence obtained as part of the investigation – including evidence that might not be relied upon in reaching a determination. Schools must take caution to send each party any evidence prior to the completion of an investigative report and provide at least 10 days for the parties to provide any written response. This written response must be considered by an investigator in making any determination.

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Written Determination: The Regulations would require that all determinations be made in writing and include: (a) identification of the section of any policy/procedure/code that is alleged to have been violated; (b) a description of the procedural compliance with the Regulations; (c) findings of fact supporting the determination; (d) application of policy to the facts; (e) a statement and rationale for any sanctions to be imposed; and (f) the procedure and permissible bases for an appeal. The written determination must be provided to the parties simultaneously.

Supportive Measures: **The Regulations address that supportive measures are to be appropriately offered to the complainant or respondent of a claim of harassment or violence and may include protective changes to ensure the safety of all parties, counseling, extensions of deadlines, modifications of class or work, escorts, leaves of absence, increased security or other measures.**

Recordkeeping: **34 C.F.R. 106.45(b)(7) would impose upon schools a record-keeping requirement whereby they must maintain relevant records connected to the investigation for a period of 3 years.**

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Impact on Illinois Schools

The regulations will have widespread impact on schools. First and foremost, most schools will need to amend Board Policies 5:20, 7:20 and 2:260 to fall in line with the new requirements. For Boards of Education who subscribe to PRESS Policy Subscriptions, we anticipate that there will be forthcoming changes to those sections, and possibly others, after implementation of the Regulations.

One area of the Regulations that may pose a problem to schools is the requirement to have a complaint investigator who does not have a conflict of interest or bias in the investigation. It is unclear whether school personnel will be presumed to have an implicit conflict or bias or whether a third-party investigator will be required for complaints.

Because of the additional due process afforded to respondents, including notice of allegations and an opportunity to review investigatory evidence, schools will have to be very careful to address any confidentiality requirements that are required by law. In addition, investigators should be prepared to encounter witnesses who are more reluctant to share information due to the

requirement that investigatory materials be shared with the parties.

The written determination required by the Regulations would require a statement and rationale for any sanctions imposed upon any party. This requirement may pose a frustration to schools whose determinations of certain discipline for students and employees must be made at the Board level and not by a complaint investigator or administrator.

The Regulations require additional investigative, hearing, due process, recordkeeping and written determinations requirements that do not presently exist. Districts will need to ensure that their leadership, complaint managers, investigators and human resources professionals are appropriately trained on the changes in order to ensure compliance with the many procedural changes. Schools may find it beneficial to coordinate with a third-party investigator to ensure compliance with the Code changes.

Comment and Codification

A copy of the proposed Regulation is available here. The proposed Regulations are open for comment for the next 60 days

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and the deadline for commenters to provide feedback is January 15, 2019. To submit comments electronically, visit www.regulations.gov or send letters directly to the U.S. Department of Education: Attention Brittany Bull, U.S. Department of Education, 400 Maryland Avenue S.W., Room 6E310, Washington, D.C., 20202.

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

Cook County School Board Candidates' Filing Locations Announced for April 2, 2019,

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Election

Since the change in the law providing for school board candidate filings to be handled by the County Clerk rather than at the local school districts, the Cook County Clerk has been able to handle the volume of filings by using multiple sites in the suburbs, as well as the Clerk's central office in Chicago. Last week, the Cook County Clerk announced where those temporary filing sites will be this year. These temporary filing locations in Orland Park and Prospect Heights will be open for filings *only on the first day for filing*, December 10, from 8:00 a.m. to 5:00 p.m.:

Orland Park Civic Center 14750 Ravinia Avenue Orland Park, IL	Rob Roy Golf Course 505 E. Camp McDonald Road Prospect Heights, IL

The following Cicero and Chicago locations will be open for the entire filing period of December 10 through 17, from 8:00 a.m. to 5:00 p.m.:

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Elections Operations Center 1330 S. 54th Avenue Cicero, IL	Cook County Clerk's Office 69 W. Washington, Pedway Level Chicago, IL

With respect to the Chicago location, filings will be on the 5th Floor rather than on the Pedway Level on each day after December 10.

Also note that the South Suburban location in Orland Park and the West Suburban location in Cicero are different than the ones used in the last two election cycles. If you have any questions, please contact our attorneys in our Flossmoor Office at 708-799-6766 or our Oak Brook Office at 630-928-1200.

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