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IAASE Region One RoundTable: Mental Health Topics in Special Education

December 17, 2018 – The Buffalo Grove Park District Fitness Center, 601 Deerfield Parkway, Buffalo Grove, IL.

IAASE Region One RoundTable: Mental Health Topics in Special Education

December 4, 2018 – The Southwest Cooperative, 6020 W. 151st St., Oak Forest, IL.

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Hauser, Izzo, Petrarca, Gleason & Stillman, LLC Legal Breakfast

October 18, 2018 – Tinley Park Convention Center, Tinley Park, IL.

Nonprofit Hospitals Must Prove Actual Charitable Use for

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Property Tax Exemption

On September 20, 2018, the Illinois Supreme Court issued its much-anticipated decision in *Oswald v. Hamer*, a lawsuit challenging the facial constitutionality of Section 15-86 of the Property Tax Code, the nonprofit hospital property tax exemption legislation enacted by the General Assembly in 2012. That section created a new test for tax exemptions -weighing the cost of certain beneficial services against the hospital's estimated property tax liability – which was extremely easy for large modern hospitals to meet, even those which could not be considered "charities" under traditional standards. But while the Supreme Court upheld the special hospital tax exemption provision of the Revenue Act as not unconstitutional on its face, it made clear that any applicant for an exemption under that provision still "must show that the subject property meets the constitutional test of exclusive charitable use." For that reason, the Court's ruling is effectively a victory for school districts and other taxing bodies and should, ultimately, result in many hospitals coming onto the property tax rolls.

The Supreme Court emphasized that it was asked only whether

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Revenue Act Section 15-86 was invalid on its face, and the court ruled that it was not. (The Court expressly declined the Illinois Association of School Boards', the Illinois Association of School Administrators', and the Illinois Association of School Business Officials' request that it re-examine the way in which Illinois courts evaluate the constitutionality of the text of a statute.) However, in so doing, the Court was forced to expressly say that Section 15-86 cannot dispose of the traditional constitutional definition of charitable use for hospitals.

For that reason, the practical effects of the Supreme Court's decision are just as beneficial to school district finances as if the statute had been invalidated. "Nonprofit" hospitals (*i.e.,* those without shareholders) are now in no better position legally than they were before Section 15-86 was enacted in 2012; they still must show facts which demonstrate that they are truly and primarily charitable, including factors such as the public or charitable source of their funding, the dispensing of services regardless of ability to pay, and the absence of private profit or gain to those connected with the institution.

What remains to be seen is the reaction of the Illinois

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Department of Revenue, the various county boards of review, and local assessors to this decision. If those agencies implement the constitutional requirement as they should, a large number of the 157 nonprofit hospitals in Illinois will become taxable and their assessed values will be considered "new property" under Property Tax Extension Limitation Law. What we cannot say right now is how quickly and effectively this will be accomplished. No doubt there are many issues still to be resolved in the courts.

For those Illinois school districts with nonprofit hospitals within their geographical boundaries, this may have a major impact on their revenues. For Illinois taxpayers, this decision should bring an element a greater fairness in the distribution of their property tax burden.

Our attorneys John M. Izzo and Eugene C. Edwards submitted *amicus curiae* briefs in this appeal on behalf of the Illinois Association of School Board, the Illinois Association of School Administrators, and the Illinois Association of School Business Officials.

If you have any questions, please contact our attorneys in our

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

United States Supreme Court Declares Fair Share Agreements Unconstitutional

This morning, the United States Supreme Court issued its anticipated decision regarding fair share agreements and the related deductions from the wages of public sector employees. (*Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*) The Court determined that an "agency fee" or "closed shop" which compels payment to a union by public employees violates the First Amendment. It specifically stated that, "neither an agency fee nor any other payment to the union" may be deducted absent the affirmative consent of the public employee without violating the

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Constitution. According to the Court, in order to be effective, the waiver of the employee's right to refuse to submit payment must be freely given and the consent to payment must be shown by "clear and compelling evidence." The Court stated that, "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."

Based upon this language within the opinion, we believe that the holding applies to the withholding of wages for both union dues and fair share fees. You should immediately cease withholding union dues and fair share fees for all public employees unless you have a signed authorization form or card from each specific employee allowing such a deduction. In our opinion, a list of authorized employees provided by a union does not demonstrate "clear and compelling" evidence. You may have previously been provided signed authorizations from the unions or individual employees who have affirmatively consented to have union dues deducted from salary. If you have not previously received these signed authorizations, however, we advise that you request the authorizations from the unions and cease withholding such payments until you receive the signed authorizations. Lastly, if you receive a written request from a union member to cease

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withholding union dues and/or fair share fees, it is our opinion that you should do so immediately.

We realize that the payroll schedules will differ from employer to employer, and for different bargaining units within the same employer, we can help to navigate these issues at your request.

Attorneys in our Flossmoor (708-799-6766) and Oak Brook (630-928-1200) offices stand ready to assist with any questions you may have.

2018 Back to School Legal

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Workshop

Please join us for our Back to School Legal Workshop on Transgender Student Rights on Tuesday, August 7, 2018 at the NIU Naperville Campus. Please click the link below for more information. We look forward to seeing you!

Click Here to see the event flyer.

ISBE Releases Medication Administration Guidance

The Illinois State Board of Education (ISBE) has released long awaited updated guidance on medication administration in schools which can be found at https://www.isbe.net/Documents/Guidance-on-Medication-June-2018.pdf

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The new guidance gives school districts 13 points to include in their school medication polices:

(1) a Registered Nurse ("RN") should begin the process of reviewing any request to administer medication at school;

(2) school staff should only administer medication that is "absolutely necessary for the critical health and well-being of the student" to reduce any interruptions to the student or classes;

(3) administrators and the RN should reserve the right to refuse to administer medications and should communicate the reasons to the parents and prescriber;

(4) all medication requires parental consent and medical authorization;

(5) the school may elect to permit a parent to administer the medication;

(6) medication requests should only be valid for specific timeframes;

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(7) medications should be in official, properly labeled containers;

(8) specific self-administration rules should be in place;

(9) "standing orders" for administration of certain medications or medications (*e.g.* epinephrine) that are kept in stock should be identified;

(10)identify who will administer the medication;

(11)whether violation of the policy will subject a student to discipline;

(12)the manner of disposing of any medication remaining at the end of the school year or treatment; and

(13)the policy should be available in as many formats, media, and languages as needed to inform parents, students, and staff.

The majority of the new guidelines focus on four elements of Section 10-22.21b of the School Code:

(1) administration of medication to students should be

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discouraged unless absolutely necessary for the critical health of the student;

(2) neither teachers nor non-administrative staff, other than school nurses, should be required to administer medication to students;

(3) districts may have policies for self-administration of medication; and

(4) school employees are permitted to provide emergency assistance to students. The new guidance addresses common questions about each of these elements.

ISBE suggests that the administration of medication includes any act to deliver the medication, including preparing it or laying it out for the student. A nurse may delegate the administration of medication that can be taken by mouth or on the skin, but may not do so if the medication is delivered by any other method. The guidance applies to any time the student is at school or at any school-related activity. Medications are absolutely necessary when used to treat life-threatening conditions or any condition that has no other suitable treatment. The rules apply

to some substances that might not be considered “medication” by some, including aromatherapy, herbal substances, and oxygen, and regardless of whether the substance is prescription or over-the-counter, it requires a note from the health care provider. These rules apply regardless of whether the student is at the school, on a field trip, athletic event, or any other school-related activity. Ultimately, ISBE’s guidance is that medications should be administered only in limited circumstances and only with the participation of the school, the parents, and the health care provider. Note that, under current law, if a student is an approved medical marijuana patient, that the student must leave school grounds to administer the treatment. However, legislation allowing a parent to come onto school grounds or a school bus to administer medical marijuana to a qualifying patient has passed both houses of the legislature and awaits the Governor’s signature.

In accordance with the amended Nurse Practice Act, ISBE has proposed amendments to current regulations. Although there have been a number of questions in the past about what activities a nurse could delegate to non-nurses, the revised Nurse Practice Act, effective 9/20/17, addresses this issue. The Act permits a

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nurse to delegate medication administration and some other nursing activities to a non-nurse in a school setting if the nurse is comfortable with the student's safety and the staff member's competence to do so. The nurse, however, is never required to delegate authority, and a non-nurse is not obligated to accept the responsibility of administering medication or performing any other nursing activity if they are uncomfortable doing so.

The guidance also reiterates that schools are required to permit students to self-carry and self-administer medications for severe allergic reactions, acute asthma episodes, and diabetes. However, in all other circumstances, schools are not required to permit students to self-carry and self-administer other medications, and may enforce "drug-free school" policies.

Finally, the guidance reminds school officials that they are always permitted to administer emergency assistance to students. All staff members should be able to identify common emergencies to notify the school nurse and/or emergency services. This extends to the stocking of epinephrine and narcotic antagonists and the training of staff to administer those medications. In the event either of these medications are administered, a report

should be made to ISBE within three days.

The final pages of the guidance include sample procedures and documents for districts to review as they create their own policies. Attorneys in our Flossmoor (708-799-6766) and Oak Brook (630-928-1200) offices can assist with any questions you may have about the guidance or policies.

U.S. Department of Education Releases FAQ Guidance Addressing Photographs and Videos as Student Records

On April 20, 2018, the U.S. Department of Education released a Frequently Asked Questions ("FAQ") document relating to the privacy of student-identifying photographs and surveillance

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videos. The FAQ, located here, addresses multiple aspects of the Family Education Rights and Privacy Act ("FERPA"). As to whether photographs or videos could be considered "education records" or student records, the FAQ generally provides that where a photo or video (1) "directly relates" to a student and (2) is maintained by the school/party acting for the school, then it would be considered a student record. Whether a visual representation is directly related to a student – rather than incidentally related to the student – is a context-specific determination. The FAQ includes examples of directly related records, such as a depiction of activity involving a student in an act of disciplinary misconduct, audio or video content containing personally identifiable information, or content that intends to make a specific student the focus of the photograph or video. Where, however, a student's image is captured as part of a background or is incidental in the depiction, the FAQ clarifies that a student record is not created.

The new FAQ also addresses whether the same photograph or video can be the school record of more than one student, detailing that parents may inspect and review or "be informed of" the specific information pertaining to the parents' own children.

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When a school cannot – without otherwise destroying the meaning of the photograph or video – segregate or redact information so that no other student information is presented, the school may nonetheless permit parents to inspect and review the record. The FAQ indicates that the school is in the best position to make the determination of whether the meaning of the photograph or video would be destroyed by segregating or redacting the video. The FAQ also emphasizes that the Act does not require the district to provide a copy of the video to parents.

The FAQ also addresses issues such as a prohibition against charging parents for redaction or segregation (*e.g.* blurring or cutting/excerpting) photographs and video surveillance; and a requirement to permit the legal representatives of a parent to be present with the parent to inspect and review photographs or videos.

The recent FAQ is hot on the heels of an earlier letter also addressing the application of FERPA to videos involving multiple students. "Letter to Wachter," located here, was in response to an attorney's inquiry asking whether a surveillance video capturing images of student misconduct that was maintained by a school district constituted a school student record under the

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Act. In the attorney's scenario, a school district's surveillance system captured video footage of eight students – six students forcing two students into the school's wrestling room where the two victims were hazed. This attorney indicated that the district could not afford to blur the faces of the students in the video and was unsure how to treat the records, which it used to mete out discipline to the offending students. In response to the inquiry, the U.S. Department of Education's Chief Privacy Officer emphasized the right of parents to inspect and review education records or "be informed of" the specific information pertaining to their own children. Where possible, however, the Chief Privacy Officer indicated that districts should utilize available technology to blur students and cut portions of video to reflect a student's singular involvement.

Attorneys in our Flossmoor (708-799-6766) and Oak Brook (630-928-1200) offices stand ready to assist with any questions you may have about the FAQ or Letter to Wachter. In addition, if you have additional questions about the maintenance and retention of student records in general, please contact one of our attorneys.

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ISSRA Amendments Remove Gender from Directory Information

Under the Illinois School Student Records Act ("ISSRA"), certain school student records information, called "directory information," which includes student names, addresses and other information as identified by the Illinois State Board of Education ("ISBE"), can only be released in accordance with ISBE rules. Under the ISBE rules, unless a parent requests that some or all of their child's information be restricted, directory information may be released to the general public. In addition, the rules require that school districts provide annual notice to parents regarding directory information and the procedure to opt out of release of directory information.

Beginning in January, ISBE took steps to amend the ISSRA rules to, among other things, change what constitutes directory information. At the January 17, 2018, Board meeting, ISBE

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adopted a change that would delete “gender” from the list of what constitutes directory information.

The ISBE-adopted change was approved by the Joint Committee on Administrative Rules (JCAR) at its March 2018 meeting, and the change was recorded in the Illinois Register (Volume 42, Issue 12) on March 23, 2018. The effective date of the amendment is March 15, 2018. This amendment will require revisions to student records policies, procedures and handbook language. A copy of the approved, amended rule is available at: https://www.isbe.net/Documents/375_wf.pdf.

ISBE’s rules specifically designated gender as an item of directory information. As revised, items of directory information now include the following:

- Student and parent names;
- Mailing addresses, electronic mail addresses and telephone numbers;
- Grade level;
- Birth date and place;
- Information connected to school-sponsored activities/organizations and athletics;

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- Academic awards/honors/degrees;
- Major field of study;
- Period of attendance in the school; and
- Certain student photographs, videos and digital images, so long as the photograph does not highlight individual faces for commercial purposes without parent consent

The rule change is in line with a now-revoked Dear Colleague Letter from the U.S. Department of Education. The May 13, 2016, Letter addressed the topic of transgender students, and in part determined that directory information disclosure of sex, including transgender status, could be harmful or an invasion of privacy. That Letter was revoked on February 22, 2017, in a subsequent Dear Colleague Letter that said the Department of Education and Department of Justice have decided to further and more completely consider the legal issues involved.

Attorneys in our Flossmoor (708-799-6766) and Oak Brook (630-928-1200) offices stand ready to assist with reviewing and revising Board Policies and other District documents addressing the above amendment. In addition, if you have additional questions about the ISSRA in general, please contact one of our attorneys.

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John Izzo to Present at 2018 IASBO Annual Conference

At this year's Illinois Association of School Business Official Annual Conference at the Renaissance Schaumburg Hotel & Convention Center, John M. Izzo will be one of the presenters. On Thursday, May 3, 2018, at 4:00 p.m. to 5:00 p.m., John and Erin Bartholomy of Chapman & Cutler will give a State Legislative Update.

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