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Transgender Student Rights Recognized by U.S. Court of Appeals

As we have previously reported, the rights of transgender students have been unsettled. A recent Federal decision may clarify this issue for Illinois students. On May 30, 2017, the Seventh Circuit Court of Appeals ruled that a 17-year old transgender boy in Kenosha, Wisconsin, must be allowed to use the boys' bathroom despite the school's claim that his presence there would invade the privacy rights of his male classmates. The Seventh Circuit's ruling is binding on federal courts in Illinois.

The facts of the case are rather straightforward. The student (whose biological sex was female) had been using the boys' bathroom during his high school career. The School District then decided that the student could only use the girls' restrooms or a gender-neutral restroom that was in the school's main office, which was quite a distance from his classrooms. The

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student sought an injunction on the grounds that the School District's policy would cause him irreparable harm, there was no adequate remedy at law, and that he was likely to succeed on the merits of his case.

This is an important case because of the Court's determination that the student was likely to succeed on the merits of his case. The Fourth Circuit Court of Appeals had ruled that schools must allow students to use the restrooms matching their gender identities. But that ruling, involving a Virginia student, was vacated by the U.S. Supreme Court after the Trump administration canceled the Obama administration's legal guidance on transgender bathroom protections in public schools.

In this matter, however, the Seventh Circuit determined that the statutory language of Title IX of the Civil Rights Act – even absent the Obama administration guidance – protects transgender students. The Seventh Circuit opted to take an expansive view of other courts' decisions which protected transgender people under Title VII of the Civil Rights Act and concluded that the rationale underlying those decisions applied to this case.

The Court also rejected the School District's argument that the

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privacy rights of the other students in the district outweighed the student's right to use the boys' bathroom. The Court pointed to the fact that no other student had complained about the student's use of the boys' bathroom and, importantly, as a transgender boy, the student used the bathroom by entering a stall and closing the door. The Court declared that "[a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."

The Seventh Circuit's ruling appears to protect the rights of Illinois' transgender students more than any other decision or regulation to date. Still, since the facts of each case may be unique, we encourage you to contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766) if you have any questions regarding this topic or you are presented with a similar issue in your district.

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Courts Rule on Applicability of FOIA to School-Related Private Organizations

The Illinois Supreme Court and the Illinois Appellate Court recently issued two important opinions clarifying when documents must be produced, not only by public bodies, but also by nongovernmental school-related organizations in response to an Illinois Freedom of Information Act (FOIA) request. These cases should guide such organizations in how they conduct business and preserve their records.

On May 9, 2017, the Second District Appellate Court rendered its decision in *The Chicago Tribune v. The College of DuPage and the College of DuPage Foundation*, 2017 IL App (2d) 160274. Pursuant to a Memorandum of Understanding (MOU) between the College of DuPage (College), a public body, the College of DuPage Foundation (Foundation), a private nonprofit organization, the College delegated its responsibility to collect, manage, and maintain all of its private donations to the Foundation.

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Thereafter, the College and the Foundation received a series of FOIA requests from the *Chicago Tribune* seeking copies of federal and Illinois grand jury subpoenas which the newspaper believed had been served upon the College and the Foundation. When the requested subpoenas were not forthcoming, the *Tribune* filed suit to obtain them.

In upholding the trial court's order that the College and the Foundation disclose the federal grand jury subpoena to the *Tribune*, the Appellate Court first determined that the subpoena was a "public record" within the meaning of the FOIA, notwithstanding the College's contention that it did not prepare, request, use, receive, possess or control it, because the subpoena had been served on the College and it pertained "to the transaction of public business…" The Court also made it clear that the subpoena continued to be a "public record" even though the College physically transferred it to the Foundation and did not keep a copy for its records; and that the College, as a "public body", was obligated to make the subpoena available to the public even though it transferred its physical possession to the Foundation pursuant to their MOU. Because the subpoena was a "public record," the College had to make a good faith

effort to obtain a copy of it for disclosure to the *Tribune.*

The Appellate Court also concluded that, by collecting, maintaining, and managing the College's private donations pursuant to the MOU, the Foundation itself was performing a "governmental function" and therefore was subject to the disclosure requirements of the FOIA. Interestingly, the Appellate Court refused to provide a definition as to what constitutes a "governmental function" under the Act. Instead, it concluded that the circumstances of each case should be examined with particular attention paid to the "public body's role and responsibilities and the specific act that it has contracted a third party to perform on its behalf." Finally, the Appellate Court decided a private entity such as the Foundation need not make all of its records available to the public, but only those that "directly relate to the governmental function performed by on behalf of a public body."

On May 18, 2017, the Illinois Supreme Court decided *Better Government Association v. Illinois High School Association*, 2017 IL 121124. In this case, the Better Government Association (BGA) served a FOIA request on both the Illinois High School Association (ISHA), a nonprofit voluntary association whose

function is to "establish by laws and various rules for interscholastic sports competition" and which "sponsors and coordinates various post-season tournaments for certain sports in which its member schools choose to compete," and Consolidated High School District 230. The request was for the ISHA's contracts related to accounting, legal services, sponsorships, public relations/crisis management, and licensed vendor applications for the 2012-13 and 2013-2014 fiscal years. When its request was not honored by either District 230 or the ISHA, the BGA filed suit alleging that their refusal to disclose the documents violated the FOIA.

The trial judge dismissed the BGA's lawsuit, concluding that the ISHA was not a "public body" within the meaning of the FOIA, and that ISHA was not performing a "governmental function" on behalf of the School District as required by the Act. The Appellate Court agreed with the trial court.

Upon its own review, the Supreme Court concluded that the trial court appropriately dismissed the BGA's lawsuit. In reaching its conclusion, the Court determined that the ISHA was not a "governmental unit" nor was it a "subsidiary body" of a governmental unit within the meaning of the Act because it was

not controlled by or subordinate to District 230. **The Court found in determining whether a nonprofit is a "subsidiary body" courts should consider: 1) the extent to which the private entity maintains a separate legal existence from the public body; 2) the degree of control the public body exerts over the private entity; 3) the extent to which the private entity is publicly funded; and 4) the nature of the functions performed by the private entity.** Based on these factors, it concluded that there was an insufficient nexus between the School District and the ISHA to make the ISHA a subsidiary of the School District. The Supreme Court also agreed with the School District that dismissal of the BGA's complaint was proper because, unlike the facts in the *Chicago Tribune* case, the School District had not delegated the performance of a governmental function to the ISHA.

What these cases make clear is that our courts look to the relationship between a public body and a nonprofit entity in determining the scope of the obligation to make disclosures under the FOIA. Where there is a very close relationship between the public body and the nonprofit, such as sharing staff, subordination of the nonprofit to the control of the public

body, and the delegation of a governmental function by the public body to the nonprofit, as was the case for the College of DuPage Foundation, the courts are likely to determine that records received by either entity are public documents that must be disclosed as long as the records are directly related to the governmental function the nonprofit undertakes on behalf of the public body. Conversely, if there is not a close relationship between the public body and the nonprofit organization, and the public body never possessed the records sought under the FOIA, as was the case for the IHSA, courts are likely to determine that a records request does not come within the purview of the Act.

Many Illinois public school districts receive support from nonprofit foundations or other groups established to help them fulfill their mission to educate our children. Whether or not such groups are subject to FOIA requests will turn on the particular factual circumstances of their relationship. In the event that a school district or foundation supporting a school district receives a FOIA request related to its relationship with the other, each should act promptly to determine what their legal obligations are.

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If you have any questions concerning your legal obligations, contact one of our attorneys at 708-799-6766 or 630-928-1200.

Sexual Orientation Discrimination: Landmark Decision from Federal Court of Appeals

Last week, the U.S. Court of Appeals for the Seventh Circuit issued its decision in *Hively v. Ivy Tech Community College of Indiana*. The decision tackles the issue of whether Title VII of the Civil Rights Act of 1964's ban on "sex discrimination" includes a ban on discrimination on the basis of sexual orientation. On an 8-3 vote, the Judges from the Seventh Circuit determined that sexual orientation discrimination is virtually indistinguishable from sex discrimination because both rely on

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stereotyped concepts of the sexual behavior and lives of men and women.

The *Hively* case involved a lesbian, part-time adjunct professor at a community college in South Bend, Indiana. The professor applied for multiple full-time positions at the Community College but was denied each position and subsequently terminated. Believing that the Community College's actions were due to discrimination on the basis of her sexual orientation, the professor filed a charge with the Equal Employment Opportunity Commission ("EEOC"). She received a right to sue letter, and filed a claim against the Community College in federal court. The Community College successfully argued in the lower court that sexual orientation was not a protected category under Title VII. The Seventh Circuit's determination last week overturns this earlier ruling and any other ruling finding that sexual orientation is not a Title VII protected class in courts under jurisdiction of the Seventh Circuit (that is in, Illinois, Indiana and Wisconsin).

The decision is a landmark one because it is the first decision in any U.S. Court of Appeals ruling that sexual orientation is protected under Title VII. However, the ruling's practical

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impact on Illinois employers is likely to be slight because Illinois already included "sexual orientation" as a protected category under the Illinois Human Rights Act. Under the Human Rights Act, Illinois declared it public policy of the State that all individuals within Illinois are entitled to freedom from discrimination on the basis of seventeen protected categories, including sexual orientation. Because of the protections afforded under State law, employment claims alleging workplace discrimination on the basis of sexual orientation were most frequently brought under an investigation by the Illinois Department of Human Rights or the Human Rights Commission, which are the entities charged with investigating complaints filed under the Human Rights Act. The Seventh Circuit's ruling in *Hively*, however, means that there may be future claims of discrimination arising under federal law and actively investigated by the EEOC.

The decision is also important because of the tension it creates with the other so-called Sister Circuits of the U.S. Courts of Appeals. In March 2017, the U.S. Court of Appeals for the Second Circuit (covering Connecticut, New York and Vermont) refused to overturn a precedential decision in that Circuit holding that

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Title VII does not prohibit discrimination on the basis of sexual orientation. In *Christiansen v. Omnicom*, the Second Circuit affirmed that being gay, lesbian or bisexual does not, in and of itself, constitute nonconformity with a gender stereotype that can give rise to a sex discrimination claim. Because of the tension between the two Circuit Court decisions, this issue may soon be ripe for an appeal to the U.S. Supreme Court. However, it appears that battle will wait for another day: the Ivy Tech Community College of Indiana has indicated to multiple news sources that it will not seek Supreme Court review of the Seventh Circuit's determination.

If you have additional questions about the Seventh Circuit's determination, the state of the law in Illinois, or this issue in general, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).

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Hospital Tax Exemptions: Major Developments But No Resolution

In three opinions issued within days of each other, the Illinois Supreme Court and the Illinois Appellate Court signaled that the ongoing controversy concerning whether hospitals owned by non-profit corporations are entitled to exemption from local property taxes will continue for some time to come.

The vast majority of hospitals in Illinois are owned by corporations without shareholders, and are thus classified as "non-profit" for federal and state income tax purposes. But that classification alone does not mean that these are charitable institutions which may be granted exemption from property taxes under the Illinois Constitution. Nonetheless, in 2012, the Illinois General Assembly created a special category for non-profit hospitals under the Property Tax Code. Section 15-86 of the Code now provides that hospital owners avoid property taxes entirely if they can demonstrate that the value of certain defined "beneficial services" are greater than the value of the property taxes the hospital owners would have to pay if the

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property were taxable. As a practical matter, this standard has been very easy for hospitals to meet, even where truly charitable services have been just a small part of their business.

Several challenges have arisen to the legislature's favorable treatment for hospitals. In the case of *Carle Foundation v. Cunningham Township*, local assessment officials in Champaign County have been trying to tax the Carle Foundation Hospital, but hospital owners went first to court to fight that effort. In January 2016, as we reported in a previous Priority Briefing, the Illinois Appellate Court ruled that Section 15-86 was unconstitutional and invalid. However, on March 23, 2017, the Illinois Supreme Court vacated the Appellate Court's ruling, not on the merits of the dispute, but because it decided that the issue of the constitutionality of Section 15-86 should not have been decided by the Appellate Court while the underlying claim was still to be decided in the circuit court. The effect of this decision by the Supreme Court, besides sending the parties in that case back to the lower court, is to leave the validity of Section 15-86 still in doubt and without providing any guidance to local and state property tax officials, at least not

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yet.

Next, in the case of *Oswald v. Hamer*, a taxpayer sought a declaration by the courts that Section 15-86 is invalid on its face because it contradicts the charitable tax exemption provision of the Illinois Constitution. In December 2016, the Illinois Appellate Court issued an opinion that the statute is facially valid, but only because it interpreted Section 15-86 as not removing the constitutional requirement that hospitals also demonstrate that they are charitable in order to qualify for property tax exemption. The taxpayer sought rehearing in the *Oswald* case, but on March 31, 2017, the Appellate Court declined to reconsider its opinion. While it is not yet known whether the taxpayer will seek Supreme Court review of this case, some of the Supreme Court justices during the oral argument of the *Carle Foundation* case indicated an awareness of *Oswald* and an opinion that it presented a more suitable vehicle to reach the merits of the validity of Section 15-86. Keep in mind that should the Appellate Court's interpretation of the statute in *Oswald* prevail in the Supreme Court, very few hospitals would likely retain their exempt status.

In a third case, a tax exemption granted to NorthShore

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University Healthsystem is being challenged in the Illinois Department of Revenue by Niles Township High School District 219. In an effort to circumvent the Department's proceedings, NorthShore went to court, arguing that the District's hearing requests were insufficient for failure to specify the Department's errors in issuing exemption certificates, even though the Department had not stated its bases for issuing those certificates in the first place. The Circuit Court dismissed NorthShore's case and, on March 28, 2017, in the case of *NorthShore University Healthsystem v. Illinois Department of Revenue*, the Appellate Court agreed with the Department and the Circuit Court that NorthShore had to complete Department's hearing procedure before going to court. That ruling will allow the Department to rule first on the NorthShore tax exemption.

Hauser Izzo, LLC attorneys are deeply involved in each of those cases. John M. Izzo and Eugene C. Edwards are representing District 219 in the NorthShore litigation. Further, John and Eugene submitted an *amicus curiae* brief on behalf of the Illinois Association of School Boards, the Illinois Association of School Administrators, and the Illinois Association of School Business Officials in the *Carle Foundation* appeal to the Supreme

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Telephone: **708.799.6766** | Facsimile: 708.799.6866

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Court. Finally, John and Eugene also submitted an *amicus curiae* brief to the Appellate Court on behalf of IASA and IASBO in the *Oswald* case.

If you have questions regarding the recent developments of these cases, please contact one of our attorneys in Flossmoor (708) 799-6766 or Oak Brook (630) 928-1200.

U.S. Supreme Court Raises the Bar on FAPE

Last week, the Supreme Court of the United States issued its decision in the case of *Endrew F. v. Douglas County School District.* The decision tackles a thirty-five-year-old question stemming from the U.S. Supreme Court's landmark ruling in *Board of Education of Hendrick Hudson Central School District v. Rowley*: what standard is used to determine whether or not a student received a free appropriate public education ("FAPE")?

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Rowley was decided 1982 and held that a FAPE must be provided to all special education students. *Rowley* further required that a FAPE be tailored to the unique needs of a child with a disability by means of an individualized education program ("IEP"). *Rowley* also spelled out that the level of benefits of an appropriate education must be "reasonably calculated" to confer a "basic floor of opportunity," and emphasized that school districts were not required to maximize the potential of a student with disabilities. This has sometimes been referred to as the "serviceable Chevrolet" standard, because students are not required to be offered a "Cadillac" education.

Somewhat problematically, the *Rowley* decision did not specify a test that courts should employ to determine whether or not a student receives an appropriate education. Instead, the U.S. Supreme Court held that the contours of an appropriate education must be decided on a case-by-case basis, in light of the individualized consideration of the unique needs of each eligible child. Since the *Rowley* decision, school districts, states, state courts and federal courts have developed varying standards for determining whether or not a student had received an appropriate education.

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Endrew F. involved a test employed by the Tenth Circuit Court of Appeals for determining whether or not an appropriate education has been afforded to a student. The student in this case, Endrew ("Drew") F., was diagnosed with autism at an early age, and had received an IEP through his local Colorado school district from preschool through the fourth grade. Drew's then-fourth grade present levels included behaviors such as screaming in class, climbing over furniture and his peers, and occasionally running away from school. When Drew's family received the school's IEP recommendation for fifth grade, they noted that it was substantially similar to the previous years' IEP, including the present levels descriptions, goals, services and placement. His parents believed that Drew's academic progress had stalled, so they unilaterally removed him to a private school that specialized in students with autism, where Drew progressed.

Drew's parents filed suit seeking reimbursement for their son's private school tuition. Drew's parents did not prevail at the administrative, district court or appellate court levels. In finding against Drew's parents, the Tenth Circuit Court of Appeals explained that it had long interpreted the requirement to provide an appropriate education to mean that the school

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district only had to confer a an "educational benefit '[that is] merely…more than *de minimis.*'" In applying this standard, the Tenth Circuit found that Drew had been making *some* progress. Thus, the parents' request for reimbursement was denied.

The parents sought an appeal to the U.S. Supreme Court, which on March 22, 2017, issued a unanimous decision by Chief Justice John Roberts rejecting the merely more than *de minimis* standard set out by the Tenth Circuit. The U.S. Supreme Court, in considering the Tenth Circuit's decision against the *Rowley* standard, found that "It cannot be the case that the [Individuals with Disabilities Education Act] typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot." The Court reasoned that a student offered an educational program providing merely more than *de minimis progress* "can hardly be said to have been offered an education at all" because they would be receiving instruction "that aims so low [to] be tantamount to 'sitting idly…awaiting the time when they [are] old enough to drop out.'"

The U.S. Supreme Court's holding is clear: "The IDEA demands

more." However, despite this clear holding, the Court refused to provide a bright-line standard for how to determine what amounts to an appropriate education. In fact, the Court stated that it was refusing to spell out such a standard because "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." In remanding the case to the Tenth Circuit, the Court did explain, however, that a child's educational program must be "appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom."

Although the Seventh Circuit – which is the United States Court of Appeals for Illinois, Wisconsin and Indiana – had previously applied a slightly different standard than the Tenth Circuit to determine what constituted an appropriate education, the *Endrew F.* case will certainly have an impact. The current standard used by the Seventh Circuit is that a school district must offer an IEP that is likely to produce educational progress, not regression or trivial advancement, and that a school district must offer more than mere trivial educational benefit to students in order to demonstrate an offer of an appropriate

education. While this is not the *de minimis* standard ruled in *Endrew F.*, the Seventh Circuit's standard for an appropriate education is still an arguably low bar, requiring just barely more than trivial educational benefits. Accordingly, we anticipate that this issue will be ripe for additional lawsuits.

If you have additional questions about the U.S. Supreme Court's determination, the current standard used by the Seventh Circuit to determine an appropriate education, or this issue in general, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).

U.S. Supreme Court Eases Path for Families to Pursue Some

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Types of Student Disability Lawsuits

This morning, the Supreme Court of the United States issued a decision in the case of *Fry v. Napoleon Community Schools*. The decision will allow families, in certain cases, to file lawsuits directly in court under Title II of the *Americans with Disabilities Act* ("Title II") and Section 504 of the *Rehabilitation Act of 1973* ("Section 504") without first exhausting their administrative remedies.

The case, which was heard last fall by the Court, involves a Michigan student with cerebral palsy and her request to have a trained service dog accompany her during the school day. That request was denied by the student's elementary school. In response, the student's parents removed the student from school, first providing her homeschooling and then enrolling her in a different school that welcomed the service dog.

The family filed a lawsuit against the school district in federal court alleging that the district violated Title II and

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
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Section 504. The remedy the family sought was declaratory relief – an order finding them the prevailing party – and monetary relief. The lower courts, a federal District Court in Michigan and the Sixth Circuit Court of Appeals, held that the family was required to exhaust the Individuals with Disabilities Education Act's ("IDEA") administrative procedures prior to filing a lawsuit in federal court. In essence, the lower courts would require the family to file and convene a Section 504 or due process hearing prior to filing suit in federal court. The family filed an appeal of those decisions with the Supreme Court of the United States, however, arguing that the IDEA's exhaustion requirement only is relevant when the lawsuit involves the denial of a free appropriate public education ("FAPE") and where the relief sought is available under the IDEA. By comparison, the family argued, their case involved matters not addressed through FAPE and the remedy sought was not available under the IDEA.

Today, the Supreme Court of the United States unanimously ruled that the IDEA's administrative procedures are unnecessary "where the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a FAPE." The Court

highlighted certain questions to ascertain whether the "gravamen" of a case concerns the IDEA and the denial of FAPE: (1) could the plaintiff have brought the same claim if the conduct had occurred at a public facility that was not a school (*e.g.* a public library or park district); and (2) could an adult at the school have pressed essentially the same complaint. The Court indicated that if the answer to these questions is yes, then a complaint probably does not concern a FAPE issue and may proceed without exhausting administrative remedies.

The Supreme Court of the United States remanded the case to the Sixth Circuit Court of Appeals for proper analysis of the family's complaint and request for relief to determine if the IDEA and the core guarantee of FAPE is involved.

The determination in *Fry* may have the outcome of increasing the amount of lawsuits filed against school districts for Title II and Section 504 claims, thereby increasing the possibility that a district may face monetary damages for such a claim. Because of the increased possibility of legal liabilities, we recommend that school districts contact their insurance carriers to confirm that their existing policies will cover claims made following the holding in *Fry*. If a district's existing policy

does not cover such claims, we recommend exploring the costs of adding additional, appropriate coverage.

If you have additional questions about the Supreme Court's determination, the issue of exhaustion of administrative remedies, or the case in general, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).

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.

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Therefore, the effective window period to hold all school board organizational meetings this year begins no earlier than Tuesday, April 25, and ends no later than Tuesday, May 2.

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.

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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Restraint and Seclusion of Students with Disabilities: U.S. Department of Education Releases Guidance

The U.S. Department of Education Office for Civil Rights ("OCR") issued *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* on December 28, 2016. In this Guidance, OCR states that its Civil Rights Data Collection indicates that schools restrain and seclude students with

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disabilities at higher rates than students without disabilities and that this raises a question regarding whether schools are imposing restraint and seclusion in discriminatory ways. OCR defines "mechanical restraint" as the use of any device or equipment to restrict a student's freedom of movement, but this does not include adaptive devices used to achieve proper body position, balance or alignment, vehicle safety restraints, orthopedically prescribed devices or restraints for medical immobilization. According to OCR, "physical restraint" refers to a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs or head freely. Finally, OCR defines "seclusion" as involuntary confinement of a student alone in an area from which the student is physically prevented from leaving, but does not include timeout in an unlocked setting used for the purpose of calming.

The Dear Colleague Letter describes the legal standards OCR uses to determine whether the use of restraint or seclusion has violated Section 504. OCR cautions that a student's behavioral challenges that lead to restraint could be a sign that the student has a disability and needs special education and related services. If the student exhibits behavior that would reasonably

cause school personnel to believe the student has a disability, the school district must evaluate the student to determine if the student has a disability. If a student is already identified as having a disability, the use of restraint or seclusion could be evidence that the student's current services are not addressing the student's needs. According to OCR, pervasive indicators that a student's needs are not being met include new or more frequent outbursts, an increase in the frequency or intensity of behavior, a sudden change in behavior, or a significant rise in missed classes or services.

OCR explains that Section 504 of the Rehabilitation Act prohibits restraint and seclusion, only when its use constitutes disability discrimination. This occurs when a school restrains or secludes a student with a disability for behavior that would not result in the restraint or seclusion of peers without disabilities or if a school restrains or secludes a student on the basis of assumptions or stereotypes about disability. Discrimination also occurs when policies, practices or procedures that are neutral in language nonetheless have the effect of discriminating against students with disabilities.

The use of restraint or seclusion can deny a student a Free

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Appropriate Public Education ("FAPE") if it has a traumatic impact on the student that affects his or her educational services or if a student misses instruction or services due to being restrained or secluded for extended periods of time. If the student has been denied FAPE, the appropriate remedy is to determine if the student's current services are meeting his or her needs, determine what changes in services are necessary and to provide compensatory services. Another appropriate remedy may be training staff on implementation of policies in a neutral, nondiscriminatory manner. Finally, OCR lists a variety of resources concerning the use of restraint and seclusion to assist school districts.

If you have additional questions about the Dear Colleague Letter or your district's policies and procedures, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).

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Racial Inequality in Special Education: U.S. Department of Education Releases Regulations and Guidance

The U.S. Department of Education Office for Civil Rights ("OCR") issued a *Dear Colleague Letter: Preventing Racial Discrimination in Special Education* on December 12, 2016. In this Guidance, OCR states that it continues to find (1) over-identification of students of color as having disabilities; (2) under-identification of students of color who do have disabilities; and (3) delays in evaluating students of color for special education services. If racial discrimination leads to a failure to timely identify, evaluate and provide special education services to a student, there are serious long term consequences for the student. On the other hand, racial discrimination that leads to inappropriate identification in special education, provision of unnecessary services, and more restrictive placement limits the educational opportunities of

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866

students.

The Dear Colleague Letter cautions schools against making discriminatory referrals for special education services by relying on stereotypes or biased perceptions, such as referring African American and Latino students for evaluations, but not referring white students with similar behavioral and academic records. OCR also suggests that general education interventions, such as Response to Intervention, should be used when students are performing poorly for reasons unrelated to disability, but must not be used as a substitute or precondition for a special education evaluation. When evaluating students for special education services, OCR explains that schools must not use different evaluation procedures for different races, require different documentation for different races, or use procedures in ways that have an adverse impact on a certain racial group. Once qualified for special education services, schools must not discriminate against students based on race, color, or national origin in the provision of such services, or any related services.

The Department of Education also released final regulations on equity under the Individuals with Disabilities Education Act

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("IDEA") that become effective on January 18, 2017. According to statistics, children of color, particularly African American and American Indian children, are identified to have disabilities at a substantially higher rate than their peers. To address inequity and under and over-representation of students of color in special education, the regulations set forth a methodology that states must use to identify school districts with "significant disproportionality" in race and ethnicity in the identification of students for special education, placement of these students in restrictive settings and the incidence, duration and type of disciplinary removals, including suspensions and expulsions. School districts that are found to have significant disproportionality must review and revise their policies, practices and procedures and may use Comprehensive Coordinated Early Intervening Services (CEIS) funds to provide professional development and to remedy the disproportionality.

If you have additional questions about the Dear Colleague Letter, the regulations, or your district's policies and procedures, please contact one of our attorneys in Flossmoor (708799-6766) or Oak Brook (630-928-1200).

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BOYLE & IZZO, LLC
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Appellate Court: Student Handbooks are not Contracts and Administrators Afforded Discretion to Manage Bullying

In *Mulvey v. Carl Sandberg HS,* 2016 IL App (1st) 151615, two sisters brought claims against their high school, the school district, and various school officials and coaches alleging that they had suffered bullying at the hands of their basketball teammates. They claimed that they were ignored, harassed, humiliated, physically assaulted, injured, and intimidated by their teammates during their high school tenure. They also alleged that certain teammates teased them on specific occasions, both in person and on social media.

The sisters claimed that the defendants had breached a contract between the students and the school by failing to enforce anti-

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866

bullying policies that were included in district handbooks. The sisters' lawsuit also claimed that the defendants willfully and wantonly disregarded the school district's obligations under the state's anti-bullying law (Section 27-23.7(d) of the School Code).

Regarding the contract claim, the Appellate Court determined that a student handbook lacks the elements necessary for the formation of a contract. Rather, it found that the district's handbooks failed to convey any specific promises. Importantly, the handbooks did not promise students and parents that attendance at the school would guarantee the complete absence of bullying conduct, nor that every student engaging in such conduct would be disciplined in a particular manner.

Additionally, the Appellate Court found that the district's anti-bullying policy "is discretionary in nature and does not mandate a specific response to every set of circumstances." The Appellate Court's decision is aligned to others that have dismissed bullying claims against school districts when school administrators also exercised their discretion. See *Hascall v. Williams*, 2013 IL App (4th) 12113; *Malinski v. Grayslake Community High School District 127*, 2014 IL App (2d) 130685, ¶

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8. Relying upon these earlier decisions, the Appellate Court determined that anti-bullying policies may afford a school district with the discretion to determine whether bullying has occurred, what consequences will result, and any appropriate remedial actions.

Even though plaintiffs constructed a variety of theories upon which the school district could have been liable and all these arguments failed, it is not enough to simply maintain a policy and not follow it. Although the Appellate Court immunized the school district from liability in this case, this decision still serves to remind school administrators that district policies must reflect state law and, more importantly, that administrators must implement and follow those policies to avoid liability. In cases involving bullying, a failure to do so may expose school officials to significant liability.

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.