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Hospital Exemption Law Held Unconstitutional

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

This decision comes in a case which is just one front in the long-running war about hospital property tax exemptions. In 2010, the Illinois Supreme Court in the case of *Provena Covenant Medical Center v. Department of Revenue* made it clear that even hospitals which do not issue stock (and therefore are "non-profit" under federal income tax law) can only qualify for exemption from local property taxes if they are primarily used for charitable purposes. In response to this decision, the

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

Section 15-86 has been challenged as inherently flawed in multiple arenas. The *Carle Foundation* case itself involves a hospital in Champaign County which local tax assessments officials have been trying to put onto the tax rolls for several years. In two declaratory judgment cases brought against the State in Cook County Circuit Court, that court in 2015 ruled

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

The *Carle Foundation* opinion dealt with many intricate procedural issues. But once the court decided that it had no choice but to look squarely at the validity of Section 15-86, it had no problem concluding that the law was inconsistent with the Illinois Constitution's requirement that the General Assembly could grant tax exemption only to properties which are used

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primarily for charitable purposes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Board Enters Settlement

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Agreement with OCR to Resolve Claims of Transgender Discrimination

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

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

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

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

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

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

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

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

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

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

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

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

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40th Anniversary of the Individuals with Disabilities Education Act

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

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

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standards for the grade in which the child is enrolled.

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

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

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

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

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

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

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

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

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Unsettled: Transgender Student Civil Rights

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

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

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

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

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

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

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

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

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

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

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

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Illinois Supreme Court: School Districts are Subject to Municipal Zoning Regulations

Clarifying what has previously been a gray area of the law, the Illinois Supreme Court has ruled that school districts are subject to municipal zoning ordinances. In *Gurba v. Community High School District No. 155*, 2015 IL 118332 (2015), the Court determined that the Crystal Lake School District illegally constructed football field bleachers when it did not receive approval or notify the City of Crystal Lake. This decision immediately impacts school districts statewide.

As we previously reported (September 23, 2014), the facts of this case are relatively straightforward. Crystal Lake School

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District constructed bleachers for the football field at one of its campuses located in the City of Crystal Lake. As it is required to do under Section 3-14.20 of the Illinois School Code (105 ILCS 5/3-14.20), the School District submitted plans and received approval from the McHenry County Regional Superintendent of Schools. The School District did not, however, receive approval or notify the City of Crystal Lake of its plans. The new bleachers would have required a variance or a special use permit as the bleachers violated numerous city zoning and storm water ordinances.

Both the Circuit Court and the Appellate District ruled in favor of the neighboring landowners who had sought to enforce the city's ordinances. The School District then appealed to the Illinois Supreme Court. On September 24, 2015, the Supreme Court determined that since the General Assembly had not enacted any statute expressly preempting or limiting a home rule unit's zoning power over public school property, it is within a city's home rule authority to impose its zoning ordinances on the School District.

The Supreme Court, like the Appellate Court before it, put great emphasis on Section 10-22.13a of the Illinois School Code. That

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section authorizes a school board "[t]o seek zoning changes, variations, or special uses for property held or controlled by the zoning district." 105 ILCS 5/10-22.13a. The Supreme Court determined that it would be unnecessary for the General Assembly to authorize a school district to seek zoning changes if it did not intend for school property to be subject to local zoning ordinances in the first place.

The Supreme Court found further support for its decision in *Wilmette Park District v. Village of Wilmette*, 112 Ill. 2d 6 (1986). The Court in *Wilmette* decided that a special use hearing is the best possible way to reconcile the competing interests of two governmental entities, but that if a municipality administers its zoning ordinance in an unreasonable, arbitrary, or discriminatory manner, judicial review is still available to the aggrieved entity.

The *Gurba* decision aligns with *Wilmette* and does not overrule it. Although it is now clear that School Districts must abide by municipal zoning codes, it does not follow that a municipality's zoning decision is now the final decision. School districts maintain recourse to challenge an unreasonable, arbitrary or discriminatory decision through the judicial

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process.

If you have questions regarding this guidance or would like to discuss your school district's building projects, please contact one of our attorneys in Flossmoor at 708.799.6766 or Oakbrook at 630.928.1200.

Broadening Educational Opportunities: New Federal Resources on English Learners and on Inclusion in Early Childhood Programs

English Learners Tool Kit

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In January, we reported on newly released joint guidance from the U.S. Departments of Education and Justice, which outlined a school district's obligation to ensure that English Learners have equal access to a high-quality education. (*English Learner Students: New Federal Guidance*, https://petrarcagleason.com/joint-federal-guidance-and-toolkit-reminds-schools-of-their-obligation-to-provide-equitable-educational-access-for-english-learner-students/)

In support of that guidance, the Office of English Language Acquisition has released an *English Learner (EL) Tool Kit* designed to aid school districts in providing ELs with the support necessary to achieve their full academic potential. The *EL Tool Kit*, divided into 10 chapters, provides explanations of legal obligations, checklists, sample tools, and additional resources covering the following topics:

- Identifying All English Learner Students
- Providing English Learners with a Language Assistance Program
- Staffing and Supporting an English Learner Program
- Providing English Learners Meaningful Access to Core Curricular and Extracurricular Programs

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- Creating an Inclusive Environment for and Avoiding the Unnecessary Segregation of English Learners
- Addressing English Learners with Disabilities
- Serving English Learners Who Opt Out of EL Programs
- Monitoring and Exiting English Learners from EL Programs and Services
- Evaluating the Effectiveness of a District's EL Program
- Ensuring Meaningful Communication with Limited English Proficient Parents

The full text of the *EL Tool Kit* can be accessed at: http://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html.

Early Childhood Inclusion

On September 14, 2015, the U.S. Departments of Education and Health and Human Services released a joint policy statement on the inclusion of children with disabilities in early childhood programs. With the goal of increasing the inclusion of infants, toddlers, and preschool children with disabilities in early childhood programs, the Departments recommend that all young

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children with disabilities have access to inclusive, high-quality early childhood programs, which can include private or publicly-funded centers or family-based child care, home visiting, Early Head Start, Head Start, private preschools, and public school and community-based pre-kindergarten programs. The Departments apply this vision to all young children – from those with the mildest disabilities to those with the most significant impairments.

Noting that children with disabilities continue to face significant barriers to accessing inclusion education, the Departments cite research which supports the benefits of inclusion for both children with and without disabilities. When compared to children with disabilities educated separately, children with disabilities in inclusion classrooms have:

- Greater cognitive and communication development
- A higher likelihood of practicing newly acquired skills
- Fewer absences
- Higher test scores in reading and math
- Higher probability of employment and higher earnings
- Stronger social-emotional skills
- A larger network of friends

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Additionally, when children without disabilities are educated in an inclusion environment, they demonstrate greater compassion and empathy and develop a better understanding of diversity and disability. The Departments believe that these benefits can be obtained without additional costs to school districts, as inclusion programs are not necessarily more expensive than operating separate early childhood programs for children with disabilities.

Early childhood programs should be inclusive of children with disabilities and their families, and school districts must ensure that policies, funding, and practices enable full participation and success. To that end goal, the Departments recommend that school districts take the following actions:

- Connect with families to ensure that inclusion information is available and accessible to all families.
- Review IFSP and IEP policies and procedures to ensure that the first option considered, and meaningfully discussed, is an inclusive setting.
- Pair children’s assessments with environmental assessments of the early childhood program to ensure that appropriate supports and accommodations are in place.

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- Review and modify resource allocation, paying close attention to a district's use of IDEA Parts B and C funds, shifting educators to provide consultative services, and optimally distributing specialized staff and materials.
- Offer professional development opportunities, especially those focused on a strong understanding of universal design and universal design for learning.
- Establish an appropriate staffing structure to strengthen staff collaboration, such as a skilled lead teacher paired with a paraprofessional/aide and specialist support, and consider co-teaching models.
- Ensure access to specialized supports, including early interventionists, inclusion specialists, early childhood mental health consultants, behavior consultants, early childhood special educators, developmental specialists, and related service providers.
- Develop formal collaborations with community partners. If no inclusive early childhood program is offered by the district, consider creating a formal agreement with community-based programs.

The full text of the Departments' Policy Statement can be accessed at:

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http://www2.ed.gov/policy/speced/guid/earlylearning/joint-statement-full-text.pdf.

If you have questions about these new Department of Education publications, please contact one of our attorneys in Oak Brook (630-928-1200) or Flossmoor (708-799-6766).

Senate Bill 100 and Recent Student Discipline Cases

Illinois Legislature Dramatically Reforms Out-Of-School Disciplinary Procedures

Governor Rauner signed Senate Bill 100 into law as Public Act 99-456 on August 24, 2015. The bill, which aims to address the school-to-prison pipeline, dramatically reforms the circumstances under and the processes by which a school district can impose out-of-school discipline. School districts do not

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need to adopt policies incorporating SB100's provisions until September 15, 2016, but it would be wise to begin revising policies and providing professional development now given the depth and breadth of the changes to the existing law.

In SB 100, the Illinois legislature cautions school officials that out-of-school suspensions and expulsions are among the most serious of disciplinary interventions and, as such, school officials must limit them and only use them only for legitimate educational purposes. This is consistent with recent guidance from the U.S. Department of Education and Department of Justice that, among other matters, emphasizes positive interventions over student removal.

Under the new law:

- Expulsions
  - May be used if the student's continuing presence would:
    - Pose a threat to the safety of other students, staff or members of the school community; or
    - Substantially disrupt, impede, or interfere with the operation of the school

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- If the Board expels a student, the written expulsion decision must:
    - Detail the specific reasons why removing the student is in the best interest of the school;
    - Include a rationale as to the specific duration of the expulsion; and
    - Document whether other interventions were attempted or whether it was determined that there were no other appropriate and available interventions

- Out-of-School Suspensions
    - Out-of-school suspensions of ***three days or less*** may be used only if the student's continuing presence in school would pose a threat to school safety or a disruption to other students' learning opportunities. These are things that need to be determined on a case-by-case basis by the school board or its designee.
    - Out-of-school suspensions and disciplinary removals for ***more than three days*** may be used if other appropriate and available behavioral and disciplinary interventions have been exhausted and

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the student's continuing presence would:
    - Pose a threat to the safety of other students, staff or members of the school community; or
    - Substantially disrupt, impede, or interfere with the operation of the school
- All suspension decisions must document:
    - The specific act of gross disobedience or misconduct resulting in the decision to suspend;
    - A rationale as to the specific duration of the suspension; and
    - Whether other interventions were attempted or whether it was determined that there were no other appropriate and available interventions. This is something that is left to the discretion of school officials.
    - For out-of-school suspensions longer than four school days, that school officials will provide appropriate and available support services during the period of suspension or whether it was determined that there are no such appropriate and available services.

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> "Appropriate and available support services" are to be determined by school authorities.

There are several board policy provisions within PA 99-456:

- Unless otherwise required by federal or state law, districts are forbidden from instituting zero-tolerance policies that require suspensions or expulsions.
- Districts must create a policy to facilitate the re-engagement of students who are suspended out-of-school, expelled, or returning from an alternative school setting.
- Districts must create a policy by which students have an opportunity to make up work for equivalent academic credit. This includes students suspended from the school bus who do not have alternate transportation to school.
- Districts are forbidden from advising or encouraging students to drop out voluntarily due to behavioral or academic difficulties.
- Districts may not issue a monetary fine or fee as a disciplinary consequence, but may still require restitution for lost, stolen, or damaged property.

Additionally, PA 99-456 states that:

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- Parent-Teacher Advisory Committees are encouraged to create MOU with local law enforcement agencies that clearly define the agency's role in schools.
- Districts must make reasonable efforts to provide professional development to their staff and board members on the adverse consequences of school exclusion and justice-system involvement, effective classroom management strategies, culturally responsive discipline, and developmentally appropriate disciplinary methods that promote positive and healthy school climates.

If you have questions regarding this guidance or would like to discuss your school district's disciplinary policies, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

Recent Student Discipline Cases

ADMINISTRATIVE TRANSFERS

Leak v. Bd. of Educ. of Rich Twp. High Sch. Dist. 227, (Ill. App. 9/9/15)

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According to the Illinois Appellate Court, an administrative transfer of a student to an alternative program for more than 10 days is tantamount to an expulsion. As such, a due process hearing before the Board of Education is required.

The Board of Education voted to terminate Superintendent Leak's employment contract for cause on the grounds that Leak administratively transferred 48 disruptive students to alternative schools without Board action. The administrative transfers for each of the 48 students were for more than 10 days.

In her lawsuit challenging her dismissal, Leak sought a declaratory judgment that the transfers were permitted under section 13A-4 of the School Code which states, in pertinent part, that "[a] student who is determined to be subject to suspension or expulsion in the manner provided by Section 10-22.6 may be immediately transferred to the alternative program." 105 ILCS 5/13A-4. The trial court dismissed Leak's argument that she had been discharged for no cause and she appealed.

The Illinois Appellate Court reviewed sub-paragraphs (a) and (b)

within Section 10-22.6. Subparagraph (a) permits the immediate transfer to an alternative program following board approval while subparagraph (b) only authorizes school personnel to suspend pupils for a period not to exceed 10 school days without board approval. The court determined that when read in their entirety, the School Code provisions establish an intent by the legislature to expel students only "after the parents have been requested to appear at a meeting of the board, or with a hearing officer appointed by it." 105 ILCS 5/10.22.6(a). Accordingly, since these administrative transfers were for more than 10 days, the transfers were tantamount to an expulsion, the students' due process rights were violated, and there should have been a board hearing.

CONFIDENTIALITY OF STUDENT RECORDS

Letter to Soukup, (FPCO 2/9/15)

The Illinois School Code requires school district anti-bullying policies to provide parents the opportunity to discuss with the school the bullying investigation, findings and actions taken by

the school. Similarly, U.S. Department of Education guidance indicates that schools should advise harassed students and their parents about bullying investigations, findings, and actions taken with regard to complaints of bullying.

Concerned that USDOE guidance contradicts confidentiality laws, an inquiry was made to the Family Policy Compliance Office ("FPCO") that implements the Family Educational Rights and Privacy Act ("FERPA"). The FPCO indicated, that in accordance with civil rights guidance, *FERPA* permits a school to disclose to the parent of a harassed student information about sanctions imposed on a perpetrator which directly relate to the harassed student. According to the FPCO, examples of these sanctions include a requirement that the harasser stay away from the victim; the separation of students; change of classes, and that the harasser is prohibited from attending school for a period of time.

Bryner v. Canyons Sch. Dist., (UT. App. 5/29/15)

In Illinois, videos created for safety or security purposes are not student records unless used for specific purposes, such as student discipline. In the following case, the District was

required to provide a redacted video only if the parent paid to redact it:

A parent of a student involved in an altercation in a middle school hallway filed a complaint in court because the district refused to produce a copy of the surveillance video showing the fight. The Court agreed with the school that the video, in which students were clearly identifiable by face, body shape, clothing or otherwise, was a student record that directly related to students and was maintained by the school. The Court cited FERPA guidance that parents have the right to inspect and review a videotape showing their own child engaged in misbehavior if no other students are pictured. The Court held that school must provide a redacted copy of the video to the parent within fifteen days of receipt of the parent's payment of the $120 cost to redact the video.

MANIFESTATION DETERMINATIONS

In re Student with Disability, (IL SEA 5/15/15)

An Illinois special education due process hearing officer

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overturned the manifestation determination and expulsion of a student who came to school under the influence of marijuana when the school failed to follow proper procedures:

A high school senior with ED and ADD was suspended for ten days and expelled for 2 years for coming to school under the influence of marijuana. The district determined his behavior was not a manifestation of his disability and he was transferred to an alternative school. Hearing Officer Milsk found that the parents did not receive proper notice of the manifestation meeting ("MDR") because the school scheduled the meeting with the parents by phone, rather than sending written notice, and it was unclear if the parents understood the purpose and possible consequences of the MDR. The MDR team was inappropriately made up of school personnel who did not have direct involvement with the student and testimony at the due process hearing showed that team members knew little, if anything, about the student's disability. The District did not have sufficient information about the student because the team found reevaluation to be unnecessary in 2010 and 2013 and the last psychological evaluation of the student was done by his previous district. As a result, the MDR and expulsion were struck down.

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Districts must give parents 10 calendar days' notice of a manifestation determination and the meeting must be held within ten school days of the decision to suspend the student for more than ten days, expel or transfer the student to an Interim Alternative Educational Setting. The IEP team must carefully consider the student's disability and its effect on the student's misbehavior.

If you have questions regarding these cases or about student discipline, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

Beware Topic Creep in Closed

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Session

School board members, administrators, attorneys: we have all been there. The school board has voted correctly to go into closed session to talk about a topic which is a proper one, say employment of specific personnel, the sale price of district-owned property, or collective bargaining matters. But after a few minutes, board members' comments and questions veer a little off-topic. A discussion of whether to employ a particular assistant principal turns into whether there should be reductions in total staff numbers at that school. A discussion of how much to ask for an old school building changes into whether the district should expand other facilities. A discussion of the cost of union bargaining proposals becomes a general discussion on district finances. Sometimes the new discussion is appropriate for closed session, but it does not fit the particular exception cited in the board's motion. This is topic creep, and the Illinois Attorney General's office has warned us against it.

In Public Access Opinion 15-003, the Attorney General reviewed a recent closed session of the Waubonsee Community College. The

evidence showed that while the board had voted to go into closed session to discuss, in part, the "appointment, employment, compensation, discipline, performance, or dismissal of specific employees," the board had, in fact, primarily discussed the financial condition of the college. The AG warned that, although fiscal matters may well have future implications with respect to the employment and compensation of employees, the specific personnel exception in the Open Meetings Act does not authorize closed session discussion of budgetary issues. Further, while that board had also cited the statutory exception for the purchase or lease of real property for public body use, the actual closed session discussion related to the college's sale of its own property. The sales price of property owned by a public body is, of course, a different exception under the Open Meetings Act. Still, the AG found a violation of the law as a result.

The circumstances which led to the AG review in this case in the first place were avoidable: a newspaper reporter had peered through a door window, where she could see projected slides on general finance matters. But never assume that your closed sessions will always avoid review. Anyone in the closed meeting

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might contact the Public Access Counselor.

Every participant in closed sessions, including board members and administrators, should be mindful of topic creep. If a discussion veers too far from a proper topic, the group should be reminded. If a different but still proper closed session topic comes up, do a quick return to open session for a new vote with the proper citation. However inconvenient or awkward, remember that Open Meetings Act violations are punishable as crimes.

If you have questions about topic creep in closed session, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).

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June School Board Meeting Agenda Reminders

As school district officials prepare the agenda for their June school board meetings, it is best to remember two routine but essential annual actions which should be on that agenda.

Prevailing Wages. The Illinois Prevailing Wage Act (820 ILCS 130/0.01 *et seq.*) establishes a policy under which school districts and other public bodies must require their construction contractors to pay their laborers, mechanics, and other workers no less than that level of wages which are determined to be prevailing in each district's locality or county. To effectuate this policy, this law contains several mandates relevant to school districts. (We are aware of some currently pending proposals would remove the Prevailing Wage Act mandates for school districts as part of various restrictions on property taxes, but none of these proposals has been enacted to date.) One of those mandates provides that, during the month of June each year, each public body must investigate and ascertain the local prevailing wages, publicly post or keep them available

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for inspection, and file them with the Illinois Department of Labor. Generally, this means that every school board must approve a resolution each June adopting the State's published wage rates for the county as its prevailing wages.

Accrued Interest. School Code Section 10-22.44 (105 ILCS 5/10-22.44) allows school boards to freely transfer interest accruing on any district fund (except Tort Immunity, IMRF, Life Safety, and Capital Improvements) to any other district fund. However, this authority is effectively limited by an Illinois State Board of Education Rule (23 Ill. Admin. Code Section 100.50), first imposed in 2008, which provides that all interest earnings "shall be added to and become part of principal as of June 30 of the fiscal year" *unless* "otherwise provided by statute or specified by board resolution adopted prior to June 30 of a fiscal year." Thus, to the extent that a school board does not exercise its authority to transfer interest in a given year, then, to fully preserve that authority, it must pass a resolution before June 30 to designate all the interest accruing during the fiscal year as interest for the coming fiscal year as well.

We strongly recommend that every school board take both of these

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actions every year during their regular June board meeting. If you have questions about email access to board members, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).