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STUDENT HEALTH RECORDS: HELPFUL NEW FEDERAL GUIDANCE

In December 2019, the United States Department of Health and Human Services and the United States Department of Education issued joint guidance on the application of the Family Educational Rights and Privacy Act(FERPA) and the Health Insurance Portability and Accountability Act of 1996(HIPAA) to student health records. The newly issued guidance updates the departments' most recent joint guidance on the subject, which was last released in November 2008. The following is a brief refresher of the intersection of the two laws as they apply to elementary and secondary schools, and some portions of the guidance that we feel may help you navigate the intricacies of these laws. For

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your reference, the guidance is available here: https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/index.html
and
https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records

As a reminder, most public elementary and secondary schools are not subject to HIPAA because they are not "covered entities" as that term is defined under HIPAA. In general, covered entities are health plans, health care clearinghouses, and health care providers that transmit health information electronically in covered transactions, such as billing a health plan electronically for services. Even if a public elementary or secondary school meets the definition of a covered entity under HIPAA, the health

information contained in student records is likely an "education record" under FERPA, which is expressly excluded from HIPAA's privacy rules. Therefore, FERPA, not HIPAA, will be more likely to govern the disclosure parameters of student health records in your school. Nevertheless, the guidance provides clarification on certain instances in which disclosure of protected health information under HIPAA and education records covered by FERPA may occur without obtaining the student or parent's written consent.

The guidance's first noteworthy point of clarification is that HIPAA allows health care providers to disclose protected health information to school nurses and other school health staff for treatment purposes. For example, if a school nurse is unsure about

the way a student's medication should be administered, HIPAA allows the student's physician or other health care provider to guide the nurse on how the medication is administered without parental consent. In the same vein, FERPA allows school officials to verify information contained in a record with a third party. Therefore, if a dean wants to confirm a doctor's note excusing a student's absence, FERPA allows the dean to disclose the contents of the note with the purported doctor who wrote the note without parental consent.

FERPA also allows school nurses and other school officials to disclose information in a student's education records to the student's physician without consent if a health or safety emergency exists and the physician's knowledge of the records

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is necessary to protect the health or safety of the student or others. For example, if a student's school health records confirm that a student has an allergy to a medication used to treat seizures, and the student is rushed from school to a hospital because of a seizure, a school official may share with the hospital that the student is allergic to the particular medication before the student arrives at the hospital.

Additionally, HIPAA allows health care providers to disclose protected health information to anyone if the provider has a good faith belief that: (1) the disclosure is necessary to prevent or lessen a serious and imminent threat; and (2) the person to whom the disclosure is made is reasonably able to prevent or lessen

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the threat. This open avenue of communication under HIPAA could be valuable when school threat assessment teams are assessing a potential student threat. FERPA has a similar exception to disclosure without consent if the disclosure of personally identifiable information in an education record is necessary to protect the health or safety of the student or others.

Finally, FERPA allows schools to disclose personally identifiable information in education records to law enforcement officials who are **not** school employees if the law enforcement officials: (1) perform a service for which the school would otherwise use employees (*e.g.* to ensure safety); (2) are under the school's direct control with respect to the use and

maintenance of the education records (*e.g.* such as through a memorandum of understanding that establishes data use restrictions and data protection requirements); (3) are using the information for the purposes for which the disclosure was made (*e.g.* to promote safety), and adhering to FERPA's limits on re-disclosure of the information; and (4) meet the criteria specified in the school's annual notification of FERPA rights for being "school officials" who have been determined to have "legitimate educational interests" in the education records.

There are many other clarifications in the December guidance and, as you know, HIPAA and FERPA invite many practical complexities concerning information management.

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If you have any questions or concerns regarding the guidance itself, how the guidance may impact the Illinois School Student Records Act, or any other student records issues, please feel free to contact your attorney at Hauser, Izzo, Petrarca, Gleason, and Stillman.

TIME OUT AND PHYSICAL RESTRAINT: ISBE ISSUES GUIDANCE AND FREQUENTLY ASKED QUESTIONS ON EMERGENCY

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REGULATIONS

The Illinois State Board of Education has issued Guidance and Frequently Asked Questions on the Emergency Regulations for the Use of Time out and Physical Restraint, dated December, 2019, responding to questions about the Emergency Rules (effective November 20, 2019 and amended with regard to prone and supine restraint on December 4, 2019). Some highlights of the document are summarized below. The Guidance can be located on ISBE's website at https://www.isbe.net/Documents/Guidance-FAQs-Time-out-restraint.pdf#search=guidance%20rules

The Guidance clarifies questions about the definition of time out and physical restraint. Time out does **not** include, and the ISBE time-out and physical restraint form therefore is **not** required for:

- In school

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suspension
- Evacuating other students from a classroom
- Staff or student directed sensory or calming breaks
- Use of study carrels or other stable, non-enclosed partitions in the classroom

The Guidance likewise describes circumstances that are **not** physical restraint:

- Physical escort (temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location).
- Orthopedic and supported positioning equipment are not restraints so long as these are not

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used for discipline or for school staff members' convenience.

- Weighted vests, blankets, and similar items are not restraints if used under the direction of an OT or PT, and for the purposes and within the parameters in the student's IEP or Section 504 Plan.

Staff members who restrain a student must ensure that the student's mode of communication (e.g. PECS, augmentative communication) is readily available during the physical restraint and that staff members are able to communicate effectively with the student.

If physical restraint is contraindicated, the school should contact emergency personnel, including but not limited to police, and the student's parent to intervene. Additionally, the school may consider a change in placement.

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With regard to the required review of the student's behavior interventions and placement after three incidents of time out or restraint, the Guidance provides that:

- The three instances of time out or physical restraint "reset" once a meeting is held and another meeting is not needed until another three incidents occur.
- The review does not require a full IEP or Section 504 meeting. Parents may waive ten days' notice of the meeting, waive the requirement that they attend the meeting or waive the meeting altogether. However, if the parent waives the meeting, the team must still conduct the review and complete the required documentation if amending the student's IEP or Section 504 Plan.

Additionally, when staff members review the use of prone or

supine restraint, a full IEP meeting is not required.

In addressing questions about the required ISBE form to report time out or physical restraint, ISBE indicates that:

- The parent may be provided the ISBE required documentation in person, by email or by mailing the form within 24 hours.
- An evaluation by a nurse is required only when a student, parent or staff member reports a staff or student injury.
- Listing names of staff members involved in the time out or restraint is sufficient; their signature on the form is not required.
- Time out ends, for purposes of documentation, when the student is no longer an imminent risk to

self or others, but other ongoing interventions and postvention should be documented as well as their length.

- If a student is subject to physical restraint during transportation, the district or cooperative is ultimately responsible for completing and submitting the required documentation, but may delegate responsibility to the bus company so long as documentation is simultaneously submitted to the district or cooperative.

For further information on the Emergency Rules and amendment and ISBE Guidance, please join us at one of our Legal Breakfasts, in Oak Brook on January 22, 2020 and in Tinley Park on January 23, 2020. You may also call one of our attorneys at 708-799-6766 (Flossmoor Office) or 630-928-1200 (Oak Brook office).

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GOVERNOR SIGNS BILL AFFECTING UNION MEMBERSHIP

On December 20, 2019, Governor Pritzker signed Senate Bill 1784 into law – creating Public Act 101-0620. Among other effects, the Public Act amends the Illinois Public Labor Relations Act and Illinois Educational Labor Relations Act to include provisions impacting union members' dues deduction authorizations. The Act, which took effect immediately, is the Illinois legislature's response to the United States Supreme Court's decision in *Janus v. AFSCME Council 31*. You will recall that, as a result of *Janus*, persons who are part of a bargaining unit represented by a

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public union – but are
not union members – cannot be required to pay union dues or "fair share" fees
to support benefits the non-members may enjoy from the union's collective
bargaining.

The Public Act's most significant upshot is that it permits unions and union members to agree to "reasonable limits" on the right of union members to revoke their dues deduction authorizations. The Act provides that a dues authorization may include a period of irrevocability that exceeds one year. The Act also provides that a dues authorization that is irrevocable for automatically renewing one-year periods and contains at least an annual 10-day window for the employee to revoke the authorization, is deemed to be reasonable. Authorized payroll deductions of dues must remain in effect until: (1) the employer is notified that an employee revoked their deduction authorization in accordance with the terms of the authorization; or (2) the employee is no longer employed by the employer in the same union; however, if the employee is re-employed by the same

employer within one year in a position represented by the same union, the dues deduction authorization is automatically reinstated. Therefore, a union member can resign from union membership at any time. But, if the member's resignation does not satisfy the requirements contained in his/her authorization (e.g., it occurs outside of any stated window to revoke), the Act requires employer to continue making dues deductions until the employee "properly" revokes the authorization (e.g., submits a written revocation during the revocability window).

We believe that this portion of the Act can be challenged on constitutional grounds given the *Janus* decision. In the meantime, most employers affected by the Act will be faced with several predicaments if an employee resigns from a union but does not properly revoke his/her dues deduction authorization: (1) follow the Act and continue deducting dues; (2) refuse to continue deducting dues, which will likely result in an unfair labor practice charge per the Act; and/or (3) bargain with the union over "reasonable limits" on employees' right to revoke a dues authorization, which, if the limits are unfavorable to the employee, could result in a First Amendment lawsuit in which the

employer could be named as a defendant.

Thankfully for employers, the Act states that a union must indemnify an employer for any damages and reasonable costs incurred for any claims made by employees for deductions made in good faith reliance on the union's information to the employer regarding dues deductions. This "hold-harmless" provision of the Act makes it a little more palatable for an employer to follow the law and continue dues deductions when required by the terms of an authorization. However, that would not preclude an employee from legally challenging the employer's continuing deductions. As stated above, that is not to say that an employer's other options are more pleasant.

The Act also:

- Prohibits various items of private information, as well as information concerning an individual's

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membership status in a union
and deduction information, from being disclosed under the Public Labor
Relations Act, Illinois Educational Labor Relations Act, Pension Code, and
Freedom of Information Act.

- Prohibits employers from disclosing certain
information about union members to third parties. The Act requires employers to
provide the union with a written copy of a request for prohibited information
(or a summary of an oral request), and a copy of any response to the request
within five business days of sending the response.

- Requires employers to give unions a list of its
members, along with extensive information about the members, once a month
unless another time frame is agreed to by the employer and

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union (before,
employers were obligated to furnish this list upon request).

- Requires employers to give the union extensive information about new hires no later than 10 calendar days from the date of the
union member's hire.

- Codifies the rights of union members, under certain circumstances, and "without charge to pay or leave time" of the
employee to: (1) meet during the workday to investigate and discuss grievances;
(2) meet during lunch and "other non-work breaks," and before and after the
workday to discuss certain collective bargaining and internal union matters;
(3) meet with newly hired employees for up to one hour either within the first

> two weeks of the hire's employment in the union, or at a later date and time if mutually agreed upon; and (4) use the employer's mailboxes and bulletin boards to communicate with union members regarding collective bargaining matters, grievance investigations and other workplace-related complaints, and internal union matters. This access to employees is to be "conducted in a manner so as not to impede normal operations."

The Act does not prohibit employers and their unions agreeing in a bargaining agreement to provide the unions with greater access to bargaining unit employees. Consequently, employers with bargaining agreements containing provisions that address any of these items in a more restrictive manner may find that those provisions are no longer enforceable.

If you have any questions or concerns regarding the Public Act's

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implications for your management/union relationships, please feel free to contact your attorney at Hauser, Izzo, Petrarca, Gleason & Stillman.

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

On December 6, 2019, the Governor signed into law Public Act 101-0598 (SB 460) which modifies the new requirement in Public Act 101-0515 that schools provide all written materials that will be

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discussed by the IEP team at Eligibility and IEP meetings to parents three school days before the meeting. This provision delays the three school-day disclosure requirement until July 1, 2020. No revisions were made to the requirements regarding related service logs or compensatory services.

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

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ISBE ISSUES AMENDMENT TO EMERGENCY RULES ON PHYSICAL RESTRAINT

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

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

1. The

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school district or other entity has determined that the student has no medical or psychological limitations that contraindicate the use of prone or supine restraint.

2. The school district or other entity determines that the situation is an emergency, in which immediate intervention is necessary to protect the student or others from imminent danger of causing serious physical harm to the student or others and less intrusive measures have been tried and were ineffective. The prone or supine restraint must be the least restrictive and intrusive intervention to address the emergency.
3. The prone or supine restraint does not impair the student’s ability to breath or communicate.
4. Personnel using prone or supine restraint have completed required

training.

5. One school professional, not involved in the holding of the student, and trained in identifying signs of distress, observes the student during the entire incident.
6. The number of staff involved in restraining the student cannot exceed the number of people necessary to safely hold the student.
7. The prone or supine restraint ends immediately when the threat of imminent serious physical harm ends, and the restraint shall not last longer than 30 minutes, unless authorized by a school administrator after the school administrator consults with a psychologist, social worker, nurse or behavior specialist.
8. If a student is restrained in a prone or supine restraint in at least 2 separate

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

If you have questions regarding the

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

GUIDANCE: ISBE EMERGENCY RULES ON TIME OUT AND PHYSICAL RESTRAINT

Effective November 20, 2019, the
Illinois State Board of Education issued emergency regulations, 23 IAC 1.285,
regarding requirements for the use of time out and physical restraint. ISBE
also issued a Physical Restraint and Time Out Form to be

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completed after each
instance of time out or physical restraint and submitted to the parent and to
ISBE. Below is a summary of the
important revisions to the regulations and our guidance regarding some
questions that we have received from clients.

Revisions to Time Out and Physical Restraint

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

- The

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

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

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

- Prone
  restraint is no longer permitted.

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

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

Notification and Reporting Requirements

- The
  new ISBE Physical Restraint and Time Out Form must be completed after each

incident of physical restraint or time out, must be sent to the parent within
24 hours and to ISBE within 48 hours.

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

Other Requirements:

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

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

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

Questions Regarding Time Out and Physical Restraint Emergency

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Rules:

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

2. What constitutes “time out?”
   The definition of “time out” in the regulations is very broad and includes a “behavior management technique” that involves the monitored separation of a student from classmates with a trained adult for part of the school day in an unlocked setting. The regulation also provides,

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however, that "time out" is used as a means of maintaining a safe environment for learning to the extent necessary to preserve the safety of students and others. Furthermore, the ISBE form to be completed for restraint and time out requires staff to check one of two reasons for a restraint or time out: (a) imminent danger to self or (b) imminent danger to another student or to staff.

a. If a student chooses to take a break, but they are separated from their peers, is that considered a "time out"? Does that require the completion of the form, notification of parents, and submission to ISBE?
This seems to be an accommodation to the student. Using the broad definition in the regulation, this is a monitored separation of the student from his classmates. However, if the student is not choosing to take a break at a time when the student is exhibiting behavior that results in imminent danger to him or herself or others, we believe that the ISBE form would not need to be completed. If the student were to request a break three times, that would not seem to be a situation where we would hold an IEP meeting to change interventions or placement. To the

contrary, the student's strategy is effective and positive. This situation does not seem to fall within the intention of the regulations or the ISBE form.

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

c. If a student leaves the classroom and processes with a social worker in their office or an alternate location, is that considered a "time out"? Does that require the completion of the form, notification of parents, and submission to ISBE?
   Similar to example a above, unless the student's behavior

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is causing imminent danger, we would not consider this situation to be within the intent of the regulations and would not complete the form.

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

e. Is a “chill zone” within a classroom considered a “time out”? Does that require the completion of the form, notification of parents, and submission to ISBE?
   We see this in the same way as example a. Additionally, depending on how the “chill zone” is set up, it may not be a separation from peers. Also, typically a “chill zone” is available to all students in the classroom.

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

g. Is an in-school suspension considered a "time out"? Does that require the completion of the form, notification of parents, and submission to ISBE? Where is the line drawn between "time out" and "in-school suspension"?
   In school suspension is a discipline matter. Time out and physical restraint may not be used for discipline. Rather than completing a time out/restraint ISBE form for a suspension, complete your form for a 1-3 day suspension or a suspension over 3 days, as applicable.

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

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

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

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whether training in PBIS, for example, satisfies this requirement.

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

7. With regards to reporting to parents and ISBE the use and required documentation, does that mean all incidents that occur on a Friday must be submitted before everyone leaves for the day to comply with the "24 hour" and "48 hour" timelines?
   This is unclear from the regulations. Reg. 1.285 (f)(3) provides that the ISBE restraint/time out form must be completed by the beginning of the school day following the episode of restraint or time out. Completing the form by Monday morning would comply with this section of the

regulations. Yet, sections (g) and (h) of the regulations require sending the form to parents within 24 hours and to ISBE no later than 48 hours after the use of restraint or time out. The ISBE form requires that written parent notification occur within 24 hours of the incident. The most conservative approach would be to complete and send the Form by the end of the day on Friday. However, Line 11 of the ISBE form provides options to check for notification to parents, including a) phone call, b) email, c) other and d) required written parent notification, therefore contemplating that there may be situations in which parents are contacted by multiple means. A possible solution is that if paperwork cannot be completed timely, or if completion of the form by the beginning of the next school day exceeds the 24 hour parent notification period, that a designated team member contact the parent by email (so that the notification is written), explain that a restraint or timeout occurred and the information that will be documented on the form and tell the parent that the form will be sent to the parent on Monday.

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

8. What does “non-therapeutic” timeout mean? Must you have a meeting after every third “therapeutic” time out, since it only says after “non-therapeutic” timeouts?
   Presumably, a non-therapeutic time out or restraint is one that is performed to administer discipline to a student and this is not permitted by the regulations. The regulatory requirement to hold a meeting when there are three “non-therapeutic” time outs or restraints does not make sense. However, the ISBE restraint/time out form, in line 15, provides options for meeting discussions upon the third incident of restraint or time out (as opposed to

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non-therapeutic restraints or time outs), so a meeting is required after 3 incidents. The form provides the choices to hold a problem-solving meeting or a domain meeting for a student not already eligible for an IEP or Section 504 Plan, or a meeting to review interventions for students with an IEP or Section 504 Plan. An "other" choice is given, which, according to the regulations, could include a meeting to determine if a change in placement is necessary.

9. Are resident districts liable for the actions of a therapeutic day school's adherence to the new legislation? There is a new complaint process in which the parent can file a complaint with ISBE against the facility that performed the time out or restraint. In that case, ISBE would investigate the facility. However, if a parent files a request for a due process hearing, that hearing request must be filed with the Superintendent of the school district in which the student resides. If the parent alleged that the restraint/time out denied the student a FAPE, the district could be held liable, for example for compensatory services. When a district places

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a student out of district, the district is required to monitor the placement to ensure that FAPE is being provided.

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

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

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

On August 23, 2019, Governor Pritzker signed Public Act 101-0531 which takes effect immediately. As further described in this briefing, the Public Act changes several areas of the School Code. Most notably, the Public Act significantly changes the procedure for investigating sexual abuse allegations made against a school district’s staff members, vendors, or volunteers. The

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Public Act also makes several additional changes that impact school districts' hiring processes; applicant and employee background checks; staff mandated reporting obligations under the Abused and Neglected Child Reporting Act; and, the suspension of a teacher's license for improperly resigning.

Sexual Abuse Investigations

The Public Act adds Section 22-85 to the School Code. This section requires boards of education to adopt a policy and procedure governing the investigation of alleged incidents of sexual abuse upon a child by an employee, school vendor or volunteer ("school staff member") either on or off school grounds. This procedure must include the following:

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

2. Any incident of alleged sexual abuse reported to DCFS or local law enforcement which is accepted for investigation must also be referred by the "entity that received the report" to the local Children's Advocacy Center. This requirement applies to "schools in a county with an accredited Children's Advocacy Center." We recommend that you become familiar with your local Children's Advocacy Center's contact information and reporting protocols.

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

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

a. The school **may not** interview the alleged victim regarding the details of the incident until after completion of a forensic interview of the victim by the Children's Advocacy Center; and

b. If asked by DCFS or local law enforcement, the school must provide any evidence the school has gathered to local law

enforcement or DCFS provided said disclosure does not violate State and federal law.

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

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

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22-85.

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

**Hiring
and Background Checks**

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

1. Each
   employee must be checked every five (5) years of

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

- Each district must "consider" the status of a person with an indicated finding of abuse or neglect by DCFS or another child welfare agency prior to hire. This does not preclude the hiring of individuals with an indicated finding but only requires that the finding be considered. We recommend keeping

information outlining the steps taken in considering the employment of such an individual and the reasons that a decision was made to hire such a person.

- If the district becomes aware that an employee has a prohibited conviction under Section 21B-80 or which requires registration under the Statewide Sex Offender Database or the Murderer and Violent Offender Against Youth Database, the district Superintendent is required to notify the State Superintendent in writing of the conviction or registration within fifteen (15) business days.

Prohibited
Criminal Offenses

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

1. Luring of a Minor – 720 ILCS 5/10-5.1
2. Involuntary Sexual Servitude of a Minor – 720 ILCS 10-9(c)
3. Solicitation to Meet with a Child – 720 ILCS 5/11-6.6
4. Sexual Relations within Families – 720 ILCS 5/11-11
5. Aggravated Battery – 720 ILCS 5/12-3.05
6. Aggravated Domestic Battery – 720 ILCS 5/12-3.3
7. Criminal Street Gang Recruitment on School Grounds – 720 ILCS 5/12-6.4
8. Hate Crime – 720 ILCS 5/12-7.1
9. Female

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Genital Mutilation – 720 ILCS 5/12-34

10. Inducement to Commit Suicide – 720 ILCS 5/12-34.5
11. Sexual Conduct or Sexual Contact with an Animal – 720 ILCS 5/12-35

It is our opinion that you are not required to terminate any current employees who were employed prior to August 23, 2019 who have been convicted of one of these newly added offenses prior to their employment. Any new applicants for employment would not be eligible for employment if they have any of these convictions. In addition, any current employees who are convicted of one of these offenses subsequent to August 23, 2019 would also be ineligible for employment.

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**Mandated
Reporting**

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

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

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conduct.

Another major change made by the Public Act is that the State Superintendent is required to immediately suspend the license of any employee "charged" with any offense prohibited under Section 21-80 of the School Code. While the Public Act does not require it, we recommend that a school district report any employee charged with a prohibited offense to the State Superintendent, so that she may fulfill her role in this process.

Teacher Resignations

The Public Act modifies Section 24-14 of the School Code, which deals with

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resignations by teachers. As you are likely aware, a tenured teacher may only resign after providing thirty (30) days written notice upon the secretary of a board of education or obtaining the board's consent. Moreover, no teacher (probationary or tenured) may resign during a school term in order to accept another teaching position without the board of education's concurrence. As amended, if a teacher resigns improperly the Board of Education may pass a resolution reflecting that the teacher's resignation was not in conformity with Section 24-14 and serve it upon the State Superintendent. The State Superintendent is then required to convene an informal evidentiary hearing within ninety (90) days after the date of the resolution. If it is determined at this hearing that the resignation was not in conformity with the School Code, the teacher's license "shall" be suspended for a period of one (1) year.

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A teacher may also agree to a “lesser licensure sanction” in lieu of such a hearing and finding, at the State Superintendent’s discretion. We are happy to work with your District to create a resolution that is in conformity with the requirements of the State Superintendent should you have any resignations which are unauthorized.

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

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

On August 23, 2019, the Governor signed into law HB 3586, which requires districts to provide additional disclosure and notification to parents of students who are or may be eligible for special education services into law. The Public Act is effective immediately.

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

What documents must be provided to the parent before an IEP

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

Written material includes, but is not limited to:

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

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

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

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

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

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When must related service logs be provided to the parent?

Related service logs must be provided:

- At the student's annual review; and
- At any time at the request of the parent

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

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

What reporting is required if related services are missed?

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If related services required by the IEP are not provided within ten school days after a "date or frequency" set forth by the student's IEP, the District, within 3 school days, must provide the parent with notice of the District's noncompliance with the student's IEP and include information about the parent's ability to request compensatory services in the notice. "School days" do not include days when the child is absent from school for reasons unrelated to a lack of IEP services.

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

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

Jack Canna Joins The Firm

We are very pleased to announce that Jack Canna will be joining our firm in an “Of Counsel” position, effective August 1, 2019. Jack brings decades of experience representing school districts and other local governmental entities. Throughout his distinguished career, Jack has earned the respect of his clients and colleagues. The addition of Jack is a great benefit to our law firm and will enhance our ability to continue to provide our clients with the highest quality legal representation.

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[Please see the full announcement here.]

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

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

Public Act 100-1177, passed last year but not effective until

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June 1, 2019, amended the Prevailing Wage Act ("PWA"). PWA generally requires that all contractors on public works in Illinois pay no less than the wages prevailing in each trade in the locality. Public bodies must include a requirement for the payment of prevailing wages in their solicitation and specifications for bids, public works contracts, and purchase orders. These requirements remain.

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

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Another mandate for school districts and other public bodies under PWA has been to receive and maintain copies of monthly certified payroll records provided by the contractors to evidence the wages actually paid. These records were then subject to inspection upon request by interested parties. The PWA amendments will relieve public bodies of this records-retention function, but not immediately. Instead, the Department of Labor will be creating no later than April 1, 2020, an electronic database where contractors will have to upload their payroll records. Once that database is in operation, local districts will no longer have a duty to receive, maintain, and grant access to those records.

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

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

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