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SCHOOL LAW UPDATE

April 9, 2019

2019 Annual MTBF&M Firm Workshop

iHotel and Conference Center

Champaign, IL

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MTBFM 2019 Firm Workshop

April 9, 2019

"School Law Boot Camp"

9:00 – 9:15	Marijuana in the School Setting
9:15 – 9:30	Responding to Subpoenas
9:30 – 9:45	Key Reminders for Section 504
9:45 – 10:00	FOIA and OMA Cases of Note
10:00 – 10:15	Employment, Minimum Wage, and FLSA Update
10:15 – 10:30	BREAK
10:30 – 10:45	Title IX in the #MeToo Era
10:45 – 11:00	Biometrics, SSNs, and Student Data Privacy
11:00 – 11:15	Religion, Prayer, and Recent Litigation
11:15 – 11:30	Bidding Cooperatives and Bidding Exemptions for Technology
11:30 – 11:45	Key Reminders for School Real Estate Transactions
11:45 – 12:00	2016 Amendments to the Illinois Marriage and Dissolution of Marriage Act, and Its Effects on Residency, Records, and Parental Rights
12:00 – 12:30	Lunch
12:30 – 1:00	Q&A

Marijuana in the School Setting

Cannabis: A Brief Legislative History

Cannabis is the source of a psychoactive drug derived from a plant which found its origins in central and southern Asian continent. Source https://en.wikipedia.org/wiki/Cannabis_(drug) (last accessed February 8, 2019). The plant produces the drug commonly known as marijuana. Marijuana was made illegal for non-medical use in the United States in 1936, and was banned nation-wide for all uses (including medical) with the passage of the Controlled Substances Act of 1970, which listed cannabis and cannabis derivatives as a Schedule I drug. 21 U.S.C. § 801 *et seq.*

Debate regarding liberalization of the drug laws began even before the passage of the Controlled Substances Act, and intensified immediately after passage of the Controlled Substances Act. Source: https://en.wikipedia.org/wiki/Decriminalization_of_non-medical_cannabis_in_the_United_States ("Decriminalization") (last accessed February 8, 2019). Oregon became the first state to decriminalize cannabis in 1973, reducing marijuana criminal penalties for possession up to an ounce to just $100. *Id*. Oregon's decriminalization was followed by Alaska in 1975, whose legislative effort ultimately resulted in full legalization as a practical matter when the State's Supreme Court ruled that a 1972 arrest for marijuana use violated Alaska's Constitutional Right to Privacy. *Ravin v. State*, 537 P.2d 494 (Ak. 1975).

Following Alaska, Minnesota, Mississippi, New York, North Carolina and Nebraska all passed laws decriminalizing use of marijuana into the late 1970s. *Decriminalization, Ibid*. However, following calls from concerned parents about teen drug use, stepped up enforcement from the federal government quashed much of the decriminalization movement in the 1980s. *Id.* The 1986-1987 nomination of Judge Douglas Ginsburg to the United States Supreme Court was defeated when it was revealed he had tried marijuana, and states began efforts to re-criminalize the drug's use. Voters in Alaska re-criminalized marijuana in 1990, and the same year the federal Solomon-Lautenberg Amendment encouraged states to pull driver licenses of drug offenders caught with marijuana. *Id*.

In 1996, California became the first state to legalize marijuana for medical use with the passage of the Compassionate Use Act of 1996 (known colloquially as "Prop 215"). Shortly after, the United States Supreme Court ruled unanimously that the federal government's Schedule I label meant that citizens using the substance in California were not immunized from federal criminal laws by the state's medical marijuana legalization because medical necessity is not a defense to charges under the Controlled Substance Act. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) ("Oakland"). *See also*, *Gonzales v. Raich*, 545 U.S. 1 (2005) ("Gonzales") (holding that enforcement of the Controlled Substances Act by the Federal Government in the State of California does not violate the Commerce Clause of the United States Constitution).

The first states to legalize recreational marijuana were Washington and Colorado by voter approval of ballot initiatives in 2012. As state legalization did not in any way change federal law, which, due to *Oakland* and *Gonzales* allowed the federal government to pursue federal criminal charges against citizens otherwise in compliance with state law, the United States Department of Justice, in 2013, commissioned the Cole Memorandum. The Cole Memorandum was delivered to all United States Attorneys working for the Attorney General and advised them the Department of

Justice would not enforce marijuana prohibition in states that had "legalized marijuana in some form and … implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana." Source: https://en.wikipedia.org/wiki/Cole_Memorandum, ("*Cole*") (last accessed February 8, 2019).

Marijuana Today

In January 2018, Attorney General Jeff Sessions rescinded the Cole Memorandum, indicating the Federal Government would return to strict enforcement of Schedule I drugs pursuant to the Controlled Substances Act of 1970. *Cole, Ibid*. However, during congressional hearings regarding his confirmation to the post of Attorney General of the United States replacing Jeff Sessions, Attorney William Barr indicated that he would advise Attorneys working for the office not to prosecute such crimes due to state reliance on the Cole Memorandum. Source: https://www.c-span.org/video/?456626-1/attorney-general-nominee-william-barr-confirmation-hearing&playEvent= (last accessed January 25, 2019). It is too early to say whether such testimony will be consistent with the role of the Attorney General, and as of the date of this writing Attorney Barr has yet to be confirmed (although it seems very likely he will imminently be confirmed). Mr. Barr also indicated a legislative solution to square federal law with state laws is required in order to lend clarity to the situation. *Id*.

At present, the only law in Illinois which provides any measure of permissive marijuana use is the Compassionate Use of Medical Cannabis Pilot Program Act (410 ILCS 130/1 *et seq*.) ("Compassionate Use Act"). The program, which suffers from the same problems of conflict with Federal law as litigated in other states, permits a patient who applies for, registers, and receives a medical cannabis card to buy and consume marijuana products for medical purpose. *Id*. at 7. The Illinois Department of Public Health is given the responsibility under the Compassionate Use Act to establish and maintain a *confidential registry* of qualifying patients authorized to use marijuana and administer rules for the implementation of the Compassionate Use Act. *Id.* at 15. The program is scheduled for repeal on July 1, 2020.

There is, within the Compassionate Use Act, no permissive exemption for use or possession of marijuana in Illinois schools (except as explained below under the heading "Ashley's Law"). Therefore, cannabis remains prohibited on school grounds and as an intoxicant for students and employees.

At present, recreational use of marijuana is not permissible in the State of Illinois. Although there is much discussion of potential legislation which might permit recreational use within the state, the Federal government's scheduling of the drug has not changed, there appears to be no movement to change that scheduling, and there has been no action on any legislation, as of the date of this writing, to legalize marijuana use within the State of Illinois.

Ashley's Law

Other states contending with compassionate use have provided broad authority to school districts to determine what to do about marijuana, even as they require schools to allow students with certain serious disabilities to utilize prescribed marijuana. In Colorado, 2016 saw the

introduction of Jack's Law, which permits schools the ability to restrict marijuana use, but requires schools to implement a policy which would allow an approved parent to administer marijuana to a student with a doctor's prescription for certain conditions such as cancer, seizures, severe nausea or pain, and post-traumatic stress disorder.

Effective August 1, 2018, Ashley's Law (Illinois Public Act 100-660) requires school districts to adopt a policy permitting use of medical marijuana in schools by students under certain very-narrow circumstances. School districts should note and be aware that adoption of the policy is not optional – it is mandatory, pursuant to 105 ILCS 5/22-33(g). But the policy and the law provide a number of exemptions schools will likely find useful.

Deciding whether to permit use is explicitly, by law, a case-by-case analysis. Pursuant to 22-33(a-5), a person can only be considered if they are a "qualifying patient" who is "registered" under the Compassionate Use Act, *Ibid*. While Ashley's Law prohibits a school from restricting a parent's ability to apply marijuana if the child meets the definitions in the Compassionate Use Act, a school may prohibit such application if:

> 1. A parent or guardian or other individual may not administer a medical cannabis infused product under this Section in a manner that, in the opinion of the school district or school, would create a disruption to the school's educational environment or would cause exposure of the product to other students.
>
> 2. A school district or school may not discipline a student who is administered a medical cannabis infused product by a parent or guardian or other individual under this Section and may not deny the student's eligibility to attend school solely because the student requires the administration of the product.
>
> 3. Nothing … requires a member of a school's staff to administer a medical cannabis infused product to a student.
>
> 4. A school district, public school, charter school, or nonpublic school may not authorize the use of a medical cannabis infused product under this Section if the school district or school would lose federal funding as a result of the authorization.

105 ILCS 5/22-33(c)-(f) (emphasis added). Whether usage is disruptive is necessarily case-by-case analysis, but it seems unlikely that allowing a child to consume a drug on school grounds or on the bus will *not* be disruptive in most communities. Because of the flux in state and federal law and conflicts discussed above, it is unclear at this point that medical marijuana *will not* cause a school district to compromise its ability to receive federal funding. Therefore, before a school district permits medical marijuana use, it should carefully analyze the facts supporting the use of the drug.

Finally, it is worth examining the allegations underlying the case which motivated Ashley's Law. Ashley Surin, a 12-year old Schaumburg resident sued her school district when the district refused to allow her to utilize cannabidiol oil (a cannabis-derived product) to control her allegedly debilitating seizures. Ms. Surin's lawsuit resulted in her school district being ordered to permit her use, even though such use likely violates Federal Law as presently written.

Schools determining whether to restrict or permit use must carefully evaluate the facts and risks involved – but while Ashley's Law requires a policy to be implemented (and failure to implement the policy puts a school district squarely in the crosshairs of the lawsuit filed by Ashley Surin, providing a procedural basis for loss without any substantive review of the facts), the law also provides some cover for a school district wishing to restrict use (on the basis of disruption and federal funding concerns) as well as a school wishing to permit a use by parent in the most extreme student circumstances.

Employee Use

There is no exception in any law which allows an employee to be intoxicated at school, which intoxication or possession explicitly violates the Safe and Drug Free Schools and Communities Act ("SDFSCA"). An employee utilizing or possessing marijuana at school potentially violates the prohibitions of the drug at schools pursuant to SDFSCA, and thus subjects himself or herself to a serious potential federal crime.

However, there is no reliable field test to test for marijuana intoxication at this time. Therefore, determining reliably whether an employee is intoxicated by marijuana while on the job may be difficult.

School districts have attempted to require drug testing of employees, but such urine or blood-sample drug tests bring their own complications. First, employing a post-hiring drug test is a mandatory subject of bargaining because its implementation would change the conditions of employment in most places. Second, testing to assess marijuana use may reveal legal use (such as use in a foreign country where marijuana use does not violate the law) which may be very difficult to distinguish, particularly given the long period of time marijuana by-products may persist in the body's fluids. Finally, so-called "qualitative" tests which promise to provide more accurate reflections of the recency and nature of consumption may not accurately reflect intoxication effects reliably and are very costly to administer.

Therefore, schools seeking to discipline for possession or intoxication should focus on proof. While proof of possession is straightforward, proof of intoxication may require a focus on the effects of intoxication rather than the cause – in other words, rather than discipline for the use of marijuana, a stronger case may be made by examining the employee's behavior and engaging discipline for inappropriate behavior. Don't forget the power of a strong investigation, though – an employee who admits to use may later be estopped from arguing he or she did not use the drug.

Full Legalization

As of the date of this writing, marijuana has not been legalized in the state of Illinois. Even if it is legalized, it is likely to be subject to rules and limitations, in much the same way that alcohol possession and consumption is subject to strict rules and limitations. Every state that has legalized marijuana thus far has left in place full restrictions on its possession and use for those under the age of 21. It is unlikely that any state legalizing marijuana at this point will not adopt the same restriction, which makes marijuana use by students in the District's charge a non-issue beyond medical use as above consistent with the Compassionate Use Act and Ashley's Law.

Best Practice Tips

In the meantime, school should adopt the following protocols in order to minimize trouble with the drug:

1. Adopt a policy consistent with Ashley's Law. Be sure the legal exemptions for federal funding and disruption are in place.

2. Do not permit marijuana use at school or restrict it strictly without review of individual circumstances. Evaluate each case based upon its substance, determining whether you have a student incapable of participating in the educational program but for a drug legally prescribed by a physician or a student whose parent thinks pot is the solution to the world's ills. A strict and thoughtful process will serve as the best possible evidence and defense against a later lawsuit for violation either of Ashley's Law or other state or federal law regarding a student's disability.

3. Do not permit employee use on school grounds, but seek enforcement through good investigation and evaluation of the effects of the use rather than the cause of intoxication.

RESPONDING TO SUBPOENAS

A *subpoena* is a document issued by the clerk of a court or an attorney of record in a court proceeding, commanding an individual to provide information by testifying or producing documents/items.

- *Subpoena Duces Tecum* (subpoena for production of evidence): requires the recipient to produce specific documents, materials, or other tangible items relevant to the facts at issue in a pending action. Often the individual serving the *subpoena duces tecum* will permit the witness to produce the requested items rather than testifying in-person.

- *Subpoena for Testimony*: requires the recipient to appear at a deposition, trial, or hearing to provide sworn testimony.

Is a subpoena the same as a court order? No.

What should I do if I receive a subpoena?

First, do not ignore the subpoena. Failing to respond to a subpoena can result in sanctions, penalties and/or fines, including being held in contempt of court.

Second, call the District attorney and provide him/her with a copy of the subpoena and any additional documents received. The District attorney will then assess the subpoena to determine what is being sought (testimony and/or documents) and whether the request triggers any legal obligations.

Finally, once the District attorney determines a specific response, act promptly and in compliance with the advice given.

How much time do I have to respond to the subpoena?

It depends. Illinois rules require service of at least seven (7) days before the date on which appearance is required for a deposition, hearing, or trial. Federal rules merely allow "reasonable time for compliance." Fed. R. Civ. P. 45(c)(3)(A).

If a subpoena compels the production of documents or deposition testimony, then the response time may be negotiated.

Are there documents that cannot be produced upon the sole production of a subpoena?

Yes. Upon receipt of a subpoena, the recipient should immediately contact the District attorney to determine if the requested documents may be released or if additional action need be taken.

For example, the Illinois School Code prohibits the release of teacher, principal, and superintendent performance evaluations. 105 ILCS 5/24A-7.1. If a subpoena requests said records, contact the District attorney immediately to ensure the District's compliance with the Code.

Similarly, the Illinois School Student Records Act ("ISSRA") forbids the production of student records absent prior written consent or a court order (see below).

I just received a subpoena for student records. What should I do?[1]

Always contact your District attorney so that assistance may be provided as to what the subpoena is seeking and how the District should respond. Here are four common scenarios:

(1) The subpoena is only seeking directory information. If the parent(s)/guardians or eligible student has not specifically requested the District to not release directory information, the District can likely respond to the subpoena after: a) notifying the affected parents and/or eligible students in writing, and b) including the date of notification, parents' names, name of student, directory information to be released, and the scheduled date of release.

(2) The subpoena is seeking directory information that the parent(s)/guardian(s) or eligible student has requested that the District not release. The District will likely need to inform the requesting party a) of the requirements of ISSRA, and b) that parents/guardians and eligible students may request that directory information not be released. After informing the requesting party of this information, the requesting party may seek a court order to compel the disclosure of the information or prior written consent.

(3) The subpoena is seeking directory information, but the District has not disclosed to the school community that directory information may be released in response to a subpoena. Carefully examine your District's definition of directory information within your Board policies, administrative procedures, and student handbook. If your District does not state that it may release directory information in response to a subpoena, consult your District attorney.

(4) The subpoena is seeking non-directory student record information. The District may not disclose the information absent prior written consent, a court order, or another exception recognized by ISSRA.

I received a court order to release student records. Are there additional requirements other than sending out the records?[2]

Yes. Under ISSRA, the District may release records pursuant to a court order provided that it gives the parent/eligible student prompt written notice of: 1) the order's terms, 2) the nature and substance of the information proposed to be released pursuant to the order, and 3) his or her right to have an opportunity to inspect and challenge the student records' contents pursuant to Section 7 of ISSRA.

I just received a subpoena for a student's mental health and/or developmental disability records. What should I do?[3]

Do not release the records, and immediately consult the District attorney. The Illinois Mental Health and Developmental Disabilities Confidentiality Act provides that no person "shall serve a

[1] Illinois Council of School Attorneys, *Answers to FAQs Responding to a Subpoena* (January 2015).
[2] Illinois Council of School Attorneys, *Answers to FAQs Responding to a Subpoena* (January 2015).
[3] Illinois Council of School Attorneys, *Answers to FAQs Responding to a Subpoena* (January 2015).

subpoena seeking to obtain access to records or communications under this Act unless the subpoena is accompanied by a written order issued by a judge or by the written consent under Section 5 of this Act of the person whose records are being sought, authorizing the disclosure of the records or the issuance of the subpoena. No such written order shall be issued without written notice of the motion to the recipient and the treatment provider." 740 ILCS 110/10 (emphasis added). Accordingly, "[n]o person shall comply with a subpoena for records or communications under the [Act] unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records." *Id.*

May I release biometric information pursuant to a subpoena?[4]

No. A District may not release biometric information about a student unless the disclosure is required by court order or the individual who has legal custody of the student or the eligible student consents to the disclosure. 105 ILCS 5/10-20.40(b)(5).

[4] Illinois Council of School Attorneys, *Answers to FAQs Responding to a Subpoena* (January 2015).

TEN KEY POINTS IN NAVIGATING SECTION 504

Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 701 *et seq*., is a federal statute that guarantees certain rights to individuals with disabilities.

Section 504 states (in part):

> **No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.**

29 U.S.C. §794 (as amended).

While the Americans with Disabilities Act of 1990 ("ADA") pertains generally to disability discrimination in public accommodations and employment, Section 504 governs the rights of individuals with disabilities in federally funded programming, including public schools.

The Department of Education is responsible for promulgating regulations implementing Section 504, which it has done at 34 C.F.R. §104.1, *et seq.*

1. A "health care plan" is not sufficient to meet Section 504 obligations.

The existence of an individual health plan generally doesn't negate the obligation to evaluate or justify unreasonably delaying an evaluation. *See, e.g., Union County (NC) Pub. Schs.*, 64 IDELR 25 (OCR 2014) (finding that although the district provided services to the student pursuant to an IHP, its failure to evaluate her to determine whether she was eligible under Section 504 denied her FAPE).

> **Health Plan versus 504 Plan:**
>
> "However, OCR cautions the Division that, where any student with a disability has a health plan in place in order to address the impact of a disability, OCR considers this student to be receiving services under Section 504, whether or not the health plan is formally incorporated into an IEP or Section 504 Plan. Thus, the student's health plan is to be developed and implemented according to the requirements of Section 504, and the student and his or her parents are entitled to Section 504's procedural safeguards with regard to the health plan." – *In re: Prince William County Public Schools*, 57 IDELR 172 (OCR 2011); see also *In re: Hanover Public Schools*, 115 LRP 37657 (OCR 2015).

2. OCR suggests that a medical diagnosis leads to a presumption of eligibility under Section 504.

An important document for practitioners, in addition the FAQ quoted below, is the *Dear Colleague Letter*, 58 IDELR 79 (OCR, January 19, 2012), which discusses issues of eligibility in great detail:

> In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district's actions and obligations to ensure equal educational opportunities. While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II.

OCR has also stated that: "Every type of ADHD affects the functioning of the parts of the brain related to thinking, concentrating, and planning. A determination that a student has any type of ADHD, therefore, is a determination that a student has an impairment for purposes of meeting one of the prongs of Section 504's definition of disability… Further, a diagnosis of ADHD is evidence that a student may have a disability. **OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities**." 68 IDELR 52 (OCR 2016). This raises the additional presumption that OCR would apply the same analysis to diagnosed conditions other than ADHD.

OCR has also opined that a medical diagnosis is not *required* for eligibility: "Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's ***determination*** that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the ***determination*** of whether an individual has a disability need not demand extensive analysis.) If, however, a district believes a medical assessment is necessary and the parent volunteers to pay for a private assessment, the district *must make it clear that the parent has a choice and can choose to accept a school-furnished assessment.* Compliance problems could arise when school districts and parents do not communicate clearly on this requirement." [Emphasis added.]

3. Do not assume that good grades means no Section 504 eligibility.

OCR has stated:

> The Section 504 regulation does not set out specific circumstances that trigger the obligation to conduct an evaluation; the decision to conduct an evaluation is governed by the individual circumstances in each case.
>
> For example, consider a student who has Attention-Deficit/Hyperactivity Disorder (ADHD) but is not receiving special education or related services, and is achieving good grades in academically rigorous classes. School districts should not assume that this student's academic success necessarily means that the student is not substantially limited in a major life activity and therefore is not a person with a disability. In passing the Amendments Act, the managers of the Senate bill rejected the assumption that an individual with a specific learning disability who performs well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.[14] Thus, grades alone are

> an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades. Additionally, the Committee on Education and Labor in the House of Representatives cautioned that "an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability." See H.R. REP. No. 110-730, pt. 1, at 15 (2008).

58 IDELR 79 (OCR, January 19, 2012).

4. IEP students have protection under Section 504 as well.

A student with a disability who is eligible for the protections and provisions of FAPE under the IDEA typically satisfies the criteria for eligibility under Section 504 as well. Such a student is "dual-eligible" because she is protected under both statutes. However, she generally cannot demand a Section 504 plan in addition to or instead of an IEP. Once a student is eligible under the IDEA, the IEP team is responsible for the whole child (although the child is still entitled to the Section 504 protections against discrimination and equal access). A district has no flexibility or discretion to provide services and accommodations in a 504 plan rather than in an IEP when a student is IDEA-eligible. However, there is some debate over whether a student may be eligible under Section 504 after his parents have refused services under the IDEA. Additionally, a student who is eligible under the IDEA for some disabilities but not for others may also attempt to claim eligibility under Section 504 for the disabilities not covered by the IDEA, although these Section 504 services are often provided as related services on the IEP.

Regardless, and at all times, an IEP student is protected from discrimination on the basis of disability under Section 504. This may include equal access to programs and materials, access to facilities, different treatment, harassment, and barriers to equal access.

5. Students with disabilities have the right to enjoy the benefits as adequately as their non-disabled peers.

"A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. §104.33(a).

34 C.F.R. §104.33(b) defines an appropriate education as the provision of regular or special education and related aids and services that:

1. Are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.

2. Are based upon adherence to procedures that satisfy the requirements of 34 CFR 104.34 [educational setting], 34 CFR 104.35 [evaluation and placement], and 34 CFR 104.36 [procedural safeguards].

6. Fewer, more specific accommodations are better than a long, one-size-fits-all list.

Zandi v. Fort Wayne Community Schools, 59 IDELR 283 (N.D. Ind. 2012). Although the mother of student with severe allergies to perfumes might have felt safer with a formal, written "no spray" policy, the student's Indiana district did not violate Section 504 or Title II when it refused to create one. The District Court ruled that the district offered the student reasonable accommodations, and that there was no evidence that a written policy banning spraying of perfumes would have prevented his allergic reactions. The student's parent requested a written policy barring the spraying of fragrances after the student had several mild to moderate reactions at school. The school refused. However, it took multiple steps to protect the student, including issuing regular morning announcements, running a school newspaper article stating that students should not spray fragrances in common areas, requiring teachers to be on the lookout for spraying, and allowing the student to leave class early to avoid the rush between classes. It also offered to put up posters about the issue. After the student had a severe reaction, the parent and student sued the district for disability discrimination. In rejecting the claim, the court pointed to the numerous steps the school took in an effort to safeguard the student. "These accommodations were reasonable in light of the mild or moderate intensity of his allergic reactions before September 14, 2010," U.S. District Judge Joseph S. Van Bokkelen wrote. After the student's final, most severe reaction, the district acted reasonably by offering to permit him to finish out the year with homebound instruction. Moreover, the student provided no evidence that a written policy would have prevented his reactions. In fact, there was no evidence that spraying caused any of the incidents because he never saw anyone spraying before he had a reaction. "Without a medical or other expert opinion establishing that perfume sprayed in the building elicited a different reaction than perfume already sprayed on a person who enters the building, [the student] cannot show that even an effective written policy would have prevented his reactions," Judge Van Bokkelen wrote.

Moody v. New York City Department of Education, 60 IDELR 211 (2nd Cir. 2013). The Second Circuit held that Section 504 did not require the school district to provide the parent's preferred accommodation for a student with diabetes, so long as the student had "meaningful access" to school lunch and other programs. The parents were specifically seeking to require the school district to heat up lunches prepared by the student's mother, but the Second Circuit noted that the school met its obligations to accommodate the student's disability without heating up the student's lunches. In its decision, the court stated that "when an individual already has 'meaninful access' to a benefit to which he or she is entitled, no additional accommodation, 'reasonable' or not, need be provided…Requiring substantial adjustments in existing programs *beyond those necessary* to eliminate discrimination against otherwise qualified individuals would constitute an unauthorized extension of the obligations imposed by that statute." Moreover, the court stated that "meaningful access" does not mean "equal access" or preferential treatment, and noted the distinction between required "reasonable accommodations" and requested "optimal accommodations." The court finally noted that "there is no evidence to suggest that [the student] was in any way prevented from eating lunches provided by the school, thus compelling the parent to send homemade lunches as a measure of last resort. Instead, the parent made an *independent decision*" to send lunches from home.

Ridley School District v. M.R. and J.R., 56 IDELR 74 (E.D. Pa. 2011). The court held that the fact that the student was treated differently than other students did not mean the student was discriminated

against. This issue arose in the context of class projects involving food, when the student was given different kinds of food due to allergies. Key Quote:

> While each of these examples may illustrate how E.R.'s daily school routine necessarily had to be different than her classmates, they in no way establish that she was separated or isolated from her classmates.
>
> Moreover, the record in no way reflects that [the student] was deprived of a learning opportunity due to her disability. Parents have not established that [the student] was prevented from meaningful participation in these activities, only that her diet was different than her classmates.

7. Section 504 falls mostly on general educators to implement.

Because the vast majority (or likely all?) of the Section 504 students spend their time entirely in a general education environment, the general education teacher must be ready to fully and completely implement the Section 504 Plan in a timely manner.

Accessible. The child's Section 504 Plan must be accessible to each regular education teacher, related services provider, and any other service provider who is responsible for its implementation.

Informed of specific responsibilities. Public agencies must ensure that each regular teacher, related services provider, and any other service provider who is responsible for the implementation of a child's Section 504 Plan is informed of her specific responsibilities related to implementing the child's Section 504 Plan and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the child's Section 504 Plan.

8. Section 504 applies to all school district programs, including extra-curriculars and athletics.

Nonacademic services and extracurricular activities are important components of the education of students with disabilities. Under both the IDEA and Section 504, districts must provide students with an equal opportunity to participate in extracurricular activities and nonacademic services. 34 CFR 300.107 (a); and 34 CFR 104.37. Additionally, the IEP or Section 504 Plan must include any supplementary aids and services that the student will need to participate in an activity, should the student choose to do so. 34 CFR 300.107 (a); and 71 Fed. Reg. 46,583 (2006).

The United States Department of Education's Office for Civil Rights (OCR) issued a *Dear Colleague Letter* on January 25, 2013, focusing on the responsibilities of school districts to serve students with disabilities in their extra-curricular athletic programs. Specifically, the *Dear Colleague Letter* focuses on the rights of students to participate in athletic programs under the guidelines established by Section 504 of the Rehabilitation Act of 1973. The *Dear Colleague Letter* reminds school districts of the ongoing obligation to ensure that students with disabilities have an equal opportunity to participate in or enjoy the benefits of athletic programs. As part of the guidance, OCR noted the following:

- A school district's legal obligation to comply with Section 504 "supersedes any rule of any association, organization, club, or league that would render a student ineligible to participate, or limit the eligibility of a student to participate" in an athletic team or event.

- A school district may not operate its program or activities on the basis of "generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular."

- School districts may require a level of skill or ability for participation in a competitive program or activity, and equal opportunity does not mean that every student with a disability is guaranteed a spot on an athletic team with *bona fide* try-outs. However, the participation of students with disabilities must be integrated to the "maximum extent appropriate" based upon an "individualized inquiry."

- A school district must consider whether a reasonable modification is legally required, based upon that individual inquiry. Within the *Dear Colleague Letter*, OCR provides several examples of required modifications (i.e., providing a visual cue in addition to the starter pistol at track events for a hearing-impaired student; waiving the "two-hand touch" finish for a swimmer with only one hand; providing a staff member to conduct glucose testing and insulin administration for a diabetic student on the gymnastics team).

- When a student with a disability participates in extra-curricular athletics, he or she should not be unnecessarily separated from non-disabled student participation (i.e., having separate programs for students with disabilities should occur only when those students cannot participate in the existing programs with reasonable modifications and services).

- School districts should offer athletic activities for those students with disabilities who cannot participate in the existing programs with reasonable modifications and services. To that end, these athletic opportunities "should be supported equally, as with a school district's other athletic activities" and should be designed to consider the "unmet interests of students with disabilities." In order to meet these unmet interests, school districts are encouraged to: (1) develop district-wide or regional teams for students with disabilities in order to provide competitive experiences; (2) mix male and female students with disabilities on teams together; or (3) offer "allied" or "unified" sports teams on which students with disabilities participate with non-disabled students.

9. Section 504 has an MDR requirements for disciplinary removals.

The process for determining if a student's misconduct is related to his disability has historically been referred to as the manifestation determination review. The MDR is a key step in the discipline process under both Section 504 and the IDEA because it impacts the type of discipline the district can impose on the student and whether the district may remove the student from his current placement because of a code of conduct violation. Under the IDEA, the conduct is a manifestation of a disability if: 1) it was caused by, or had a direct and substantial relationship to, the child's disability; or 2) it was the direct result of the LEA's failure to implement the IEP. OCR interprets Section 504 as requiring the same steps when a student is subjected to a "significant change in placement" under 34 CFR 104.35.

Under OCR policy, "a significant change in placement" triggering an MDR occurs when a student with a disability is suspended or expelled for more than 10 consecutive school days in a single school year. *Mason v. Board of Educ.-Howard Pub. Sch. Sys.*, 56 IDELR 14 (D. Md. 2011); *Dunkin (MO)*

R-V Sch. Dist., 52 IDELR 138 (OCR 2009); *Confluence Academies (MO),* 64 IDELR 85 (OCR 2013); and *Youngstown (OH) City Sch. Dist.,* 114 LRP 29317 (OCR 02/26/14).

10. Use your internal procedures for claims of disability discrimination (including, but not limited to, claims of harassment, different treatment, access, or failure to implement).

A core component of school district compliance with Section 504 and the ADA involves the establishment of grievance procedures that can be followed in the event of a possible violation of one of these laws.

Districts must ensure that their grievance procedures incorporate appropriate due process standards and include at a minimum the following: a) a statement that the grievance procedure is applicable to complaints alleging discrimination, harassment, and retaliation on the basis of race, color, national origin, disability, sex, and age by students, employees, and third parties; b) a notice to students, employees, and others of the process for filing a grievance, including who to contact (title, address, and telephone number of the contact individual should be included) and how to initiate a grievance; c) a requirement that all complaints will be promptly, thoroughly, and impartially investigated and decided within reasonable, designated time frames at each stage of the grievance process; d) provisions for maintaining the confidentiality of the person who files a complaint; e) a written notice to the grievant of the disposition of the grievance at each stage of the process; f) a fair and equitable appeal process; g) a notice that retaliation against a person who files a complaint of discrimination, or people who participate in related proceedings, is prohibited; h) an assurance that if discrimination has occurred, appropriate corrective and remedial actions will be taken; and i) a provision that notifies individuals that they may file complaints with OCR. *Dibble (OK) Pub. Schs.*, 50 NDLR 118 (OCR 2014). *See also Pemberton (NJ) Twp. Sch. Dist.*, 116 LRP 24642 (OCR 03/22/16) (finding that a district violated Section 504 and Title II by implementing deficient grievance procedures that were too "narrow" to provide parents an avenue for relief); and *Mountain Discovery Charter Sch. (NC),* 68 IDELR 204 (OCR 2016) (concluding that a district's grievance procedures failed to conform to Section 504 requirements because they did not apply to discrimination, guarantee notice to parents, or prohibit retaliation against complainants).

FOIA and the Open Meetings Act are not going away.

Improper Denial of Request as Unduly Burdensome
Public Access Opinion 18-013

The Office of the Governor violated FOIA by improperly denying a request as unduly burdensome. On July 12, 2018, the Requestor submitted a FOIA request seeking any emails sent by or to certain identified individuals pertaining to nominations for appointment to any of 14 Illinois public bodies. The Requestor also asked for documents prepared by or in the possession of the identified individuals pertaining to such nominations, but limited the scope of the request to January 1, 2016 through June 30, 2018. On July 19, 2018, the Governor's Office responded that the FOIA request was unduly burdensome pursuant to Section 3(g) of FOIA because it was "overbroad and vague" because documents could be "directly or indirectly related to a nomination for a board appointment without mentioning the board or potential appointee by name." The Governor's Office gave the Requestor an opportunity to narrow his request. On July 20, 2018, the Requestor narrowed his request and stated he was willing to work out a reasonable timeline for production of the request. The Governor's Office still denied the FOIA request as unduly burdensome, stating its preliminary search yielded more than 44,000 potentially responsive emails and that a manual review of the emails would be necessary to respond to the FOIA request.

Upon review, the PAC first analyzed and rejected the Governor's Office's contention that the Requestor's initial FOIA request was "overbroad and vague." The PAC found that "a requestor needs only to identify the records being requested by describing their contents" and that FOIA did not require the Requestor to furnish the Governor's Office with search terms to locate the requested records. Because the FOIA request specifically identified both the individuals who sent/received the emails and the subject matter of them, it reasonably identified the public records sought and was not impermissibly vague or overbroad.

Next, the PAC reviewed the Governor's Office's preliminary email search, and found it was not limited in any way to the board appointments. The Governor's Office explained that it could not further limit its preliminary email search because adding other terms would exclude many relevant emails. However, it turns out that the Governor's Office did try a more limited search which yielded only 1,783 emails. The Governor's Office explained that it did not tell the Requestor about the more limited search results because even sifting through those results would be unduly burdensome. The PAC held that the Governor's Office had not demonstrated how reviewing 1,783 potentially responsive emails would be unduly burdensome, let alone how any potential burden would outweigh the significant public interest in the records. The PAC ordered the Governor's Office to provide the Requestor with copies of the responsive emails, subject to appropriate redactions under Section 7 of FOIA.

Settlement Agreement Provisions Not Exempt from FOIA
Public Access Opinion 18-010

A public school district (District) violated FOIA by improperly using Section 7(1)(c) to redact portions of a settlement agreement with a former employee. On April 13, 2018, the Requestor submitted a FOIA request to the District seeking copies of records pertaining to a

settlement agreement between the District and a former school principal. Three days later, the District provided the Requestor with a redacted copy of the settlement agreement but did not specify the exemption in Section 7 of FOIA that it claimed to authorize the redactions. The Requestor emailed the District to ask why the redacted information was not disclosed, and the District responded that the information was not disclosed because it would have constituted a clearly unwarranted invasion of personal privacy under FOIA Section 7(1)(c).

After reviewing an unredacted copy of the settlement agreement, the PAC determined that the redacted portions – which very generally addressed the nature of the former school principal's potential claims against the District – were so general that they were not highly personal, and so their disclosure would not be objectionable to a reasonable person. Further, the PAC found that the nature of the claims bear on the public duties of a public employee, which it had previously held "shall not be considered an invasion of personal privacy." PAC 15-004. For these reasons, the PAC held that the redacted information was not exempt from disclosure under the plain language of Section 7(1)(c) and ordered the District to provide the Requestor an unredacted copy of the settlement agreement.

Improper Closed Session Discussion of Budget and Layoffs
Public Access Opinion 18-012

A public university (University) violated Section 2(a) of OMA by improperly discussing its budget, layoffs, and related matters in closed session during its June 28, 2018 meeting. The Request for Review alleged that the closed session discussion did not discuss specific employees – which is permitted by Section 2(c)(1) of OMA – but instead improperly discussed layoffs in general and/or whole classes of employees.

Reviewing the verbatim recording of the closed session, the PAC discovered that the University briefly discussed one particular employee but spent the "overwhelming majority" of the closed session discussing budgetary matters and considerations applicable to categories of employees, not the merits or conduct of individual employees. Not only does OMA prohibit such general discussions during closed session, but the PAC pointed to one of its 2015 opinions where it found that "a discussion of eliminating a position itself which does not consider the performance of the employee or whether a particular employee should occupy the position, is not within the scope of the section 2(c)(1) exception." PAC 15-7. Accordingly, the PAC held that the University violated Section 2(a) of OMA by discussing in closed session matters outside the scope of the Section 2(c)(1) exception. The PAC ordered the University to make public a copy of the both the closed session minutes for and verbatim recording of the closed session portion of the June meeting.

PA 100-0768, effective January 1, 2019, provides that the Performance Evaluation Review Act (PERA) committee meet annually, and also includes language exempting the Reduction In Force and PERA committees from the Open Meetings Act (OMA). It also allows collective bargaining strategy sessions to be exempt from the provisions of the OMA:

(115 ILCS 5/18)
Sec. 18. Meetings. The provisions of the Open Meetings Act shall not apply to collective bargaining negotiations, including negotiating team strategy sessions, and grievance arbitrations conducted pursuant to this Act.

Employment, Minimum Wage, and FLSA Update

Public Act 100-895, effective January 1, 2019 (Severance)

The Government Severance Pay Act, 5 ILCS 415/1 *et seq*., chiefly requires that school districts entering into contracts or employment agreements that contain a severance pay provision not permit severance pay to exceed 20 weeks of compensation, and prohibits any severance pay in any such contract from being paid to an officer, agent, employee, or contractor who has been fired for misconduct.

It is rare, in public schools, that severance agreements are contemplated and made a part of an initial employment contract. Such agreements are common at the collegiate level (particularly for coaches), which may be the target of the law.

Still, schools should be mindful of the provision if they do attempt to negotiate such payments into a contract. Moreover, schools should be mindful of the restrictiveness such severance agreements provide – negotiating a resolution to a dismissal case is often a function of the narrow facts a school can prove, which often times requires a third party to trust certain witnesses more than other witnesses. Settlements for severance are often reached not as a gift or benefit, but as an alternative to incurring the large costs and risk involved in litigation. Flexibility given the facts is routinely necessary to find adequate resolution. Having that flexibility probably means a school district is not incentivized to work severance into employment contracts. Moreover, if severance under such a contract is required, a school should be mindful of the need to refrain from suggesting misconduct was found in any resolution.

Public Act 100-1040, effective January 1, 2019 (Sexual Harassment and Discrimination Severance)

Signed August 23, 2019, Public Act 100-1040 amends the Illinois Local Records Act to add certain requirements when a school district enters into a severance agreement with an employee or contractor because the employee or contractor "was found to have engaged in sexual harassment or sexual discrimination," as defined by the law. 50 ILCS 205/3c(a). When such a severance agreement is entered into, a school district must make available to news media and publish on its internet website:

(1) the full name and title of the person receiving payment under the severance agreement;

(2) the amount of the payment;

(3) that the employee or contractor was found to have engaged in sexual harassment or sexual discrimination, as applicable; and

(4) the date, time, and location of the meeting at which the taxing body approved the severance agreement.

50 ILCS 205/3c(a). Of course, it is unusual if an agreement is reached that there is an actual finding of sexual harassment or discrimination – but school districts should be aware of the fact that, if a finding is reached when the school district is discussing severance, the foregoing requirements may impede an agreement for separation. It may be worthwhile where good evidence exists for a school district to consider termination as an option rather than severance.

Public Act 100-1094, effective January 1, 2019 (Reimbursement)

The Illinois Wage Payment and Collections Act was also amended to require an employer to reimburse employees for full expenses incurred as the result of the employer's directive. The statute requires:

> An employer shall reimburse an employee for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer. As used in this Section, "necessary expenditures" means all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer.

820 ILCS 5/9.5 (emphasis added). An employee's own negligence does not compel reimbursement, and the employer is entitled to seek and keep vouchered receipts within 30 days of the incurred expense pursuant to the school district's policy.

School districts should be mindful that changes to reimbursements may be a mandatory subject of bargaining (wages), and, therefore, changes should be made only after notice to the union. Moreover, schools should be aware that a policy or contract which provides for a "fixed amount" benefit in lieu of full reimbursement may subject the school to risk of an Illinois Department of Labor complaint pursuant to the foregoing law.

Lifting Up Illinois Working Families Act

With his signature on February 19, 2019, Governor Pritzker made a new minimum wage bill, (known as the "Lifting Up Illinois Working Families Act,") Public Act 101-1, law. The new law requires employers to do the following:

1. From January 1, 2020 through June 30, 2020, every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than **$9.25 per hour**; and

2. From July 1, 2020 through December 31, 2020 every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than **$10 per hour**; and

3. From January 1, 2021 through December 31, 2021 every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than **$11 per hour**; and

4. From January 1, 2022 through December 31, 2022 every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than **$12 per hour**; and

5. From January 1, 2023 through December 31, 2023 every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than **$13 per hour**; and

6. From January 1, 2024 through December 31, 2024, every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than **$14 per hour**; and

7. On and after January 1, 2025, every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than **$15 per hour**.

The Act provides a new penalty for employers who fail to keep a payroll record, at a penalty of **$100 per impacted employee**. In addition, damages for underpayment of wages are now as high as triple the amount of underpayment, plus a **5% damages** assessment (up from 2%) and **$1500 fine**.

While some of the fines are new or increased, nothing in the new law changes the law's long-standing requirement to keep an adequate and accurate record reflecting hours worked by staff. Although it may be tempting for employers to shift the burden of such record-keeping to the employee by way of implementing a time-clock, time card, or other new employment requirements, employers must be mindful of the fact that changing a term and condition of employment (such as clocking in and clocking out) may require bargaining upon demand of the collective bargaining agent. Employers should remember that the burden of keeping and producing accurate records befalls upon the employer and not the employee.

Salary-Basis Exemptions

The primary purpose of the law's various requirements to track the hours of staff is to assure they are provided benefits to which they are entitled. In addition to insurance for employees who work more than 30 hours in a week, the law requires employers compensate all employees (regardless of whether they are exempt from overtime) at a rate of pay at or above minimum wage, and that all employees who are not exempt from overtime pay to be paid at 1.5 times their regular rate of pay for all hours worked over 40 in a week.

It is not uncommon for employees or employers to choose to pay someone working in a school on an annualized basis over the course of the year. While doing so is permissible where a collective bargaining provision permits, the annualization of payment does not either relieve the employer from complying with minimum wage or overtime requirements of the Fair Labor Standards Act. The most common violation of the rule occurs with an employee (sometimes titled "bookkeeper" or "secretary" or "office manager") who has very limited *independent* authority but who works well in excess of 40 hours in a week. That person still must be paid overtime – even if his or her salary is annualized.

There is an exemption available from overtime pay rules for staff that is "administrative" or "executive" in nature. But the title does not end the inquiry – the facts determine whether a person meets that exemption.

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455* per week;[5]

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

- **The employee must have the authority to hire or fire other employees**, or the employee's suggestions and recommendations as to the

[5] The threshold was proposed to be raised in 2016 by the Department of Labor to $913/week. After a lawsuit caused a Federal Court to issue an injunction to block the implementation of the rule, new rules were proposed March 22, 2019, which would raise the threshold to $679/week, or a $35,308 annual salary. It is unclear at this time whether the proposed rules will become final at the rate proposed, but schools should be careful to assess their own facts to assess whether each employee meets *all* of the factual criteria underlying the exemption.

hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455* per week;

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

- **The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.**

Source: U.S. Department of Labor, Fact Sheet 17A, accessible at: https://www.dol.gov/whd/overtime/fs17a_overview.pdf (last accessed March 27, 2019).

According to the U.S. Department of Labor,

The exemptions provided by FLSA Section 13(a)(1) apply only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Id. Employers are well-advised, before changing the rules on any employee, to check the facts underlying a claimed exemption, understand the collective bargaining implications of making a change (wages and hours are a mandatory subject of bargaining, of course), and be sure to carefully assess whether there will be political consequences for changing the expectations of an employee serving pursuant to a long-standing practice.

Title IX in the #MeToo Era:

Background & Summary of the Education Department's Proposed Title IX Regulations

• Title IX protects every student's right to educational opportunities and benefits free from sex discrimination. Every student has the right to attend school without fear of sexual harassment or assault. Every student has the right to attend school without fear of being determined responsible for sexual harassment or assault without due process protections.

• Title IX regulations on the books since the 1970s require schools to have a non-discrimination policy and disseminate that policy to its students and employees, have a grievance process that provides for the "prompt and equitable" resolution of sex discrimination complaints, and designate at least one employee to serve as a Title IX Coordinator to handle complaints of sex discrimination. However, Title IX regulations have never addressed sexual harassment or assault, specifically, or the need for due process protections in Title IX grievance processes related to sexual harassment.

• In a 1998 decision (*Gebser*), the U.S. Supreme Court held that teacher-on-student sexual harassment could constitute sex discrimination under Title IX, and in a 1999 decision (*Davis*) the Supreme Court held that student-on-student sexual harassment could constitute sex discrimination.

• Since the mid-1990s, the Education Department has treated sexual harassment (and sexual assault, referred to together as "sexual harassment") as a form of sex discrimination under Title IX, but has addressed it only through guidance – never through regulation. A result has been unpredictable Title IX sexual harassment systems under which complainants and respondents have been thrust into inconsistent grievance proceedings that often deprive both parties of a fair process. Such systems too often overlook the importance of a school offering supportive measures to a complainant reporting sexual harassment when the reporting complainant does not wish to participate in a grievance process, and ignore the need to avoid punishing an accused person without first reaching a factual determination of responsibility in an impartial proceeding.

• The Trump Administration's proposed regulation of sexual harassment under Title IX is the first time the Education Department is treating the problem of sexual harassment through notice and comment rulemaking. Under the proposed regulations, schools have an obligation to protect all their students from sex discrimination by responding supportively to survivors while giving due process protections to respondents.

• As context for what this proposed Title IX regulation does and does not address, it is helpful to keep a few reference points in mind:

- First, the two principal objectives of Title IX are to prevent federal dollars from flowing to schools that deny students access to educational opportunities on the basis of sex and to provide individuals with effective protections against such discriminatory practices; Title IX is not a prohibition on sexual misconduct or sexual crimes per se.
- Second, Title IX is directed at schools themselves – not at students or faculty. Title IX does not punish people who commit sexual harassment – it penalizes schools that respond to sexual harassment in a way that amounts to subjecting students to sex discrimination.
- Third, Congress passed Title IX under its Spending Clause authority, and the Supreme Court has observed (e.g., in *Gebser*) that this means that as part of the "contract" a school enters

into by accepting federal funding, the government can only hold schools accountable for things that are within the school's knowledge and control.

- Fourth, because sexual harassment can constitute sex discrimination under Title IX, the proposed regulation does not attempt to relieve schools of responsibility to address sexual harassment by, for example, permitting schools to discharge their response obligations simply by "calling the police." Instead, complainants retain three independent avenues for pursuing redress for sexual harassment: (1) Reporting their experience to their school and receiving supportive measures whether or not they also choose to file a formal complaint asking their school to discipline the alleged perpetrator; (2) Filing a civil lawsuit against the alleged perpetrator; and/or (3) Pursuing criminal prosecution of the alleged perpetrator.

• Overall, the existing regulations prohibiting sex discrimination remain intact and the proposed regulation adds new sections specific to sexual harassment. In broad strokes the proposed regulation describes three things: (1) What constitutes sexual harassment for purposes of rising to the level of a civil rights issue under Title IX; (2) What triggers a school's legal obligation to respond to incidents or allegations of sexual harassment; and (3) How a school must respond.

• The proposed regulation requires schools to respond meaningfully to all sexual harassment reports of which the school becomes aware without requiring every report to activate the school's grievance process. The regulation encourages schools to offer students supportive measures designed to restore or preserve a complainant's access to the school's education program and activities (e.g., no-contact orders, changes in class schedules or dorm room assignments, or counseling) even when the reporting complainant does not want to file a formal complaint, empowering complainants with greater control over the type of school response that will best serve their needs.

• When a formal complaint is filed (either by the complainant or the Title IX Coordinator), the school must investigate and apply certain due process safeguards so that whatever a school decides to do with respect to disciplining a respondent and providing remedies to a complainant is based on a fair determination of the facts.

• Within due process guardrails, the thousands of different K-12 schools, colleges and universities across the country retain pedagogical control over their educational environments. For example, the regulation does not demand any particular type of discipline against offenders, does not prevent (or require) a school from using affirmative consent in the school's code of conduct, and does not prevent a school policy from prohibiting sexual behavior that does not meet the Title IX definition of harassment. The regulation leaves flexibility for a school to pursue informal resolutions, designate its own reasonable time frames, conduct investigations through the school's own employees or by outsourcing that function, coordinate with law enforcement as appropriate, and decide whether to offer a school-level appeal.

BIOMETRICS, SOCIAL SECURITY NUMBERS, AND STUDENT DATA PRIVACY

Biometrics

A. Illinois School Code

The School Code defines "biometric information" as "any information that is collected through an identification process for individuals based on their unique behavioral or physiological characteristics, including fingerprint, hand geometry, voice, or facial recognition or iris or retinal scans." 105 ILCS 5/10-20.40.

School Districts may only collect biometric information from its students for identification and/or fraud prevention purposes. Before collecting biometric information from students, Section 10-20.40 of the Illinois School Code requires that school districts obtain written permission from the individual who has legal custody of the student, or from the student if he or she has reached the age of 18. 105 ILCS 5/10-20.40.

When collecting biometric information, the School Code also requires the District to:

1. Store, transmit, and protect all biometric information from disclosure.
2. Prohibit the sale, lease, or other disclosure of biometric information to another person or entity unless: (a) prior written permission from the individual who has legal custody of the student – or the student if he or she has reached the age of 18 -- is granted, or (b) the disclosure is required by court order.
3. Discontinue the use of a student's biometric information under either of the following conditions: (a) upon the student's graduation or withdrawal from the school district; or (b) upon receipt in writing of a request for discontinuation by the individual having legal custody of the student or by the student if he or she has reached the age of 18.
4. Destroy all of a student's biometric information within 30 days after the occurrence of either conditions 3(a) or 3(b) above.

B. *FERPA and ISSRA*

Under the regulations implementing FERPA, a "personal identifier, such as the student's social security number, student number, or biometric record" is personally identifiable information protected by FERPA. Accordingly, a student's social security number may not be disclosed without prior written consent. 20 U.S.C. § 1232g(b); 34 CFR § 99.30.

- Can a School District disclose part of a student's social security number? No. No exemptions permit a school district to "publically disclose personally identifiable information, including … portions of the student's social security number, from the education records of students." *Letter to Hunter College*, available at https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/hunter.html.

Similarly, a "School Student Record" means any writing or other recorded information concerning a student and by which a student may be individually identified, maintained by a school or at its direction or by an employee of a school, regardless of how or where the information is stored." 105 ILCS 10/2 (d) (emphasis added). A social security number is therefore protected information that can only be disclosed with prior written consent, a court order, or another applicable exception.

C. *FOIA*

Under the Illinois Freedom of Information Act, all records in the possession of a public body are presumed to be open to inspection or copying. 5 ILCS 140/1.2. However, Illinois FOIA identifies "biometric identifiers" as private information that is exempt from disclosure, unless the disclosure is required by law or court order. 5 ILCS 140/2(c-5); 5 ILCS 140/7(a)(b).

D. *Personal Information Protection Act*

The Personal Information Protection Act defines "biometric data" as personal information "generated from measurements or technical analysis of human body characteristics used by the owner or licensee to authenticate an individual, such as a fingerprint, retina or iris image, or other unique physical representation or digital representation of biometric data." 815 ILCS 530/5.

The Personal Information Protection Act (815 ILCS 530/) contains mandates to provide-

1. Written or electronic notification to an individual whenever his or her personal information was acquired by an unauthorized person;
2. Cooperation with the individual in matters relating to the breach as required by 815 ILCS 530/10, which may include informing the individual of the breach and informing the individual of any steps the collector has taken (or plans to take) relating to the breach;
3. Disposal of materials containing personal information in a manner that renders the personal information unreadable, unusable, and undecipherable.

A violation of this Act constitutes an unlawful action under the Consumer Fraud and Deceptive Business Practices. 815 ILCS 530/20.

Social Security Numbers

A. *FOIA*

The Illinois FOIA provides that social security numbers are "private information" subject to exemption. 5 ILCS 140/7.

While certified payroll records submitted pursuant to the Prevailing Wage Act are subject to inspection and copying, "contractors' employees' addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure." 5 ILCS 140/2.10.

Student Data Privacy

All school employees must be concerned about protecting school district student, employee, and financial, information, such as, Social Security numbers, credit card numbers, financial information, driver's license information, and health information. However, more than these pieces of information are used to harm students, employees, or the school district. Other pieces can be used individually, or in combination, to guess passwords, answer security questions, and assume the identity of a student (or an employee) in order to access and create accounts, to purchase drugs, or to engage in an endless number of other unlawful or unauthorized acts.

Once the school district possesses data and other electronic information, it must protect the information. At the very least, the information legally required to be protected must be safeguarded pursuant to both the Family Educational Rights and Privacy Act (FERPA) and the Children's Online Privacy Protection Act (COPPA), which both address the privacy and security of student's and children's information. These statutes regulate the purposeful disclosure of their information by regulating the process of acquiring parental notice and consent. This assumes that the school district and parents have control over the information in order to comply with the requirements and act on the consent of the parents or eligible students whose information is being used. The COPPA requires owners of websites and online services, and developers of apps directed to children younger than 13 to post privacy policies, notify parents about their data practices, and to obtain verifiable parent consent prior to collecting, using, or disclosing children's information. The Federal Trade Commission published a Frequently Asked Questions publication answering questions about complying with COPPA requirements relevant to schools. It addresses schools consenting to the collection, use, and disclosure of the child's information:

https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions

Also, the Department of Education has made multiple resources available at:

https://studentprivacy.ed.gov/

The bottom line:

Strong passwords, encryption, filtering, security software, security patches, antivirus software, limited network connectivity, monitoring servers for hacking attempts, oversight, policies, audits, contracts that adequately protect data, training, properly vetting apps, exercising due diligence before hiring service providers, and basic security measures are standard practices to help prevent data breaches and lessen a school district's liability and damages.

Gentle Reminders about Redaction-

- *If you use a permanent marker to redact documents, double-check the documents to ensure that they cannot be read.*
- *If you use electronic redaction methods, copy and paste the redacted section into a new document. If the text appears, then the original document has not been properly redacted and must be flattened.*

Religion, Prayer, and Recent Litigation

***Freedom from Religion Foundation, Inc.v. Concord Community Schools*, 885 F.3d 1038 (7th Cir. March 21 2018).**

- **Facts**: For decades, students at Concord High School have staged and performed the Christmas Spectacular, a holiday show featuring students' choral, instrumental, and dance performances. The students not only perform, but also handle the design and creation of costumes, sets, and props.
  - 2014 show: The 30-minute second half contained a 20-minute segment called "The Story of Christmas." This section included religious songs interspersed with a narrator reading passages from the New Testament. Student actors walked across stage (as if going to Bethlehem) before posing for a nativity scene; in all, this lasted about 12 minutes.
  - 2015 show: The first half, "The Magic of the Season," continues to feature seasonal and non-religious songs and skits, such as "Winter Wonderland," "Text Me Merry Christmas," and "Secret Agent Santa." It lasts about an hour. The second half, "The Spirit of the Season," is still about a half-hour in length and takes a more reverential tone. After announcing that the Spectacular will now "observe the many cultural celebrations during this holiday season," the show spends about four and a half minutes each explaining and performing a song to represent Hanukkah and another for Kwanzaa. Images are projected onto large screens to accompany both songs. For the remaining 20 minutes, students perform numerous Christmas songs that are more religious in nature (*e.g.*, "Jesus, Jesus, Rest Your Head," "O Holy Night"). During one of the songs, a nativity scene appears on stage for two minutes. The manger uses mannequins, not student actors. There are no New Testament readings.
- In August 2015, the Freedom from Religion Foundation Inc., along with three parents, sued the school, alleging that the Christmas Spectacular violated the First Amendment's Establishment Clause. 885 F.3d 1038, 1041-44 (7th Cir. 2018).
- **Holding:** A reasonable observer would not have perceived the District's 2015 show as a religious endorsement. Furthermore, the 2015 show was not permissibly coercive. 885 F.3d 1038 (7th Cir. 2018).
- **Reasoning**: "We must ask if a reasonable observer, viewing the Spectacular as a whole, would perceive the 2015 show as a religious endorsement. 885 F.3d 1038, 1046 (7th Cir. 2018).
  - *The nativity scene*: "We are not prepared to say that a nativity scene in a school performance automatically constitutes an Establishment Clause violation. Each show must be assessed within its own context. …But in Concord's 2015 show, the nativity tableau no longer stands out. Instead of serving as the centerpiece for much of the second half and the finale, it has become just another visual complement for a single song. The Supreme Court has similarly allowed a crèche that is part of a larger, mostly secular display. 885 F.3d 1038, 1046 (7th Cir. 2018).
  - *The music of the show's second half*: In the 2015 version, while the playlist carries over much of the earlier programs, it adds Ani Ma'amin and Harambee. We acknowledge that, although the narrative descriptions for each holiday are roughly the same length, the number of Christmas songs dwarfs the single songs to celebrate Hanukkah and Kwanzaa. Nevertheless, we accept the school's assertion that there are a greater

number of appropriate Christmas arrangements by virtue of the sheer volume of Christmas songs. 885 F.3d 1038, 1047 (7th Cir. 2018).

- Yet the broader secular context—on top of the inclusion of two other holidays—matters here because a reasonable audience member, sitting through the 90-minute Spectacular, would not understand the production to be ratifying a religious message. The changes to the second act reduced the religious impact, tipping the scales in favor of Concord. The show's history, in particular the use of the same living nativity scene for the previous 45 years, supports this conclusion…. Where the second half was exclusively a telling of the birth of Jesus, it can now be seen as a collection of music from multiple traditions. It is worth emphasizing that no one factor alone—the secular first half, the nativity's lack of prominence, the inclusion of other holidays—leads us to conclude that the 2015 Spectacular passes muster under the endorsement test. Overall, the 2015 performance in its current form would not cause a reasonable observer to believe that Concord is signing off on a particular religious message. 885 F.3d 1038, 1047-48 (7th Cir. 2018).

Plaintiffs also argue that the 2015 production impermissibly coerced the audience members (including some students, we presume) and student participants to conform to one particular religion—Christianity…. As in *Lee*, *Santa Fe*, and *Elmbrook II*, Concord had a captive audience on its hands—in terms of both students involved in performing arts classes and extracurricular activities, and their families and friends attending the show to support the students. … Yet unlike *Lee*, *Santa Fe*, and *Elmbrook II*, here there was no religious activity in which performers or audience members had to partake during the Spirit of the Season. There was no prayer as in *Lee* and *Santa Fe*. No one passed out religious literature as in *Elmbrook II.* The show took place in a school auditorium, not a church sanctuary, a religious space by definition. The component that came closest to religious activity, reading from the New Testament, was removed in 2015 and so we have no need to opine on it….Although the matter is not open-and-shut, we see no reason to reverse the district court's conclusion on summary judgment that the 2015 show did not pressure individuals to support any religious beliefs. 885 F.3d 1038, 1048-49 (7th Cir. 2018).

***Freedom from Religion Foundation v. Chino Valley Unified School District,* 896 F.3d 1132 (9th Cir. 2018).**

The FFRF, on behalf of public school students, parents, and employees brought action against local public school board and its members, alleging that board's policy and custom of opening board meetings with prayer, and its policy and custom of including Bible reading and preaching in meetings, violated First Amendment's Establishment Clause. The Ninth Circuit Court of Appeals upheld the District Court order, which granted partial summary judgment in favor of advocates, enjoined board members from conducting prayers in board meetings, and entered declaratory judgment that prayers, Bible readings, and proselytizing in board meetings violated Establishment Clause.

The school board included prayer as part of its meetings at least since 2010. In September 2013, the FFRF sent the board a letter requesting that it "refrain from scheduling prayers as part of future school board meetings." One month later, the board adopted a policy regarding invocations at board meetings. The prayer policy provides for prayer delivery "by an eligible member of the clergy or a religious leader in the boundaries of" the district. Should the selected member of the clergy not appear, the board president can solicit a volunteer from the board or audience.

Under the procedures employed by the school board, it selects clergy for each meeting pursuant to a list of eligible local religious leaders and chaplains kept by the superintendent's designee. The designee compiles this list, under the terms of the policy, by 1) looking through a commercial phone book "for 'churches,' 'congregations,' or other religious assemblies"; 2) collating "research from the Internet"; and 3) consulting with "local chambers of commerce." Any "religious assembl[y] with an established presence" in Chino Valley is eligible, and a religious entity can write to the superintendent's designee to ensure that it is on the list. All chaplains for fire departments and law enforcement agencies in Chino Valley and "any nearby military facilities" are automatically on the list. Once a year, the designee mails an invitation to pray at Board meetings to the "religious leader" of each congregation on the list, as well as to all the chaplains.

Prayer practice that fits within the tradition long followed in Congress and the state legislatures is not subject to typical Establishment Clause analysis because such practice was accepted by the Framers and has withstood the critical scrutiny of time and political change. "Legislative prayer," exempt from typical Establishment Clause analysis, occurs at the opening of legislative sessions, in order to lend gravity to the occasion and invite lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing. In "legislative prayer," exempt from typical Establishment Clause analysis, the audience consists of mature adults who during the prayer are free to enter and leave with little comment and for any number of reasons.

However, the Ninth Circuit held that the school board's policy and practice of starting open-to-public portion of board meetings with invocation did not fall under legislative-prayer tradition, and thus was not exempt from typical Establishment Clause analysis, where many members of audience and active participants in meetings were children and adolescents, including student representative who sat on board and participated in board's deliberations. The court held that a requirement that a child choose whether to participate in a religious exercise or to dissent in order to participate in a complete educational experience, on par with that of her peers, implicates graver Establishment Clause considerations than the prayers at public meetings found to be within the legislative-prayer tradition. The history of public schools in the United States, and their intersection with the Establishment Clause, does not support the application of the legislative-prayer exception to the practices of public school boards, including school-board prayer.

According to the Ninth Circuit, the existence of equally available secular means of accomplishing the Board's stated purposes, coupled with the history of Christian prayer, demonstrates that the prayer policy's purpose is predominantly religious in violation of the Establishment Clause.

***Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. August 23, 2017) (*cert. denied* 586 U.S. (2019)).**

- **Facts:** Once he first started working at Bremerton High School ("BHS"), Kennedy felt called to "take a knee at the 50-yard line and offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." Kennedy's prayer usually lasted about thirty seconds. He wore a shirt or jacket bearing a BHS logo when he prayed at midfield. Because his "prayer lifts up the players and recognizes their hard work and sportsmanship

during the game," Kennedy's religious beliefs required him to pray on the actual field wherse the game was played. Several games into his first season, a group of BHS players asked Kennedy whether they could join him. "This is a free country," Kennedy replied, "You can do what you want." Hearing that response, the students elected to join him. Over time, the group grew to include the majority of the team. Sometimes the BHS players even invited the opposing team to join. Eventually, Kennedy's religious practice evolved to something more than his original prayer. He began giving short motivational speeches at midfield after the games. Students, coaches, and other attendees from both teams were invited to participate. During the speeches, the participants kneeled around Kennedy, who raised a helmet from each team and delivered a message containing religious content. Upon learning of Kennedy's conduct, BHS wrote to Kennedy, stressing that Kennedy was "free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity." For a short time, Kennedy stopped praying on the field while students were around. After a month, Kennedy resumed praying on the field in the view of students and the community. The District subsequently notified Kennedy in a letter that he had violated the District's directives and placed him on administrative leave. Kennedy did not reapply for his coaching position for the following year. Instead, he initiated a legal action against the District, alleging that his rights under the First Amendment were violated. 869 F.33d 813, 815-21 (9th Cir. 2017).

- **Holding**: Kennedy spoke as a public employee, and not as a private citizen, when he prayed on the fifty-yard line in view of students and parents immediately after BHS football game. Accordingly, he cannot show a likelihood of success on the merits of his First Amendment retaliation claim. 869 F.33d 813, 831 (9th Cir. 2017).
- **Reasoning**: Applying the foregoing principles, Kennedy spoke as a public employee, and not as a private citizen. Before undertaking our analysis, two critical points deserve attention. First, the relevant "speech at issue" involves kneeling and praying on the fifty-yard line *immediately* after games *while in view of students and parents*. It is not, as Kennedy contends, praying on the fifty-yard line "silently and alone." We know this because Kennedy was offered (and, for a time, accepted) an accommodation permitting him to pray on the fifty-yard line after the stadium had emptied and students had been released to the custody of their parents. His refusal of that accommodation indicates that it is essential that his speech be delivered in the presence of students and spectators. Second, for the same reason, the "speech at issue" is *directed* at least in part to the students and surrounding spectators. 869 F.33d 813, 825 (9th Cir. 2017).
- Kennedy's job was multi-faceted, but among other things it entailed both teaching and serving as a role model and moral exemplar. When acting in an official capacity in the presence of students and spectators, Kennedy was also responsible for communicating the District's perspective on appropriate behavior through the example set by his own conduct. …Mindful of those facts, by kneeling and praying on the fifty-yard line immediately after games while in view of students and parents, Kennedy was sending a message about what he values as a coach, what the District considers appropriate behavior, and what students should believe, or how they ought to behave. Because such demonstrative communication fell well within the scope of Kennedy's professional obligations, the constitutional significance of Kennedy's job responsibilities is plain—he spoke as a public employee, not as a private citizen, and his speech was therefore unprotected. 869 F.33d 813, 827 (9th Cir. 2017).

Bidding

Pursuant to Section 10-20.21 of the School Code, school districts must let for competitive bidding any contract in excess of $25,000, subject to certain exceptions provided in the statute. However, there is not currently a valid exception which allows for bidding cooperatives to be exempt from these bidding requirements.

Without question, utilizing bidding cooperatives for purchases that are below the threshold is acceptable and has been encouraged by and sponsored by various organizations, including the Illinois Association of School Boards. However, these organizations also caution that school districts should obtain an opinion from their board attorney to determine whether an exemption from the bidding mandate applies prior to making a purchase from a bidding cooperative in excess of $25,000.

Schools do well to remember that the primary purpose of the bidding statute is to save schools money on non-specialized work. If a bidder proposes they are the only ones who can perform a certain non-technical function, they will be the only bidder (so there is no harm in bidding). If the bidder proposes they will be the lowest bidder anyway, there is no harm in letting the contract for bid and testing that. In order to be exempt from bidding, the bidder must meet the threshold for a *specific* exemption from the requirements, for which the law requires schools:

> (a) To award all contracts for purchase of supplies and materials or work involving an expenditure in excess of $25,000 or a lower amount as required by board policy to the lowest responsible bidder, considering conformity with specifications, terms of delivery, quality and serviceability, after due advertisement, except the following:
>
> (i) contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part;
>
> (ii) contracts for the printing of finance committee reports and departmental reports;
>
> (iii) contracts for the printing or engraving of bonds, tax warrants and other evidences of indebtedness;
>
> (iv) contracts for the purchase of perishable foods and perishable beverages;
>
> (v) contracts for materials and work which have been awarded to the lowest responsible bidder after due advertisement, but due to unforeseen revisions, not the fault of the contractor for materials and work, must be revised causing expenditures not in excess of 10% of the contract price;
>
> (vi) contracts for the maintenance or servicing of, or provision of repair parts for, equipment which are made with the manufacturer or authorized service agent of that equipment where the provision of parts, maintenance, or servicing can best be performed by the manufacturer or authorized service agent;
>
> (vii) purchases and contracts for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and interconnect equipment, software, and services;
>
> (viii) contracts for duplicating machines and supplies;
>
> (ix) contracts for the purchase of natural gas when the cost is less than that offered by a public utility;

(x) purchases of equipment previously owned by some entity other than the district itself;

(xi) contracts for repair, maintenance, remodeling, renovation, or construction, or a single project involving an expenditure **not to exceed $50,000 and not involving a change or increase in the size, type, or extent of an existing facility;**

(xii) contracts for goods or services procured from another governmental agency;

(xiii) contracts for goods or services which are economically procurable from only one source, such as for the purchase of magazines, books, periodicals, pamphlets and reports, and for utility services such as water, light, heat, telephone or telegraph; (xiv) where funds are expended in an emergency and such emergency expenditure is approved by 3/4 of the members of the board; (xv) State master contracts authorized under Article 28A of this Code; and

(xvi) contracts providing for the transportation of pupils, which contracts must be advertised in the same manner as competitive bids and awarded by first considering the bidder or bidders most able to provide safety and comfort for the pupils, stability of service, and any other factors set forth in the request for proposal regarding quality of service, and then price. However, at no time shall a cause of action lie against a school board for awarding a pupil transportation contract per the standards set forth in this subsection (a) unless the cause of action is based on fraudulent conduct.

105 ILCS 5/10-20.21(a)(emphasis added). A school can draft a bid carefully to assure all the school's requirements are met – including that the bidder provide the very services or structures for which the school may be enamored with a particular proposed bidder.

It is important, as well, to consider the totality of scope of a project. A set of non-technical wiring runs at $100,000 of work to hook up cameras is probably not exempt. However, a computer processing security system for which the software and equipment manufacturer and developer are an integral component of the system which is all to be installed by the contractor probably *is* exempt pursuant to 10-20.21(a)(vii).

Key Reminders for School Real Estate Transactions

Local Government Property Transfer Act

The Local Government Property Transfer Act ("the Act") allows the transfer of property between "municipalities", which are defined to include school districts, and allows a school district (hereinafter, sometimes "Board" or "District") to transfer real estate to a City, County, Park District, etc. The Act does not require a minimum price, and, unlike the School Code, it does not require a public auction. The general public policy underlying the lack of restrictions is that the real estate is transferred to another unit of government, not a private citizen or business. Effectively, the public still benefits (even if the units of government do not have the same tax "footprint").

In order to transfer real estate under the Act, both the transferee and transferor municipality are required to adopt an ordinance finding that the transfer or property is "necessary and convenient". While the Act refers to an "ordinance" the school district would adopt a resolution. The terms and condition of the transfer (price, condition of premises, use and other terms) are generally set forth in an Intergovernmental Agreement. If the property in question is desired by another unit of local government, this method of sale/transfer is significantly more flexible than an auction sale under the School Code.

Sale Pursuant to Section 5/5-22 of the School Code

The sale of school real estate to a private individual or entity is governed by Section 5-22 of the School Code (attached, emphasis added). The School Code provisions are relatively slow and inflexible, but are intended to ensure that the District receives the greatest price possible when selling real estate. The School Code requires and allows the following:

- Adoption of a Resolution finding that the real estate has become "unnecessary, unsuitable, or inconvenient for a school or unnecessary for the uses of the district".

- The Resolution must be passed by a **2/3rds vote** of the Board of Education.

- The public sale must take place by auction or sealed bids. We have found that auctions are generally only advisable if the District is selling farmland (or another property that is uniquely suited for a traditional auction format). We typically recommend sale by sealed bids, but often provide that the top three bidders shall have the opportunity to raise their bids after the opening. This process effectively creates a "mini auction" that is conducted among the top three bidders after the opening. This process generally does not yield a windfall, but can help the District to increase the ultimate sales price by a small percentage, and serves as an effective tiebreaker.

- A Notice of Sale must be published for three consecutive weeks prior to the sale.

- The District may state a minimum bid. The advantage to stating a minimum bid is that if the minimum bid is not met, the District may hire a "licensed real estate broker" to sell the property. The broker must sell the property at or above the minimum bid within 120 days, and may not receive a commission greater than 7%. We have found minimum bids to be effective if the Board does not anticipate receiving reasonable or sufficient bids at auction. If that occurs,

the Board can list the property with a broker without starting the notice and auction process over. The "catch" in establishing a minimum bid is that the broker must sell the property for at or above the stated minimum. Setting a minimum bid artificially high increases the potential that it can be listed with a realtor, but also increases the likelihood that the realtor will not be able to locate a buyer at or above that minimum. If the Board desires to reduce the minimum it must re-start the notice and sale provisions. A relatively new exception that allows a building trades house to be listed with a realtor without the standard notice and auction requirement.

- The Board may reject all bids. For example, if the Board does not state a minimum bid and receives only one bid, for $500.00, it is not required to accept the bid. Even if the Board sets a minimum bid, it may reject bids exceeding the minimum (although in that instance, it would not be able to proceed with the broker option).

- The School Code does not permit the District to consider factors other than price in evaluating bids. The Illinois Municipal Code allows municipalities greater flexibility in selling publically owned real estate, but unlike municipalities, the District is not permitted to select or favor a certain buyer based on the future use or development of the real estate. If the District desires to limit the sale to a particular use or development it would need to transfer the property to the City under the Local Government Property Transfer Act (above) and allow the City to sell the property. If that is a viable possibility in this instance there are multiple issues that will require additional discussion and explanation.

Sec. 5-22. Sales of school sites, buildings or other real estate. When, in the opinion of the school board, a school site, or portion thereof, building, or site with building thereon or any other real estate of the district has become unnecessary, unsuitable, or inconvenient for a school or unnecessary for the uses of the district, the school board, by a resolution **adopted by at least two-thirds of the board members**, may sell or direct that the property be sold in the manner provided in the Local Government Property Transfer Act or in the manner herein provided or, in the case of residential property constructed or renovated by students as part of a curricular program, may engage the services of a licensed real estate broker to sell the property for a commission not to exceed 7%, contingent on the public listing of the property on a multiple listing service for a minimum of 14 calendar days and the sale of the property within 120 days.

Unless legal title to the land is held by the school board, the school board shall forthwith notify the trustees of schools or other school officials having legal title to such land of the terms upon which they desire the property to be sold. If the property is to be sold to another unit of local government or school district, the school board, trustees of schools, or other school officials having legal title to the land shall proceed in the manner provided in the Local Government Property Transfer Act. In all other cases, except if the property is to be sold to a tenant that has leased the property for 10 or more years and that tenant is a non-profit agency, the school board, trustees of schools, or other school officials having legal title to the land shall, within 60 days after adoption of the resolution (if the school board holds legal title to the land), or within 60 days after the trustees of school or other school officials having legal title receive the notice (if the school board does not hold legal title to the land), **sell the property at public sale, by auction or sealed bids, after first giving notice of the time, place, and terms thereof by notice published once each week for 3 successive weeks prior to the date of the sale if sale is by auction, or prior to the final date of acceptance of bids if sale is by sealed bids, in a newspaper published in the district or, if no such newspaper is published in the district, then in a newspaper published in the county and**

having a general circulation in the district; however, if territory containing a school site, building, or site with building thereon, is detached from the school district of which it is a part after proceedings have been commenced under this Section for the sale of that school site, building, or site with building thereon, but before the sale is held, then the school board, trustees of schools, or other school officials having legal title shall not advertise or sell that school site, building, or site with building thereon, pursuant to those proceedings. The notices may be in the following form:

NOTICE OF SALE

Notice is hereby given that on (insert date), the (here insert title of the school board, trustees of school, or other school officials holding legal title) of (county) (Township No. ...., Range No. .... P.M. ....) will sell at public sale (use applicable alternative) (at ..... (state location of sale which shall be within the district), at .... ..M.,) (by taking sealed bids which shall be accepted until .... ..M., on (insert date), at (here insert location where bids will be accepted which shall be within the district) which bids will be opened at .... ..M. on (insert date) at (here insert location where bids will be opened which shall be within the district)) the following described property: (here describe the property), which sale will be made on the following terms to-wit: (here insert terms of sale)

....
....
....
(Here insert title of school
officials holding legal title)

For purposes of determining "terms of sale" under this Section, the General Assembly declares by this clarifying and amendatory Act of 1983 that "terms of sale" are not limited to sales for cash only but include contracts for deed, mortgages, and such other seller financed terms as may be specified by the school board.

If a school board specifies a reasonable minimum selling price and that price is not met or if no bids are received, the school board may adopt a resolution determining or directing that the services of a licensed real estate broker be engaged to sell the property for a commission not to exceed 7%, contingent on the sale of the property within 120 days. If legal title to the property is not held by the school board, the trustees of schools or other school officials having legal title shall, upon receipt of the resolution, engage the services of a licensed real estate broker as directed in the resolution. **The board may accept a written offer equal to or greater than the established minimum selling price for the described property. The services of a licensed real estate broker may be utilized to seek a buyer. If the board lowers the minimum selling price on the described property, the public sale procedures set forth in this Section must be followed. The board may raise the minimum selling price without repeating the public sale procedures**.

In the case of a sale of property to a tenant that has leased the property for 10 or more years and that is a non-profit agency, an appraisal is required prior to the sale. If the non-profit agency purchases the property for less than the appraised value and subsequently sells the property, the agency may retain only a percentage of the profits that is proportional to the percentage of the appraisal, plus any improvements made by the agency while the agency was the owner, that the agency paid in the initial sale. The remaining portion of the profits made by the non-profit agency shall revert to the school district.

The deed of conveyance shall be executed by the president and clerk or secretary of the school board, trustees of schools, or other school officials having legal title to the land, and the proceeds paid to the school treasurer for the benefit of the district; provided, that the proceeds of any such sale on the island of Kaskaskia shall be paid to the State Treasurer for the use of the district and shall be disbursed by him in the same manner as income from the Kaskaskia Commons permanent school fund. The school board shall use the proceeds from the sale first to pay the principal and interest on any outstanding bonds on the property being sold, and after all such bonds have been retired, the remaining proceeds from the sale next shall be used by the school board to meet any urgent district needs as determined under Sections 2-3.12 and 17-2.11 and then for any other authorized purpose and for deposit into any district fund. But whenever the school board of any school district determines that any schoolhouse site with or without a building thereon is of no further use to the district, and agrees with the school board of any other school district within the boundaries of which the site is situated, upon the sale thereof to that district, and agrees upon the price to be paid therefor, and the site is selected by the purchasing district in the manner required by law, then after the payment of the compensation the school board, township trustees, or other school officials having legal title to the land of the schools shall, by proper instrument in writing, convey the legal title of the site to the school board of the purchasing district, or to the trustees of schools for the use of the purchasing district, in accordance with law. The provisions of this Section shall not apply to any sale made pursuant to Section 5-23 or Section 5-24 or Section 32-4. (Source: P.A. 99-794, eff. 1-1-17.)

Divorce, Custody and the 2016 Amendments to the Marriage and Dissolution of Marriage Act

(750 ILCS 5/602.10)

Sec. 602.10. Parenting plan.

(f) Parenting plan contents. At a minimum, a parenting plan must set forth the following:

(1) an allocation of significant decision-making responsibilities;

(2) provisions for the child's living arrangements and for each parent's parenting time, including either:

(A) a schedule that designates in which parent's home the minor child will reside on given days; or

(B) a formula or method for determining such a schedule in sufficient detail to be enforced in a subsequent proceeding;

…

(4) each parent's right of access to medical, dental,and psychological records (subject to the Mental Health and Developmental Disabilities Confidentiality Act), child care records, and school and extracurricular records, reports, and schedules, unless expressly denied by a court order or denied under Section 602.11;

(5) a designation of the parent who will be denominated as the parent with the majority of parenting time for purposes of Section 606.10;

(6) the child's residential address for school enrollment purposes only;

…

(750 ILCS 5/602.11)

Sec. 602.11. Access to health care, child care, and school records by parents.

(a) Notwithstanding any other provision of law, access to records and information pertaining to a child including, but not limited to, medical, dental, child care, and school records shall not be denied to a parent for the reason that such parent has not been allocated parental responsibility; however, no parent shall have access to the school records of a child if the parent is prohibited by an order of protection from inspecting or obtaining such records pursuant to the Domestic Violence Act of 1986 or the Code of Criminal Procedure of 1963…

(750 ILCS 5/606.10)

Sec. 606.10. Designation of custodian for purposes of other statutes. Solely for the purposes of all State and federal statutes that require a designation or determination of custody or a custodian, a parenting plan shall designate the parent who is allocated the majority of parenting time. This designation shall not affect parents' rights and responsibilities under the parenting plan. For purposes of Section 10-20.12b of the School Code only, the parent with the majority of parenting

time is considered to have legal custody.

(105 ILCS 5/10-20.12b)

Sec. 10-20.12b. Residency; payment of tuition; hearing; criminal penalty.

(a) For purposes of this Section:

(1) The residence of a person who has legal custody of a pupil is deemed to be the residence of the pupil.

(2) "Legal custody" means one of the following:

(i) Custody exercised by a natural or adoptive parent with whom the pupil resides.

(ii) Custody granted by order of a court of competent jurisdiction to a person with whom the pupil resides for reasons other than to have access to the educational programs of the district.

(iii) Custody exercised under a statutory short-term guardianship, provided that within 60 days of the pupil's enrollment a court order is entered that establishes a permanent guardianship and grants custody to a person with whom the pupil resides for reasons other than to have access to the educational programs of the district.

(iv) Custody exercised by an adult caretaker relative who is receiving aid under the Illinois Public Aid Code for the pupil who resides with that adult caretaker relative for purposes other than to have access to the educational programs of the district.

(v) Custody exercised by an adult who demonstrates that, in fact, he or she has assumed and exercises legal responsibility for the pupil and provides the pupil with a regular fixed night-time abode for purposes other than to have access to the educational programs of the district.

(105 ILCS 5/14-1.11) (from Ch. 122, par. 14-1.11)

Sec. 14-1.11. Resident district; parent; legal guardian. The resident district is the school district in which the parent or guardian, or both parent and guardian, of the student reside when:

(1) the parent has legal guardianship of the student and resides within Illinois; or

(2) an individual guardian has been appointed by the courts and resides within Illinois; or

(3) an Illinois public agency has legal guardianship and the student resides either in the home of the parent or within the same district as the parent; or

(4) an Illinois court orders a residential placement but the parents retain any legal rights or guardianship and have not been subject to a termination of parental rights order.

In cases of divorced or separated parents, when only one parent has legal guardianship or custody, the district in which the parent having legal guardianship or custody resides is the resident district. When both parents retain legal guardianship or custody, the resident district is the district in which either parent who provides the student's primary regular fixed night-time abode resides; provided, that the election of resident district may be made only one time per school year.

When the parent has legal guardianship and lives outside of the State of Illinois, or when the

individual legal guardian other than the natural parent lives outside the State of Illinois, the parent, legal guardian, or other placing agent is responsible for making arrangements to pay the Illinois school district serving the child for the educational services provided. Those service costs shall be determined in accordance with Section 14-7.01.

(105 ILCS 5/14-1.11a) (from Ch. 122, par. 14-1.11a)

Sec. 14-1.11a. Resident district; student. The resident district is the school district in which the student resides when:

(1) the parent has legal guardianship but the location of the parent is unknown; or

(2) an individual guardian has been appointed but the location of the guardian is unknown; or

(3) the student is 18 years of age or older and no legal guardian has been appointed; or

(4) the student is legally an emancipated minor; or

(5) an Illinois public agency has legal guardianship and such agency or any court in this State has placed the student residentially outside of the school district in which the parent lives.

In cases where an Illinois public agency has legal guardianship and has placed the student residentially outside of Illinois, the last school district that provided at least 45 days of educational service to the student shall continue to be the district of residence until the student is no longer under guardianship of an Illinois public agency or until the student is returned to Illinois.

The resident district of a homeless student is the Illinois district in which the student enrolls for educational services. Homeless students include individuals as defined in the Stewart B. McKinney Homeless Assistance Act.