FRANCZEKRADELET

ATTORNEYS & COUNSELORS

Special Education Legal Update

I. Recent Illinois Legislation

A. 105 ILCS 5/27-23.7 — Bullying prevention (effective June 26, 2014)

School districts, charter school and non-public schools must create an implement a robust policy on bullying. The law contains a number of detailed provisions that schools must include in their policies on bullying. For examples, the policy must include procedures for reporting bullying, informing parents of bullying incidents, provide information regarding intervention services to address bullying, and contain a statement that prohibits retaliation against those who report bullying. The law also establishes the locations where the policy must be posted.

B. 105 ILCS — Cyber Bullying Policy (effective January 1, 2015)

Bullying that occurs through off-campus online activity or online activity conducted on non-school owned devices is prohibited. The definition of cyber bullying includes any type of activity using electronic technology that causes a substantial disruption to the educational process or orderly operation of the school. This statute applies when a school receives a report that cyber bullying occurred through online off-campus activity or non-school devices. The policy shall include a process to investigate whether a reported act of bullying is within the permissible scope of the district's or school's jurisdiction and shall require that the district or school provide the victim with information regarding services that are available within the district and community, such as counseling, support services, and other programs.

C. Passwords

Effective January 1, 2014, the statute (PA 98-0129) requires school districts to publish in their disciplinary rules, policies, or handbooks the "expectations" for students regarding social networking websites, including the circumstances in which the district might request or require the student to provide a password or other account information.

D. Compulsory Attendance Age

Effective July 1, 2014, this statute (PA 98-0544) lowers the compulsory school age from 7 years of age to 6 years of age (on or before September 1) for students enrolled in public schools.

E. Reporting Hazing

Effective August 16, 2013, this statute (PA 98-0393) creates a new crime in the Criminal Code for "Failure to Report Hazing". If a school official fails to report hazing it is a Class B Misdemeanor (if the act caused great bodily harm or death, it is a Class A Misdemeanor). "School Official" is defined as a paid administrator, teacher, counselor, education support personnel, or a paid or volunteer coach.

F. Clear and Present Danger

The new statute that allows for the concealed carry of firearms with specified restrictions (PA 98-0063) also contains a provision that states that it is the duty of the principal to report to the Department of State Police "when a student is determined to pose a clear and present danger to himself, herself, or to others, within 24 hours of the determination." Clear and present danger is further defined as someone who "poses a clear and imminent risk of serious physical injury to himself, herself or another person; or who demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior as determined by a physician, clinical psychologist or qualified examiner."

II. Federal Guidance

A. Bullying

1. The Office of Special Education and Rehabilitative Programs (OSERS) issued a Dear Colleague Letter on August 20, 2013, outlining school districts' responsibilities under the IDEA (*Individuals with Disabilities Education Improvement Act*) to address bullying of students with disabilities. The guidance stresses that when a student with a disability is bullied such that he or she is denied meaningful educational benefit, the school district can be liable for a denial of FAPE (free appropriate public education). This essentially means that a school district could be ordered to increase related service minutes, add accommodations, provide compensatory education, etc.

2. When an allegation of bullying arises, school districts should convene an IEP team meeting to determine whether the student's needs have changed as a result of the effects of the bullying and revise the student's IEP accordingly. If the instigator is a student with a disability, the IEP team

should consider whether additional supports are needed to address the inappropriate behavior.

3. Remember that bullying may trigger a district's child find obligations, regardless of whether the student is the instigator or the victim.

B. Athletics

1. The Office for Civil Rights (OCR) issued a Dear Colleague Letter on January 25, 2013, instructing school districts on their responsibilities to serve students with disabilities in extracurricular activities under Section 504.

2. OCR states that while a school district can appropriately establish benchmarks based on skill and ability when selecting students for extracurricular activities, it must provide necessary aids, services, and/or reasonable modifications for students with disabilities, unless doing so would fundamentally alter the nature of the activity. A school district, including athletic staff, must not base decisions regarding a student's participation on stereotypes or assumptions about how the disability may limit the student.

3. OCR also encourages that when students with disabilities cannot participate in the school district's existing extracurricular activities, even with reasonable modifications or aids and services, school districts should consider offering students with disabilities opportunities for athletic activities that are separate or different from those offered to students without disabilities.

4. School districts must also ensure that outside organizations that use school facilities provide necessary accommodations to qualified students with disabilities.

5. OCR recently clarified that equal opportunity does not mean compromising student safety, changing the nature of selective teams, giving a student with a disability an unfair advantage, or changing essential elements or the fundamental nature of the game/activity. Additionally, providing accommodations for extracurricular activities does not require a meeting by the entire 504 team.

III. Liability Issues for School Personnel

A. In Illinois, laws governing the operation of schools and the management of students and teachers are set forth by the Illinois School Code [105 ILCS 5/1-1 et seq.]. Constitutional law and the common law (case law) also provide guidance, especially with regard to the constitutional rights afforded to both teachers and students.

B. *In Loco Parentis*: This term is used in situations where another individual or agency is acting in place of a parent on behalf of a minor.

C. 105 ILCS 5/24-24 Maintenance of Discipline (105 ILCS 5/24-24)

- [T]eachers, other certificated educational employees, and any other person, whether or not a certificated employee, providing a related service for or with respect to a student shall maintain discipline in the schools, including school grounds which are owned or leased by the board and used for school purposes and activities.

- In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils.

- This relationship shall extend to all activities connected with the school program, including all athletic and extracurricular programs, and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.

- [A] teacher, other certificated employee, and any other person, whether or not a certificated employee, providing a related service for or with respect to a student may use reasonable force as needed to maintain safety for the other students, school personnel or persons or for the purpose of self-defense or the defense of property…. [and] may remove a student from the classroom for disruptive behavior….

- The policy shall not include slapping, paddling or prolonged maintenance of students in physically painful positions nor shall it include the intentional infliction of bodily harm.

D. Student Restraint

The term "physical restraint" (which might otherwise be prohibited) does not include momentary periods of person to person contact, without the aid of material or mechanical devices, accomplished with limited force and designed to (1) prevent a student from completing an act that would result in potential physical harm to himself/herself or others, or (2) to remove a disruptive student who is unwilling to voluntarily leave an area. 105 ILCS 5/10-20.33.

IV. Student Rights

A. Property Interest in Education

Students must be afforded due process before they are deprived of this interest

B. Student Confidentiality

1. Illinois School Students Records Act, 105 ILCS 10/1 et seq.

2. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g

3. Mental Health and Developmental Disabilities Confidentiality Act (MHDDCA), 740 ILCS 110/1 et seq.

C. Rights of Special Education Students

The Individuals with Disabilities Education Improvement Act (IDEA) was passed by Congress in order to assure that all children with disabilities have available to them "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400 (c). Under the provisions of this law, "related services" are developmental, corrective and other supportive services. This definition includes medical services that may be required to assist a child with a disability to benefit from special education. 20 U.S.C. 1401(22).

D. Medical Care

1. Because of the Supreme Court's decision in *Cedar Rapids Community School District v. Garret F.*, 119 S.Ct. 992 (1999), it is now established law that school districts must provide medical care that can be provided by a nurse or qualified lay person. Although this list is not comprehensive, included in this care are services such as urinary catheterization, oxygen supplement positioning, and suctioning.

2. According to the Federal Regulations which interpret the Individuals with Disabilities in Education Act, a State may allow paraprofessionals and assistants who are appropriately trained and supervised to assist in the provision of special education and related services to children with disabilities. 34 C.F.R. 300.136(f). Under Illinois law, noncertified personnel, functioning under a professional staff member, may perform related services, including medical care, for special education students when they are trained to do so. 23 Ill. Adm. Code 226.800(k).

E. Administration of Medication 105 ILCS 5/10-22.21b:

Administering medication. To provide for the administration of medication to students. It shall be the policy of the State of Illinois that the administration of medication to students during regular school hours and during school-related

activities should be discouraged unless absolutely necessary for the critical health and well-being of the student. Under no circumstances shall teachers or other non-administrative school employees, except certified school nurses and non-certificated registered professional nurses, be required to administer medication to students. This Section shall not prohibit a school district from adopting guidelines for self-administration of medication by students. This Section shall not prohibit any school employee from providing emergency assistance to students.

V. Potential Liability in the Classroom

A. Injury to Students

1. Illinois School Code, 105 ILCS 5/24-24; 5/10-20.20: ESP staff, like other school employees and school volunteer personnel, are protected from liability when performing the functions of their jobs with due care and in good faith. This indemnification and protection is provided by Section 10-20.20 of the Illinois School Code and includes any liability arising from incidents occurring within the scope of employment.

2. Illinois Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 et seq.: The Illinois Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act") was enacted in 1965. The Tort Immunity Act provides broad protection from liability for school districts and their employees, officials and volunteers. 745 ILCS 10/1 et seq.

   a. Definition of Employee. "Employee" includes a present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee, whether or not compensated, but does not include an independent contractor. 745 ILCS 10/1-202.

   b. Definition of Injury. "Injury" means death, injury to a person, or damage to or loss of property. It includes any other injury that a person may suffer to his person, reputation, character or estate which does not result from circumstances in which a privilege is otherwise conferred by law and which is of such a nature that it would be actionable if inflicted by a private person. "Injury" includes any injury alleged in a civil action, whether based upon the Constitution of the United States or the State of Illinois, and the statutes or common law of Illinois or of the United States. 745 ILCS 10/1-204.

   c. Immunity Enjoyed by Public School Employees. Public school district employees, including teachers, administrators and support staff personnel, are shielded from some tort liability. Immunity for school employees derives from essentially two sources:

- *In Loco Parentis.* The first source of protection comes from the doctrine of in loco parentis – standing "in the place of" the parents. This doctrine generally provides that teachers, certificated staff members and non-certificated staff members who provide services for or with respect to a student cannot be held liable for ordinary negligence and instead may only be liable for conduct that is "willful and wanton." 105 ILCS 5/24-24.

- Tort Immunity. The second source of protection is offered by 745 ILCS 10/1 et seq. Under the Tort Immunity Act, school employees may be protected from many types of liability, including the exercise of discretion: A public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused. 745 ILCS 10/2-201.

3. Indemnification. Teachers and school employees may be indemnified by the board of education for acts committed within the scope of their employment. In other words, when an employee is sued for conduct within the scope of his or her employment, the board of education may defend the employee and pay for any judgment against the employee. 105 ILCS 5/10-20.20.

4. When can school employees be held liable? School employees may still be liable for willful and wanton behavior. In addition, employees sued for conduct outside the scope of their employment may not be indemnified by the board of education.

5. What is Willful and Wanton Conduct? The Tort Immunity Act defines "willful and wanton conduct" as a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. 745 ILCS 10/1-210. Illinois courts have adopted a similar definition.

6. What is the Scope of Employment? Employees are acting within the scope of their employment when they are acting in the course of employment and in furtherance of the business of the employer. Employees are acting outside the scope of employment when they act solely for their own benefit.

7. Examples of Conduct Giving Rise to Liability. The following conduct may result in employee liability:

a. allowing student to engage in conduct known to be dangerous (i.e., permitting "crack-the-whip" on the playground)

b. failing to get medical treatment for student

c. advising untrained high school student to medically and surgically treat another student

d. failing to intervene when students engaged in dangerous behavior of pounding a piece of scrap metal through hole with anvil

e. releasing two students who were known to be fighting

f. administering excessive corporal punishment

g. sexual relations with students, even if "consensual"

h. other criminal act

VI. Student Confidentiality

Confidentiality issues in the public schools are increasingly becoming an area of concern. Many questions arise in the context of student counseling services, whether provided by school psychologists, social workers, or teachers. Students often look to role models in the schools for guidance concerning personal issues. There is an inherent conflict between maintaining the confidentiality of communications shared by students and keeping parents informed of the issues facing their children.

A. Mental Health and Developmental Disabilities Confidentiality Act (MHDDCA)

The Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 et seq., was first passed 20 years ago. It governs all instances where mental health or developmental disabilities services are rendered. The main purpose of the MHDDCA is to ensure the confidentiality of all records and communications divulged to a therapist in the course of providing mental health or developmental disability services. The MHDDCA also governs the release of confidential information in certain limited circumstances.

B. What is a confidential communication or record?

1. A confidential communication is any communication (oral or written) made by a student to a therapist (whether the session is one-on-one or group) during or in connection with providing mental health services. This term includes any information that indicates that the student is receiving mental health services.

2. A record under the MHDDCA is defined as all information kept by a therapist or school district in the course of providing mental health

services, including what services have been provided. Personal notes are not considered a part of the student's records under the MHDDCA, and as will be discussed further herein, personal notes are not subject to disclosure except in very limited circumstances.

C. What is a mental health service?

It is a common misconception that a mental health service consists of something more than just listening or talking with a student about an issue the student is facing. However, the MHDDCA broadly defines a mental health service and gives examples that include examination, diagnosis, evaluation, treatment, training, or rehabilitation.

D. Who is considered a therapist?

A therapist under the MHDDCA means a psychiatrist, physician, psychologist, social worker, or nurse providing mental health services or any other person not prohibited by law from providing mental health services if the student reasonably believes that such person is permitted to do so. There are numerous individuals in the school setting who may reasonably be viewed by students as "therapists" for purposes of the law. For example, principals, teachers, and guidance counselors, by virtue of their positions of trust, could be considered "therapists" under the MHDDCA after they have consulted with a student on a mental health issue. The word therapist is used throughout this outline to generally mean all school personnel whom students may consider as therapists.

E. Disclosure of Confidential Communications or Records

1. The MHDDCA strictly prohibits the release of confidential communications or records except in limited circumstances. Students should feel comfortable telling school district personnel personal information without fear that the information will be disclosed to their parents. However, there is the competing interest that parents have regarding the well-being and care of their children. The MHDDCA attempts to strike a balance between these two competing interests.

2. Under the MHDDCA, a parent or guardian of a student under the age of 18 is always entitled to receive the following information: the student's current physical and mental condition, diagnosis, treatment needs, services provided, and services needed, including medication. This provision seems designed to cover those instances when the therapist is a physician, since most school personnel are not authorized to make a diagnosis or dispense medication. However, if a parent asks a school social worker "what services have you provided to my son?," that social worker is allowed to answer in accordance with the MHDDCA.

3. Following are the individuals/entities that are entitled to copies of a student's mental health records upon request:

a. the **parent or guardian** of a student who is **under 12** years of age;

b. the **student** if he/she is 12 years of age or older;

c. the **parent or guardian** of a student who is **at least 12 but under 18 years of age** if: the student is informed and does not object OR if the therapist does not find any compelling reasons for denying the access;

d. the **guardian** of a student who is 18 years or older;

e. an **attorney or guardian ad litem** who represents a student 12 years of age or older in any judicial or administrative proceeding, provided that the court or hearing officer has entered an order granting the attorney or guardian ad litem this right;

f. an **agent** appointed under a student's power of attorney; and

g. **any other person with the written consent** of a person who is entitled (under numbers 1-6 above) to a student's mental health records.

VII. Emergency Release of Records

Records and communications under the MHDDCA may be disclosed in the following five situations which generally fall under the category of emergency release of information:

A. To protect the student or another person against a clear, imminent risk of serious physical or mental injury, disease, or death;

B. To warn or protect a specific individual against whom a student has made a specific threat of violence;

C. When necessary for the provision of emergency medical care to a student who is unable to assert or waive his/her rights to confidentiality;

D. In accordance with the Sex Offender Registration Act (i.e. if the student admits he/she should be registered but is not); and

E. In accordance with the Abused and Neglected Child Reporting Act (ANCRA).

F. Whenever a disclosure is made of records or communications under these five scenarios, the good faith of the person or school district making the disclosure is presumed and no liability arises from these types of disclosures.

VIII. Questions?

