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WELCOME TO THE 2019 MTBF&M SCHOOL LAW UPDATE

2019

April 9, 2019



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MARIJUANA IN THE SCHOOL SETTING

2019

David J. Braun

Cannabis Background

2019

- Medical Use
 - 1996 California
 - 2014 Illinois (Pilot only)
- Recreational Use
 - 2012 – Colorado and Washington
 - Ages 21+ recreationally
 - 2013 – Cole Memorandum
- Medical Use in Schools
 - 2016 – Colorado (Jack’s Law)
 - 2018 (August 23) – Illinois (Ashley’s Law)



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Ashley’s Law

2019

- Requires a policy
 - Prohibits schools from preventing *parent administration* at school.
 - Provides several exceptions, including:
 - 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.
 - 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.



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Employees

2019

- Safe and Drug Free Schools and Communities Act
 - Does not allow staff member possession
 - No legal recreational use in Illinois (yet)
 - Medical use still exempted from schools
 - Problem of enforcement – testing (qualitative vs. quantitative)
 - Bargaining testing



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Take-aways

2019

- Legalization
 - Every state that has legalized has limited use to 21+
 - Think: alcohol
 - Ashley's law requires policy adoption
 - But retains exceptions to use for federal law, disruption
 - Don't implement without knowing your facts carefully, evaluating risks
 - For employees, drug testing is probably not the solution
 - The facts are
 - Impairment of any sort can always result in discipline, regardless of cause (substance used)



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RESPONDING TO A SUBPOENA

2019

Christine G. Christensen

Responding to a Subpoena

- 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)
 - ▣ *Subpoena for Testimony*

Responding to a Subpoena

- The Illinois School Code prohibits the release of teacher, principal, and superintendent performance evaluations. 105 ILCS 5/24A-7.1.
- Similarly, the Illinois School Student Records Act (“ISSRA”) forbids the production of student records absent prior written consent or a court order. 105 ILCS 10/6.

Responding to a Subpoena

- *I just received a subpoena for student records. What should I do?*
- (1) Directory information.
 - Consult your District’s definition of directory information.
 - Check whether the parent(s) or eligible student has specifically requested that the District not release directory information.
 - If no request is on file, 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.

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

Responding to a Subpoena

- *I just received a subpoena for student records. What should I do?*
- (2) Student Records (non-directory information)
 - The District may not disclose the information absent prior written consent, a court order, or another exception recognized by ISSRA.

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

Responding to a Subpoena

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

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

Responding to a Subpoena

- *I just received a subpoena for a student's mental health and/or developmental disability records. What should I do?*
 - Do not release the records.
 - The Illinois Mental Health and Developmental Disabilities Confidentiality Act provides that no person “shall serve a 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[.]” 740 ILCS 110/10 (emphasis added).

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



TEN KEY POINTS IN NAVIGATING SECTION 504

2019

Brandon K. Wright

Section 504

2018

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).



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Section 504

2018

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



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Section 504

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



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Section 504

2018

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



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Section 504

2018

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



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Section 504

2018

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



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Section 504

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



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Section 504

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



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Section 504

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



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Section 504

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



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Section 504

2018

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).



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FOIA AND OMA UPDATE

2019

Luke M. Feeney

FOIA and OMA Update

2018

Under the Freedom of Information Act (FOIA):

(5 ILCS 140/1.2)

Sec. 1.2. *Presumption.* All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.

And remember: public records can include public employees discussing public business on personal devices or accounts!



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FOIA and OMA Update

2018

Under the Freedom of Information Act (FOIA):

Dance Like No One Is Watching.

Email Like It May One Day Be Read Aloud In A Deposition.



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user card



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FOIA and OMA

2017

PAC 18-013 – What is “unduly burdensome”?

PAC 18-010 – Settlement Agreements always public.

PAC 18-012 – No budget discussions in closed session.



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FOIA and OMA

2017

Recent PDF Redaction Failures:

“Judge Blasts Sun Sentinel for Publishing Confidential Information in Parkland School Shooting Case” – August 16, 2018



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FOIA and OMA

2017

Some Basic Tips for Properly Redacting Word to PDF Files:

- Delete the sensitive information before converting the text or Word document to a PDF file.
- Create PDFs as image files with no text.
- If you use a redaction tool such as Adobe Acrobat, be certain that the software is the correct and updated version. Know that most office tools such as Microsoft Word also contain hidden metadata that can be accessed. Converting a Word document to PDF does not automatically remove all metadata.



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MINIMUM WAGE, FLSA, AND EMPLOYMENT LAW

2019

David J. Braun

Minimum Wage

2019

- Lifting Up Illinois Working Families Act
 - January 1, 2020 - \$9.25/hr
 - July 1, 2020 - \$10/hr
 - January 1, 2021 - \$11/hr
 - January 1, 2022 - \$12/hr
 - January 1, 2023 - \$13/hr
 - January 1, 2024 - \$14/hr
 - January 1, 2025 - \$15/hr



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Minimum Wage

2019

- Lifting Up Illinois Working Families Act
 - *Increases* penalty for failure to keep payroll record
 - \$100/employee
 - 5% damages (up from 2%)
 - \$1,500 fine
 - NOT a new penalty – just increased.



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Minimum Wage

2019

- Lifting Up Illinois Working Families Act
 - *Wages are a mandatory subject of collective bargaining*
 - Will you increase just base?
 - Schedule? Watch out for indexed schedules.



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Minimum Wage

2019

- Lifting Up Illinois Working Families Act
 - Good time to look for exemptions. Is your
 - secretary/
 - payroll clerk/
 - bookkeeper/
 - substitute/
 - transportation director actually making minimum wage?
 - Re-examine annualization of such employees.



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Minimum Wage

2019

- Additionally, proposed rules for the Fair Labor Standards Act, if approved, will raise minimum salary
 - from \$23,660 /yr
 - TO \$35,308 /yr

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Title IX in the #MeToo Era

2019

Brandon K. Wright

Title IX in the #MeToo Era

2019

- *What does Title IX really mean?*

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Title IX in the #MeToo Era

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- *What does Title IX really mean?*



It isn't just sports...

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Title IX in the #MeToo Era

2019

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance. Title IX states that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

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Title IX in the #MeToo Era

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#MeToo

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Title IX in the #MeToo Era

2019

#MeToo

The national movement to highlight sexual harassment, abuse, and misconduct.



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Title IX in the #MeToo Era

2019

- ❖ Nearly 50% of grade 7-12 students reported experiencing sexual harassment since 2011.
- ❖ Yet, OCR noted in 2014 that 67% of school districts had zero records of allegations of sexual harassment.



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Title IX in the #MeToo Era

2019

K-12 Title IX sexual harassment is an emerging trend.

Colleges and universities have struggled with enforcing the Title IX requirements over the last decade.

What lessons can we learn?

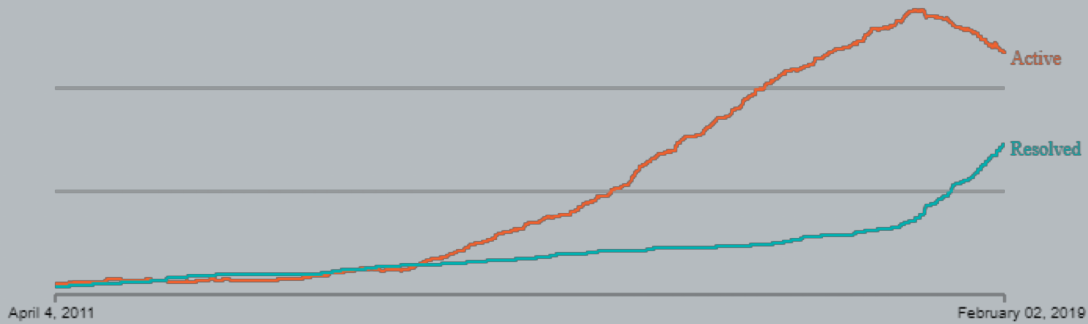


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Title IX in the #MeToo Era

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Increase in Ed Department Open Title IX Investigations from 2011 to 2019:



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Title IX in the #MeToo Era

2019

How many of you know who your Title IX Coordinator is for your district?

Does your Title IX Coordinator report directly to the Superintendent?

Annual reporting? Visibility on website? Regular training?



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Title IX in the #MeToo Era

2019

“We are an elementary school without sports teams... why do we need a Title IX coordinator?”



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Title IX in the #MeToo Era

2019

Proposed Title IX Regulations:

- ❖ Must respond “meaningfully” to every report of sexual harassment.
- ❖ Even if no formal complaint, must still “do something.”
- ❖ Investigate for patterns of harassment.
- ❖ Increased due process for accused.



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Title IX in the #MeToo Era

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Remember: Title IX applies to any discrimination on the basis of sex, including disparate impact, sexual harassment, and sexual violence.



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Title IX in the #MeToo Era

2019

- ❖ Title IX issues quickly become a BIG and expensive problems.
- ❖ K-12 is the new target.
- ❖ Training, training, training.



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DATA PRIVACY

2019

Christine G. Christensen

Biometric Information

- School Districts may only collect biometric information from its students for identification and/or fraud prevention purposes. 105 ILCS 5/10-20.40.
- 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.

Biometric Information

- When collecting biometric information, the School Code also requires the District to:
 - ▣ Store, transmit, and protect all biometric information from disclosure.
 - ▣ 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.
 - ▣ 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.
 - ▣ Destroy all of a student's biometric information within 30 days after the occurrence of either conditions 3(a) or 3(b) above.
- 105 ILCS 5/10-20.40.

Social Security Numbers

- Social Security Numbers are “private information” subject to exemption under FOIA. 5 ILCS 140/7.
- Social Security Numbers are protected pursuant to ISSRA/FERPA.
 - ▣ 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>.

Data Privacy

2019

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, drivers license information, and health information.

Data Privacy

2019

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.



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Data Privacy

2019

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.



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UNDERSTANDING FIRST AMENDMENT LITIGATION REGARDING RELIGION

2019

Luke M. Feeney

Religion

2018

The “*Lemon Test*”

1. Secular purpose;
2. primary effect must neither advance nor inhibit religion;
3. not cause “excessive entanglement” with religion.

❖ Cannot reasonably be viewed to endorse religion.



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Trends in the Schoolyard

2018

Freedom From Religion Foundation v. Concord Community Schools, 2017 WL 879848 (N.D. Ind. 2017) - Establishment Clause

In 2017, the District Court for the North District of Indiana held that the Concord Community School District violated the Establishment Clause of the First Amendment through its renditions of the **Christmas Spectacular Holiday Show** (“Show”) in 2014 and its proposed presentation of the 2015 Show prior to the Court’s issuance of a preliminary injunction, which enjoined the 2015 Show in part, as noted below.



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Trends in the Schoolyard

2018

Freedom From Religion Foundation v. Concord Community Schools, 2017 WL 879848 (N.D. Ind. 2017) - Establishment Clause



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Trends in the Schoolyard

2018

Freedom From Religion Foundation v. Concord Community Schools, 2017 WL 879848 (N.D. Ind. 2017) - Establishment Clause



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Trends in the Schoolyard

2018

Freedom From Religion Foundation v. Concord Community Schools, 2017 WL 879848 (N.D. Ind. 2017) - Establishment Clause



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Trends in the Schoolyard

2018

Freedom From Religion Foundation v. Concord Community Schools, (7th Circuit 2018) - March 21, 2018

On appeal, the 7th Circuit held that the “updated” version of the Christmas Spectacular Holiday Show, which removed the overtly religious portions, were enough to pass constitutional muster.

However, it upheld the finding that the prior findings regarding the 2014/2015 show were not moot and the relief granted.



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Trends in the Schoolyard

2018

Freedom From Religion Foundation v. Chino Valley Unified School District, 896 F.3d 1132 (9th Cir. 2018) (Prayer at School Board Meetings):



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Trends in the Schoolyard

2018

Kennedy v. Bremerton School District, 869 F.3d 813 (9th Cir. August 23, 2017)
(First Amendment/ Religious Expression):



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BIDDING

2019

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Bidding

2019

- Must bid projects for labor and materials over **\$25,000**
 - Or **\$50,000** 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**;
 - Unless an exemption applies



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Bidding

2019

- Common exemptions include:
 - Perishable food and beverages
 - Data processing equipment, software, or services and telecommunications and interconnect equipment, software, and services
 - Security systems?
 - Contracts for duplicating machines
 - Single source procurement
 - High skill required
- If the State education purchasing entity creates a master contract as defined in Article 28A of this Code, then the State education purchasing entity shall notify school districts of the existence of the master contract.



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Bidding

2019

- Watch out for groups holding themselves out as meeting the exception for “bidding cooperative.”
 - A master contract has to be approved by CMS and ISBE
 - There are none for projects exceeding \$25,000.
 - In fact, in a widely circulated memo from IASB, IASB directs schools to contact counsel for projects *exceeding \$25,000 in value*.
 - “Before making a purchase from BuyBoard in excess of \$25,000, members in Illinois should obtain an opinion from their board attorney to determine whether an exemption applies.”



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AVOIDING PITFALLS IN SCHOOL REAL ESTATE

2019

Luke M. Feeney

School Real Estate

2018

Types interest in real property (*aka* “the bundle of sticks”):

- Full ownership (fee simple)
- Partial ownership:
 - Joint tenancy (with right of survivorship)
 - Tenants in common
 - Mineral rights
- Life estates
- Remainder / reversionary interests
- Options / rights of first refusal
- Easements
- Licenses
- Leasehold interests
- Adverse interests (adverse possession – “squatters rights”)



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School Real Estate

2018

Methods of acquiring real property:

- Purchase
 - Private transaction
 - Local Government Property Transfer Act
- Lease
 - Not to exceed 99 years
 - 2/3 vote required beyond 10 years
- Gift, grant, donation or devise
- Condemnation (eminent domain)



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School Real Estate

2018

Purchase issues to consider:

- Title insurance
- Encumbrances
- Inspections
- Prior use of the property
 - Environmental issues
 - Asbestos
 - Underground storage tanks
- Zoning / land use



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School Real Estate

2018

Lease issues to consider:

"The devil is in the details!"

Frequent problem areas:

- Term (automatic renewal, early termination, notification timeline)
- Insurance / indemnification
- Alterations and repairs (fixtures, trade fixtures)
- Nonpayment, eviction and attorney's fees
- Farm leases (cash rent, variable cash rent, crop share)
- Mixed use properties: School districts must carefully consider leases that result in shared spaces or overlapping occupancy – particularly if/when students are present.



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School Real Estate

2018

Sale of school real estate:

School Code requirements are intended to guarantee that a school district receives a fair price ... *BUT* ... are neither fast, nor flexible.

- Notice must be published for 3 consecutive weeks
- Auction or sealed bid
- The Board must sell to the high bidder, but may reject all bids
- Property may be listed with a broker only if minimum bids are not met (and the broker must then sell at above the minimum bid)
- Separate provisions for building trades houses



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School Real Estate

2018

Sale of school real estate:

- The School Code does not permit a district to consider development, intended use, tax base, local ownership, etc.
- *However*, municipalities have greater flexibility in selling real estate to specific parties or for specific purposes
- Illinois Local Government Property Transfer Act
 - Allows units of local government to transfer property largely free of the School Code restrictions



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PARENT IS A **VERB**: DIVORCE, CUSTODY, AND 2019 MDMA AMENDMENTS

2019

Brandon K. Wright

Parenting Plans

2017

(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;



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Parenting Plans

2017

(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:

(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;



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Parenting Plans

2017

(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:

(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;



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Parenting Plans

2017

(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:

(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;



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Parenting Plans

2017

(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...



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Parenting Plans

2017

(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.



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Thank you!

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**STICK AROUND FOR OUR
Q&A SESSION
AFTER LUNCH!**

2019

April 9, 2019