Deadline Fast Approaching to Adopt Disciplinary Policy Prohibiting Abortion Referrals

By October 1, 2019, State School Aid Act Section 166 requires school boards to adopt a disciplinary policy that, among other things, includes a financial penalty against a school district, ISD, or public school academy (PSA) employee who violates Revised School Code Section 1507, refers a student for an abortion, or assists a student in obtaining an abortion.

A school district, ISD, or PSA that fails to adopt this required policy by October 1, 2019 is subject to a $100,000 state aid deduction.

To assist our retainers clients in timely adopting the required policy, sample policy language is provided below.

**Important:** In determining how to incorporate the sample policy language, school officials and board members must consider that board policies often address the conduct of employees, board members, contracted services providers, visitors, and volunteers in various sections. School officials and board members will, therefore, need to consider whether they prefer to:

1. insert the policy language into multiple policy sections (limiting the two concluding sentences about financial penalties to policies about employees); or
2. incorporate the policy language into a single overarching operations policy, ensuring that this policy is incorporated by reference into any other policies that require employees, board members, contracted services providers, visitors, and volunteers to comply with board policies.

**Sample Policy**

Employees, board members, contracted services providers, visitors, and volunteers shall comply with Revised School Code Section 1507 (sex education) and are prohibited, while on school property or acting within the scope of their respective board duties, employment, contracted services, or volunteerism from referring a student for an abortion or assisting a student in obtaining an abortion.

The [District] [ISD] [PSA] may investigate suspected violations of this Policy, and if a violation is substantiated, the [District] [ISD] [PSA] may discipline that person in accordance with Board Policy and any applicable collective bargaining agreement or employment contract. In addition, a person employed by the [District] [ISD] [PSA] found to have violated this Policy will be fined an amount totaling [insert amount not less than 3%] of the person’s annual compensation. Any fines collected by the [District] [ISD] [PSA] under this Policy shall be remitted to the state school aid fund.
Surviving the Heat Without Air Conditioning

With schools back in session, school officials should consider the implications of holding classes and other activities in high temperatures.

Disabled Employees

The Americans with Disabilities Act (ADA) generally requires employers, including schools, to provide a qualified employee with a disability a reasonable accommodation to assist the employee in performing the essential functions of that employee’s job. Michigan’s Persons with Disabilities Civil Rights Act substantially mirrors the ADA in this regard.

Courts have not addressed whether temperature sensitivity is a disability, but some medical conditions may be triggered or exacerbated by high temperatures. Those include:

- Fibromyalgia;
- Asthma;
- Anemia;
- Low blood pressure;
- Multiple sclerosis; and
- Some forms of cancer.

The reasonable accommodation provided to an employee with a disability is determined through the ADA’s interactive process. An employer’s obligation to engage in the interactive process and offer a reasonable accommodation is generally triggered by an employee’s request for an accommodation.

School officials and the employee should discuss the employee’s proposed accommodation and other potential accommodations, as well as the feasibility and effectiveness of each proposed accommodation. Although employers must give some deference to the employee’s suggestions, the decision on what reasonable accommodation is selected is within the school’s discretion.

Reasonable accommodations for an employee whose disability is triggered or exacerbated by high temperatures may include moving the person to a cooler area of the classroom or building, allowing the employee to use a personal fan, providing additional breaks, or permitting the use of accrued or unpaid leave.

Disabled Students

Both Rehabilitation Act Section 504 and the Individuals with Disabilities Education Act (IDEA) require that a school provide eligible students a free appropriate public education (FAPE) based on the student’s individual needs. The Office for Civil Rights (OCR) rarely views budgetary considerations and administrative convenience as acceptable reasons to reduce or eliminate services required for a student with a disability to receive a FAPE.

School officials should review any Individualized Education Program (IEP) or Section 504 plan that requires a student to receive instruction in a room with cooler temperatures. If the classroom where the student is scheduled to receive instruction does not have a functioning air conditioning unit, it may be necessary to amend the IEP or 504 Plan or reconvene the IEP or 504 Team to discuss how best to provide the student a FAPE (e.g., providing the student with a personal fan or cooling unit or closing the classroom’s shades).

School officials and teachers should avoid moving a disabled student to a cooler area of the school building to work independently. OCR found that a school violated a student’s right to a FAPE when the student was sent to a cooler building area to work independently during a two-week period when the classroom’s air conditioning was broken. Birdville Indep Sch Dist (OCR, 2015).

Student Activities

Many schools have adopted the Michigan High School Athletic Association’s (MHSAA) proposed heat and humidity guidelines for conducting athletic activities. These guidelines direct schools to begin monitoring the heat index (a combination of temperature and humidity) once the temperature reaches 80 degrees. Depending on the heat index, the guidelines require providing water breaks, observing athletes, offering cooling towels, or delaying practice until later in the day.

Conclusion

School officials overseeing schools where air conditioning units are broken or non-existent should review applicable board policies and safety plans, and consider the general safety of the students and employees. Information about symptoms of heat illnesses, including heat exhaustion and heat stroke, are available on the Michigan Department of Health and Human Services website at:

https://www.michigan.gov/mdhhs/0,5885,7-339-71548_54783_54784_78428_78430_78441--,00.html

and on MHSAA’s website at:


Some safety measures school officials may implement during high temperatures include scheduling frequent water breaks, providing students and
staff with water bottles, distributing fans, closing blinds, turning off lights, and in some cases moving classes to cooler rooms or outside in the shade. In extreme conditions, school officials may even determine that delays, early dismissals, or cancellations of classes or activities are necessary for the safety and welfare of students and employees.

Finally, schools may be able to use surplus bond proceeds to finance the purchase of a new structural or detachable air conditioning unit or to use sinking fund monies to purchase a structural unit. If you are interested in purchasing an air conditioning unit through one of those financing options, please contact your Thrun finance attorney for further details.

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School Safety Drill FAQs

Get your school year off to a safe start by reviewing the following frequently asked questions about school safety drill requirements.

Q: Which schools are required to conduct safety drills each school year?

A: Michigan’s Fire Prevention Code requires every local school district, ISD, and PSA operating any of grades K-12 to conduct fire, tornado, and lockdown drills.

Q: How many fire, tornado, and lockdown drills are required? When are they required?

A: A school must conduct a minimum of five fire drills each school year. At least three of those drills must be held by December 1, and the other two drills must take place during the remainder of the school year with a reasonable interval between the drills.

A school must conduct a minimum of two tornado drills each school year. At least one of those drills must be held in March.

A school must conduct a minimum of three lockdown drills each school year. At least one of those drills must be held by December 1, and at least one must take place after January 1.

While 10 total drills are required, a school may conduct more drills, if desired.

Q: Must a school schedule these safety drills in advance?

A: Yes. By September 15, the school’s chief administrator (e.g., the superintendent) must provide a list of the scheduled drill days to the county emergency management coordinator in the school’s jurisdiction. A school also must conduct at least one drill (e.g., fire, tornado, or lockdown) during either lunch, recess, or another time when a significant number of students are gathered but not in a classroom.

Q: What is a lockdown drill, and what must it include?

A: Under a lockdown drill, students and staff are to be restricted to the interior of the school building. A lockdown drill must include security measures that are appropriate to “an emergency,” such as the release of a hazardous material or the presence of a potentially dangerous individual in or near the school building. The school board must seek input from school administration and local public safety officials on the nature of the drills. State and local police may, but are not required, to participate.

Q: Under what grounds may the school’s chief administrator reschedule a safety drill?

A: The school’s chief administrator may reschedule a safety drill due to conditions not within the control of school authorities (e.g., severe storms, fires, epidemics, utility power unavailability, water or sewer failure, or health conditions as defined by public health authorities). A canceled safety drill must be rescheduled within 10 school days after the originally scheduled date, and the school’s chief administrator must notify the county emergency management coordinator of the rescheduled date.

Q: What must the school do after conducting a safety drill?

A: Within 30 days after each safety drill, school officials must provide documentation on the school’s website that the drill occurred. Documentation must include the school’s name; the school year; the drill type; the number of completed drills to date for that drill type; the school principal or designee’s signature acknowledging the drill; and the name of the person who conducted the drill, if not the school principal. The school’s website must provide this information for at least three years.

Q: What is the penalty for failing to conduct a required safety drill?

A: Failing to conduct a required safety drill violates the Fire Prevention Code and is punishable as a misdemeanor.

* * *
**Constitution and Citizenship Day**

Federal law designates September 17 as Constitution Day and Citizenship Day and urges educational authorities “to make plans for the proper observance” of those holidays. School officials may consider providing instruction on the U.S. Constitution and citizenship on Tuesday, September 17, or they may contact their county bar association to ask if local attorneys are available to present on those topics. Thrun Law Firm attorneys have previously worked with county bar associations and Michigan school officials to help celebrate those holidays by providing instruction on the U.S. Constitution.

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**MDE Reverses State Aid Deductions**

In each of two state aid deduction appeals handled by Thrun Law Firm, MDE reversed a state aid deduction issued for the employment of a non-certificated career and technical education (CTE) teacher. Those decisions highlight the impact of recent legislation that authorizes a school district, ISD, or PSA (collectively, “public school”) to “engage” a non-certificated CTE teacher to teach if that teacher meets the experience-based criteria listed in Revised School Code (RSC) Section 1233b.

**State School Aid Act**

A public school must ensure that each of its teachers holds an appropriate teaching certificate, permit, authorization, or approval issued by MDE. Teaching in an elementary or secondary school without those credentials is considered non-certificated employment and potentially subjects a public school to two state aid deductions.

The first deduction is authorized by State School Aid Act (SSAA) Section 163 and is equal to the amount paid by the public school to the teacher during the period of non-certificated employment. The second deduction arises under SSAA Section 6 and is equal to the basic foundation allowance attributable to the number of full-time equivalent students taught by the teacher during the period of non-certificated employment.

**Revised School Code**

RSC Section 1233b permits a public school to “engage” a non-certificated teacher to teach a course if: (1) that teacher is teaching a course listed in that section; (2) that teacher meets certain experience-based requirements; and (3) generally, the public school is unable to engage a certified, endorsed teacher to teach the course.

The teacher must be teaching a course in one or more of the following:

- In grades 9-12: computer science, foreign language, mathematics, biology, chemistry, engineering, physics, robotics, or other similar areas designated by the State Board of Education;
- An industrial technology program; or
- A CTE program.

The teacher also must satisfy all of the following experience requirements:

- Possess a bachelor’s degree from an accredited postsecondary institution;
- Have a major or a graduate degree in the field in which the teacher will teach;
- If the teacher desires to teach for more than one year, pass the subject area exam, if such an exam exists, in the field in which the teacher will teach; and
- Except for a foreign language teacher, have at least two years of occupational experience in the five years immediately preceding the teacher’s hire date in the field in which the teacher will teach.

If teaching a course in an industrial education or CTE program, the teacher must meet the above experience requirements or all of the following requirements:

- Teach in a subject matter or field in which the teacher has achieved expertise, as determined by the public school board;
- Possess a high school diploma or a high school equivalency certificate;
- If teaching in a subject matter or field in which a professional license or certification is required, hold such a license or certification, or have held such a license or certification that expired no more than two years before the teacher’s hire date; and
- Have at least two cumulative years of experience in that subject matter or field in the immediately preceding ten years.

RSC Section 1233b permits a public school to employ a non-certificated industrial education or CTE program teacher meeting Section 1233b requirements to teach a course in an industrial education or CTE program for up to ten years. Thereafter, continued employment is conditioned on State Superintendent approval. RSC Section 1233b does not specify a cap for those teaching grades 9-12 in the subjects specified above.

MDE’s administrative rules require a public school to obtain an MDE permit or annual authorization before assigning a teacher pursuant to RSC Section 1233b.
State Aid Deduction Appeals

A district and an ISD each assigned a CTE teacher that satisfied RSC Section 1233b requirements to teach a course in a CTE program. Neither the district nor the ISD timely obtained an MDE permit or annual authorization for the CTE teacher. Consequently, MDE issued an SSAA Section 163 state aid deduction against the district and the ISD, and MDE additionally issued an SSAA Section 6 state aid deduction against the district.

The district and ISD each argued that RSC Section 1233b, which permitted non-certificated employment of the CTE teacher, exempted the district and ISD from the statutory state aid deductions associated with that employment notwithstanding non-compliance with administrative rule requirements. The district and ISD further argued that statutory language controlled over MDE’s administrative rules.

MDE reversed the SSAA Section 163 state aid deductions "based on the information presented in the appeal." Our Firm’s follow-up conversations with an MDE representative disclosed that MDE intends to continue to require a permit or annual authorization for a CTE teacher employed under RSC Section 1233b, but MDE acknowledges that it lacks authority to issue an SSAA Section 163 state aid deduction if a CTE teacher meets RSC Section 1233b requirements.

SSAA Section 6 state aid deduction appeals are reviewed by a different office within MDE than SSAA Section 163 state aid deduction appeals. Relying on the SSAA Section 163 decision, MDE also reversed the SSAA Section 6 state aid deduction.

School officials should regularly verify that teachers are appropriately certificated for their assignments and obtain MDE-required permits or certificates. Teacher certifications and permits can be verified using MDE’s online certification system, which is available at: https://mdoe.state.mi.us/MOECS/PublicCredentialSearch.aspx.

If MDE notifies your school of a state aid deduction for non-certificated employment, remember that there are exceptions to non-certificated employment and avenues of appeal. We are here to help.

Long-Awaited Guidance Issued on Homeschool Partnership Programs

On July 31, 2019, outgoing Interim State Superintendent Sheila Alles issued a much-anticipated pupil accounting decision regarding homeschool partnership programs. Traverse City Area Pub Schs (MA 18-6). A copy of the decision is available under the heading “Links to Publications” on our website at www.thrunlaw.com\links.

Schools that operate homeschool partnership and other shared-time programs should review the decision carefully to ensure continuing compliance with Michigan law and the Pupil Accounting Manual. Failure to do so may result in substantial state-aid deductions and penalties.

The decision is MDE’s first attempt at formal guidance on what it means for a shared-time course to be “available” to full-time students and how to calculate FTEs claimed for nonpublic students. Because both issues are critical in determining whether a nonpublic school student may be counted in membership, the decision will have a significant impact on how schools continue to operate shared-time programs.

We have contacted those clients directly that we know are operating homeschool partnership programs to provide suggestions on next steps. If your school operates a homeschool partnership program or other shared-time program, we strongly suggest that you review the decision and make any necessary changes for the 2019-2020 school year.

If you have specific questions or would like more information, please contact Robert Dietzel at rdietzel@thrunlaw.com or Jennifer Starlin at jstarlin@thrunlaw.com.

Parent’s IEP Attendance Qualifies for FMLA Leave

On August 8, 2019, the U.S. Department of Labor (DOL) issued an opinion letter opining that a parent’s attendance at her child’s special education IEP Team meetings qualified for intermittent leave under the Family and Medical Leave Act (FMLA).

Special education law requires public schools to develop an IEP for a child who receives special education and related services with input from the child and the child’s parents, teachers, school administrators, and related personnel.

The FMLA grants employees up to 12 weeks of unpaid leave per year to care for the employee’s spouse, child, or parent with a “serious health condition.” The FMLA defines a serious health condition as a condition that involves inpatient care or continuing treatment by a healthcare provider. FMLA leave may be taken intermittently when medically necessary, but an employer may require a certification issued by a health care provider verifying that an intermittent leave arrangement is medically necessary.

The parent obtained a certification from the child’s doctor, supporting her need to take intermittent leave to care for her child. The parent’s employer permitted intermittent FMLA leave for medical appointments, but
not for IEP team meetings, which were held four times per year to review the child’s educational and medical needs, wellbeing, and progress.

The parent’s spouse drafted a letter to the DOL, requesting an opinion on whether IEP Team meetings qualified for intermittent FMLA leave. The spouse represented that the child had a serious health condition as defined by the FMLA.

The DOL concluded that the parent’s attendance at the IEP Team meetings qualified for FMLA leave because the meetings concerned a qualifying family member, her child, with a serious health condition. Specifically, the DOL opined that the parent’s attendance at the IEP Team meetings appeared to be essential to her ability to provide appropriate care to her child. The parent attended the meetings to help other IEP Team participants make appropriate decisions about the child’s therapy, to discuss the child’s wellbeing and progress, and to ensure the child’s school environment was appropriate for the child’s medical, social, and academic needs. The DOL noted that a doctor did not need to be present at the IEP Team meetings for the parent’s attendance to qualify for intermittent FMLA leave.

Navigating employee leave is often difficult. School officials must consider not only FMLA rules, relevant policies, CBA provisions, and employment terms, but also the ADA, workers compensation laws, and other disability laws. If you are unsure whether an employee’s leave qualifies for FMLA leave, please contact your Thrun employment law attorney.

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Teacher Placement and Evaluation Decision Did Not Violate PERA

The Michigan Employment Relations Commission (MERC) recently ruled that a school did not commit an unfair labor practice when it unilaterally assigned a teacher to a classroom position and noted performance deficiencies on the teacher’s year-end evaluation. *Birmingham Pub Schs*, MERC Case No C161-098 (2019).

Robyn Tarnow was an elementary teacher at the district for approximately 20 years. During that time, she taught 2nd grade and developed a teaching method whereby students wrote about current events in a classroom notebook that would then be discussed by the class. During the 2012-13 school year, after a parent complaint, the district directed Tarnow to screen the notebook entries and to avoid inappropriate topics. Tarnow and the union grieved the district’s directive to adjust her teaching method and ultimately prevailed at arbitration during the 2013-14 school year.

Tarnow taught 2nd grade in the 2014-15 school year and 3rd grade in the 2015-16 school year. For the 2016-17 school year, the district assigned Tarnow to teach kindergarten to better accommodate other schedule changes. Tarnow expressed displeasure with the assignment because she could not implement her teaching method as easily with kindergarten students. Even though Tarnow indicated her preference for an open 2nd grade position at a different elementary school, the district again assigned her to teach kindergarten for the 2017-18 school year.

Starting with the 2013-14 school year, administrators tasked with annually evaluating Tarnow began documenting concerns about her classroom management, classroom environment, and professional collaboration and communication. Those concerns continued each successive school year. Although Tarnow’s overall year-end evaluation scores were at least “effective,” each year she received some “minimally effective” ratings in evaluation categories.

Tarnow and the union initiated an unfair labor practice charge against the district, claiming that the district’s assignment and evaluation decisions violated the Public Employment Relations Act (PERA) because they allegedly were made in retaliation for her union activity (i.e., the prior grievance) and an attempt to discourage her from future union activity.

The union retaliation allegation implicates PERA Section 10(1)(c), which makes it unlawful for a public employer to “discriminate with regard to hire, terms, or other conditions of employment to encourage or discourage union membership." A violation requires an adverse employment action against the employee motivated by the public employer’s union animus.

MERC noted that an adverse employment action usually takes the form of an ultimate employment decision, such as discharge, demotion evidenced by a wage decrease, a less distinguished title, or a material loss of benefits or responsibilities. MERC found that the district’s decision to assign Tarnow to a kindergarten position (as opposed to another elementary position) was not an adverse employment action. MERC observed that Tarnow suffered no loss of pay or benefits and there was no difference, aside from Tarnow’s personal preference, between a kindergarten position and other elementary teaching positions. There also was no evidence that any assignment decision made by the district was based on union animus.

As for the alleged discriminatory year-end evaluations, which were “effective,” MERC found that Tarnow failed to show that the administrators who conducted the evaluations acted with any discriminatory motive toward her.

MERC next addressed whether the district’s assignment and evaluation decisions constituted a threat to dissuade Tarnow from future union activity. Because teacher assignment and placement decisions are a prohibited bargaining subject, MERC found that
the district had the right to unilaterally assign Tarnow. Accordingly, the district was exercising its rights, not unlawfully threatening Tarnow. MERC again observed that Tarnow did not produce any direct evidence linking either the assignment or evaluation decisions to union animus. MERC dismissed the unfair labor practice charges.

Although teacher placement is a prohibited bargaining subject, allowing a school to make teacher placement decisions in its sole discretion, keep in mind that there could be factual circumstances that would support an unfair labor practice charge based on a teacher placement decision or evaluation (e.g., if retaliatory). Accordingly, school officials should contemporaneously document legitimate non-discriminatory reasons supporting each employment decision.

**Employer’s Statement Is Not a Threat**

MERC ruled that an employer did not violate PERA when it informed employees that they may be required to attend after-hours events, instead of allowing the employees to volunteer for such events. *Wayne State Univ*, MERC Case No C17 H-073 (2019).

Unionized admissions counselors regularly volunteered to attend after-hours recruiting events. An admissions counselor volunteered to attend such an event, but due to an incoming snow storm, told his supervisor that he would not attend. The supervisor, after asserting that the counselor was still expected to attend the recruiting event, offered the counselor the opportunity to leave early, stay at a hotel, and use a university vehicle. The counselor still refused to attend, and the supervisor went in the counselor’s place.

The counselor received a written reprimand. A union representative told the supervisor that she would ensure other union members were aware of the reprimand so that they would be on notice about possible repercussions for not attending voluntary events. The supervisor replied that voluntary events may become mandatory.

The union filed an unfair labor practice charge on behalf of the counselor alleging, among other things, that the supervisor’s statement that voluntary events may become mandatory amounted to a threat and interfered with an employee’s exercise of union rights.

PERA grants employees the right to engage in protected union activity free from employer threats responsive to that activity. Employer remarks, including alleged threats, must be analyzed in context to determine whether they constitute a threat. The test is whether a reasonable employee would interpret the statement as a threat made in response to an employee’s protected union activity.

MERC found that the supervisor’s statement was not a threat, but rather a statement of alternative action that the supervisor believed would be required if employees chose not to volunteer for recruiting events. MERC noted as significant that the collective bargaining agreement (CBA) permitted the university to assign an admissions counselor to attend an event if no one volunteered. Accordingly, MERC dismissed the unfair labor practice charge.

Determining whether a statement is a threat that violates PERA is a fact-specific inquiry; therefore, school officials should exercise caution when informing unionized employees about potential consequences of employee union conduct.

**CBAs Only Guarantee Benefits During the CBA Term**

The Michigan Supreme Court recently ruled that a CBA does not imply a right to lifetime and unalterable benefits unless that promise is made in clear and unambiguous CBA language. *Kendzierski v Macomb Co*, Mich Case No 156086 (2019).

For 20 years, Macomb County CBAs required the county to provide healthcare benefits to retired employees under certain circumstances. The county unilaterally altered those benefits, and over a thousand retirees sued, claiming that the CBAs in effect during their employment required the county to perpetually guarantee their healthcare benefits.

The disputed CBA language generally stated that the county would provide medical coverage “to the employee and the employee’s spouse, after eight (8) years of service with the employer, for the employee who leaves employment because of retirement . . . This Agreement shall continue in full force and effect until [month/day/year].”

The Michigan Court of Appeals concluded that there was a “latent ambiguity” (an ambiguity that arises when the document is executed) based on the language above that implied there would be coverage for retirees and surviving spouses. The Michigan Supreme Court disagreed.

The Court determined that the CBAs did not entitle the employees to lifetime health benefits because: (1) the CBAs did not specifically commit to providing unalterable benefits to retirees for life; and (2) when a specific CBA provision does not provide an end date, the guarantee only lasts for the CBA duration.

This case serves to remind school officials to be cautious when drafting or selecting CBA language.
Promises and expectations should be clearly and unambiguously stated in the CBA to simplify contract administration and to avoid legal action.

... Contemplating a Change of Placement Is Not Prohibited Predetermination...

The Ninth Circuit Court of Appeals recently ruled that a student’s IEP offered the student a FAPE in the least restrictive environment (LRE) and that the school district did not predetermine the placement in violation of the IDEA. *JG v Hawaii*, Case No 18-16538 (CA 9, 2019).

JG was eligible for services under IDEA as a student with Autism Spectrum Disorder. At the time of the due process complaint, JG attended a private school for students with autism owned by his parents. During JG’s IEP Team meeting, which occurred over several days, the IEP Team determined that JG could receive a FAPE in a less restrictive environment at a new local public school facility because, unlike at the private school, JG would have opportunities to interact with non-disabled peers during community outings. JG’s parents contested the school’s proposed placement, alleging that it was inadequate to meet JG’s needs and would not enable him to receive a FAPE. JG’s parents also claimed that the school improperly “predetermined” JG’s placement before the IEP Team meeting.

**Least Restrictive Environment**

The IDEA’s LRE provision requires that:

*To the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled, and special classes, separate school, or other removal of children with disabilities from the regular educational environment [are to] occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.*

In determining JG’s LRE, the IEP Team used a worksheet that listed the various placement options, “from most-to-least restrictive,” and then proceeded to discuss the pros and cons of each option, including the academic and non-academic benefits of each potential placement. Based on the team’s discussions, the IEP Team concluded that the public school placement was the LRE for JG.

The hearing officer, lower court, and the Ninth Circuit agreed, each finding that JG’s proposed placement at the public school offered JG a FAPE in the LRE. The Ninth Circuit concluded that JG would benefit both academically and non-academically and that he would not negatively impact teachers or other students. The court relied heavily on the fact that the proposed placement at the public school offered greater access to non-disabled peers and provided more opportunities for community interactions than the private placement. Further, the private placement did not offer any planned activities with non-disabled peers.

**Predetermination**

IDEA prohibits a school from predetermining placement for a student with a disability before the IEP Team meets. Instead, an IEP Team must examine the programs and services required for the student to receive a FAPE, which in turn drives the placement determination.

JG’s parents alleged that the district predetermined JG’s placement in four ways. First, one of JG’s IEP Team members visited the public school placement before the IEP meetings. The court, however, found that the visit amounted to “due diligence,” not predetermination.

The IEP Team also discussed the possibility of JG needing public transportation (something JG would require if attending the public school program). The Ninth Circuit, however, sided with the school, stating that the parents sought to “penalize the IEP Team for its thoroughness.”

Third, the school used a pre-printed IEP which listed the public school program as the proposed placement. While testimony demonstrated that this allegation was false, the Ninth Circuit nonetheless observed that school officials are generally “permitted to form opinions and compile results prior to IEP meetings.” The court further noted that even if the public school program was written in the draft IEP, “it is not clear that such a fact would evidence pre-determination.”

Finally, JG’s parents alleged that the IEP was predetermined because placement was not discussed until the fifth and final day that the IEP Team met, which allegedly demonstrated that the parents were denied full participation in the IEP process. However, the Ninth Circuit found that the parents actively, substantially, and meaningfully participated in JG’s IEP process. The court elaborated that even if the parents had not known about the public school, the IDEA does not require a school to allow parents to visit a proposed placement before finalizing an IEP.

Ultimately, the Ninth Circuit concluded that the parents were able to meaningfully participate in JG’s IEP and that the district had not improperly predetermined JG’s placement.

While this case is not binding on Michigan schools, it provides an excellent example of how to conduct an
LRE discussion when contemplating a change of placement without predetermining the outcome in violation of the IDEA.

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**Sixth Circuit Prevents Parent from Circumventing IDEA Exhaustion Requirement**

The IDEA provides schools and parents of students with disabilities a variety of administrative procedures to address special education complaints (e.g., school due process hearings and complaints filed with MDE). Generally, parents and students are required to exhaust those administrative procedures before filing a federal lawsuit.

Rehabilitation Act Section 504 generally prohibits disability-based discrimination and requires that individuals with disabilities be provided an equal opportunity to benefit from a school’s services or programs. Like the IDEA, Section 504 also requires a school to provide a student with a disability with a FAPE, which must be tailored to the student’s unique needs. Nonetheless, the IDEA administrative exhaustion requirement applies to federal lawsuits claiming a violation of FAPE, even if disguised as a Section 504 claim.

The Sixth Circuit Court of Appeals, whose decisions are binding in Michigan, recently ruled against a parent who attempted to circumvent the IDEA administrative exhaustion requirement by filing a lawsuit under the guise of Rehabilitation Act Section 504. *LG v Fayette Co Bd of Ed*, Case No 18-5715 (CA 6, 2019).

LG, a middle school student, was diagnosed with an E. coli infection and was advised by his physician not to attend school. LG’s parents notified the school that he would be out for an extended time. Approximately two months later, LG’s mother learned that LG was failing most of his classes because her notice was not accepted.

The school later approved LG for homebound services and contacted his parents about setting up a Section 504 plan. LG’s parents withdrew him from the school before any plan was developed. Without pursuing any remedies under the IDEA, the parents sued the school, alleging that it discriminated against LG based on his disability in violation of Section 504. The district court granted the school’s motion to dismiss, reasoning that LG failed to exhaust his administrative remedies under the IDEA before filing the lawsuit.

The Sixth Circuit affirmed the district court’s decision. The Sixth Circuit emphasized that although the complaint alleged a “discriminatory denial of access to education,” the complaint did not contend that the school refused to provide aids or supports that would make education more available to LG (e.g., ramps, service dog, or appropriate seating). The complaint also did not allege that some services were available to other students and not to LG because of his disability. Instead, the complaint stated that the school “failed to assist . . . with his academic needs” and “did not locate and provide educational services” for LG, phrases that implicate the school’s provision of a FAPE to LG. The fact that the complaint did not include the words “individualized education program” or “FAPE” did not change the court’s analysis. According to the Sixth Circuit, there are no “magic words” that allege the denial of a FAPE. Instead, the substance of the claim must be the focus.

The Sixth Circuit also opined that the complaint’s reliance on LG’s failing grades as evidence of the school’s failure to assist with academic needs demonstrated clearly that the complaint was about a FAPE; grades are used to signify a student’s educational development and progress.

Ultimately, the court held that because the complaint essentially sought a FAPE, LG was required to exhaust his administrative remedies under the IDEA before pursuing the lawsuit.

If your school is served with a complaint that includes disability-based claims involving a student, please promptly contact your Thrun special education law attorney to explore whether the complaint could be dismissed (in whole or in part) for failure to exhaust applicable IDEA administrative procedures.

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**2020 Election Dates and Deadlines**

2020 will be a busy election year. The November 3, 2020 general election will elect the U.S. president, congressional representatives, and many local school board members. A school district may place millage and bond propositions on the November 2020 ballot or any of the other two regular annual election dates in 2020, and on certain petition initiative election dates. Because 2020 is a presidential election year, a school district also may place a proposition on the March primary ballot.

The available 2020 regular election dates for millage or bond proposals are on the following Tuesdays:

- March 10
- May 5
- August 4
- November 3

A certified copy of the school board resolution approving ballot language for millage or bond proposi-
tions must be filed with the school’s election coordinator at least 12 weeks before the chosen election date. For the March 2020 election date, that filing deadline is Tuesday, December 17, 2019, at 4:00 p.m. If your school district is considering a millage or bond proposition for next March, please contact the attorney who assists your district with election matters as soon as possible.

Registered electors in a school district also may circulate petitions to place a millage or bond proposition on the ballot on a date other than one of the regular election dates listed above. Petitions bearing a sufficient number of signatures must be filed at least 12 weeks before the applicable election date. For 2020, the available petition initiative “floater” election dates are the following Tuesdays:

- January 7, 14, 21, 28
- February 4
- June 16, 23, 30
- September 15, 22, 29
- December 15, 22, 29

The 2020 regular and “floater” election dates could be used to seek voter approval for any of the following:

- Millage renewal;
- Restoration/override of Headlee reduction to existing millage;
- New millage, such as sinking fund, recreational, or regional enhancement; or
- Voted bonds.

For a new bond issue that a district would like qualified under the School Bond Qualification and Loan Program, school officials should contact their bond attorney at least five months before the prospective election date to schedule a preliminary qualification meeting with the Department of Treasury.

If you have questions about voted bonds or millages, please contact the Thrun Law Firm attorney who assists your school district with election matters.

### Municipal Finance & Elections Practice Group

<table>
<thead>
<tr>
<th>Attorney</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michael D. Gresens</td>
<td>517-374-8838</td>
</tr>
<tr>
<td>Fredric G. Heidemann</td>
<td>517-374-4535</td>
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<td>Matthew F. Hiser</td>
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<td>Christopher J. Iamarino</td>
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<td>Ryan J. Nicholson</td>
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<tr>
<td>Jeffrey J. Soles</td>
<td>517-374-8835</td>
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**New Attorney Joins Thrun Law Firm**

We are pleased to announce that Ian F. Koffler has joined Thrun Law Firm, P.C.

Ian joins us after having practiced for four years with a Grand Rapids law firm. Prior to that, Ian practiced in Kentucky for ten years. Ian graduated from the University of Richmond (B.A., 1999) and the University of Kentucky (M.P.A., 2001 and J.D., 2004).

Ian is a member of the State Bar of Michigan, the Kentucky Bar Association, the National Association of Bond Lawyers, the American Bar Association, and the Lansing Bar Association.

Ian’s practice focuses on public finance matters and renewable energy projects.

Ian serves as a member of the Michigan Board of Nursing Home Administrators. He resides in Ada with his wife and daughters. In his free time, Ian enjoys fishing, hunting, mountain biking, and the Kentucky Wildcats.

Welcome to “Team Thrun,” Ian!

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**New Legislation Impacts School Opioid Antagonist Administration**


Opioid antagonists are drugs that reverse opioid overdose. Examples of opioids include heroin and prescription painkillers. Although the AOAA will continue to allow “school districts” to administer opioid antagonists, there are some significant differences between the soon-to-be-repealed RSC provisions and the AOAA:
### RSC (Repealed as of Sept. 24, 2019)

- School district, ISD, or PSA may obtain, and have trained employees administer, an opioid antagonist.

- Trained employee, or a licensed registered professional nurse employed or contracted by the school, may administer an opioid antagonist.

- Employee training must be approved by a licensed registered professional nurse.

- Schools requiring employees to be trained in the administration of opioid antagonists must implement a policy that, among other things, requires school personnel to notify a parent or legal guardian of a pupil to whom an opioid antagonist has been administered.

- Schools must report to MDE, at least annually, all instances of opioid antagonist administration to a pupil at school.

- Employee who administers an opioid antagonist in good faith and in compliance with the RSC is not civilly or criminally liable for any resultant damages, unless the employee is grossly negligent.

- School district and school district board members are not civilly liable for any injuries resulting from an employee’s good faith administration of an opioid antagonist in compliance with the RSC.

### AOAA (Effective Sept. 24, 2019)

- “Political subdivision” may obtain, and have trained employees or agents administer, opioid antagonists.

- The AOAA interjects ambiguity by defining a “political subdivision” to expressly include a “school district,” without expressly including an “intermediate school district” or “public school academy.”

- Trained employee or agent may administer an opioid antagonist, if the employee or agent has reason to believe that a person is experiencing an opioid-related overdose.

- The term “agent” includes contractors, volunteers, and board members.

- An “opioid-related overdose” includes, but is not limited to, extreme physical illness, decreased level of consciousness, respiratory depression, coma, or death resulting from the consumption or use of an opioid.

- Employee or agent who administers an opioid antagonist in good faith and in compliance with the AOAA is not civilly liable for any resultant injuries or damages, unless the employee or agent is grossly negligent.

- Employee or agent who administers an opioid antagonist in good faith and in compliance with the AOAA is not criminally liable for administering an opioid.

- School district and school district board members are not civilly liable for injuries resulting from an employee’s good faith administration of an opioid antagonist in compliance with the AOAA.

- School district that purchases, possesses, or distributes an opioid antagonist in compliance with the AOAA is not civilly liable for injuries or damages arising out of the administration of an opioid antagonist to a person, unless the conduct is grossly negligent.

- School district that purchases, possesses, or distributes an opioid antagonist in compliance with the AOAA is not criminally liable for purchasing, possessing, or distributing an opioid antagonist.

Schools that have implemented policies required by the RSC to administer opioid antagonists should review those policies to ensure compliance with the AOAA. We will update our retainer clients as additional AOAA guidance becomes available.
## Schedule of Upcoming Speaking Engagements

Thrun Law Firm attorneys are scheduled to speak on the legal topics listed below. For additional information, please contact the sponsoring organization.

www.thrunlaw.com/calendar

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