



FRANCZEK RADELET

Attorneys and Counselors

300 South Wacker Drive | Suite 3400 | Chicago, IL 60606
Phone 312.986.0300 | Fax 312.986.9192 | franczek.com

DAWN SPIVEY MORITZ
312.786.6582
dsm@franczek.com

September 8, 2009

VIA ELECTRONIC AND U.S. MAIL

Ms. Susan Meister
Division of Legal Services
Illinois Department of Public Health
535 West Jefferson Street, 5th floor
Springfield, IL 62761

Re: Comments on Proposed Rules Regarding AEDs

Dear Ms. Meister:

Our law firm represents more than 100 Illinois public school districts and other educational entities. Our communications with numerous school districts indicate a need for additional clarity as it relates to the Physical Fitness Facility Medical Emergency Preparedness Act, 210 ILCS 74/1 et seq. (the "Act"), and the Proposed Rules issued by the Illinois Department of Public Health to implement the Act. 77 Ill. Adm. Code 527, 33 Ill. Reg. 10947.

During this comment period to the Proposed Rules, we take the opportunity to describe the issues confronting school districts and other entities and to suggest how the IDPH should address the issues through revisions to its Proposed Rules.

I. SUGGESTED REVISIONS TO THE PROPOSED RULES

To address the concerns regarding community use of school facilities, described more fully below, we suggest deleting the proposed Section 527.600(e) and, instead, adding the following new paragraph in an appropriate location in the Rules:

The requirements of the Act and these Rules do not apply to school districts or to Third Party Operators of school district facilities when the Third Party Operator is independently conducting and Supervising the activities on or in the school district's facilities.

Such an explicit rule will remove the confusion described below and have additional benefits. It will reduce significant administrative burden on school districts in having to review and make determinations for every instance of use, rather than knowing, more generally, that neither the school nor any third-party user is obligated to comply with the requirements of the Act in the course of community use of school facilities. It will reduce the economic burden on school districts that are attempting to comply with the Act where it may not actually be required.



It will reduce the economic burden on community organizations, many with limited resources, who are being asked to provide their own AED equipment and trained users when utilizing a school district facility. It also would support what we have heard described anecdotally as the intent of the legislators, and the legislative history is silent on this point.

II. THE ACT AND ITS APPLICATION

As you are aware, Section 5.25 of the Act defines a “physical fitness facility” as a facility that is:

- (i) owned or operated by a [school] and (ii) supervised by one or more persons, other than maintenance or security personnel, employed by the [school] for the purpose of directly supervising the physical fitness activities taking place at any of these facilities...

Confusion exists among many school districts and community organizations as to the application of the Act when the school’s facility is in use by a third-party, such as a local youth group renting the school’s basketball court for after-school activities, or a private soccer club renting the school’s outdoor field for practice.

Applying the statute literally, the requirements of the Act seem not to be triggered because, during such use, the facility does not meet the Section 5.25 definition of “physical fitness facility.” It does not apply to the school because, although owned by the school, the facility (e.g., basketball court or soccer field) is not being supervised by the school, other than the possible provision of maintenance or security personnel, thereby failing to satisfy the second prong of the definition. Nor does it apply to the third-party user who is operating the facility and supervising the activity, because the supervising third-party personnel are not employed by the school, thereby failing to satisfy the second prong of the definition. For example, a private soccer club renting a school’s outdoor soccer fields for after-school practice would be the operator of the facilities owned by the school district. However, such use is independent of school programs and is supervised solely by the private soccer club. Except for possible maintenance or security personnel provided by the school to coordinate community use of the facilities, the supervision is solely by soccer club personnel who are not employed by the school. Thus, neither the school nor the private soccer club would be subject to the requirements of the Act according to the application of Section 5.25 in this instance.

However, school districts are receiving conflicting guidance from the IDPH. At the end of January 2009, the IDPH issued a document entitled, “Frequently Asked AED Questions for Schools.” The document included the following (*emphasis added*):

Q. We have community groups using our outside facilities for sports practices and games such as baseball, volleyball, football, wrestling, gymnastics, swimming and soccer. Do we have to have an AED available outside for them?



A. If the law requires that your facility have one or more AED's present, then **both the owner and operator of the facility must ensure that the proper number of functioning AEDs are present.** If the facility is one that also must also have trained AED users present, then **it is up to both the owners and operators to make sure that all statutory requirements are met.**

Q. Can we contractually require a third party that is using our facility to provide the AED and AED trained users during the activity?

A. If the law requires that a particular facility have one or more AED's present, then **both the owner and operator of the facility are responsible for ensuring that the proper number of functioning AEDs are present.** If the facility is one that must also have trained AED users present, then **it is up to both the owners and operators to make sure such statutory requirements are met.** Please consult a qualified lawyer if you are looking to enter into a contract that attempts to place responsibility for having AEDs and Trained AED Users present on third parties.

Despite the literal application of the statute described above, the IDPH document imposes responsibility on both the owner (school) and the operator (third-party). Although the caveat "if the law requires . . ." is included at the beginning of each answer, the specific scenario described seems to impose this requirement on schools and their third-party facility users, in contradiction to our analysis of the statute above.

Until this is clarified in a manner on which a school district can rely, many school districts have adopted a conservative approach, particularly in light of school districts' safety concerns. That is, when a third-party is seeking use of a school district's facilities, the school district requires the third party to provide a trainer AED user and, in some instances, to provide their own AED. If a third-party refuses or is unable to do so, the organization is not permitted use of the school district's facilities. Understandably, school districts have met with great resistance from community groups who do not have resources available to meet these requirements and/or who question the necessity of such a requirement under the Act. Lack of clarity in this area is causing unnecessary administrative burden, imposing unnecessary costs, and reducing community access to school facilities which should otherwise be available as an integral part of community life.



III. PROPOSED AMENDED RULES

Section 527.100 of the IDPH's Proposed Rules adds two new definitions which seem promising in clarifying this:

Supervising – directing, inspecting or being in charge of individuals while those individuals are engaging in physical fitness activities.

Third party operator – an individual or organization that has an agreement to use a physical fitness facility that the individual or organization does not own.

However, no additional clarity was added to Section 527.300 regarding the definition of physical fitness facility. Moreover, a new section in the proposed amended rules, Section 527.600(e), still seems to impose the requirements of the Act on school districts by permitting them to contract out the responsibilities to provide AEDs and trained users:

Facility owners/operators may enter into written contracts with third party operators to ensure that a proper number of AEDs and trained AED users are present during all third party sponsored activities that are not otherwise supervised by the owners/operators of the facility.

Thus, we propose deleting the proposed Section 527.600(e) and inserting, instead, the more explicit language we suggest in Section I above.

IV. PUBLIC ACT 96-0748

On a related note, Public Act 96-0748, enacted on August 25, 2009 and effective January 1, 2010, amends Section 15(b) of the Act:

A physical fitness facility must ensure that there is a trained AED user on staff during staffed business hours and ~~present during all physical fitness activities.~~

To the extent school districts must provide, or require third-party facility users to provide, a trained AED user for after-school activities conducted by community users, the new law limits this responsibility only to staffed business hours. This helps school districts in the practical application of the Act because most third-party use is not “during staffed business hours.” However, not all third-party uses will occur after-hours. Additionally, Public Act 96-0748 does not remedy the confusion as to the definition of physical fitness facility, and whether or not the Act applies at all to school districts, with respect to their third-party users, and/or to the third-party user. For this reason, we again request consideration of our proposed language in Section I to clarify the Proposed Rules.



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Thank you for your consideration of these comments and suggestion. If you have any questions or would like to discuss this further, please do not hesitate to contact me or my partner, Todd Faulkner.

Very truly yours,

Dawn Spivey Moritz

cc: Todd Faulkner, Franczek Radelet P.C.