

THE  
**Extra Mile**  
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**PAC Approves School Withholding Survey Comments under FOIA**--On March 3, 2011, the Public Access Counselor approved a school district's claim of exemption under the *Freedom of Information Act* ("FOIA") for survey comments submitted by the school district's employees and parents.

The district had conducted a climate survey soliciting comments by parents and staff and later received a FOIA request for those comments.

In response to the request, and with HLERK's assistance, the district submitted a request for approval to the Public Access Counselor's office

seeking to withhold the survey comments as "predecisional/preliminary" information (exemption 7(1)(f)) and as "personal information" whose disclosure would violate the commenter's right to privacy (exemption 7(1)(c)).

After reviewing the comments, the Public Access Counselor ultimately issued a written decision ([No. 2010 PAC 6961](#)) finding that the comments were preliminary documents obtained and utilized by the district in its decision-making process.

As noted in the written decision, the exemption at FOIA Section 7(1)(f) is

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**Seventh Circuit Upholds Students' Free Speech Right to Wear "Be Happy, Not Gay" T-Shirts**--In *Zamecnik v. Indian Prairie Sch. Dist. #204*, 2011 WL 692059 (7th Cir. Mar. 1, 2011), a three judge panel of the U.S. Court of Appeals for the Seventh Circuit unanimously upheld a ruling by the federal district court that students are entitled to a permanent injunction prohibiting the school district from banning them from wearing clothing at school displaying the message "Be Happy, Not Gay," plus nominal damages. The court found the evidence presented by the school district was insufficient to satisfy the *Tinker* "substantial disruption" standard.

Two students filed a lawsuit against Indian Prairie School District No. 204 after they were prohibited by school officials from wearing t-shirts that said "Be Happy, Not Gay" on the "Day of Truth," which is the day after and in response to the "Day of Silence," a day meant to promote gay tolerance.

In 2008, the Seventh Circuit granted both students an injunction allowing them to wear the t-shirts at school. In 2010, after conducting further proceedings, the trial court made permanent the Seventh Circuit's preliminary injunction, and expanded it to cover any student at the school.

In addition, the federal district

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**Consumer Price Index**

Percent change for the month of **February 2011**, for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	0.5	0.5
12 Mth	1.8	2.2
St. Louis-6 Mth	1.3	1.4
12 Mth	2.5	2.7
U.S. Mthly	0.5	0.5
12 Mth	2.1	2.3

March CPI figures will be released April 14, 2011. For the most recent CPI, visit our website at: [www.hlerk.com](http://www.hlerk.com).

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**Reminders & Notes**

- Remember to have your boards of education adopt a resolution prior to June 30 if you wish to avoid having interest monies earned on district funds being converted to principal pursuant to ISBE rules. Contact **Heather Brickman** or **Steven Richart** with questions.
- **Mike Loizzi** chaired a key panel on collective bargaining on financial issues in difficult economic times on Thursday, April 7th at the Council of School Attorneys meeting in San Francisco.
- **Bennett Rodick** will chair the "attorneys' panel" at the upcoming IAASE Spring Conference in Collinsville. Visit [www.iaase.org](http://www.iaase.org) for information and registration.

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**Survey Cont.** intended to encourage government officials to openly and frankly discuss matters of governmental concern in order to make informed policy decisions. The Public Access Counselor did not address whether the “personal information” exemption also

applied to the comments.

**FOIA issues continue to multiply. If you have any questions concerning this case or FOIA in general, please contact Steve Richart or Bennett Rodick.**

**Response to Intervention (RTI) Cannot Delay or Deny an Evaluation for Special Education Eligibility**--On January 21, 2011, the U.S. Department of Education’s Office of Special Education Programs (OSEP) issued a [memorandum](#) stating that Response to Intervention (“RTI”) *cannot* be used to delay or deny an evaluation for eligibility under *IDEA*.

initial evaluations of children suspected of having a disability and not fulfilling their child find obligations.

OSEP affirms that parents may ask at any time that a district conduct an initial evaluation to determine if their child has a disability pursuant to IDEA. A school district may deny such a request by sending the proper ISBE form but, as the OSEP memo confirms, RTI cannot be used as the basis for this denial.

In other words, schools cannot use RTI to delay or deny the identifying process, often referred to as “Child Find,” of a child with a suspected disability. OSEP was concerned that some districts were in the habit of using RTI as a strategy to delay or deny timely

**RTI issues in relation to special education continue to grow in complexity. Contact Jay Kraning or Stephanie Jones with your RTI inquiries.**

**T-Shirts Cont.** court awarded the students \$25 in nominal damages.

plaintiffs was barred based on the doctrine of “heckler’s veto.” That is, the court found the speech did not constitute fighting words and “no reasonable person would have been moved to a riotous response.”

First, the court disposed of the district’s argument that the case was moot because both students had graduated. The court noted that “the permanent injunction runs in favor of any student at the high school” because “one or more of its 4,000-plus students may someday want to display the slogan.” The court also found the award of nominal damages was justified because one student’s t-shirt was defaced and the other student’s “desire to wear the t-shirt on multiple occasions . . . was thwarted by fear of punishment.”

While the court acknowledged schools have a duty to protect students from serious disruption to their studies by offensive speech, in this case, the disruption, if any, was caused not by the speech itself but by the student filing the lawsuit to assert her free speech right. Also, the court found that an expert’s report, which concluded the slogan was “particularly insidious,” failed to satisfy any of the requirements for admissible expert testimony under the federal rules of evidence.

Turning to the main issue of whether the ban on the t-shirts was justified as a foreseeable substantial disruption under *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969), the Seventh Circuit held the evidence was insufficient to satisfy the standard. The court found the evidence presented by the district of incidents of harassment of homosexual students was negligible, as details of the incidents could not be confirmed and, as a result, no students were disciplined.

**This case is another in a long line of cases regarding the extent to which students shed their First Amendment rights at the schoolhouse door, although it is now taking place in new mediums, e.g., t-shirts and bracelets. School districts need to make sure their student speech and dress policies are up to date and correct, and school officials need to understand the limits on their powers and the procedures to use should student free speech issues arise. For questions about this case or student issues related to the First Amendment, please contact Nancy Krent.**

The court also determined the introduction of evidence of incidents of harassment against one of the student-

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