



Welcome Back to the 2010-2011 School Year!--Yet another summer has swept by and, like you, we are preparing for the start of the new school year. With this special four page issue, we welcome you back for what promises to be an extraordinary school year.

In this school year, all districts will have to begin implementation of the massive "education reform" legislation. Every aspect of school district personnel and labor practices are impacted by the legislation. In addition, school districts will continue to face the financial challenges of the state's on-going financial crisis.

In this complex and ever changing environment, we are pleased to continue our service to Illinois educators by working with *your* professional organizations, IASA, IASB, IAASE and IASBO in bringing you the key legal information that you need to avoid or minimize legal liability.

We are pleased to join with IASA to offer the administrator academy programs on the new education reform legislation (See Reminders and Notes below). In addition, online registration is now available for the IASA annual school law conferences, *The Year in Review: The Highlights and Lowlights of Illinois School Law 2011*.

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Cook County Circuit Court Dismisses Referendum Challenges--Two different judges in the Cook County Circuit Court have dismissed taxpayer lawsuits seeking to void successful tax rate referenda by school districts in Cook County.

In *Kuriakos, et al. v. Oak Park District 97, et al.*, No. 2011 CH 15443, successfully defended by **Rob Swain** and **Steven Richart**, plaintiffs filed suit against Oak Park School District No. 97 to prevent the district from collecting a property tax increase that was approved by the voters in the April 2011 election by a margin of 6,081 votes in favor to 5,089 votes against.

In *Sorock v. Wilmette*, No. 2011 CH 17820, a similar suit was filed against Wilmette School District No. 39, whose referendum was approved by a margin of 5,740 votes in favor to 3,363 votes against. In both cases, plaintiffs argued that the election ballot vastly understated the impact of the property tax increase and as a result, the election was void.

At issue in both cases was Section 18-190(a) of the *Property Tax Extension Limitation Law* (PTELL), which provides the form of ballot for referenda to increase a district's "limiting rate" under PTELL. Section 18-190(a) requires the ballot to contain an estimate of the additional

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Consumer Price Index

Percent change for the month of **June 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	0.0	0.0
12 Mth	3.8	4.6
St. Louis-6 Mth	2.0	2.4
12 Mth	3.3	3.9
U.S. Mthly	-0.1	-0.2
12 Mth	3.6	4.1

July CPI figures will be released August 14, 2011. For the most recent CPI, visit our website at: www.hlerk.com.

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Reminders & Notes

- Limited space remains for the IASA administrator academy programs on education reform. Join IASA and HLERK at one of these absolutely vital programs at the remaining two locations:

August 4th-Oak Brook

August 11th-Peoria

Due to enormous demand, additional space has been obtained to accommodate you. Visit www.iasaedu.org for information and registration.

- Federal law requires all school districts to conduct educational programs during the week of September 18th in honor the Constitution's birthday.

Offices
Arlington Hts. 847-670-9000
Peoria 309-671-9000
Belleville 618-355-7850

Welcome Back Cont.

Dates and locations are:

October 6th-Peoria

October 20th-Oak Brook

October 27th- Collinsville

Visit www.iasaedu.org for information and registration.

In addition, we are pleased to announce that HLERK will co-sponsor the IAASE Fall Conference reception on September 22nd. **Bennett Rodick** will chair the "attorneys' panel" on September 23rd and speak on educational reform as well. Visit www.iaase.org for information and registration.

HLERK is also proud to co-sponsor the Lake County Superintendent's Fall Leadership Conference in October and will host a reception at the conference. Visit www.lcsupts.org for information and registration.

We expect to soon have a new edition of our acclaimed *A School Board Member's Handbook*. Visit www.hlerk.com where we will post when it will become available. As always, our retainer clients will receive complimentary copies of the Handbook.

Finally, if you have not yet registered to receive the *Extra Mile* by email please fill out the attached form and send it in. Educators receive the email edition up to two weeks before the hard copy.

Welcome back to the new school year. We thank you for reading the *Extra Mile*.

All of us wish you an educationally successful new school year and one free from legal issues. We hope our service to the educational community helps you in meeting that goal. We look forward to seeing you at our variety of programs and receptions this fall.

Third Circuit Federal Appellate Court Upholds Student Free Speech Rights In "Social Media"--The entire court of the Third Circuit Court of Appeals (which does *not* govern Illinois) has issued two separate decisions finding that school suspensions given to students for creating inappropriate profiles of their school principals on MySpace violated the students' First Amendment rights.

In *J.S. v. Blue Mountain Sch. Dist.*, 2011 WL 2305973 (3d Cir. 2011) an eighth grade honor roll student created a fake profile of her middle school principal on MySpace. The profile was created on her parents' computer at her home during non-school hours. J.S. did not identify the principal by name but used a photograph of the principal copied from the school district's website. The profile included profanity and a comment that suggested that the principal was a pedophile. As a result of the profile, the school suspended J.S. for ten days.

In *Layshock v. Hermitage Sch. Dist.*, 2011 WL 2305970 (3d Cir. 2011) a high school senior set up a fake profile of his school principal. Justin Layshock created the profile on his grandmother's computer at his grandmother's house. The profile referred to the princi-

pal as a "big steroid freak," a "big hard ass," and a "big whore." Justin's action resulted in a ten-day suspension.

Originally, different panels of the Third Circuit reached different results in these two cases. (See, [March 2010, Extra Mile](#)). One panel of the court upheld J.S.'s suspension while another panel of the court found that Justin Layshock's suspension violated his First Amendment rights. To resolve this difference, the full court convened and ruled, *in both cases*, that the suspensions violated the students' rights to free speech under the First Amendment.

The disruption, or lack thereof, caused by the MySpace profiles was key to the court's decision. Citing *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 513 (1969), the court noted that schools may not suppress student expressions unless authorities reasonably conclude that the conduct would "materially and substantially disrupt the work and discipline of the school." A school may only regulate a student's off-campus expression if it meets the *Tinker* standard.

In both cases, the court noted the three exceptions to

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Free Speech Cont.

Tinker when a school district may regulate student expressions even if substantial disruption does not result.

The first exception is in-school expression that is lewd, vulgar, indecent, or plainly offensive speech. *Beth Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). The second exception is school-sponsored speech, where a reasonable observer would view the expression as the school's own speech. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The third exception involves speech at a school-sponsored event that promotes illegal activity. *Morse v. Frederick*, 551 U.S. 393 (2007).

The court found that J.S.'s speech did not cause a substantial disruption at the school nor was there a reasonable belief that her off-campus speech would cause a disruption in the future. The court further noted that though J.S.'s speech may have been lewd, the *Fraser* exception did not apply to off-campus speech.

The court therefore decided that the school's attempt to regulate undisruptive off-campus speech violated J.S.'s

First Amendment rights. In *Layschock*, the school district tried to draw a connection between the MySpace profile and the school campus by stating that the speech was aimed at the school district and the principal, arguing that this allowed it greater leeway in imposing discipline.

However, the court rejected this argument saying that the references to school and school personnel did not "constitute entering the school." The court reiterated that schools may only punish off-campus behavior if it is substantially disruptive.

While not governing law in Illinois, these cases illustrate the difficulties facing school administrators seeking to manage student use of a variety of social media. Until and unless the Supreme Court resolves these issues, school districts seeking to discipline students for inappropriate use of social media outside of school face significant constitutional hurdles. Contact Nancy Krent with your First Amendment student inquiries.

School District Ordered to Produce Closed Session Minutes for Court--In *John Doe v. Freeburg Community Consolidated School District, et al.*, 2011 WL 2013945 (S.D. Ill. 2011), the U.S. District Court for the Southern District of Illinois ordered the District to produce closed session board meeting minutes requested by Plaintiff in the underlying suit.

Plaintiff alleged, among other things, that he was sexually abused by a former employee of the district and that the district was aware of reports and allegations of sexual misconduct by the employee involving other students at the time of Plaintiff's alleged abuse.

Part of Plaintiff's discovery request to the district sought any minutes and/or audio recordings from the open and closed session board meetings from the year the employee was employed by the district to the present. The district disclosed copies of the open session minutes, but objected to disclosure of the recordings and typed minutes from the closed session board meetings as irrelevant to Plaintiff's claims and protected by

the Illinois *Open Meetings Act* ("OMA"), federal common law deliberative process privilege, and attorney-client privilege.

The district argued that under the OMA, verbatim records of closed session meetings are not subject to discovery in a judicial proceeding other than one brought to enforce the Act. 5 ILCS 120/2.06(e). The court, however, held that Plaintiff's need for the evidence contained in the minutes of the closed session board meetings to pursue his claims substantially outweighed the policy underlying the OMA (to promote the frank discussion of legal and policy matters) and, thus, the district's interests.

The federal common law deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. The court found that although the privilege applies to the closed session minutes, concerning discussion regarding Plaintiff's legal claims and the district's

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Closed Session Cont.

litigation strategy regarding those claims, Plaintiff demonstrated a particularized need for the requested documents due to the nature of his claims.

As to whether the attorney-client privilege protected the closed session minutes from disclosure, the court reasoned that it may apply to portions of the minutes. Ultimately, the district was ordered to produce all closed session minutes requested by Plaintiff, and for the

documents which the district believes are protected by the attorney-client privilege, the district must produce a "privilege log" and submit the unreacted documents to the court for its review.

As this decision demonstrates, boards of education need to understand that even closed session minutes may end up being disclosed in litigation. Contact Bob Kohn with questions concerning the above decision or your Open Meetings Act inquiries.

Referendum Cont.

taxes extendible in the event the referendum is successful.

However, the statute's instructions for computing this estimate do not include the State equalizer factor, which in recent years has been 3.0 or higher in Cook County. The statute further contains a so-called "savings clause" providing that any error in computing the amounts set forth in the ballot that is not deliberate shall not invalidate the election.

In the Oak Park case, the District successfully argued

that the ballot estimate had been properly calculated under the statute and that, in any event, the statute's savings clause would validate the referendum. The Cook County Circuit Court agreed on both counts, and dismissed the complaint in its entirety. Another Cook County judge reached the same result in the Wilmette case.

Both decisions are now being appealed by the Plaintiffs. For further information regarding these cases, contact Rob Swain or Steve Richart.

ISBE Determines that Either Parent with Joint Custody May Revoke Consent to Special Education Services--

In a recent complaint filed by a parent against O'Fallon Township High School District No. 203, a father complained that the school district refused to allow him to revoke consent for special education services for his child. In this case, the parents at issue were divorced and had a specific parenting agreement that required mediation if the parents could not agree on their child's education.

When the parents disagreed regarding the provision of transition services for their child, the IEP team adopted the services it felt necessary. The father disagreed with the IEP and revoked consent for services, but post-dated his revocation until the day before his child's graduation. When the mother was notified that the father revoked consent, she indicated that she did not revoke consent and wanted her child to continue receiv-

ing services. The district determined to provide services pending judicial resolution of the parent's differences.

The ISBE complaint followed, with the father alleging that the school district was obligated to honor his revocation of consent, despite his ex-wife's disagreement.

ISBE agreed with the father determining that either parent, *regardless of their marital status or parenting agreement*, can revoke consent at any time. ISBE, however, disagreed with the father that he could post-date the revocation, determining that the revocation was in effect the moment it was given.

Revocation of consent issues continue to impact school administrators. For more information regarding this ISBE decision, please contact Bennett Rodick or Stephanie Jones.