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EDUCATION EDITION

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THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

U.S. Supreme Court Limits School Drug Searches/Expands Parent Special Education Rights--In its usual end-of-term flurry of rulings, the U.S. Supreme Court issued two major rulings expanding student and parent rights.

Student Search Unconstitutional

First, on June 25th, the Supreme Court held that the strip search of a 13 year old girl to find "prescription strength" ibuprofen was unreasonable and unconstitutional because the school official had no reason to suspect that the drugs were concealed in her underwear and there was insufficient risk to other students to justify the search.

Although the student's Fourth Amendment rights were violated, the court found that the school official was still entitled to "qualified immunity" from liability. Importantly, the court concluded that no such immunity will exist for future administrators engaging in a strip search of a student under similar circumstances.

In *Safford Unified School District Number 1 v. Redding*, 2009 WL 1789472 (2009), an assistant principal found a day planner belonging to a student, Savana Redding, which contained knives, lighters and a cigarette. The school official told Redding that she had received a report that Redding was supplying drugs to students, which Redding denied. Then, the assistant principal told

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Consumer Price Index

Percent change for the month of **May, 2009,** for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	0.9	0.9
12 Mth	-2.4	-2.8
St. Louis-6 Mth	0.4	0.2
12 Mth	2.5	2.6
U.S. Mthly	0.3	0.4
12 Mth	-1.3	-1.9

June CPI figures will be released July 18, 2009. 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

- **If you are only receiving the paper edition of our newsletter, or if you wish to receive the electronic version at a different email address, please fill-in the attached form to receive *The Extra Mile* by email. Join hundreds of your fellow administrators in receiving critical news of important school legal developments as soon as possible.**
- **Join Jay Kraning at the upcoming ISBE Special Education Directors' Conference in Peoria. Jay will address the Conference on August 6th on *Making Special Education Law Functional* as well as on August 7th on *Hot Topics in Special Education Law.***

Illinois Appellate Court Allows Electioneering Complaint to Proceed Against School Board for Referendum Mailings--In a blow to all Illinois school districts issuing mailings in connection with referenda, the Illinois Appellate Court has decided that a school district's mailings regarding a referendum during the weeks prior to an election constituted "electioneering communications" under the *Election Code*.

Thus, the school district was subject to the *Election Code*'s campaign disclosure and filing requirements for local political committees. The district's failure to comply with these requirements warranted further action by the Illinois State Board of Elections.

The involved school district is seeking leave to appeal from the Illinois Supreme Court. We are pleased to announce that the Illinois Association of School Boards has retained HLERK to prepare a "friend of the court brief" on behalf of IASB in support of the district's position.

In *Citizens Organized to Save the Tax Cap v. State Board of Elections, et al.*, 2009 WL 1475488 (1st Dist. May 22, 2009), a taxpayer advocacy group filed a complaint with the Illinois State Board of Elections against Northfield Township High School District No. 225

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Supreme Court Cont. Redding to remove her clothes and shake out her bra and underwear; no pills were found.

The district court found this search reasonable as did an appellate panel; however, the Court of Appeals sitting *en banc*, held that the search was unreasonable and the school official was not entitled to qualified immunity (and thus potentially subject to punitive damages) because it was "clearly established" law that the strip search of a teenager for ibuprofen was unreasonable.

The Supreme Court held that the initial search of the student's backpack and planner was valid. The lesser standard of reasonable suspicion was all that was required for searches conducted at school by school officials. The Court defined reasonable suspicion is "a moderate chance of finding evidence of wrongdoing." The tip that Redding had drugs on her was plausible because the informant and Redding were acquainted, Redding had brought contraband to school in the past and Redding's planner contained contraband.

However, the suspicion was only enough to search Redding's backpack and outer clothing. The strip search was unreasonable because it was highly invasive, the pills did not pose an immediate threat to the student body and the assistant principal had no reason to suspect that Redding had the pills in her underwear.

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Electioneering Cont. and its elected board members. The complaint alleged (and the taxpayers established) that the district spent $12,978 in the three weeks prior to the November 2006 election on newsletters regarding a referendum proposition for approval of bonds.

The newsletters primarily extolled the benefits of the referendum if passed, but also provided information regarding the cost of the referendum. One of the newsletters contained a statement urging electors to vote in the upcoming election. The newsletters did not explicitly urge a vote in favor of the bonds.

The taxpayers argued that the newsletters constituted "electioneering communications" under Section 9-1.14 of the *Election Code* (10 ILCS 5/9-1.14), and because the district spent more than $3,000 on the mailings, the district acted as a "local political committee" under Section 9-1.7 of the *Election Code* (10 ILCS 5/9-1.7).

Therefore, like other local political committees, the district was required to file a "statement of organization" with the State Board of Elections and the county clerk, yet failed to do so. The taxpayers' complaint sought a determination that violations had occurred and requested that the district register as a local political committee and file the requisite financial reports.

The Illinois Appellate Court, overturning the State Board of Elections, held that the election interference prohibition in the *Election Code* does not authorize districts to disseminate factual information constituting "electioneering communications" without registering as a local political committee.

The court reasoned that in this case, the mailings clearly referred to the district's November 6, 2006, referendum proposition and were sent out within the requisite timeline to constitute "electioneering communications."

While the district argued that its mailings fell within a specific statutory exception for communications "made as part of a non-partisan activity designed to encourage individuals to vote," the court held that this exception did not apply as only one of the mailings had, in fact, encouraged individuals to vote and the mailings clearly were the product of a campaign directly related to the referendum.

Thus, since the district spent in excess of $3,000 on the electioneering communications, the district acted as a "local political committee" and was required to file campaign disclosure information. The court concluded that the taxpayers' complaint should not have been dismissed and remanded the case to the State Board of Elections for further proceedings on the taxpayers' complaint.

This decision highlights the need for school districts to consult with counsel regarding their involvement in referendum campaigns, and certainly prior to issuing any referendum-related mailings.

For further information regarding this decision or its impact on your school district, contact Stan Eisenhammer or James Levi.

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Supreme Court Cont. Because the assistant principal did not have a specific suspicion that a strip search would uncover the drugs, the search was unreasonable and violated Redding's Fourth Amendment rights.

The Court next decided the issue of the school administrator's "qualified immunity." A school official is not entitled to qualified immunity when "clearly established" law exists. The leading case on search and seizure in schools is *T.L.O. v. New Jersey*, 469 U.S. 325 (1985), where the Court held that a reasonable search must be both justified at its inception and reasonable in scope.

Lower courts have, however, applied the *T.L.O.* standard differently. The Supreme Court held that these differing applications of *T.L.O.* was substantial enough to require immunity for the school officials in this case.

IDEA Parent Rights Expanded

On June 22nd, the Supreme Court expanded parent rights under IDEA holding that IDEA authorizes parent reimbursement for private school tuition when the public school failed to provide FAPE and the private school placement is appropriate, even if the student never received special education or related services from the public school district.

In *Forest Grove School District v. T.A.*, 2009 WL 1738644 (2009), the school district determined that a student was ineligible for special education under IDEA because his disability did not have an adverse effect on his educational performance. His parents enrolled the student at a private school and filed for a due process hearing to recover the cost of tuition.

The hearing officer granted the parents reimbursement. The district court held that IDEA barred recovery of reimbursement for students who had not received special education or related services from a public school district. The Ninth Circuit overturned the district court and allowed the parents to recover reimbursement.

The Supreme Court based its holding on *School Community of Burlington v. Department of Education of Massachusetts*, 471 U.S. 356 (1985). In that case, the Supreme Court held that IDEA authorizes reimbursement for private education when a parent unilaterally placed a student in private school because the school district failed to provide FAPE.

In *Forest Grove*, the student never had an IEP. The Court held, however, that a "school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP."

The Court held that whether the child received special education services was not relevant. IDEA would be irrational, the Court found, if it allowed relief when inadequate services were offered, but did not offer a remedy if the school district unreasonably denied the student services.

The Court also held that reimbursement for children unilaterally placed in a private school is not a substantial burden on school districts because parents can only recover reimbursement if the public placement would violate IDEA and the private placement is appropriate.

Parents still bear the risk that courts will not grant them reimbursement if they unilaterally place their child in a private setting.

Finally, the Court noted that when courts decide whether to grant reimbursement, they must consider whether the parents notified the school district that they were unilaterally seeking a private placement at the district's expense.

Each of these Supreme Court decisions change the legal environment school administrators face. Contact Nancy Krent with questions regarding the student search decision and Jay Kraning or Bennett Rodick with questions regarding the special education decision. Jay will be discussing the Supreme Court's special education decision at the rapidly approaching ISBE Special Education Directors' Conference in Peoria.

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Court Allows Reinstatement of a Teacher Terminated for an Unfair Labor Practice, Even Though the Reinstatement Resulted in the Teacher Obtaining Tenure-- The Illinois Appellate Court has upheld the Illinois Educational Labor Relations Board's ("IELRB") ruling that a school district committed an unfair labor practice when it did not renew a teacher's contract for engaging in a protected activity under the Illinois Educational Labor Relations Act ("IELRA"). The court also found that reinstatement resulting in the teacher obtaining tenure was not an abuse of IELRB's discretion.

In *Speed District 802 v. Warning*, No. 1-08-0344 (June 8, 2009), a teacher was placed on a "correction plan" calling for regular meetings between the teacher and principal to evaluate her progress. The plan stated that failure to follow the plan could result in her termination. The teacher insisted that a union representative accompany her to the meetings.

The principal stated that the teacher did not have the right to the union representative's attendance because the meetings were about performance and not discipline. The principal subsequently gave the teacher unsatisfactory reviews and notified her that her teaching contract would be terminated at the end of the year. The union filed an unfair labor practice against the district stating that the district retaliated against the teacher for insisting on having a union representative present at her meetings.

The IELRB held that the district committed an unfair labor practice and ordered the school to reinstate the teacher with back pay. The court affirmed the IELRB's decision. The district argued that the teacher did not engage in a protected activity when she requested the attendance of a union representative at her meetings because the meeting only concerned her performance.

The court held that remedial meetings can sometimes result in termination; therefore, the teacher engaged in a protected activity. The district also argued that antiunion motivation was not a motivating factor in the teacher's termination. The court held that antiunion motivation could be inferred from the hostility expressed by the principal about having a union representative attend the meeting. Therefore, the finding by the IELRB was not clearly erroneous and the court affirmed its holding that the school district committed an unfair labor practice.

The IELRB ordered the school district to reinstate the teacher even though the reinstatement resulted in the teacher obtaining tenure. The purpose of a remedy to an unfair labor practice is to make the victim whole by placing her in the same position she would be in had the unfair labor practice not occurred. The court held that although the teacher obtained tenure, she was placed in the same position she would have been in had the illegal nonrenewal never happened.

The Speed decision impacts every Illinois school district engaged in non-tenured teacher remediation activities. Contact Mike Loizzi or Cindi DeCola with questions regarding its impact on your school district or teacher evaluation requirements or procedures.

National Summit on 403(b) Plans Update--On June 23rd, the National Tax Sheltered Accounts Association ("NTSAA") sponsored a 403(b) Compliance Resolution Summit with **Barbara Erickson** of our firm attending as an invitee. The Summit was designed as a facilitated, participant discussion forum where 403(b) professionals were able to identify, explore and examine common operational and compliance problems that have occurred in the 403(b) market and develop working solutions.

Some of the topics explored during the Summit included: account transfers, exchanges and rollovers; loans and hardship withdrawals; distributions; and de-selected service providers and the effect of de-selection on grandfathered and non-grandfathered accounts.

A representative from the Internal Revenue Service was also in attendance and offered guidance during the problem-solving workshops. The NTSAA is expected to produce a summary of the issues explored and potential resolutions developed at the Summit. Some of the takeaways from the Summit include the possibility of developing problem-solving task forces in the near future as well as scheduling additional Summits.

Keep reading The Extra Mile for future developments on this important topic or contact Barbara or Heather Brickman with inquiries regarding your 403(b) plans and service providers.

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