Hodges Loizzi Eisenhammer Rodick & Kohn LLP

THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

EDUCATION EDITION

September 2013

New Illinois "Concealed Carry" Law Creates New Reporting Obligation for Schools--Illinois' new concealed carry law, P.A. 98-0063, specifically bars firearms license holders from knowingly carrying a firearm to certain locations, including "any building, real property, and parking area under the control of a public or private elementary or secondary school."

However, notwithstanding this school exemption, a license holder is permitted to carry a concealed firearm "on or about his or her person within a vehicle," "may store a firearm or ammunition concealed in a case within a locked vehicle or locked container out of plain view within the vehicle in the parking area" and "may carry a concealed firearm in the immediate area surrounding his or her vehicle within a prohibited parking lot area only for the limited purpose of storing or retrieving a firearm within the vehicle's trunk, provided the licensee ensures the concealed firearm is unloaded prior to exiting the vehicle."

The Act also creates the *School Administrator Reporting of Mental Health Clear and Present Danger Determinations Law*, which requires

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Consumer Price Index

Percent change for the month of **July 2013,** for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago Mthly	-0.2	-0.4
12 Mth	1.7	1.8
St. Louis, 1st Half 2013		
6 Mth	0.8	0.9
12 Mth	1.6	1.5
U.S. Mthly	0.0	0.0
12 Mth	2.0	2.0

August CPI figures will be released September 14, 2013. 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

- **Remember to provide your administrator and teacher compensation packages (ATSB) to your board of education at its regular September meeting, post the report on the district's website and submit it to ISBE (EIS) by October 1st.**
- **Remember to require student health exams and immunizations by October 15th unless you have set an earlier date (with parent notification) or if the student is an out-of-state transfer student.**
- **Join HLERK as we co-sponsor the reception at IAASE's Fall Conference on September 26th and present at a variety of the Conference's sessions.**

Court Denies Request to Stop School Bleacher Construction- In *Gurba v. Community High School District No. 155*, successfully defended by **Dean Krone**, **Rob Swain**, **Steve Richart**, and **Kerry Burnet**, two homeowners with property adjacent to Crystal Lake South High School asked a judge for a temporary restraining order ("TRO") to stop construction of new bleachers at the school's existing football field. Because the construction was 95% complete, the court determined that issuing a TRO would not prevent any harm to the property owners, and ruled for the district.

The City also issued an administrative "stop-work" order, threatening the school district with fines if work resumed. HLERK filed a TRO on behalf of the district, seeking to complete the work without interference from the City. The City relented, and the court issued an order allowing the district to finish construction and use the bleachers while the underlying litigation proceeds.

The issue in the underlying litigation is whether the district is subject to local zoning regulations in lieu of (or in addition to) the requirements of the Health/ Life Safety Code enforced by the ROE. The McHenry County ROE approved the bleachers and issued a building permit to the district, but the City argues that

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Concealed Carry Cont. school administrators (principals or their designees) to report to the Department of State Police when a student is determined to pose a "clear and present danger" to himself, herself, or to others within 24 hours of the determination.

A clear and present danger exists when a student "demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions or other behavior, as determined by the…school administrator." The law provides immunity from civil or criminal liability for the administrator with respect to the reporting obligation, except for willful and wanton conduct.

Contact any of our student practice group attorneys with your inquiries regarding concealed carry legislation or its reporting obligations.

Split Federal Court Decisions on "I ♥ Boobies!" Bracelets Challenge School Districts--The Third District Circuit Court of Appeals (which does *not* govern Illinois) recently decided that school administrators violated students' First Amendment rights by disciplining students who refused to remove their "I ♥ boobies! (KEEP A BREAST)" bracelets. *B.H. et al. v. Easton Area School District*, 2013 WL 3970093 (3d Circ. 2013). At the same time, a federal trial court in Indiana reached the opposite conclusion in *J.A. et al. v. Fort Wayne Community Schools*, No. 12-155 (N.D. Ind. 2013).

B.H. and K.M., students at Easton Area Middle School, purchased bracelets from the Keep a Breast Foundation, which promotes breast cancer awareness and treatment. The students continued to wear the bracelets even after the bracelets were banned by school administrators. The students also refused to remove the bracelets when asked. The students were given a one and a half day suspension and were forbidden from attending a school dance. The girls' mothers filed for a preliminary injunction against the district and won at the district court level. The district appealed.

On appeal, the Third Circuit interpreted the Supreme Court decision in *Morse v. Frederick*, which upheld the discipline of a student who displayed a "Bong Hits 4 Jesus" banner, to mean that speech that is not "plainly lewd" cannot be prohibited by a school official if the speech conveys a political or social message. *Morse v. Frederick*, 551 U.S. 393 (2007). Instead, the Third Circuit articulated certain standards by which school officials may evaluate lewd speech: 1) schools may restrict plainly lewd speech; or 2) schools may restrict speech which is ambiguously lewd, as long as the speech does not touch on a political or social issue. After applying the facts of the case to these standards, the Third Circuit ruled that the word "boobies" was not plainly lewd speech and could not be banned when used as part of a breast cancer awareness message. However, the court did not provide school officials with any standards by which they could distinguish plainly lewd speech from ambiguously lewd speech.

Just weeks later, however, an Indiana Federal District Court came to the opposite conclusion on the bracelets. In this case, school administrators banned the bracelets under a policy prohibiting inappropriate bracelets with profane or obscene messages. J.A. continued to wear the bracelet after the ban and her bracelet was confiscated. Here, the district court interpreted Supreme Court precedent to allow courts to give deference to a school official's determination that speech is lewd. The district court noted that so long as a reasonable person could view the speech as lewd, then the court would defer to the school's determination on the matter.

In particular, the district court noted that deference is important because the school officials are best able to

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Bleachers Cont. the plans are also subject to City approval. The outcome of the litigation could have implications for school districts throughout the State.

We will keep you updated in the Extra Mile on the status of the underlying litigation. Please read the Extra Mile for updates or contact Dean, Rob, Steve, or Kerry with questions.

Boobies Cont. determine what constitutes lewd speech within the context of the specific school. Finally, the district court dismissed the standards set forth by the Third Circuit; the district court wrote that lewd speech, even if ambiguously lewd, which comments on a social or political issue does not have any additional protection under the First Amendment.

As a practical matter, the "I ♥ boobies" cases demonstrate the near impossibility of determining what constitutes protected student speech in a school setting.

However, neither the Third Circuit nor the Northern District of Indiana governs Illinois. Until the Seventh Circuit or the Supreme Court makes a ruling on the issue, school officials should continue to be cautious in restricting speech that is intended to convey a political or social message.

Contact Nancy Krent or Pam Simaga with your First Amendment student speech inquiries.

Board Member Communications on Electronic Devices During Board Meetings Are Subject to FOIA
On July 16th, in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, the Illinois Appellate Court (Fourth District), held that communications "pertaining to public business" that are sent to and from individual city council members' personal electronic devices during council meetings are "public records" subject to disclosure under the *Freedom of Information Act (*"FOIA").

In July of 2011, a local newspaper reporter submitted a FOIA request to the City of Champaign, requesting "[a]ll electronic communications, including cellphone text messages, sent and received by members of the city council and the mayor during city council meetings and study sessions since (and including) May 3rd. Please note that this request applies to both city-issued and personal cellphones, city-issued or personal email addresses and Twitter accounts." (Note: At some point thereafter, the parties agreed to limit the scope of the request to non-personal communications, so all of the documents at issue in this case pertained to public business.)

Under FOIA, a document is subject to disclosure as a "public record" if it "pertains to the transaction of public business" and was either prepared by or for, or used, received, possessed or controlled by, a public body. 5 ILCS 140/2(c). The City of Champaign denied the request with respect to all communications on privately-owned electronic devices, including those communications relating to city business.

On review, the Public Access Counselor of the Attorney General's Office issued a binding opinion that communications concerning city council business sent or received from a council member's personal electronic device during public meetings are public records subject to FOIA. As we previously reported in our July 2012 edition, the City sought review of the opinion in the trial court, which affirmed the Attorney General's decision. The City then appealed the trial court's decision to the appellate court.

On appeal, the City argued that (1) communications sent between individual city council members on their privately-owned electronic devices are not public records because individual council members are not themselves the "public body," and (2) public officials have a reasonable expectation of privacy in their

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Electronic Devices Cont. personal electronic communications. In response, the Attorney General appeared to use the terms "public record" and "public business" interchangeably, asserting that whether information is a public record is not determined by where or how or on what device that record was created, but rather whether the record was prepared or used by *one or more members* of a public body in conducting the affairs of government.

The appellate court analyzed the issue by first agreeing with the City that an individual council member is not a "public body" for purposes of FOIA because an individual council member, acting alone, cannot conduct the business of the public body. Thus, the court opined, a message from a constituent—even one pertaining to the transaction of public business—received at home by an individual council member on his personal electronic device would not be subject to FOIA.

However, the court continued, if such a message were forwarded to enough members of the city council to constitute a quorum, such communication would then effectively be "in the possession of a public body" and subject to FOIA. *Further, as to the facts of the specific FOIA request on appeal, the court determined that when council members convene a city council meeting (or study session) they are acting in their collective capacity as a "public body" during the time the meeting is in session. As a result, any communications pertaining to the transaction of public business sent or received by council members' personal electronic devices during such a meeting are public records subject to FOIA.*

The court noted that to hold otherwise would allow public officials to "subvert" both the *Open Meetings Act* ("OMA") and FOIA by allowing officials to communicate privately during meetings via their personal electronic devices. Because the newspaper's request in this case was narrowed to include only non-personal communications (*i.e.,* communications pertaining to public business) sent and received by city council members during city council meetings and study sessions, the court found that all of the requested records were "public records" subject to disclosure pursuant to FOIA. *To this end, the court "encourage[d]" municipalities to consider adopting their own rules banning council members from using personal electronic devices during council meetings.*

The court also noted that communications by individual city council members sent or received on a publicly-issued device, including messages forwarded by the council member from his personal device to his publicly-issued device, would be subject to FOIA because such communications would be "under the control of a public body."

Despite affirming the circuit court's decision with respect to the required disclosures, the appellate court reversed the circuit court's decision requiring the City to pay the newspaper's attorneys' fees, because FOIA only provides for an award of attorneys' fees when a party seeks injunctive or declaratory relief directly from the court after a FOIA denial, and not when a party seeks a court's administrative review of a final opinion of the Attorney General.

The analysis of the appellate court with respect to city council members' electronic communications appears to be equally applicable to all local elected officials, including board of education members.

This case has major implications for responding to FOIA requests involving board member emails, and also may shield public bodies from costly attorney fee awards if they wish to challenge the Attorney General on FOIA and OMA matters in the courts.

Please contact Heather Brickman or Steven Richart with your FOIA or Open Meetings Act inquiries.

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