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Court Nixes Use of Church for Public School Graduation

Despite two earlier rulings allowing the practice in the same case, the United States Court of Appeals in Chicago, by a 7-3 vote last week, ruled that a Wisconsin high school district acted improperly in conducting its graduation ceremonies in an evangelical Christian church.

In what is commonly referred to as the "Establishment Clause", the First Amendment to the United States Constitution prohibits governmental sponsorship, endorsement, or support of any religious beliefs or non-belief. In the case of *Doe v. Elmbrook School District* (Case No. 10-2922, July 23, 2012), the U.S. Court of Appeals for the 7th Circuit held that it amounted to an improper establishment of religion for that district to conduct its high school graduation ceremonies in a church which contained numerous and obvious religious symbols and proselytizing items to which participants in the ceremony would be subjected. The majority opinion emphasized the presence of Latin crosses in the sanctuary and on the church roof and the

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
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evangelical literature in the lobby and in the pews. The court concluded that the display of such materials conveyed a sectarian message of endorsement of particular religious beliefs and had a coercive effect, similar to subjecting graduation attendees to religious exercises such as prayers. There was no evidence that school officials selected the location for the purpose of proselytizing their individual beliefs. But the majority found neither this fact, nor the favorable features of the church location such as its space and comfort, to be determinative. This is because, while a governmental action might be invalidated due solely to a religious purpose or motivation, so could a non-religiously motivated action which has the predominant though unintended effect of promoting religion. Although the majority opinion went to great lengths to emphasize that its ruling was based on the particular facts present in this case and was not meant to create an absolute rule against public school graduations in houses of worship, it is hard to imagine many situations where religious iconography and literature would not be so apparent as to pass muster under this court's reasoning.

Given the strong dissents and the controversial nature of the

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decision, there is a good possibility that this case will be reconsidered by the United States Supreme Court. However, unless and until that happens, and absent exigent circumstances, we recommend that all Illinois public schools avoid the use of any house of worship for any function involving students, especially where attendance is compulsory or nearly so. This advice applies even though such locations may offer many legitimate advantages such as increased capacity, temperature control, or the preferences of the majority of parents or students. While the court's reasoning would not necessarily extend to temporary or rental use of church-owned properties such as meeting halls or sports fields where religious iconography and literature are not so obvious or may easily be concealed, we strongly recommend consulting with legal counsel to assess the circumstances.

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.

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IAASE Attorney Panel Presentation on September 21, 2012

Teri Engler will be addressing special education transportation issues as part of an Attorney Panel presentation at the IAASE Fall Conference in Tinley Park on September 21, 2012.

Open Meetings Act: New Agenda Requirements

Effective January 1, 2013, there are a few new provisions in the Open Meetings Act relating to board meeting agendas. The amendments are contained in Public Act 97-827, which adds new subsection (c) to Section 2.02.

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First, it is now mandated that the "general subject matter of any resolution or ordinance" must be set forth in order for a board to take final action. This sets at least some standard for the degree of particularity required on the agenda for action items. The Act has long provided that, to be valid, actions at special meetings need only be "germane to a subject on the agenda," and, logically, it would seem that regular meeting agendas would not have to be more particular than special meetings. However, one 10-year-old appellate court decision ruled that the topic "new business" on a regular meeting agenda was not specific enough notice for any particular action to be taken. This new statutory language, requiring "general subject matter," is more particular than being merely "germane," but note that the new requirement is limited to formal actions which could be termed a "resolution or ordinance."

Second, the amendments make it clear that a posted agenda must be **continuously** available for public review during the 48-hour period preceding the meeting. However, this continuous posting requirement may be satisfied alternatively via the district's website, as well by physically posting the agenda at the district office.

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Finally, if the 48-hour continuous availability for viewing requirement is not met due to actions outside of the control of the district, then that failure will not invalidate the meeting or any action taken.

Principal & Teacher Evaluations Fourth Reminder of Actions Required by PERA and Senate Bill 7

Action required on the first day of student attendance. Action required on or before September 1, 2012.

PRINCIPAL/ASSISTANT PRINCIPAL EVALUATION

The Performance Evaluation Reform Act (“PERA”) requires that on

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and after September 1, 2012, data and indicators of student growth be a "significant factor" in the performance evaluation of "principals." Subsequent legislation has included "assistant principals" within this requirement. Rules adopted by the Illinois State Board of Education ("ISBE") define "significant factor" as a minimum of 25% of the principal/assistant principal overall evaluation in the 2012-13 and 2013-14 school years, and a minimum of 30% in the 2014-15 school year and thereafter. Principal/assistant principal practice must be at least 50% of the overall evaluation. On and after September 1, 2012, principals/assistant principals must be evaluated at least once each school year.

The title "assistant principal" is defined by ISBE rule as:

> *…an administrative employee of the school district who is required to hold an administrative certificate…or a professional educator's license endorsed for either general administration or principal, and who is assigned to assist the principal with his or her duties in the overall administration of the school.*

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In our opinion, this definition is broad enough to encompass most, if not all, building level administrators. Other administrators, beyond the building level, are not required to be evaluated in accordance with PERA.

On and after September 1, 2012, a principal/assistant principal must be evaluated by a "qualified evaluator." A qualified evaluator is a superintendent or designee who has completed the five prequalification training modules available on the ISBE website for the evaluation of principals/assistant principals and who has passed the State-developed assessments appropriate to each of the training modules. Although the training modules were late to arrive, the training modules are now available. Only a "qualified evaluator" may evaluate the performance of a principal/assistant principal after September 1, 2012.

The ISBE rules provide that on the first day students are required to be in attendance, the school district/joint agreement shall provide a written notice to each principal and assistant principal that a performance evaluation will be conducted that school year. If the principal or assistant principal is hired or assigned to the position after the start

of the school year, the written notice must be given not later than 30 days after the contract is signed or the assignment is made. The written notice shall include:

1. a copy of the rubric to be used to evaluate student growth and professional practice; and
2. a summary of the manner in which student growth and professional practice measures will be used to obtain an evaluative rating.

The legal impact of failing to provide the required notice on the first day of student attendance is, as yet, unknown; we suggest that you comply with the requirement as provided by the ISBE rules.

TEACHER EVALUATION

The inclusion of data and indicators of student growth in the evaluation of teachers is not required until the PERA implementation date which, for most school districts, is September 1, 2016. Nonetheless, on and after September 1, 2012, a teacher must be evaluated by a "qualified evaluator." As with the evaluation of principals/assistant principals, a qualified evaluator is an administrator or, with the agreement of the

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teachers' exclusive bargaining representative another teacher, who has completed the prequalification training modules available on the ISBE website for the evaluation of teachers and has passed the state-developed assessments appropriate to each of the training modules. Only a "qualified evaluator" may evaluate the performance of a teacher after September 1, 2012.

The training modules were late to arrive and, therefore, the ISBE has altered the required prequalification training schedule. As a result, training modules one through three must be completed by September 1, 2012 or by the beginning of the evaluation of teachers within the local school district/joint agreement. Training module four must be completed by November 1, 2012. Training module five, which concerns the incorporation of data and indicators of student growth need not be completed until November 1 of the school year in which the student growth component is implemented in the local school district/joint agreement.

The extension until November 1, 2012 for completion of training module four is, in our opinion, troublesome. Training module four concerns measurement, evaluation and reflection in order to determine performance ratings for teachers. Commencing the

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observation and data gathering process for teacher evaluation prior to the completion and successful passage of the assessment of module four, may lead to challenges to the validity of the evaluation and performance rating of teachers. Rather than risk such challenges, we recommend that teacher evaluators complete module four before commencing evaluations. Obviously, if completion is delayed until on or about November 1, 2012, the timeframe to complete teacher evaluations will be substantially compressed. We suggest your immediate attention to completing training modules one through four.

Like the evaluation of principals/assistant principals, the ISBE rules provide that on the first day students are required to be in attendance, the school district/joint agreement shallprovide a written notice to each teacher scheduled for evaluation that school year stating that a performance evaluation will be conducted. If a teacher is hired after the start of the school year, the written notice must be given not later than 30 days after the contract is executed. The written notice shall include:

1. a copy of the rubric to be used to rate the teacher against identified standards and goals, and other tools to

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be used to determine the performance rating; and
2. a summary of the manner in which measures of student growth (only for those school districts/joint agreements implementing student growth) and professional practice will be used to obtain an evaluative rating; and
3. a summary of the procedures related to the provision of professional development for teachers who receive a "needs improvement" or "unsatisfactory" rating.

Again, the legal impact of failing to provide the required notice on the first day of student attendance is, as yet, unknown; we suggest that you comply with the requirement as provided by the ISBE rules.

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.

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Required Hospital Qualifications for Property Tax Exemptions

On June 14, 2012, a new law became effective which is intended to clarify some controversial issues surrounding a hospital's right to receive property tax exemptions. The controversy was the focus of the Illinois Supreme Court decision in Provena Covenant Medical Center v. Department of Revenue, 236 Ill.2d 368 (2010). In Provena, the Illinois Supreme Court ruled that a particular "non-profit hospital" was not entitled to receive a property tax exemption because it did not qualify as a charitable institution. In order to qualify as a charitable institution, the hospital would have to derive its funds mainly from charities, dispense charity to all who need it, and not provide a profit to any person connected with it.

Since the Provena decision, meeting the specific requirements to entitle a hospital to property tax exemption status has been hotly debated among hospital organizations and governmental

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
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institutions. The Illinois Department of Revenue (IDOR) initially was hesitant to make any determinations regarding hospital tax exemption applications. However, on August 16, 2011, the IDOR issued a decision denying tax exemption status to Prentice Women's Hospital at Northwestern Memorial Hospital in Chicago, Edward Hospital in Naperville, and Decatur Memorial Hospital. Those decisions stated that the properties were not owned by charitable organizations and were not being used for charitable purposes. Therefore, the IDOR denied exemption status for these institutions.

To resolve the ambiguities surrounding what it will take for a hospital organization to qualify as a charitable organization entitled to tax exemption status, Public Act 097-0688 was enacted. This Act amends the Illinois Income Tax Act, Use Tax Act, Service Use Tax Act, Service Occupation Tax Act, Retailer's Occupation Tax Act, and the Property Tax Code to include provisions outlining what requirements are needed to entitle hospitals to qualify for various tax exemptions.

Generally, the amendments state that a hospital will be entitled to a tax exemption if the amount of charitable services it provides in one year is equal to or higher than the amount of

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property taxes it would owe for that year. What constitutes charitable services is specifically defined in the new law. The monetary value of all charitable services is added together; if this sum exceeds the estimated specific tax liability for the year, the hospital is entitled to a tax exemption.

In order to receive property tax exemption status, an organization must apply for such status with the local county board of review. The local county board of review then forwards their exemption decision to the IDOR. The IDOR makes the final determination on whether the organization should receive an exemption or not. The new provisions regarding charitable exemptions for hospitals in the Property Tax Code applies to all exemption applications filed by hospitals before the county board of review and all hospital exemption decisions that are currently pending before the IDOR. Once a hospital is granted tax exempt status as a charitable organization, the hospital has to file an affidavit at the beginning of each year thereafter with the chief county assessment officer confirming whether it still satisfies the conditions for which the exemption was originally granted. A failure to file this affidavit may terminate the organization’s exemption status at the discretion

of the chief county assessment officer.
School districts with hospitals within their boundaries should be aware that this Act may impact the amount of tax revenue they receive. The continuation of existing exemptions should have no revenue impact. However, the granting of new exemptions may result in costly tax refunds, especially if certificates of error are issued for up to three past tax years. Conversely, removal of the exemption can mean increased revenues because the hospital's assessed value will be treated as new property under the Property Tax Extension Limitation Law (the "tax cap").

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Illinois Appeals Court Limits

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School District's Obligation to Provide Transportation to Parochial School Students

On June 18, 2012, the Illinois Fifth District Appellate Court ruled that the Illinois School Code does not require a public school district to provide transportation to parochial and charter school students on days that public schools are not in session. In *C.E. and C.L. v. Board of Education of East St. Louis School Dist. 189, et. al.,* 2012 IL App (5th) 110390, the Court was asked to decide if Section 29-4 of the School Code required the East St. Louis School District to provide transportation to students attending parochial and charter schools which extended their school years to include 15 days when the public schools were closed. The plaintiffs, parochial school students and their parents, argued that language in the Code requiring school boards to provide free transportation to parochial and charter school students "on the same basis" as public school students, meant that the public school district had to provide transportation whenever the charter and parochial

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866

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schools were in session. The Appellate Court disagreed.

Even though the Appellate Court was conscious of the "failing state" of the public school district in question and sympathetic to the circumstances facing parents of children "who certainly deserve access to quality education," it interpreted the language in Section 29-4 of the School Code requiring that transportation be provided "on the same basis" as public school students to mean that parochial and charter school students were not entitled to any more transportation than public school students. Therefore, on days that transportation is not provided to public school students, the district is not obligated to provide it to parochial and charter school students. The Court noted that any other interpretation of the Code would ignore the intent of the Legislature to make transportation equally accessible to nonpublic school students and to provide them with transportation without unduly increasing the costs to the public school district.

This is an important decision which limits the obligation of public schools to provide transportation to charter and private school students.

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E-Mails and Text Messages on Personal Communication Devices Subject to FOIA

On June 12, 2012, a Circuit Court in Sangamon County, Illinois ordered the City of Champaign and its City Council members to produce emails and text messages sent on their personal cell phones during a City Council meeting. The lawsuit was brought by a newspaper which had previously submitted a request for the records pursuant to the Freedom of Information Act (FOIA) and was denied access to these records. The City's basis for the denial was that the records were not "public records" because the emails and text messages were not "in the possession of" or

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in the "control of" the public body but, rather, individual members of the public body. The Circuit Court determined that a record in the possession of the individual members of the public body in which public business was discussed was a public record as defined by FOIA and, therefore, subject to disclosure. While this decision is still subject to appeal, it brings to the forefront an important issue for school districts and other governmental entities.

As you are aware, under FOIA public records are presumed to be open unless one of the exceptions to disclosure in Section 7 of the Act applies. 5 ILCS 140/1.2. A public record is defined as "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." 5 ILCS 140/2(c). The FOIA also states that, "a public record that is not in the possession of a public body but is in

the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under the Act, shall be considered a public record." 5 ILCS 140/7(2).

The upshot of the Sangamon County ruling demonstrates that publicly elected local officials will likely not be permitted to perform an end run around the FOIA by conducting public business on personal communication devices. Furthermore, it is likely that a court would determine that any public records in the possession of a paid administrator would fall squarely within the language of Section 7(2) of the FOIA regardless of where the record is stored. These disclosure requirements pursuant to FOIA are separate and apart from the potential that the device could be procurable pursuant to subpoena or a discovery request should any litigation arise involving any individual who is conducting public business via personal electronic devices. In a court setting, there would be no question that any relevant communications would be discoverable regardless of the medium or device used to communicate. It should further be noted that permitting the use of personal electronics and/or e-mail servers

for the discussion of public business creates issues when a district is required to preserve electronic evidence in litigation.

With these thoughts in mind, we are making the following recommendations to our clients:

- Ensure that all communications regarding public business and/or employees are conducted on district-owned electronic devices and/or email accounts. This will help ensure that the information is properly maintained and that it can easily be controlled and preserved in the event of litigation.
- Ensure that any portable communication device where email is accessible uses a “pop-through” method where any email message sent and/or received is stored on the district’s server.
- If using a personal computer to send e-mail, access the district-owned email account and conduct business through that medium when discussing public business or employees.
- Ensure that all members of the board of education are issued and use a districtcontrolled email address to communicate about public business and/or employees.

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- To the maximum extent possible, limit the amount of public business that you conduct via text message. To the extent that you believe you must conduct public business via text message, contact your service provider to determine how these messages are stored and how long each message is stored. If there is an ability to preserve text messages in the same fashion as email messages, your district should strongly consider exercising that option.
- Encourage all administrators and board members to refrain from communicating about public business and/or employees on any non-district-controlled medium such as blogs, Facebook or other on-line communication sites.

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.

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