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Working Cash Bonds for Building Projects Approved in Second District

The Illinois Appellate Court, Second District, in the case of *1001 Ogden Avenue Partners v. Henry*, has given school districts a major victory in the on-going battle against one of the most persistent arguments made in tax rate objections.

Illinois school districts often need to raise money to pay for capital projects in amounts which cannot be funded through normal operating revenues. This can be through the issuance of bonds, borrowing money which is paid off over a period of years. The law specifies several different kinds of school district bonds and the mechanism for obtaining the authority to issue them differs with each kind of bond. Some bonds always require voter approval, some only have to be submitted to referendum upon filing of a petition signed by a particular number of registered voters ("back door referendum"), and some do not need voter approval at all. Working cash bonds fall into

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the middle category, requiring voter approval only upon proper petition. Once working cash bonds have been issued, the money in the working cash fund may be used for many purposes, including short-term inter-fund loans. But working cash moneys may also be transferred to other district funds on a permanent basis. It has long been the practice of school districts throughout the State to issue working cash bonds and then use the proceeds to finance various types of building projects short of building a new school.

Over the last several years, however, taxpayers in multiple counties have been filing rate objections alleging that the School Code and the Property Tax Code do not permit the issuance of non-referendum bonds, such as those for working cash, if the school district intends to use those bonds to finance any kind of building project. The objectors have contended that direct referendum approval of “building bonds” is the exclusive means for financing building-related projects, regardless of the scope or size of the project.

This issue has been actively litigated for several years in both the Cook County and the DuPage County Circuit Courts. The DuPage Court ruled against the objectors in September 2016. Upon the

appeal of that decision, the Second District of the Appellate Court issued a unanimous opinion on September 21 which held that, where a school district complies with all of the statutory steps mandated in Article 20 of the School Code for the issuance of working cash bonds, then it need not also seek voter approval as required under Article 19 for building bonds, even though the district has indicated its intent to use the bonds to finance building projects. The court explained that the School Code permits working cash bonds to be used for any "corporate purpose" and that capital projects – such as the roof maintenance, carpet replacement, ceiling repair, and door and toilet replacements done by one of the districts in this case – fit the broad definition of that term. Although Article 19 building bonds, which always require voter approval, may be issued for the "building, equipping, altering or repairing [of] school buildings or purchasing or improving school sites", the legislature did not intend for Article 19 bonds to be the exclusive means of financing any and all projects which meet this description. While there is some overlap in the purpose for which Article 19 building bonds and Article 20 working cash bonds may be used, the two provisions include different tax and borrowing limitations and different procedures. Thus, as a

practical matter, school districts cannot use working cash bonds for the largest capital projects, such as building a new school. (Besides the amount of money required to build a completely new school building, the School Code expressly requires a referendum for that purpose.) Finally, despite the assertions by the objectors that the districts had been "fraudulent" and "hid" their true intent in order to "scam" the public, the Court found that, by complying with all of the notice and hearing requirements of several different statutory provisions, the districts had provided the taxpayers with ample opportunity to pose any questions they had or to submit petitions requesting a referendum.

The consequences of a court decision going the other way can hardly be overstated. Not only would those school districts with pending objections of this sort (and there are scores of those) face the prospect of losing millions of dollars in revenue through tax refunds, no school district in the future would be able to finance even the most routine capital projects without waiting for voter approval.

Nonetheless, this opinion may not end the dispute. First, the DuPage County objectors in the *1001 Ogden Avenue Partners* case

may seek a rehearing in the Appellate Court, review by the Illinois Supreme Court, or both. Further, the Cook County objectors have their own objections still pending and are expected to continue to pursue their remedies there, possibly to the First District of the Appellate Court. But the decision last week from the Second District Court is the first ruling on that level and hopefully indicates how this important school finance dispute will ultimately be resolved.

If you have questions about this topic, or tax rate objections generally, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

Extended Leave Not a

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"Reasonable Accommodation" Under ADA

Employees who have exhausted their right to paid sick leave and unpaid leave under the Family and Medical Leave Act ("FMLA") often request additional unpaid leave as a "reasonable accommodation" due them under the Americans with Disabilities Act ("ADA"). Now, the United States 7th Circuit Court of Appeals, whose jurisdiction includes Illinois, has taken an important step in defining the parameters of an employer's obligation to provide such leave under those circumstances. In *Severson v. Heartland Wood Craft, Inc.*, the Court ruled that the ADA did not require that an employer grant an employee a multi-month period leave to recover from surgery which would have extended beyond the employee's 12-week period statutory leave period under the FMLA.

In *Severson*, the employee, who suffered from debilitating spinal impairments, properly exercised his right to the 12-week FMLA leave. Before his FMLA leave was scheduled to expire, the employee requested that he be given an additional 3-month leave

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to recuperate from surgery as a reasonable accommodation. The employer refused his request and terminated him at the conclusion of his FMLA leave, but invited the employee to reapply for work once he had recovered from surgery. Rather than re-apply, the employee filed suit alleging that the employer violated the ADA because, among other things, it failed to reasonably accommodate his disability. The U.S. District Court rejected the employee's claim and granted judgment in favor of the employer. The Court of Appeals agreed with the District Court and upheld its decision.

The Court of Appeals examined the language of the ADA and concluded that a "reasonable accommodation" was "one that allowed a disabled employee to perform the essential functions of the employment position." Based on this understanding, the Court held that if the accommodation does not make it possible for the employee to return to work, the employee is not a "qualified individual" within the meaning of the ADA, and therefore could not prevail in a lawsuit against an employer. Simply put, the Court of Appeals decided that the employee was not denied a "reasonable accommodation" because the accommodation he sought was more time off of work, not an

accommodation that would permit him to do his job. However, the Court distinguished "long-term" leave from intermittent time off and short-term leave of "a couple of days or even a couple of weeks", which might be considered a reasonable accommodation under some circumstances.

The Court of Appeals also rejected the employee's argument that he should have been allowed to take a vacant position with the employer that arose after he was terminated. Instead, the Court of Appeals decided that the employer's duty to provide alternative employment as an accommodation meant that the alternative position had to exist at the time of the employee's termination. In other words, the ADA does not require an employer to create a new job for the employee or remove the important duties of a currently existing job to accommodate an employee.

Severson is an important case because, while it confirms an employer's duty under the ADA to accommodate a disabled employee, it makes it clear that the employer's duty cannot be converted into a right to a multi-month extension of leave beyond the 12-week period set forth in the FMLA.

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If you have any questions concerning how *Severson* may apply to your employees, please contact our attorneys at our Flossmoor Office at 708-799-6766, or our Oak Brook Office at 630-928-1200.

Tax Rate Limit for Educational Fund Lifted in Tax-Capped Counties

Another of the provisions contained in the school funding legislation signed into law by Governor Rauner on August 31, 2017, (known as SB 1947, or Public Act 100-465) which has not received much attention in the media is the removal of the specific rate limit for Educational Fund levy for all school districts subject to the Property Tax Extension Limitation Act (PTELL or the "tax cap"). This new provision was added as Section 17-3.6 of the School Code. Since the Educational Fund

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can be used for any purpose, this action should give tax-capped school districts much more flexibility in the use of precious property tax revenues.

Some history is helpful in understanding the significance of this legislation. Prior to PTELL (and still in those counties not subject to PTELL), school district tax levies in all of the major operating funds were subject to specific rate limitations, defined as a percentage of the district's equalized assessed valuation (EAV). Those rate limits varied from district to district and could be increased by referendum, but there was a cap on the Educational Fund. Even with voter approval, an elementary or high school district's Educational Fund tax rate could not be higher than 3.50%, or 4.00% in unit districts. As the tax cap first came into play in the 1990s for most districts, each district's local rate limits carried over, so there were individual rate limits within the overall limiting rate for the aggregate levy established under the PTELL formula. However, the aggregate PTELL limiting rate floated up or down in inverse relation to the district's EAV, while the individual rate limits remained fixed as a percentage of EAV. In 2006, the Property Tax Code was amended to allow tax-capped

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districts to maximize their rate limits without a referendum, meaning that all such districts could levy in their Educational Fund up to 3.50% or 4.00% of EAV.

Then the Great Recession of 2008-09 hit, bringing with it historic drops in property values and sinking EAVs. The effect of this was that, while PTELL's floating limiting rate protected a district's aggregate property tax revenues, the fixed Educational Fund rate limit prevented many districts from levying enough in the one school fund where districts needed the money most. To meet this challenge, many districts levied more in the unlimited Transportation Fund and then transferred those revenues to the Educational Fund later, but this was never a satisfactory solution and last year's transportation "Lockbox" constitutional amendment raised real issues concerning the transferability of those revenues.

SB 1947's elimination of the Educational Fund rate limit for school districts in tax-capped counties solves this problem. Districts can now levy whatever portion of their aggregate tax levy in the Educational Fund which they need to. And since Educational Fund revenues can effectively be used for any school district purpose, this provides much more flexibility in the use

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and management of the district's funds. ***School boards and school administrators should keep this in mind when preparing this year's and future years' proposed levies.***

The lifting of the Educational Fund tax rate limit will not bring more money to tax-capped school districts, but it is designed to allow those districts to put their tax moneys where it can be most effectively used to accomplish the district's goals. Levies should be prepared to take advantage of this new authority.

If you have questions about this topic, or any provision within SB 1947, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

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Mandate Relief to Illinois School Districts

One of the lesser known aspects of the school funding legislation signed into law by Governor Rauner on August 31, 2017, (known as SB 1947, or Public Act 100-465) is that it provides much-needed relief from some of the mandates historically imposed upon school districts statewide. Importantly, the School Code previously permitted waivers of mandates only when they were necessary to stimulate innovation or improve student performance. Under the new law, a waiver may be granted if a school district believes that criteria will be satisfied **or** if it can demonstrate that it can address the intent of the mandate in a more effective, efficient, or economical manner.

Public Act 100-465 also makes changes to the waiver process. Previously, waivers of School Code mandates were considered by the full General Assembly. However, the legislation establishes a panel of four legislators who will now have the opportunity to first review waiver requests. If three or more of the

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legislators object to the request, then it goes directly to the full legislature for consideration. But, if fewer than three object, the waiver is transmitted to ISBE which can approve, deny, or modify the waiver. ISBE's failure to act on a request will constitute approval of the waiver. If ISBE denies it, the request will go to the full legislature just as requests did previous to this new law.

The legislation also provides relief with regard to some specific School Code mandates which have been the frequent subject of waiver applications: driver training and physical education.

Driver Training. Formerly, a school district needed to be granted a waiver in order to contract with a driver training school. Under the new law, a school district will be able to contract with a commercial driver training school to provide both the classroom instruction part and the practice driving part, or either one, without having to request a modification or waiver of administrative rules of the State Board of Education. Rather, the school district will only need to approve a contract with a commercial driver training school after a public hearing.

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Physical Education. Schools have been required to provide physical education five days per week. Under the new law, however, a school board may determine the schedule or frequency of physical education courses, provided that a pupil engages in a course of physical education for a minimum of three days per five-day week. The legislation also permits additional discretion to excuse students, on a case-by-case basis, from physical education requirements. SB 1947 provides that, in addition to the existing bases by which students in grades 11 and 12 may be excused from physical education, a school board may also, on a case-by-case basis, excuse pupils in grades 7 through 12 who participate in an interscholastic or extracurricular athletic program from engaging in physical education courses. Lastly, waivers from all physical education mandates are still available; however, the law now permits the waiver to remain in place for five years, instead of just two years with a limit of two renewals.

If you have questions about this topic, or any provision within SB1947, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).

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OCR Provides Instructions on Transgender Student Investigations

As we have reported in previous Priority Briefings, the rights of transgender students have yet to be resolved. In the last several months, the federal government withdrew guidance that existed under the Obama Administration and federal courts have dismissed cases that could have clarified transgender students' rights nationwide. In light of these events, on June 6, 2017, the United States Department of Education's Office of Civil Rights ("OCR") issued instructions to its field offices to assist their investigations of complaints of sex discrimination against transgender students. In those instructions, OCR stated that investigators should "rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect." This statement

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will likely mean different things to different field offices, depending on the federal circuit in which the OCR investigator is located. The OCR guidance lists specific instances where investigators might have specific jurisdiction, such as failure to use a student's preferred pronoun or a school or district's failure to fix an environment that is hostile toward transgender students. Notably, investigations into the denial of transgender students' right to use the bathrooms of their choice is not on that list. Instead, the memo states that, based on jurisdiction, some complaints might go forward while others, including those involving bathrooms, might be dismissed.

Illinois is located within the jurisdiction of the Seventh Circuit Court of Appeals, which has recently ruled that the statutory language of Title IX of the Civil Rights Act – even absent the Obama administration guidance – protects transgender students. The Seventh Circuit opted to take an expansive view of other courts' decisions which protected transgender people under Title VII of the Civil Rights Act and concluded that the rationale underlying those decisions applied to this case. Consequently, we predict that transgender students in Illinois will be among the most protected in the country. As we have

mentioned previously, however, since the facts of each case may be unique, we encourage you to contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766) if you have any questions regarding this topic or you are presented with a similar issue in your district.

Transgender Student Rights Recognized by U.S. Court of Appeals

As we have previously reported, the rights of transgender students have been unsettled. A recent Federal decision may clarify this issue for Illinois students. On May 30, 2017, the Seventh Circuit Court of Appeals ruled that a 17-year old transgender boy in Kenosha, Wisconsin, must be allowed to use

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the boys' bathroom despite the school's claim that his presence there would invade the privacy rights of his male classmates. The Seventh Circuit's ruling is binding on federal courts in Illinois.

The facts of the case are rather straightforward. The student (whose biological sex was female) had been using the boys' bathroom during his high school career. The School District then decided that the student could only use the girls' restrooms or a gender-neutral restroom that was in the school's main office, which was quite a distance from his classrooms. The student sought an injunction on the grounds that the School District's policy would cause him irreparable harm, there was no adequate remedy at law, and that he was likely to succeed on the merits of his case.

This is an important case because of the Court's determination that the student was likely to succeed on the merits of his case. The Fourth Circuit Court of Appeals had ruled that schools must allow students to use the restrooms matching their gender identities. But that ruling, involving a Virginia student, was vacated by the U.S. Supreme Court after the Trump administration canceled the Obama administration's legal guidance on

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transgender bathroom protections in public schools.

In this matter, however, the Seventh Circuit determined that the statutory language of Title IX of the Civil Rights Act – even absent the Obama administration guidance – protects transgender students. The Seventh Circuit opted to take an expansive view of other courts' decisions which protected transgender people under Title VII of the Civil Rights Act and concluded that the rationale underlying those decisions applied to this case.

The Court also rejected the School District's argument that the privacy rights of the other students in the district outweighed the student's right to use the boys' bathroom. The Court pointed to the fact that no other student had complained about the student's use of the boys' bathroom and, importantly, as a transgender boy, the student used the bathroom by entering a stall and closing the door. The Court declared that "[a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."

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The Seventh Circuit's ruling appears to protect the rights of Illinois' transgender students more than any other decision or regulation to date. Still, since the facts of each case may be unique, we encourage you to contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766) if you have any questions regarding this topic or you are presented with a similar issue in your district.

Courts Rule on Applicability of FOIA to School-Related Private Organizations

The Illinois Supreme Court and the Illinois Appellate Court recently issued two important opinions clarifying when documents must be produced, not only by public bodies, but also by nongovernmental school-related organizations in response to an Illinois Freedom of Information Act (FOIA) request. These cases

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should guide such organizations in how they conduct business and preserve their records.

On May 9, 2017, the Second District Appellate Court rendered its decision in *The Chicago Tribune v. The College of DuPage and the College of DuPage Foundation*, 2017 IL App (2d) 160274. Pursuant to a Memorandum of Understanding (MOU) between the College of DuPage (College), a public body, the College of DuPage Foundation (Foundation), a private nonprofit organization, the College delegated its responsibility to collect, manage, and maintain all of its private donations to the Foundation. Thereafter, the College and the Foundation received a series of FOIA requests from the *Chicago Tribune* seeking copies of federal and Illinois grand jury subpoenas which the newspaper believed had been served upon the College and the Foundation. When the requested subpoenas were not forthcoming, the *Tribune* filed suit to obtain them.

In upholding the trial court's order that the College and the Foundation disclose the federal grand jury subpoena to the *Tribune*, the Appellate Court first determined that the subpoena was a "public record" within the meaning of the FOIA, notwithstanding the College's contention that it did not

prepare, request, use, receive, possess or control it, because the subpoena had been served on the College and it pertained "to the transaction of public business…" The Court also made it clear that the subpoena continued to be a "public record" even though the College physically transferred it to the Foundation and did not keep a copy for its records; and that the College, as a "public body", was obligated to make the subpoena available to the public even though it transferred its physical possession to the Foundation pursuant to their MOU. Because the subpoena was a "public record," the College had to make a good faith effort to obtain a copy of it for disclosure to the *Tribune.*

The Appellate Court also concluded that, by collecting, maintaining, and managing the College's private donations pursuant to the MOU, the Foundation itself was performing a "governmental function" and therefore was subject to the disclosure requirements of the FOIA. Interestingly, the Appellate Court refused to provide a definition as to what constitutes a "governmental function" under the Act. Instead, it concluded that the circumstances of each case should be examined with particular attention paid to the "public body's role and responsibilities and the specific act that it has

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contracted a third party to perform on its behalf." Finally, the Appellate Court decided a private entity such as the Foundation need not make all of its records available to the public, but only those that "directly relate to the governmental function performed by on behalf of a public body."

On May 18, 2017, the Illinois Supreme Court decided *Better Government Association v. Illinois High School Association*, 2017 IL 121124. In this case, the Better Government Association (BGA) served a FOIA request on both the Illinois High School Association (ISHA), a nonprofit voluntary association whose function is to "establish by laws and various rules for interscholastic sports competition" and which "sponsors and coordinates various post-season tournaments for certain sports in which its member schools choose to compete," and Consolidated High School District 230. The request was for the ISHA's contracts related to accounting, legal services, sponsorships, public relations/crisis management, and licensed vendor applications for the 2012-13 and 2013-2014 fiscal years. When its request was not honored by either District 230 or the ISHA, the BGA filed suit alleging that their refusal to disclose the documents violated the FOIA.

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The trial judge dismissed the BGA's lawsuit, concluding that the ISHA was not a "public body" within the meaning of the FOIA, and that ISHA was not performing a "governmental function" on behalf of the School District as required by the Act. The Appellate Court agreed with the trial court.

Upon its own review, the Supreme Court concluded that the trial court appropriately dismissed the BGA's lawsuit. In reaching its conclusion, the Court determined that the ISHA was not a "governmental unit" nor was it a "subsidiary body" of a governmental unit within the meaning of the Act because it was not controlled by or subordinate to District 230. **The Court found in determining whether a nonprofit is a "subsidiary body" courts should consider: 1) the extent to which the private entity maintains a separate legal existence from the public body; 2) the degree of control the public body exerts over the private entity; 3) the extent to which the private entity is publicly funded; and 4) the nature of the functions performed by the private entity.** Based on these factors, it concluded that there was an insufficient nexus between the School District and the ISHA to make the ISHA a subsidiary of the School District. The Supreme Court also agreed with the School District that

dismissal of the BGA's complaint was proper because, unlike the facts in the *Chicago Tribune* case, the School District had not delegated the performance of a governmental function to the ISHA.

What these cases make clear is that our courts look to the relationship between a public body and a nonprofit entity in determining the scope of the obligation to make disclosures under the FOIA. Where there is a very close relationship between the public body and the nonprofit, such as sharing staff, subordination of the nonprofit to the control of the public body, and the delegation of a governmental function by the public body to the nonprofit, as was the case for the College of DuPage Foundation, the courts are likely to determine that records received by either entity are public documents that must be disclosed as long as the records are directly related to the governmental function the nonprofit undertakes on behalf of the public body. Conversely, if there is not a close relationship between the public body and the nonprofit organization, and the public body never possessed the records sought under the FOIA, as was the case for the IHSA, courts are likely to determine that a records request does not come within the purview of the

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Act.

Many Illinois public school districts receive support from nonprofit foundations or other groups established to help them fulfill their mission to educate our children. Whether or not such groups are subject to FOIA requests will turn on the particular factual circumstances of their relationship. In the event that a school district or foundation supporting a school district receives a FOIA request related to its relationship with the other, each should act promptly to determine what their legal obligations are.

If you have any questions concerning your legal obligations, contact one of our attorneys at 708-799-6766 or 630-928-1200.

Sexual Orientation

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Discrimination: Landmark Decision from Federal Court of Appeals

Last week, the U.S. Court of Appeals for the Seventh Circuit issued its decision in *Hively v. Ivy Tech Community College of Indiana*. The decision tackles the issue of whether Title VII of the Civil Rights Act of 1964's ban on "sex discrimination" includes a ban on discrimination on the basis of sexual orientation. On an 8-3 vote, the Judges from the Seventh Circuit determined that sexual orientation discrimination is virtually indistinguishable from sex discrimination because both rely on stereotyped concepts of the sexual behavior and lives of men and women.

The *Hively* case involved a lesbian, part-time adjunct professor at a community college in South Bend, Indiana. The professor applied for multiple full-time positions at the Community College but was denied each position and subsequently terminated. Believing that the Community College's actions were

due to discrimination on the basis of her sexual orientation, the professor filed a charge with the Equal Employment Opportunity Commission ("EEOC"). She received a right to sue letter, and filed a claim against the Community College in federal court. The Community College successfully argued in the lower court that sexual orientation was not a protected category under Title VII. The Seventh Circuit's determination last week overturns this earlier ruling and any other ruling finding that sexual orientation is not a Title VII protected class in courts under jurisdiction of the Seventh Circuit (that is in, Illinois, Indiana and Wisconsin).

The decision is a landmark one because it is the first decision in any U.S. Court of Appeals ruling that sexual orientation is protected under Title VII. However, the ruling's practical impact on Illinois employers is likely to be slight because Illinois already included "sexual orientation" as a protected category under the Illinois Human Rights Act. Under the Human Rights Act, Illinois declared it public policy of the State that all individuals within Illinois are entitled to freedom from discrimination on the basis of seventeen protected categories, including sexual orientation. Because of the protections

afforded under State law, employment claims alleging workplace discrimination on the basis of sexual orientation were most frequently brought under an investigation by the Illinois Department of Human Rights or the Human Rights Commission, which are the entities charged with investigating complaints filed under the Human Rights Act. The Seventh Circuit's ruling in *Hively*, however, means that there may be future claims of discrimination arising under federal law and actively investigated by the EEOC.

The decision is also important because of the tension it creates with the other so-called Sister Circuits of the U.S. Courts of Appeals. In March 2017, the U.S. Court of Appeals for the Second Circuit (covering Connecticut, New York and Vermont) refused to overturn a precedential decision in that Circuit holding that Title VII does not prohibit discrimination on the basis of sexual orientation. In *Christiansen v. Omnicom*, the Second Circuit affirmed that being gay, lesbian or bisexual does not, in and of itself, constitute nonconformity with a gender stereotype that can give rise to a sex discrimination claim. Because of the tension between the two Circuit Court decisions, this issue may soon be ripe for an appeal to the U.S. Supreme

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Court. However, it appears that battle will wait for another day: the Ivy Tech Community College of Indiana has indicated to multiple news sources that it will not seek Supreme Court review of the Seventh Circuit's determination.

If you have additional questions about the Seventh Circuit's determination, the state of the law in Illinois, or this issue in general, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).

Hospital Tax Exemptions: Major Developments But No Resolution

In three opinions issued within days of each other, the Illinois Supreme Court and the Illinois Appellate Court signaled that the ongoing controversy concerning whether hospitals owned by non-profit corporations are entitled to exemption from local property taxes will continue for some time to come.

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The vast majority of hospitals in Illinois are owned by corporations without shareholders, and are thus classified as "non-profit" for federal and state income tax purposes. But that classification alone does not mean that these are charitable institutions which may be granted exemption from property taxes under the Illinois Constitution. Nonetheless, in 2012, the Illinois General Assembly created a special category for non-profit hospitals under the Property Tax Code. Section 15-86 of the Code now provides that hospital owners avoid property taxes entirely if they can demonstrate that the value of certain defined "beneficial services" are greater than the value of the property taxes the hospital owners would have to pay if the property were taxable. As a practical matter, this standard has been very easy for hospitals to meet, even where truly charitable services have been just a small part of their business.

Several challenges have arisen to the legislature's favorable treatment for hospitals. In the case of *Carle Foundation v. Cunningham Township*, local assessment officials in Champaign County have been trying to tax the Carle Foundation Hospital, but hospital owners went first to court to fight that effort.

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In January 2016, as we reported in a previous Priority Briefing, the Illinois Appellate Court ruled that Section 15-86 was unconstitutional and invalid. However, on March 23, 2017, the Illinois Supreme Court vacated the Appellate Court's ruling, not on the merits of the dispute, but because it decided that the issue of the constitutionality of Section 15-86 should not have been decided by the Appellate Court while the underlying claim was still to be decided in the circuit court. The effect of this decision by the Supreme Court, besides sending the parties in that case back to the lower court, is to leave the validity of Section 15-86 still in doubt and without providing any guidance to local and state property tax officials, at least not yet.

Next, in the case of *Oswald v. Hamer*, a taxpayer sought a declaration by the courts that Section 15-86 is invalid on its face because it contradicts the charitable tax exemption provision of the Illinois Constitution. In December 2016, the Illinois Appellate Court issued an opinion that the statute is facially valid, but only because it interpreted Section 15-86 as not removing the constitutional requirement that hospitals also demonstrate that they are charitable in order to qualify for

property tax exemption. The taxpayer sought rehearing in the *Oswald* case, but on March 31, 2017, the Appellate Court declined to reconsider its opinion. While it is not yet known whether the taxpayer will seek Supreme Court review of this case, some of the Supreme Court justices during the oral argument of the *Carle Foundation* case indicated an awareness of *Oswald* and an opinion that it presented a more suitable vehicle to reach the merits of the validity of Section 15-86. Keep in mind that should the Appellate Court's interpretation of the statute in *Oswald* prevail in the Supreme Court, very few hospitals would likely retain their exempt status.

In a third case, a tax exemption granted to NorthShore University Healthsystem is being challenged in the Illinois Department of Revenue by Niles Township High School District 219. In an effort to circumvent the Department's proceedings, NorthShore went to court, arguing that the District's hearing requests were insufficient for failure to specify the Department's errors in issuing exemption certificates, even though the Department had not stated its bases for issuing those certificates in the first place. The Circuit Court dismissed NorthShore's case and, on March 28, 2017, in the case of

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NorthShore University Healthsystem v. Illinois Department of Revenue, the Appellate Court agreed with the Department and the Circuit Court that NorthShore had to complete Department's hearing procedure before going to court. That ruling will allow the Department to rule first on the NorthShore tax exemption.

Hauser Izzo, LLC attorneys are deeply involved in each of those cases. John M. Izzo and Eugene C. Edwards are representing District 219 in the NorthShore litigation. Further, John and Eugene submitted an *amicus curiae* brief on behalf of the Illinois Association of School Boards, the Illinois Association of School Administrators, and the Illinois Association of School Business Officials in the *Carle Foundation* appeal to the Supreme Court. Finally, John and Eugene also submitted an *amicus curiae* brief to the Appellate Court on behalf of IASA and IASBO in the *Oswald* case.

If you have questions regarding the recent developments of these cases, please contact one of our attorneys in Flossmoor (708) 799-6766 or Oak Brook (630) 928-1200.

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U.S. Supreme Court Raises the Bar on FAPE

Last week, the Supreme Court of the United States issued its decision in the case of *Endrew F. v. Douglas County School District.* The decision tackles a thirty-five-year-old question stemming from the U.S. Supreme Court's landmark ruling in *Board of Education of Hendrick Hudson Central School District v. Rowley*: what standard is used to determine whether or not a student received a free appropriate public education ("FAPE")?

Rowley was decided 1982 and held that a FAPE must be provided to all special education students. *Rowley* further required that a FAPE be tailored to the unique needs of a child with a disability by means of an individualized education program ("IEP"). *Rowley* also spelled out that the level of benefits of an appropriate education must be "reasonably calculated" to confer a "basic floor of opportunity," and emphasized that

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school districts were not required to maximize the potential of a student with disabilities. This has sometimes been referred to as the "serviceable Chevrolet" standard, because students are not required to be offered a "Cadillac" education.

Somewhat problematically, the *Rowley* decision did not specify a test that courts should employ to determine whether or not a student receives an appropriate education. Instead, the U.S. Supreme Court held that the contours of an appropriate education must be decided on a case-by-case basis, in light of the individualized consideration of the unique needs of each eligible child. Since the *Rowley* decision, school districts, states, state courts and federal courts have developed varying standards for determining whether or not a student had received an appropriate education.

Endrew F. involved a test employed by the Tenth Circuit Court of Appeals for determining whether or not an appropriate education has been afforded to a student. The student in this case, Endrew ("Drew") F., was diagnosed with autism at an early age, and had received an IEP through his local Colorado school district from preschool through the fourth grade. Drew's then-fourth grade present levels included behaviors such as screaming in class,

climbing over furniture and his peers, and occasionally running away from school. When Drew's family received the school's IEP recommendation for fifth grade, they noted that it was substantially similar to the previous years' IEP, including the present levels descriptions, goals, services and placement. His parents believed that Drew's academic progress had stalled, so they unilaterally removed him to a private school that specialized in students with autism, where Drew progressed.

Drew's parents filed suit seeking reimbursement for their son's private school tuition. Drew's parents did not prevail at the administrative, district court or appellate court levels. In finding against Drew's parents, the Tenth Circuit Court of Appeals explained that it had long interpreted the requirement to provide an appropriate education to mean that the school district only had to confer a an "educational benefit '[that is] merely…more than *de minimis.*'" In applying this standard, the Tenth Circuit found that Drew had been making *some* progress. Thus, the parents' request for reimbursement was denied.

The parents sought an appeal to the U.S. Supreme Court, which on March 22, 2017, issued a unanimous decision by Chief Justice John Roberts rejecting the merely more than *de minimis* standard

set out by the Tenth Circuit. The U.S. Supreme Court, in considering the Tenth Circuit's decision against the *Rowley* standard, found that "It cannot be the case that the [Individuals with Disabilities Education Act] typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot." The Court reasoned that a student offered an educational program providing merely more than *de minimis progress* "can hardly be said to have been offered an education at all" because they would be receiving instruction "that aims so low [to] be tantamount to 'sitting idly…awaiting the time when they [are] old enough to drop out.'"

The U.S. Supreme Court's holding is clear: "The IDEA demands more." However, despite this clear holding, the Court refused to provide a bright-line standard for how to determine what amounts to an appropriate education. In fact, the Court stated that it was refusing to spell out such a standard because "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." In remanding the case to the Tenth Circuit, the Court did explain, however, that a child's

educational program must be "appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom."

Although the Seventh Circuit – which is the United States Court of Appeals for Illinois, Wisconsin and Indiana – had previously applied a slightly different standard than the Tenth Circuit to determine what constituted an appropriate education, the *Endrew F.* case will certainly have an impact. The current standard used by the Seventh Circuit is that a school district must offer an IEP that is likely to produce educational progress, not regression or trivial advancement, and that a school district must offer more than mere trivial educational benefit to students in order to demonstrate an offer of an appropriate education. While this is not the *de minimis* standard ruled in *Endrew F.*, the Seventh Circuit's standard for an appropriate education is still an arguably low bar, requiring just barely more than trivial educational benefits. Accordingly, we anticipate that this issue will be ripe for additional lawsuits.

If you have additional questions about the U.S. Supreme Court's determination, the current standard used by the Seventh Circuit

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to determine an appropriate education, or this issue in general, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).