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# APPELLATE COURT ON TAX OBJECTIONS: NO HARM, NO FOUL

The Illinois Appellate Court, Second District, issued a decision on September 30, in *G.I.S. Venture v. Novak* ("*G.I.S. Venture II*") with an opinion favorable to school district financial practices.

The same court in *G.I.S. Venture I* (2009) had ruled that, when school districts abate their working cash funds, the abated funds must be transferred only to the educational fund. This decision led directly to the School Code amendments in 2010 which now expressly allow working cash fund abatement transfers to any district fund. But left unresolved were the taxpayer objections to the pre-amendment transfers. The Appellate Court in *G.I.S. Venture I* had returned the case to the circuit court to determine whether, had the transfer properly gone to the educational fund, there would have been any excessive accumulations in the educational fund.

After a collaborative effort involving the DuPage County State's

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Attorney's office and the attorneys representing 17 different districts and covering 13 tax years, the circuit court found there would have been no educational fund excess accumulations; therefore, the taxpayers were not entitled to any tax refunds. The Appellate Court in *G.I.S. Venture II* affirmed this finding. Its opinion clearly states that, while the working cash transfers were not proper under the law as then written, the taxpayers were still not entitled to relief because those transfers did not cause excessive tax levies.

Subject to the taxpayers seeking a rehearing in the Appellate Court or review in the Illinois Supreme Court, of course, the immediate effect of this decision is to save several DuPage County school districts millions of dollars in potentially lost revenue. But of broader impact, *G.I.S. Venture II* stands for the principle that not every procedural error in school district financial practices will result in costly tax refunds. To obtain those refunds, the tax objectors must demonstrate that the district's error actually resulted in excess property taxes.

John Izzo of Hauser Izzo participated both in the *G.I.S. Venture II* appeal and in the drafting and advocating for the 2010 School Code amendments which legislatively overturned the *G.I.S.*

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*Venture I* ruling about working cash transfers.

Should you have any questions, please contact one of our attorneys at our Flossmoor Office at 708-799-6766.

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# SCHOOL DISTRICTS SUBJECT TO ZONING REGULATIONS

For the first time, the Illinois Appellate Court has ruled without condition that school districts are subject to the zoning regulations of local municipalities. The ruling was announced this month in the case of ***Gruba vs. Community High School District 155***, 2014 Ill App 2d 140098.

The facts of the case are relatively straightforward. Crystal Lake School District 155 constructed bleachers for the football field at one of its campuses located in the City of

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Crystal Lake. The School District submitted plans and received approval and a building permit from the McHenry County Regional Superintendent of Schools. The School District did not, however, receive approval (nor did it even notify) the City of Crystal Lake. The new bleachers would have required a variance or a special use permit as the bleachers violated numerous zoning and storm water ordinances of the City.

A lawsuit was filed against the School District, not by the City, but by neighboring landowners seeking to privately enforce the City's zoning and storm water ordinances. The Circuit Court ruled in favor of the neighboring landowners, concluding that the School District was subject to Crystal Lake's zoning and storm water ordinances. The School District then appealed to the Second District Illinois Appellate Court, which affirmed the decision of the trial court, holding unequivocally that school districts are subject to the zoning regulations of local municipalities.

For decades, this has been a gray area of the law. Prior to this decision, the apparent rule was that school districts and other special districts are only subject to local municipal zoning ordinances if those ordinances do not frustrate

the school districts' or other special districts' statutory purposes. A previous line of cases, including the 1986 Illinois Supreme Court case of *Wilmette Park District vs. Village of Wilmette*, 112 Ill.2d 6 emphasized the importance of inter-governmental cooperation in these situations and concluded that the best way to reconcile competing interests of local governmental entities was to require participation in the re-zoning or special use permit process of the host municipality. If, at the end of that process, a special district determined that the municipal requirements were frustrating the district's statutory purposes, then the district could seek redress in the court system. Curiously, in *Gruba* there was no direct reference by the Court to the *Wilmette Park District* case in the entire 42-page opinion (although the Court tangentially addressed it in discussing a recent Attorney General opinion).

The Second District Appellate Court placed great emphasis on Section 10-22.13a of the Illinois School Code in reaching its decision. That section provides school boards with the power "[t]o seek zoning changes, variances, or special uses for property held or controlled by the School District." 105 ILCS 5/10-22.13a The Court reasoned that the legislature

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obviously intended for school districts to be subject to local municipal zoning ordinances or this section of the School Code would be superfluous.

It is important to note that this decision does not require school districts to comply with local municipal building codes. The Health/Life Safety Code remains the governing code of public school buildings and the Regional Offices of Education continue to have jurisdiction over school construction projects.

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# MORE PUBLIC ACCESS GUIDANCE:

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# SPEAKER ADDRESSES, EMPLOYEE PHOTOS, LATE RESPONSES, AND STUDENT RECORDS

We periodically provide updates on recent legal opinions from the Illinois Attorney General's Public Access Counselor ("PAC") regarding the Open Meetings Act ("OMA") and the Freedom of Information Act ("FOIA"). Here are summaries of recent PAC opinions of interest to school districts.

**OMA – PAC Binding Opinion 14-009: Speaker Addresses**

The Attorney General's Office released a binding opinion stating it is a violation of the OMA for a public body to require an individual to state their home address before making a comment before the Board. A municipal village board requested a woman to state her address before making a public comment because it was the board's typical custom and practice. However, the board did not have a specific rule in place that required an individual to state their address before speaking to

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the board during the public comment period.

Although OMA allows a board to establish rules governing the public comment period during a meeting, these rules must be reasonable time, place, and manner restrictions aimed at furthering the a significant government interest in operating an orderly meeting. The PAC determined that requiring an individual to state their address before addressing the board, regardless of whether it is an established rule of a board or just a general custom, exceeds the scope of the rules created to govern public comment. Requiring individuals to state their address may deter individuals from commenting during meetings. Thus, requiring individuals to state their address before publicly addressing a board violates the OMA.

While this opinion is not binding on all public bodies at this point, school boards should consider eliminating any rules or customary practices that require members of the public to state their addresses before commenting at any public meetings.

**FOIA – PAC Binding Opinion 14-008: Employee Photos**

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A newspaper reporter submitted a FOIA request to a sheriff's office requesting photographs of a deputy. The sheriff's office denied this request under the private information exemption which includes biometric identifiers. The sheriff's office argued that photographs are biometric identifiers because they can be used to identify biological attributes. However, the PAC disagreed.

Although FOIA does not define biometric identifiers, the PAC determined biometric identifiers are commonly used to describe an individual's fingerprints or voice pattern. The Illinois Biometric Information Privacy Act defines biometric information to include fingerprints, voice patterns, plus retina, hand, and face scans. However, that Act specifically excludes photographs from that definition.

The PAC also pointed out that other sections of FOIA reference photographs. If the General Assembly had intended photographs to be exempt, it would have specifically included photographs in its definition of private information. Since it did not, photographs are not biometric information prohibited from disclosure under a private information FOIA exemption. The sheriff's office, therefore, violated FOIA when it failed to

produce the requested photographs and must disclose the photographs pursuant to the request.

School districts should be aware that they may have to disclose photographs pursuant to a FOIA request, but they also should first determine whether there are any other FOIA exemptions which would apply to permit the withholding of the applicable information.

**FOIA – PAC Binding Opinion 14-007: Late Response**

A newspaper reporter submitted a FOIA request to the Chicago Public Schools for all records showing ticket proceeds from athletic events during the previous school year. The PAC determined that the Chicago Public Schools violated FOIA when it failed either to timely respond to this request within five business days, or to properly ask for an extension of time to answer.

The PAC also determined the Chicago Public Schools violated FOIA by failing to properly search for the requested records and explain these search procedures in its denial response to the requester. The Chicago Public Schools failed to

explain if it had any records that contained the requested information or why it could not extract portions of the requested information from other more comprehensive records if they existed. The Chicago Public Schools' response indicated that it had some information responsive to the request at individual schools but failed to indicate that it had attempted to collect these records from these schools. Since the Chicago Public Schools failed to take or explain why it did not take any of these measures, it violated FOIA.

Furthermore, the Chicago Public Schools failed to inform the requester that the request may be unduly burdensome within the required FOIA timeframe in order to invoke this exemption. Since the Chicago Public Schools failed to state the request was unduly burdensome in its initial response, it was prohibited from relying on this exemption to support why it did not comply with the request later. Additionally, even if the Chicago Public Schools had properly responded within the required time frame that this request was unduly burdensome, it still would have violated FOIA because it did not give the requester an opportunity to narrow its request to a manageable proportion or state why the request was unduly burdensome to the

Chicago Public Schools operations.

This opinion again demonstrates how important it is to timely respond to FOIA inquiries and to thoroughly explain all reasoning behind searches undertaken and any request denials. A dilatory or incomplete response limits options later on. The failure to engage a requester regarding narrowing the request may undermine a legitimate argument that the request is unduly burdensome.

**FOIA – PAC Non-Binding Opinion 2014 PAC 29212: Student Records**

In a matter for which Sraga Hauser represented the school district, a parent of a student submitted a FOIA request to the district to receive copies of her sons' student records that are stored electronically and to receive a list of her sons' student records that are stored in non-electronic format. The district denied the request because FOIA specifically exempts disclosure of school student records under the School Student Records Act and informed the requester that it did not have a list containing the student records that are stored non-electronically.

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The requester alleged that she had been unable to obtain copies of her sons' student records, despite her requests, pursuant to the School Student Records Act. However, the school district maintained that it had given the parent opportunities to receive copies of these records in accordance with the School Student Records Act procedures but that she had failed to comply with these procedures. The Public Access Counselor determined the school district did not violate FOIA because the district did not have to produce these records under the School Student Records Act FOIA exemption.

Although this is a non-binding opinion, it demonstrates that a parent cannot circumvent the School Student Records Act requirements and procedures by bringing a request for student records pursuant to FOIA.

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# UPDATE ON RECALL RIGHTS FOR 2013-14 RIFS

On July 18, 2014, we reported on new recall rights made effective July 1, 2014, by P.A. 98-0648. Our Priority Briefing stated that any teacher who was in Grouping 2 of the sequence of honorable dismissal list as a result of one "needs improvement" rating and a second "satisfactory", "proficient" or "excellent", and who was RIF'd in the Spring of 2014, is entitled to recall to any position for which s/he is qualified which becomes vacant between the start of the 2014-15 school term through February 1, 2015. This statement tracks the express language of the new statute.

The Illinois State Board of Education has issued "Non-Regulatory Guidance" entitled "Recall Rights of Honorably Dismissed Teachers Changes Made by Public Act 98-0648." Despite the language in the new statute, the State Board of Education

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concludes that beginning July 1, 2014, the effective date of the statute, the recall rights extend to any position which becomes vacant between the end of the school term in which the teachers received the notices of reduction and February 1 of the following school term.

Should you have any questions, please contact one of our attorneys at our Flossmoor Office at 708-799-6766.

[Posted 8/11/14]

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# EMPLOYEE PHYSICALS: SCHOOL CODE AMENDMENT EXPANDS AND ALTERS REQUIREMENTS

Public Act 98-0716, effective July 16, 2014, amends Section 24-5 of the School Code. The amendments add a broad definition of

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who is an "employee" under this section that expands its applicable scope. Now under the Act, new "employees" who are subject to the foregoing requirements include:

- Any new employee of a school district
- Student teachers who start after July 16, 2014
- Employees of contractors that begin providing services to students or in schools after July 16, 2014
- Any individual for whom a criminal history records check and check of the Statewide Sex Offender Database and Statewide Murderer and Violent Offender Against Youth Database is required (*e.g.,* new food service workers, school bus drivers and other transportation employees, who have direct, daily contact with pupils).

(Prior to this Act, school boards were to require of "new employees evidence of physical fitness to perform duties assigned and freedom from communicable disease, including tuberculosis.")

The amendments also remove the requirement that new employees provide evidence of freedom from tuberculosis, and provide instead that a new or existing employee may be subject to

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additional health examinations, including screening for tuberculosis, as required by rules adopted by the Department of Public Health or by order of a local public health official.

As was the case prior to these amendments, new employees must provide their evidence of physical fitness to perform duties assigned and freedom from communicable disease "not more than 90 days preceding time of presentation to the board." The cost of obtaining an examination remains with the new employee.

Going forward, school districts will need to ensure that their hiring practices and related paperwork, as well as their bid specifications, RFPs, and vendor agreements, are adjusted to meet the requirements of the School Code. Should you have any questions, please contact one of our attorneys at our Flossmoor Office at 708-799-6766.

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# IMMEDIATE ATTENTION REQUIRED: NEW RECALL RIGHTS EFFECTIVE FOR 2013-14 RIFS

Effective July 1, 2014, limited recall rights have been extended by P.A. 98-0648 to certain teachers receiving a "needs improvement" performance rating. Prior to this Act, Senate Bill 7 had deprived all teachers in Grouping 2 of the sequence of honorable dismissal list of any recall rights in the event of a reduction in force ("RIF"). Teachers in Grouping 2 are those receiving a "needs improvement" or "unsatisfactory" rating on either of the teacher's last two performance evaluations.

Those teachers in Grouping 2 who are RIF'd and who received one "needs improvement" rating on either of the teacher's last 2 performance evaluations and a "satisfactory", "proficient", or "excellent" on the other performance evaluation, if two ratings are available, must be offered any position for which the teacher is qualified which becomes vacant

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within the period commencing with the beginning of the following school term through February 1 of the following school term (unless a date later than February 1 but not later than six months from the beginning of the school term is established by a collective bargaining agreement).

**This expressly applies to eligible teachers in Grouping 2 who were RIF'd during the 2013-14 school year. Thus, any teacher who was in Grouping 2 as a result of one "needs improvement" rating and a second "satisfactory", "proficient" or "excellent", and who was RIF'd in the Spring of 2014, is entitled to recall to any position for which s/he is qualified which becomes vacant between the start of the 2014-15 school term through February 1, 2015. This requires your immediate attention. Note that those Grouping 2 teachers who have been RIF'd but who did not receive any better than a "needs improvement" rating on both of their last two performance evaluations are still not eligible for any recall rights.**

Additional revisions made by P.A. 98-0648 will be discussed in a future Priority Briefing.

Should you have any questions, please contact one

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of our attorneys at our Flossmoor Office at 708-799-6766.

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# SEARCHING SMART PHONES: DIGITAL CONTENT SUBJECT TO 4TH AMENDMENT PROTECTION

The United States Supreme Court has recently issued opinions restricting law enforcement searches of the digital content of smart phones. Those decisions should have implications for school officials' searches of student phones, as well.

The Fourth Amendment to the United States Constitution protects our right to be secure in our "persons, houses, papers and effects against unreasonable searches and seizures…" and requires that law enforcement obtain a search warrant "particularly describing the place to be searched…"

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More than 200 years ago, the Framers had no concept of modern communication devices which are so much a part of our lives. On June 25, 2014, the United States Supreme Court issued decisions in two cases, *Riley v. California* and *United States v. Brima Wurie*, addressing how the Fourth Amendment applies in the age of digital technology. While *Riley* and *Brima Wurie* were criminal cases, they raise considerations for educators whose responsibilities include the detection of disciplinary offenses that sometimes also constitute violations of the law and involve local police departments.

In an 8-1 decision, the Supreme Court ruled that police officers, who lawfully seized the cellphones of criminal defendants upon their arrest, violated the Fourth Amendment when they conducted a search of the phones' digital contents without first obtaining a warrant. The Court determined that police officers may seize a cell phone and search its hardware for weapons and evidence of a crime to protect the safety of police officers and to prevent the distribution of evidence. However, recognizing that modern cell phones are "mini computers" containing photographs, phone logs and Internet search capabilities and records, and that they are akin to "logs" and

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"diaries," the Court concluded that the Fourth Amendment prohibits law enforcement from reviewing the digital contents of a cellphone phone without first obtaining a warrant.

Of course, these Supreme Court decisions curtailed the power of *law enforcement* to conduct warrantless search of cell phones – not school administrators. Nonetheless, the decisions merit consideration by school officials.

The Court previously ruled in the 1985 case of *New Jersey v. T.L.O.* that even though students have a reasonable expectation of privacy in their persons and personal belongings, *school officials, unlike police officers, do not have to have probable cause, but only a reasonable suspicion, that student is in possession of fruits and/or instrumentalities of criminal activity, and/or contraband, to conduct a warrantless search of a student*. Moreover, searches by school officials are subject to a two-part "reasonableness" test. Provided that school officials are, first, able to point to factual circumstances which justified their decision to seize a student's phone and, second, limit the scope of their search of its content to the circumstances which justified the seizure in the first place, the Supreme Court's ruling should have no impact on their

authority to conduct warrantless searches of student's phones. But, as with any item of personnel effects, justification for the initial search alone does not necessarily justify a highly intrusive examination of the item's contents.

Moreover, the application of the decisions to schools becomes more complicated by the regular involvement of local law enforcement with school district disciplinary processes. Many police departments have resource officers (RSO) who are assigned to schools. Other times, police officers may be called in by school officials to conduct a search with or without the assistance of school officials. Or, school officials may confiscate a telephone and turn it over to the local police. Even though the Illinois Supreme Court has decided that RSOs are held to the same reasonableness standard as school officials, and the Illinois School Code states that students do not have a reasonable expectation of privacy in their lockers and their personal belongings in a locker, school officials should exercise caution before seizing a cell phone and searching its contents in conjunction with the local police because, depending on the extent of and circumstances surrounding the police involvement, police officials may be held

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to the more stringent probable cause standard instead of the reasonable suspicion standard that applies to school officials acting without law enforcement involvement.

This is an evolving area of the law. Therefore, school administrators should consult with legal counsel when considering a search of cell phone contents. If you have any questions, please contact one of our attorneys at our Flossmoor Office at 708-799-6766.

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# NEW ANTI-BULLYING LEGISLATION REQUIRES SCHOOLS TO EXPAND EXISTING POLICY AND PROCEDURES

Governor Quinn has signed into law Public Act 98-0669, which amends Section 5/27-23.7 of the Illinois School Code by requiring schools to expand their existing anti-bullying

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policies based on collaboration with a range of school stakeholders, including students and parents/guardians. The new law covers public elementary and secondary school districts, as well as charter schools and non-public, non-sectarian elementary and secondary schools. Under the Act, bullying prevention policies must include the definition of "bullying" under 105 ILCS 5/27-23.7(b), and state that:

- bullying is contrary to school district policy and State law;
- retaliation against a person who reports bullying is prohibited; and
- retaliation and false accusations of bullying will result in consequences and remedial actions as specified by the policy.

Bullying prevention policies must now list available interventions to address bullying including, but not limited to, school social work services, restorative measures (i.e., "a continuum of school-based alternatives to exclusionary discipline, such as suspensions and expulsions"), social-emotional skill building, counseling, school psychological services, and community-based counseling. Additional policy

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requirements include:

- procedures for promptly reporting bullying to appropriate school officials (including contact information for the staff person(s) responsible for receiving such reports);
- procedures for anonymous reporting;
- procedures for investigating and addressing allegations within 10 school days of the reported incident whenever possible;
- involving appropriate school personnel based on their bullying prevention training;
- procedures for notifying the principal/designee and parents/guardians of all students involved in the alleged incident, consistent with federal and State law confidentiality requirements; and
- information about available interventions.

Bullying prevention policies must be distributed annually, published on the school website, in the student handbook, and by other specified means, and reviewed/re-evaluated every two years. Data examined as part of the biennial review must include the frequency and types of bullying, school locations where bullying is most prevalent, stakeholder feedback

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about school safety, bystander factors such as intervention and participation in bullying, and other relevant data already collected. Finally, findings from the policy review/re-evaluation must be communicated to all stakeholders via the school's website or other means if a website is not maintained.

Public Act 98-0669 is now in effect and school boards should revise and publish their bullying prevention policies and procedures as contemplated by the Act. Should you have any questions, please contact one of our attorneys at our Flossmoor Office at 708-799-6766.

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# CEREMONIAL PRAYER PERMISSIBLE AT LOCAL BOARD MEETINGS

Last month, in the case of *Town of Greece v. Galloway*, the United States Supreme Court extended its precedent permitting a ceremonial prayer at the beginning of a legislative

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session to a local government town council meeting. Although that case concerned a municipal governing board and the justices provided varying opinions to support their action in a 5-4 decision, the logic of all the opinions suggests that no different result would likely apply to school board meetings.

The Town of Greece, New York, since 1999 opened its monthly board meeting with a prayer given by volunteer clergy selected from the congregations listed in a local directory. While the program was open to all denominations, all participating clergy for eight years were Christian. Town officials did not review the prayer in advance and provided no guidance as to tone or content.

In 1983, in the case of *Marsh v. Chambers*, the Supreme Court held that, based on the long-standing tradition and practice first established by the same first Congress which wrote the First Amendment's prohibition against government establishment of religion, a ceremonial prayer at the beginning of a state legislative session does not offend that provision of the Constitution. While some lower courts have attempted to limit the *Marsh* precedent to the federal and state legislatures, all nine of the justices in *Galloway* apparently viewed *Marsh* as

applicable to some degree to the town council in this case.

What divided the Court here was whether the Town of Greece's practice conformed closely enough to a permissible ceremonial invocation. The dissenters, like the Court of Appeals, believed that the town officials' longtime practice of selecting only Christian clergy violated the Constitution. Further, they pointed to the greater community involvement inherent in local government meetings and, based on that, found fault in highly sectarian prayers addressed not just to the council members but to the community members in attendance.

But the majority held that permissible invocations need not be nonsectarian or inoffensive to all possible listeners. "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." Still, the Court articulated the following standard:

> "The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in

> tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court."

In sum, where a school board wishes to add solemnity to its meetings through a religious invocation, it would best be advised to rotate in a nondiscriminatory fashion those invited to present it and to request that their prayer address the board members in the manner suggested by the Court.

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# STATE'S ATTORNEYS SUBJECT TO FOIA

Reversing the decision of the Appellate Court last year, the Illinois Supreme Court has ruled that the office of the State's Attorney in each county is indeed subject to the Freedom of Information Act ("FOIA").

FOIA, which requires the disclosure of most state and local governmental records upon request from any member of the public, has certain limited exceptions. It is a statute with which officials in school districts and other local governments have had to become very familiar, especially since the sweeping amendments in 2010. Since its enactment, FOIA has broadly defined "public body" to include "all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of the State, any subsidiary bodies of any of the foregoing …." However, this definition does not include the judicial branch.

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The State's Attorney in Kendall County, which had been served with document requests, had been able to convince the local circuit court and the Illinois Appellate Court, Second District, that office of the State's Attorney belongs to the judicial branch and is, therefore, not a public body subject to FOIA. This view was emphatically rejected by the Illinois Supreme Court on May 22, 2014, in its opinion in *Nelson v. Kendall County*. In that opinion, the Court reviewed both the language and the policy of FOIA, as well as previous court rulings, to conclude that for purposes of FOIA the office of State's Attorney is part of the executive branch.

School districts may find this decision helpful in obtaining copies of correspondence, legal opinions, and notices affecting them which have been prepared, issued, or retained by their local State's Attorney. For instance, where a state's attorney's office has documents relating to such school district-related matters as property tax objections, board member qualifications disputes, or criminal proceedings against employees, requests for copies may no longer be rebuffed out-of-hand.

Should you have any questions, please contact one of

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