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OFF-CAMPUS INTERNET STUDENT SPEECH ENTITLED TO CONSTITUITIONAL PROTECTION

The U.S. Supreme Court ruled today that a cheerleader's expletive-filled social media posting about her school is protected under the First Amendment. Schools generally have limited authority to regulate their students' on-campus speech only when that speech "materially and substantially" interferes with school activities. *Tinker v. Des Moines*, 393 US 503 (1969).

Appellate Courts have been grappling for decades on how to apply the *Tinker* standard to off-campus speech, especially in the broader school environment of online learning and social media. Today's ruling further clarifies the application of *Tinker* to off-campus speech and the impacts of social media use by students.

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Brandi Levy was a cheerleader who posted a photo on Snapchat of her and a friend raising their middle fingers and captioned the photo with the uncensored message "f**k school f**k softball f**k cheer f**k everything," after she didn't make the varsity cheerleading squad. After discovering the post, her school suspended her from the cheerleading squad. Her parents appealed to the school district to reconsider the discipline and, when unsuccessful, filed a federal lawsuit arguing the discipline violated her off-campus free speech rights. A federal district court in Pennsylvania sided with Levy. On appeal, the 3rd U.S. Circuit Court of Appeals agreed with the lower court and found that the First Amendment precluded schools from regulating speech "that is outside school-owned, -operated, – or supervised channels."

While the U.S. Supreme Court did not agree with the 3rd Circuit's bright-line off-campus rule, the Court did agree that the school violated Levy's First Amendment rights. Justice Breyer, writing for the majority, wrote that some speech that takes place off campus can be regulated, such as bullying,

harassment or threats aimed at teachers or other students. "[W]e do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus," he wrote. "The school's regulatory interests remain significant in some off-campus circumstances." However, Levy's Snapchat posting was found to not have caused a substantial disruption in school activities. The Court also found that Levy's First Amendment interest in making the statements outweighed the school's interests in attempting to regulate it based upon its content and the fact that it was made off-campus.

Although the Court did determine that the off-campus speech could be regulated by schools in some circumstances, it specifically noted that there was a distinct difference in a schools' interest in regulating on-campus speech as opposed to off-campus speech and that the "leeway the First Amendment grants to schools in light of their special characteristics is diminished" when off-campus speech is involved. The Court specifically declined to adopt a bright-line rule as to when the First Amendment would permit a school to regulate off-campus

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speech and instead left it to “future cases to decide where, when and how” the special features of off-campus speech will still permit regulation by the schools.

Given the absence of a bright-line rule, schools should remain careful when addressing potential actions against students based upon off-campus speech even when published on social media accounts. As a practical matter, the punishment of off-campus social media postings will at a minimum require significant evidence of substantial disruption within the learning environment as opposed to mere discomfort with the expression of an unpopular viewpoint.

If you have any questions about this ruling’s impact or any questions arise regarding off-campus student speech, please do not hesitate to contact one of our attorneys to provide guidance and assistance.

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Published June 23, 2021

OCR ISSUES NOTICE OF INTERPRETATION OF TITLE IX TO PROHIBIT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

The U.S. Department of Education Office for Civil Rights (OCR) has issued a Notice of Interpretation that it will investigate allegations that an individual has been discriminated against in educational programs or activities, including allegations of harassment, disciplinary discrimination, exclusion, or lack of equal access to the

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school's activities or programs, sex-stereotyping and being treated differently because of sexual orientation or gender identity.

The Notice of Interpretation is available at:

Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 (PDF)

OCR concluded that Title IX (which prohibits an individual from being excluded from participation in, denied the benefits of, or subjected to discrimination in any educational program or activity receiving federal funds, *on the basis of sex*), protects students and employees who identify as male, female, nonbinary, transgender or cisgender, intersex, lesbian, gay, bisexual, queer, heterosexual, or in other ways. OCR described its conclusions to be based on:

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- Similarities in the language of Title IX and Title VII where the United States Supreme Court has interpreted sex discrimination in employment to include discrimination on the basis of sexual orientation and gender identity;
- Case law finding that differential treatment of students based on gender identity or sexual orientation causes emotional and physical harm to those students; and
- Consistent interpretation by the U.S. Department of Justice (DOJ).

The Notice of Interpretation is consistent with the joint OCR and DOJ Dear Colleague Letter issued on May 13, 2016 that was withdrawn by the Trump Administration on February 22, 2017. If you have any questions concerning the Notice of Interpretation or the District's obligations under Title IX, please contact one of our attorneys.

If you have any questions about this important legislation, please do not hesitate to contact one of our attorneys.

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Published June 17, 2021

PROPERTY TAX REFUND REVENUE RECOVERY IN MOST CASES APPROVED BY GENERAL ASSEMBLY

With the passage of Senate Bill 508 in the closing minutes of its spring 2021 session, the General Assembly has set the stage for all school districts and other local taxing districts in counties subject to the Property Tax Extension Limitation Law (PTELL) to benefit from supplemental tax levies. These supplemental levies would make up for those revenues lost due to property refunds paid out to taxpayers who have obtained

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refunds at the districts' expense based on most retroactive property assessment reductions. This would include refunds due to rulings by the Illinois Property Tax Appeal Board (PTAB), the courts in specific objections cases, and certificates of error. The bill will now go to the Governor for his consideration.

With the passage of Senate Bill 508 in the closing minutes of its spring 2021 session, the General Assembly has set the stage for all school districts and other local taxing districts in counties subject to the Property Tax Extension Limitation Law (PTELL) to benefit from supplemental tax levies. These supplemental levies would make up for those revenues lost due to property refunds paid out to taxpayers who have obtained refunds at the districts' expense based on most retroactive property assessment reductions. This would include refunds due to rulings by the Illinois Property Tax Appeal Board (PTAB), the courts in specific objections cases, and certificates of error. The bill will now go to the Governor for his consideration.

Certain limitations should be kept in mind,

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however. First, the provision of a new refund-recovery levy would not be available for districts in non-PTELL counties. Further, there would be no recovery for losses from refunds due to certain other reasons, such as tax rate objections or the granting of new property tax exemptions. Moreover, any revenue recovery would take time since refunds issued in one year would not be offset by new levy revenue until the next year.

Most important, making districts financially whole for taxpayer refunds comes at a significant long-term cost. It means that tax rates will go up and that the property tax burden in the community will be shifted to other taxpayers. Since most PTAB appeals and specific objection complaints are initiated by the largest commercial and industrial taxpayers, the bringing of more successful, or even uncontested, property tax assessment cases will inevitably result in higher and higher tax bills for homeowners and small businesses. This result may only exacerbate the problem already facing many suburban and small city communities, where higher property taxes discourage new development and hold down property values, thus increasing tax rates even more and further discouraging development. It is a

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cycle of fiscal disadvantage which the State has promised to ameliorate, but to date without much effect. These factors should be weighed when future involvement in opposing assessment appeals is considered.

We will keep you informed of when the Governor acts on this bill or when county officials offer input on the implementation of this legislation.

If you have any questions about this important legislation, please do not hesitate to contact one of our attorneys.

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FUND TRANSFERS AND DELAYED LAST CHANCE: STATUTORY AUTHORITY AGAIN DUE TO EXPIRE AT END OF FISCAL YEAR

In April 2020, we cautioned that an important tool for school districts in fund management was due to expire. But at the last minute, the General Assembly granted a reprieve, extending certain fund transfer authority for one more year. However, it is now April again, and no bill to date in the 2021 session has included any further extension of this authority. So once again, districts would be wise to employ that tool before the end of the fiscal year in order to maintain flexibility in the use of scarce resources and, even more important, to avoid costly tax objection refunds in the future.

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Section 17-2A of the School Code has long provided a useful mechanism for moving money between any of a school district's three principal operating funds: Educational, Operations & Maintenance, and Transportation. Since 2017, transfers from the Tort Immunity Fund to the Operations & Maintenance Fund have also been permitted. The procedural requirements of notice and a public hearing remain. But the statute has also contained an ill-defined usage limitation: a transfer may be ***"made solely for the purpose of meeting one-time, non-recurring expenses."*** The statute does not define "one-time, non-recurring expenses," nor are there court cases or administrative rules clarifying the meaning of this use limitation.

However, since 2003, the meaning of the use limitation has been irrelevant because Section 17-2A has also included a sunset provision temporarily waiving application of the use limitation to a specific date. And, as the sunset date has approached on each occasion since 2003, the General Assembly has acted to push the date further out. But as of today, there is no pending legislation under consideration to extend the sunset provision of the use limitation in Section 17-2A beyond June 30, 2021.

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The need for this transfer authority has somewhat lessened with the removal a few years ago of the specific rate limitation for the Educational Fund for those districts subject to the Property Tax Extension Limitation Law (PTELL or the "tax cap"). Still, that action does not address districts in non-PTELL counties or existing balances in any district throughout the State. It remains highly advantageous for school districts to be able to move money between the operating funds without the usage limitation.

So right now, every district should be closely examining the projected year-end balances in their Educational, Operation & Maintenance, Transportation, and Tort Immunity Funds. If there will be insufficient money in one of those funds in the coming year, a transfer now, rather than after June 30, should be made. Further, if there is much more than enough money in one of those funds, it is critical to move the excess out now. An allegation of excessive balances in school district funds is one of the most common types of taxpayer rate objections and can lead to severe revenue losses due to tax refunds.

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Going forward, unless there is yet another change in the law, Section 17-2A transfers should still be available after June 30, but only for more limited purposes, and arguably not for routine fund balance management. Because of this, more extensive use of the Educational Fund in PTELL counties is strongly advised.

School district administrators should also be aware of another fund transfer mechanism which has a sunset provision due to expire this June 30. Section 17-2.11(j) permits the transfer of unused life safety revenues to the Operations and Maintenance Fund, subject to a public notice and hearing like the one in Section 17-2A. This transfer can be accomplished without an offsetting tax abatement if it is to be used for building repair work, but only until June 30, 2021. In the past, that deadline has been extended in tandem with the one discussed above, but also like that one, might not be pushed back this time. ***We recommend, therefore, that you act soon to move any excess Life Safety Fund money to Operations and Maintenance before the end of the fiscal year.***

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If you have any questions or would like assistance in accomplishing timely fund transfers, please do not hesitate to contact one of our attorneys.

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REMINDER ABOUT BOARD ORGANIZATIONAL MEETINGS

Pursuant to law, every school board must hold its organizational meeting no later than 28 days after the consolidated election. Further, new board members cannot be seated until after the

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official canvass of the results by the county election authority. The deadline for the canvass is not until 21 days after the election.

Therefore, the effective window period to hold all school board organizational meetings this year begins no earlier than Tuesday, April 27, and ends no later than Tuesday, May 4, 2021.

If your Board does not have a regular meeting scheduled during that week-long period, a special meeting must be called.

The only tasks which must be performed at the organizational meeting are these:

1. Swear in and seat newly elected board members. The oath for board members, as prescribed in School Code Section 10-16.5, is attached.
2. Elect board officers, including president, vice president

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and secretary.
3. Set the board's regular meeting schedule.

Other business may be, but need not be, conducted at the organizational meeting.

If you have any questions about organizational meetings or the transition to new board terms, please contact one of our attorneys at 708/799-6766 (Flossmoor) or 630/928-1200 (Oak Brook).

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ISBE ISSUES NEW GUIDANCE ON QUALIFIED INTERPRETERS AND EXTENDED SCHOOL YEAR AND AMENDS SPECIAL EDUCATION REGULATIONS

The Illinois State Board of Education ("ISBE") recently issued a new Notification of Conference form and Guidance regarding qualified interpreters at IEP meetings, issued non-regulatory guidance on Extended School Year Services, and amended its special education regulations to conform to recent legislation.

New Notice of Conference Available and Qualified Interpreter Guidance Issued

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ISBE has issued a revised Parent/Guardian Notification of Conference that includes (1) the required notice that a parent has the right to request an interpreter at an IEP meeting and that the interpreter have no other role at the meeting and (2) the required contact information for questions or complaints about interpretation services. This new form is available at https://www.isbe.net/Documents/nc_conf_34-57d.pdf

A March, 2021 Guidance Document regarding Qualified Interpreters is also available. The Guidance sets forth the training and examination requirements for qualified interpreters and notice requirements to parents. See our Priority Briefing at https://petrarcagleason.com/priority-briefings/new-special-education-regulations-require-qualified-interpreters-at-iep-meetings/

ISBE will select a training entity and make training and examinations available in the future. In the meantime, school districts should ensure that interpreters understand special education terminology and processes.

To assist school districts to provide competent interpreters,

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Hauser, Izzo, Petrarca, Gleason & Stillman, LLC offers a six hour training in special education terminology and protocol.

Extended School Year Frequently Asked Questions Guidance

Non-regulatory guidance on Extended School Year ("ESY") was issued in March, 2021 by ISBE. Highlights of the Frequently Asked Questions Guidance include:

- ESY cannot consist of related services only. Related services may be provided if needed for the student to benefit from special education services received during ESY.

- An IEP team should collect data related to student progress (whether the student made progress on IEP goals, the extent to which goals were met, whether the student's rate of progress declined during breaks in instruction,

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whether the student's rate of progress was commensurate with his or her ability, and whether the student is beginning to master an important skill such that an interruption in instruction will lead to loss of mastery) and the student's regression and recoupment.

- If a student qualifies for ESY, the student's IEP must include the type and amount of services to be provided and the goals to be implemented during ESY.

- The team must consider the least restrictive environment when determining ESY services. A student receiving ESY in a nonpublic special education facility must receive at least 120 hours of instruction during ESY.

- A student may receive regular summer school as ESY, if so determined by the IEP team, at no cost to the parent. If a student does not qualify for ESY, the student with a disability may enroll in regular summer school if the

student satisfies the school's summer school requirements and pays any required summer school fees.

Amendments to Special Education Regulations

Effective March 2, 2021, ISBE has amended its special education regulations to conform to changes to the School Code. Most significantly, the regulations are amended to include the requirement that the school provide a child's parent with copies of all written materials to be discussed at an eligibility meeting or IEP meeting no later than three school days prior to the meeting using the method of delivery requested by the parent. For eligibility meetings, the school must provide the parent with all evaluations and collected data to be discussed at the meeting. For IEP meetings, the school must provide the parent all draft IEP components, *except services minutes and placement,* to be discussed at the meeting. Parents must also be informed of their right to review and copy their child's student records prior to any eligibility or IEP meeting.

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The regulations require that related service logs for speech-language, occupational therapy, physical therapy, social work, counseling, psychology, and school nursing services that record the type of service and minutes delivered, be made available to the child's parent at any time upon request. The District must inform the parent, within twenty school days from the beginning of the school year, or upon establishment of an IEP, of the parent's ability to request these logs.

Amendments were also made to the regulations concerning procedures for a school district to petition to withdraw from a special education cooperative.

If you have any questions concerning any of these new ISBE special education documents, please contact one of our attorneys.

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IDPH AND ISBE ISSUE NEW PUBLIC HEALTH GUIDANCE SUPPORTING A RETURN TO IN-PERSON INSTRUCTION

On March 9, 2021, the Illinois Department of Public Health ("IDPH") and the Illinois State Board of Education ("ISBE") issued Revised Public Health Guidance for Schools. Through this guidance, IDPH and ISBE recommend and support a return to in-person instruction throughout Illinois as soon as practicable. To make this goal possible, the guidance lists certain practices which schools must follow to help prevent the spread of COVID-19 as schools open and return to in-person instruction. Specifically, schools must:

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1. Require universal and correct use of appropriate personal protective equipment, including face masks;
2. Require social distancing be observed;
3. Require contact tracing, isolation of individuals with suspected or confirmed COVID-19, and quarantine of close contacts;
4. Require an increase in schoolwide cleaning and disinfection; and
5. Require promotion and adherence to handwashing and respiratory etiquette.

The guidance also contains new information and recommendations for how schools can comply with the above-practices and return to in-person instruction in a safe manner. Some of the key information found in the guidance includes:

- All people on school grounds and school buses are required to wear face masks. The guidance lists a limited number of exceptions to this rule including, for example, when students are eating, or when an individual has a

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documented medical condition which prevents him from wearing a mask.

- For in-person learning, social distancing is now defined as 3-6 feet for students and fully vaccinated staff. Although 6 feet is safest, schools can operate with a 3-feet social distancing to provide in-person learning.
    - Any time face masks are removed (*e.g.*, during lunch), schools must strictly adhere to 6-feet social distancing.
    - Unvaccinated staff should still maintain 6-feet distance as much as possible.
- Close contacts (exposure to a confirmed case within 6 feet of the confirmed case for a cumulative period of 15 minutes over 24 hours) are still required to quarantine. However, a person who is fully vaccinated is not considered a close contact and is therefore not required to quarantine.
- To minimize exposure to other individuals, schools should utilize cohorts in which students – and sometimes teachers or staff – stay together throughout the school day. Young children should stay in cohorts all day, and schools should utilize cohorts as much as possible for older

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children.

- Schools should continue to perform contact tracing in collaboration with local health departments.
- Schools should require self-certification by all staff, students, and visitors prior to entering school buildings.
    - IDPH and the CDC no longer recommend, however, that schools perform symptom screenings (*e.g.*, temperature checks) for all individuals. However, schools may continue to perform screenings themselves if they choose to do so.
- Schools should develop and implement sanitation procedures in accordance with CDC, IDPH, and local health department recommendations.
- During meals, students should sit at assigned seats and with the same group each day. If possible, all students should face the same direction during meals.
- Meals should be individually plated, and all food and drink items should be served to students rather than having students help themselves.
- Physical education activities must allow for 6 feet of distance between students as much as possible. Face masks

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are required to be worn at all times.
- Schools must educate students and staff on healthy hand and respiratory hygiene practices.

Finally, while the guidance strongly encourages all Illinois schools to return to in-person instruction, it clarifies that students who are at increased risk of severe illness as a result of COVID-19, or who live with people at an increased risk, must still be given the option of remote instruction.

If you have any questions, please contact one of our attorneys.

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NEW SPECIAL EDUCATION REGULATIONS REQUIRE QUALIFIED INTERPRETERS AT IEP MEETINGS

Effective January 22, 2021, the Illinois State Board of Education (ISBE) has adopted new regulations that require districts to provide "Qualified Interpreters" at IEP meetings to allow parents, whose native language is other than English, to meaningfully participate in the meeting. The regulations also require districts to give parents notice of the availability of interpretation services. ISBE sets forth credentials for a "Qualified Interpreter."

The new regulations require that districts:

- Pay for qualified interpreters to attend IEP meetings. If the district does not employ a qualified interpreter, the

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district may use outside vendors, including telephonic interpreters.

- Provide in an annual notice to all parents of children with disabilities, and in each Notice of IEP Conference, information about the availability of interpretation services at IEP meetings, an explanation of how parents can request an interpreter, notice that the parent may request that the interpreter serve no other role at the IEP meeting and that the district should make reasonable efforts to fulfill this request, and a person to contact with any questions or complaints about interpretation services.

- Document whether a parent requested an interpreter, previously requested interpretation, or had otherwise indicated that an interpreter was necessary to meaningfully participate in the IEP meeting, the language for interpretation, whether a qualified interpreter was provided for each IEP meeting, whether the parent

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requested that the interpreter serve no other role in the IEP meeting and whether the district granted that request.

The regulations provide numerous requirements for "Qualified Interpreters." The individual must:

- Satisfy all employment requirements of the district.

- Demonstrate proficiency in English and the target language by passing State-approved language proficiency tests in the domains of listening, speaking, and reading. (The regulations provide exemptions to taking these tests if the individual possesses certain degrees or licenses, a State Seal of Biliteracy, certain certifications or received a score of 4 or higher on an Advanced Placement language test in the target language).

- Complete at least six hours of training on special

education terminology and protocols. (The regulations provide an exemption for individuals who hold special education licenses, endorsements, or approvals).

- Complete at least nine hours of training on (1) interpreting in and out of English; (2) interpretation standards of practice, ethics, and confidentiality; (3) the role of the interpreter and role boundaries; and (4) respect, impartiality, professionalism, cultural competence and responsiveness and advocacy for communication and cultural needs. This training must include videos demonstrating proper and improper interpretation techniques.

- After completing the nine hours of training, achieve a score of at least 80% on a written examination to demonstrate knowledge of special education terminology and protocol, interpretation standards and techniques, and interpretation ethics.

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- After completing the nine hours of training, achieve a score of at least 70% on an oral examination on interpreting in and out of English, through consecutive or simultaneous interpreting, and sight translation.

To maintain the designation of "Qualified Interpreter," the individual must participate in at least six hours of ongoing professional development at least once every two years in the areas of confidentiality, accuracy, impartiality, interpreter ethics and professionalism, cultural awareness, special education processes, special education vocabulary, and language acquisition.

The new regulations respond to the concerns of parents who brought suit against Chicago Public Schools in *H.P. v. Board of Education of the City of Chicago,* who alleged that CPS failed to provide competent interpretation services. The parents argued that their children were denied a Free Appropriate Public Education because, without effective interpretation services, the parents could not meaningfully participate in their

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children's IEP meetings or in decisions critical to their special education.

Collective bargaining issues such as the provision and payment for training to become and maintain status as a Qualified Interpreter may arise, depending upon how the district provides these services.

If you have questions regarding the new special education regulations, please contact one of our attorneys in Flossmoor (708.799.6766) or Oak Brook (630.928.1200).

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"Legal Update" Webinar – Will County ASBO

John M. Izzo will present a virtual "Legal Update" to the Will County Association of School Business Officials on February 3, 2021 at 12:00 p.m. www.my.iasbo.org

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"Challenges to Property Tax Assessments"

John M. Izzo will co-present "Challenges to Property Tax Assessments" on February 18, 2021 at 10:00 a.m. for the Illinois Association of School Boards. www.iasb.com

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