

THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

New Federal Rules Require Retention of E-mail and Electronic Information-

Recent [revisions](#) to the Federal Rules of Civil Procedure, currently in effect, impose significant new obligations on school districts to retain e-mail, instant messages, and other “electronically stored information.”

School districts which are parties to federal litigation are now required to produce electronically stored information when responding to requests for information in litigation. Parties are required to put a “litigation hold” on electronically stored information for this purpose, just as they are required to preserve paper files and physical evidence that might be relevant to the litigation.

Perhaps most importantly, however, commentary to the new Rules states that the obligation to retain electronic information arises as soon as litigation can be “reasonably anticipated,” even if litigation

has not yet been filed. This will require school districts, together with their attorneys, to be proactive in formulating and implementing protocols to govern the retention of e-mail and other electronic information. A proactive approach will also help school districts avoid sanctions in certain circumstances, as the Rules excuse the loss of information “as a result of the routine, good-faith operation of an electronic information system.”

These new Rules also implicate a number of other issues, ranging from the preservation and destruction of records under the [Local Records Act](#) to the production of public records under the [Freedom of Information Act](#) to existing practices that might be set forth in your district’s records retention policy.

For additional information, please contact Rob Swain or Stephanie Jones.

Seventh Circuit Limits Teachers’ Free Speech Rights in the Classroom--

The Seventh Circuit Court of Appeals which governs Illinois has held that the First Amendment *does not* entitle primary and secondary teachers, to cover topics or advocate viewpoints in the classroom, that depart from the curriculum adopted by the school system.

In [Mayer v. Monroe County Community School Corp.](#), 2007 WL 162833 (C.A.7, Jan. 24, 2007), an Indiana school district did not rehire Deborah Mayer, a first year elementary teacher. Mayer claimed that this was due to her statements in class regarding opposition to the war in Iraq. In response to a student question, Mayer answered that she had participated in a political demonstration against the Iraq war. Parents complained, but the district did not discipline Mayer; however, the District did not rehire her at the end of the school year.

Mayer argued that her non-renewal was motivated by her political speech which was, in her view, protected by the First Amendment as “academic freedom.”

The court, however, ruled the teacher’s case was covered by the recent U.S. Supreme Court decision in [Garcetti v. Ceballos](#), (See [July, 2006, Extra Mile](#)). *Garcetti* held that the First Amendment *does not* protect the statements of public employees made as part of their official duties.

The court found that academic freedom at this level is

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Consumer Price Index

Percent change for the month of **December, 2006**, for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	-0.1	0.1
12 Mth	0.7	0.4
St. Louis-6 Mth	0.8	0.9
12 Mth	1.5	1.7
U.S. Mthly	0.1	0.2
12 Mth	2.5	2.4

January CPI figures will be released February 18, 2007. Visit the most recent CPI at our website, www.hlerk.com

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Reminders/Notes

- Remember your statutory and CBA deadlines for reductions-in-force or dismissal of certificated and educational support personnel. *Contact Athena Christofalos with your evaluation, dismissal or RIF issues.*
- Make your reservation today for the HLERK/PDN programs on special education law: **February 16 in Springfield and March 1 in Chicago.** Contact the PDN at 715.836.9900 or register on the web at www.meds-pdn.com.
- Review the necessity for administrative reclassifications or non-renewal of employment contracts and take any necessary action prior to April 1.

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U.S. Supreme Court Will Decide “Bong Hits” Student Speech Case – The U.S. Supreme Court has agreed to hear an appeal of the case [Frederick v. Morse](#), 439 F.3d 1114 (9th Cir. 2006). The case revolves around an incident at an Alaskan high school where a student held up a banner with the words “Bong Hits 4 Jesus” while standing across the street from the school during the passing of the Olympic torch for the 2002 Winter Olympics.

The principal allowed the students to go outside to view the torch run during school hours. The principal took the banner and the student was suspended by the school for ten

days for the display. The Ninth Circuit Court of Appeals reversed the suspension and upheld the student’s free speech right to display the banner.

The school district argued that students should not be allowed to promote illegal drug use in the educational setting. However, the appeals court found that the student’s speech did not substantially interfere with the operations of the school, and that the school administration had disciplined the student merely to punish and censor speech that did not align with the school’s views on marijuana use. **Please contact Debra Kaplan for more information.**

Free Speech (Cont.) limited because the authorities charged by law with curriculum development may require the obedience of subordinate employees, including classroom teachers, to limit their expression to the approved curriculum.

In addition, the court focused on the fact that student attendance in elementary and secondary education is compulsory

and that students should not be subject to teachers’ idiosyncratic perspectives. Rather, the court found that elected school boards are responsible for what the school curriculum should contain.

The *Mayer* decision provides substantial guidance on the issue of the free speech rights of teachers in their schools. **Please contact Shayne Aldridge or Tina Christofalos with your employee dismissal inquiries.**

School Districts Do Not Have the Burden of Proof in Due Process Hearings– The Federal District Court for the Northern District of Illinois has ruled that school districts do not automatically bear the “burden of proof” in a special education due process hearing.

In *Kerry M. v. Manhattan School District No. 114*, 2006 WL 2862118 (N.D. Ill., September 29, 2006) thirteen-year-old twins Kerry and Kristine M. suffer from Rett Syndrome, resulting in severe physical disabilities and impaired cognitive abilities. The twins’ parents sought placement for the twins in an educational environment permitting significant interaction with non-disabled peers and filed a due process complaint.

The Parents lost a hearing and appealed to federal court, alleging that the hearing officer incorrectly placed the bur-

den of proof on the parents at the due process hearing.

The court found that the school district was only obligated to present evidence at the hearing and that the *Individuals with Disabilities Education Act* (IDEA) framework in Illinois *does not* place the burden of proof with the school district to demonstrate that a student was receiving a free and appropriate public education. Further, the court agreed that the students’ IEPs were reasonably calculated to enable both students to receive educational benefits and that the students could not be satisfactorily educated in a regular classroom.

The court stressed that IDEA only requires mainstreaming to the maximum extent *appropriate* and not the maximum extent *possible*. This decision is currently on appeal to the Seventh Circuit. **For more information, please contact Michelle Todd.**

Illinois Supreme Court Holds that Employer Was Not Liable for Out-of-Work Release of Confidential Information-- In a decision with significant implications for school districts, the Illinois Supreme Court has reversed an appellate court ruling from last year (See [September, 2006, Extra Mile](#)) in which a hospital was held liable for an employee’s release of confidential patient information in a tavern outside of work time. In *Bagent v. Blessing Care Corp.* a patient sued a hospital for breach of confidentiality and invasion of privacy after a hospital employee revealed the patient’s pregnancy to a friend in a tavern.

The Illinois Supreme Court reversed the appellate court’s

ruling, finding the hospital not liable for the employee’s disclosure. The Supreme Court found that the employee’s disclosure of plaintiff’s medical records was not the kind of conduct she was employed to perform, nor was it motivated by a desire to serve her employer, as such disclosures were expressly forbidden and the *employee had received training from her employer in the confidential treatment of medical records.*

This case provides some relief to school districts but emphasizes the importance of training staff to safeguard the confidentiality of student and personnel records. **For further information, please contact Steven Richart.**

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