Summer 2007

The California School Board Association's
Education Legal Alliance

Alliance REPORT

IMPORTANT ISSUES

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OTHER ACTIVE CASES

This Alliance Report highlights the newest cases. For information on other cases, please contact us.

We fight better when we stand together

The Education Legal Alliance of the California School Boards Association initiates and supports litigation on behalf of public schools. This consortium of school districts, county offices of education and regional occupational centers/programs voluntarily joins together to impact education issues and case law.

Formed in 1992 to challenge the constitutionality of property tax collection fees imposed on all school districts, the Alliance continues to be successful in pursuing and defending the broad spectrum of statewide public education interests in the courts and before state agencies.

Process for submission of cases to the Alliance: *When a district/county office is involved in an issue of statewide significance, requests for assistance may be submitted to the Alliance. An Attorney Advisory Committee, consisting of experts in the field of education law, reviews the case and makes a recommendation to the Alliance Steering Committee. The Steering Committee, consisting of board members, superintendents and representatives of education groups, makes the final determination as to whether the Alliance should become involved in the case.*

IMPORTANT ISSUES

The following section provides an overview of some of the important issues that the Alliance has been working on, such as a legal issue before a state agency, an issue in the trial court that the Alliance is tracking or an issue in which the Alliance is initiating legal action.

AB 1381 – Mayoral Takeover of LAUSD

Mendoza et al. v. State of California et al. | California Court of Appeal

Issue:

Are the provisions of AB 1381 (Los Angeles Mayoral "takeover" bill), establishing a convoluted governance structure for Los Angeles USD, constitutional?

Background:

AB 1381 restructured LAUSD governance, narrowing the governing board's authority and providing Los Angeles Mayor Antonio Villaraigosa with effective control over LAUSD through a Council of Mayors. The Council of Mayors was to be comprised of the mayors of the cities served by LAUSD and supervisors from the unincorporated area, with representative voting rights based on the number of students in each city or area.

AB 1381 also granted an expanded role to the LAUSD superintendent and required employment decisions made by the board with respect to the superintendent to be ratified by the Council of Mayors.

Finally, AB 1381 established the "The Los Angeles Mayor's Community Partnership for School Excellence," to develop and implement an educational demonstration project for three clusters of the lowest performing schools.

CSBA and the Alliance were Petitioners in this case along with LAUSD. Petitioners were successful in the trial court and blocked implementation of AB 1381 before its effective date of January 1, 2007.

Case Status/Recent Activities:

On April 17, the appellate court affirmed the trial court's ruling that AB 1381 was an unconstitutional attempt by the Legislature to bypass the will of the citizens of Los Angeles and transfer many of the powers of the board to the Mayor and other entities outside of the public school system.

The court held that the citizens of Los Angeles have the constitutional right to decide whether the board is elected or appointed and to amend the charter as they saw fit. "What is not permissible is for the Legislature to ignore that constitutional right and to bypass the will of the citizens of Los Angeles and effectively transfer many of powers of the board to the Mayor, based on its belief, hope or assumption that he could do a better job."

On May 18, the Mayor announced his decision to not appeal the decision to the California Supreme Court. Thus, the court proceedings are now completed and the appellate court's decision is the final ruling on the matter.

Mandated Cost Lawsuit

CSBA/ELA, et al. v. State of California, Commission on State Mandates | California Court of Appeal

Issue:

Is a statute constitutional that prohibits mandate reimbursement to a local agency for the costs of performing duties necessary to implement, reasonably within the scope of, or expressly included, in a ballot measure that was approved by the voters?

Background:

The basis of the lawsuit is the approval of AB 138 (Statutes 2005, Chapter 138) by the Legislature, a statute enacted as part of the state's concentrated strategy to terminate its constitutional obligation to reimburse local governments for costs associated with providing mandated services. For many years, the Commission on State Mandates had determined that three state mandated programs were reimbursable mandates: the School Accountability Report Card, Mandate Reimbursement Process and certain Brown Act requirements. AB 138 changed COSM's determination by requiring the COSM to either vacate or reconsider its prior decisions if the mandate is "necessary to implement" or "reasonably within the scope of" an expressly stated voter-approved mandate. Thus, in accordance with the Legislature's directive, COSM reversed and set aside its prior determinations in the three claim areas that are the basis of this litigation.

The Alliance, joined by Sweetwater Union HSD, the City of Newport Beach, Fresno County and Los Angeles County, filed a lawsuit challenging AB 138 and the actions of the COSM. The lawsuit reflected the Alliance's assertion that the provisions of AB 138

are unconstitutional as the legislation adds new, additional requirements beyond those in the Constitution that local governments must satisfy in order to claim a reimbursable mandate and denies local governments the ability to pursue legitimate claims.

Case Status/Recent Activities:

In March, the Superior Court ruled in favor of the Alliance and held that AB 138 was an unconstitutional attempt by the Legislature to avoid reimbursing districts for mandated costs. While it has always been the case that mandates added by the voters through a ballot measure are not reimbursable, mandates added by the Legislature, under the guise of being "necessary to implement" the ballot measure, must be reimbursed. The court also held that the Legislature's attempt to require the COSM to overturn its prior decisions violated the separation of powers doctrine. Local districts rely on the decisions of the COSM regarding the extent of reimbursements, thus the Legislature's attempt to retroactively deny reimbursement was unconstitutional.

The state and the Department of Finance have appealed and it is expected that the COSM will likewise appeal. The Alliance and the other petitioners are also cross-appealing questioning whether the underlying statute denying reimbursement of voter approved mandates is constitutional.

Mandated Cost Claim Audits by the State Controller's Office

Clovis USD et al. v. Controller | Sacramento Superior Court

Issue:

Has the State Controller's Office imposed unreasonable supportive documentation requirements in audits of mandated cost claims thus thwarting school districts from receiving reimbursement for state-mandated costs?

Background:

Since 2002, the SCO has audited reimbursable state mandate claims filed by local education agencies. A number of problems have arisen with the auditing procedures relied upon by the SCO, which have resulted in a total denial or substantial reduction of many claims. Most typically, the problem is a result of the SCO's demand for supporting data for LEA staff time. A two-part "group" challenge of the new procedures is underway and includes:

- The filing of incorrect reduction claims with the COSM, and
- The filing of a lawsuit against the SCO, led by Clovis USD. The majority of the issues with SCO procedures have been in the following mandate programs: collective bargaining, school district of choice, intra-district attendance, notification of truancy and graduation requirements.

The Alliance is providing financial assistance to help the districts that filed suit which will defray the costs of their lawsuit against the SCO. In addition, the Alliance was a participant in meetings with the State Controller for the purpose of facilitating a settlement of the litigation and establishing guidelines for future audits.

Recent Activities:

For the moment, settlement discussions have been abandoned and the lawsuit is in the discovery stage (e.g., document demands being made, depositions taken). Trial has been set for February, 2008.

Revision of Proposition 39 Charter School Facilities Regulations

State Board of Education

Background:

Since the passage of Proposition 39, there have been four court decisions relating to charter school facilities issues and the State Board of Education has adopted regulations implementing the facilities requirements of Proposition 39. One of the provisions requiring binding arbitration to resolve facilities disputes between charter schools and districts was adopted by the SBE but later rejected as unauthorized. CSBA and the Alliance learned of an effort by charter school interests and California Department of Education staff to develop proposed revisions to the existing regulations to incorporate the court decisions and to revisit the dispute resolution procedure. The Alliance participated in these discussions.

Many of the Alliance's initial concerns and objections were heeded by the CDE and a more acceptable proposal was presented to the SBE. There were, however, still concerns and objections with the dispute resolution process and other proposals that are beyond the regulatory authority of the SBE. The SBE began the formal rule-making process in January and CSBA and the Alliance filed a formal challenge of several of the proposals.

Recent Activities:

The SBE adopted the proposed regulations at its May meeting. Once the Department of Finance determines the fiscal impact of the proposal, if any, and signs off on any fiscal impact, the regulations will be submitted to the Office of Administrative Law for a determination of legal validity. If approved by the OAL, the regulations will then become final.

Of particular concern to CSBA is the proposed limited timeline for districts to review and process charter schools' facilities requests. This proposal will create a hardship for districts with limited staff, especially when processing multiple requests for facilities. Concerns also focus on provisions limiting districts' ability to move "conversion" charters (public schools that are transformed into charters) from one facility to another. These new regulations will especially constrain districts that must close schools and reconfigure facilities to deal with declining enrollment.

Role of the Alliance:

In filing formal comments to the SBE, CSBA and the Alliance have established its legal position in order to protect school districts. If the regulations are approved by the OAL, the Alliance is prepared to file a lawsuit to challenge implementation of the new regulations.

Statewide Benefit Charter Schools

State Board of Education

Over the last year, CSBA has been concerned about the SBE's process for granting statewide benefit charters. AB 1994 (Chapter 1058, Statutes of 2002) added Education Code section 47605.8 providing for the creation of statewide benefit charter schools, which are able to bypass the geographical limitations on charter schools and operate at multiple sites throughout the state. The charter petition comes directly to the SBE and may be granted only when the SBE makes a finding that the charter will provide a statewide benefit and that the services cannot be provided by a charter operating in only one district or county.

It is the opinion of the Alliance that the SBE is acting contrary to law by approving

statewide benefit charters without first considering whether the charters could be accommodated by a local district or county office of education and without finding any unique circumstances that would justify why the charter is of "statewide benefit." It appears that the charters are bypassing the local districts in an attempt to avoid local oversight and moving straight to the SBE, where they are likely to receive a favorable reception.

The Legislature agrees that the SBE is misinterpreting the intent of AB 1994 and, in January, the legislative leadership wrote a letter to the SBE asking them to cease from granting more statewide benefit charters until the Legislature could adopt legislation to clarify the process. The SBE ignored the leadership's request and granted a petition by Aspire Charter School at its March meeting.

In response to the SBE's actions at the March meeting, CSBA, ACSA and CTA sent a letter to the SBE asking them to rescind its actions for its failure to make the appropriate findings required by law.

Recent Activities:

Because it is unlikely that the SBE will reverse its direction on statewide benefit charters, the Alliance is planning on filing litigation against the SBE. It is expected that CTA and ACSA will join. CSBA is also exploring a legislative solution.

UPDATE ON NEW ALLIANCE CASES

Board Censure Resolution

Californians Aware v. Orange Unified School District | California Court of Appeal

Issue:

Does a school district governing board have the right to adopt a censure resolution to collectively express its opinion about the improper conduct of an individual board member?

What this case is about:

During the public comment portion of a meeting of the Orange USD governing board, board member Rocco publicly stated that he does not attend closed sessions, but if he did he would vote to fire an administrator in the district. In response, the board adopted a resolution to "censure" Rocco based on his statement in open session concerning employee discipline, an item which was not on that meeting's agenda for either closed or open session. The resolution stated that Rocco's comments were in violation of the California Constitution (right to privacy).

Adoption of the resolution of censure was placed on the agenda for open session discussion at two subsequent board meetings. At these meetings, McKee, a member of the public, testified against the adoption of the censure resolution. McKee testified that he believed that Rocco's statements were protected by the First Amendment. The board did not prevent McKee from completing his testimony.

On behalf of Rocco and McKee, Californians Aware filed suit against the board and superintendent. The suit alleged that the district violated the Brown Act by prohibiting public criticism and adopting the resolution of censure against Rocco.

Believing that Rocco's lawsuit was an attempt to silence the board's rights to freedom

of speech, the board filed an anti-SLAPP motion to strike the lawsuit. California law provides special protections against "strategic lawsuits against public participation" (SLAPP cases) and an anti-SLAPP motion is a legal procedure to request that the court dismiss a meritless lawsuit filed with the intent to discourage the defendant from exercising the First Amendment right to free speech. According to the board's anti-SLAPP motion, the censure resolution is "speech" and, as a public body, the board has the same First Amendment rights as individuals.

The Orange County Superior Court granted the district's motion and dismissed Rocco's lawsuit against the board. First, the court determined that the conduct was protected speech and found that the board enjoys the right to express its point of view and that censure is the only means available to the board members to express their collective opinion. In addition, the court found that the term "censure" was not controlling because the board did not impose a penalty or constraint upon Rocco. As such, the censure did not violate Rocco's rights. Californians Aware has appealed the trial court's decision.

Why this case is important:

As an organization, CSBA does not recommend that boards censure a fellow board member. While censure should be a matter of last resort, this case appears to be an instance were a board needs to take a stand about what is appropriate and legally acceptable behavior by a member.

Role of the Alliance:

The Alliance will file an amicus brief in support of the board, focusing on the protected right of a governing board to adopt a resolution to collectively express its opinion.

Teacher Termination for Failure to Obtain Required Certification

Ripon USD v. Commission on Professional Competence, Theresa Messick, RPI | San Joaquin County Superior Court

Issue:

May a school district terminate a credentialed teacher who refuses to obtain English Learner certification?

What this case is about:

Theresa Messick is a tenured music teacher at Ripon High School holding a Life Single Subject Credential (Music) and has been employed by Ripon USD for 26 years.

The CDE conducted a Coordinated Compliance Review and found the district out of compliance based on the fact that students with designated EL identification needs were placed in classrooms where the teacher lacked EL certification. In response to the findings, the district developed an "EL Master Plan" that included an agreement with the teachers union that all certificated staff would be given until a date certain to obtain the certification. The district took various actions to inform staff about the need to obtain the certification and offered staff a stipend.

Messick refused to obtain the necessary training for the next three years, despite numerous follow-up memos, directives and warnings that she could lose her job for failing to comply. The board took action to give Messick a Notice of Unprofessional Conduct as a prerequisite to termination which served as an official warning to comply with the district's directives or face termination. Messick eventually allowed the district to sign her up for a course, offered through the San Joaquin County Office of Education,

and completed the coursework, however she did not complete the portfolio thus the certification process was not completed. She testified during her deposition that cleaning her house was a higher priority for her than obtaining the certification. Messick has persistently refused to get the training because she did not think it was fair to make a tenured teacher obtain additional training.

At the hearing, the Administrative Law Judge agreed with Messick's argument that a board cannot decrease the annual salary of a teacher for failure to meet any requirement of the district that additional units, course of study or work be completed. Further, according to the Administrative Law Judge, there is no statutory authority, enforceable by the CTC or the district, requiring Messick to obtain the supplemental certificate to teach EL students. Thus, there is no cause for dismissal for unprofessional conduct.

Why this case is important:

This is an issue of statewide significance in that boards should have the right to terminate an employee for failure to follow directives from the district and to meet district qualification requirements.

Role of the Alliance:

This case is currently in the trial court and ordinarily the Alliance does not get involved at the trial court stage in these kinds of matters. However, the Steering and Advisory Committees were impressed by the financial burden this small district was shouldering in litigating this important issue of statewide concern and voted to provide some money to the district to help defray the costs.

Dismissal of Employee for Failure to Assist in Internal Investigation

Spielbauer v. County of Santa Clara, et al. | *California Supreme Court*

Issue:

May a public employee be terminated for refusing to answer questions regarding the performance of public duties after having been forewarned that refusal to answer his employer's questions would constitute insubordination leading to termination and assured that his statements could not be used against him in criminal proceedings?

What this case is about:

Deputy Public Defender Spielbauer committed misconduct by making material misrepresentations to a judge in a criminal case in an "unmistakable attempt to affirmatively mislead the court." Following revelation of Spielbauer's misconduct, the public defender's office commenced an internal investigation. When interviewed, Spielbauer declined to answer questions relying on the advice of counsel and his right against self-incrimination. Consistent with the requirements established by California Supreme Court precedent, the interviewing supervisor told him that he had a right to remain silent and to not incriminate himself, but that his silence could be deemed insubordination, leading to administrative discipline, up to and including termination. He was also told that any statement he made during the interview could not be used against him in any subsequent criminal proceeding.

Spielbauer was terminated for insubordination. The court held that a governmental employer cannot compel employees to answer incriminating questions unless it has first obtained for that employee a formal grant of immunity from the state.

Why this case is important:

This decision came as a surprise to attorneys representing public employers who had long-believed that a previous California Supreme Court decision allowed an employer to discipline an employee for failure to answer questions, as long as the employee received the appropriate admonition and warnings (i.e., right to remain silent, etc.). In this case, Spielbauer received all of the warnings that attorneys believe had been required. However, the appellate court determined that the Supreme Court ruling only applied to public safety officers, not all public employees.

Role of the Alliance:

The Alliance will file an amicus brief, in conjunction with the League of Cities and the California State Association of Counties, focused on the rights of public employers to discipline employees who refuse answer questions in an internal investigation.

RULINGS/SETTLEMENTS IN ACTIVE ALLIANCE CASES

English Learner Testing Litigation

Coachella Valley USD et al. v. State of California, et al. | San Francisco County Superior Court

Background:

Plaintiff districts filed suit against the state for forcing the districts to test English learners in English.

NCLB requires states to establish and administer tests in core academic subjects that are "valid and reliable" for all students. For calculation of progress under NCLB, the SBE chose, through its state NCLB plan, to require districts to administer standardized tests in English only. The districts' suit sought to compel the SBE to allow districts to administer standardized tests to EL students in their native languages on the basis that the tests in English were not a "valid and reliable" measurement of those students' academic achievement. According to the suit, schools and districts were identified as program improvement "failures" based solely on the scores of EL students and, as a result, the schools and districts were subject to potentially expensive sanctions under NCLB.

The court found that it did not have the authority to compel the SBE to change the state plan in order to allow students to be tested in their native languages. While NCLB created the generalized goal of "valid and reliable testing," the court observed that the law does not specify how that goal is to be accomplished, thus each state has discretionary authority to determine how best to achieve that goal. The court could only compel the SBE to change its action if the SBE's decision to give standardized tests only in English constituted an abuse of discretion that was arbitrary and capricious. In this case, the court could not find any such abuse of discretion.

Interestingly, one of the reasons cited by the court for finding that that the SBE's actions were not arbitrary and capricious is that the linguistic variety among California's student presented an "obvious educational challenge" that voters dealt with by passing Proposition 227, which mandates, with limited exceptions, that students be taught in English. While conceding that the question of how NCLB assessments should be

conducted might present different issues from those dealt with by Proposition 227, the court concluded that it could not find the decision to assess all students in English was arbitrary and capricious, given that they are taught largely in English.

Plaintiff school districts are determining whether to appeal this decision to the state appellate court.

Role of CSBA/Alliance:

CSBA filed a declaration in support of the districts' action. Consistent with CSBA's Policy Platform, the declaration focused on the fact that California's assessment system was an inaccurate measure of the student achievement of EL students because the tests cannot distinguish language errors from content errors and are thus unable to yield meaningful data. The declaration also expressed CSBA's concern that schools and districts were identified for program improvement, and subject to sanctions, based solely on the scores of EL students on tests administered in a language they do not understand.

Impact of the Decision:

This decision does not answer the question whether or not the current tests used are "valid and reliable" for EL students. Rather, the judge's order makes clear that he does not believe the court has the authority in this case to substitute the court's judgment and compel the SBE to revise its plan. According to the judge, "it is emphasized that rational people could differ as to whether administration of NCLB assessments in a second language, or in multiple additional languages, is also feasible, or desirable, or otherwise appropriate. The test for this court, however, is not to choose among competing rational alternatives and then mandate the judicially chosen one. To the contrary, decisions such as how to assess student performance for purposes of NCLB are best left to other branches of government..."

Evidence of Molestation in Teacher Dismissals

Truitt v. Superior Court of California, County of Merced, Respondent, Atwater ESD, Real Parties in Interest | California Supreme Court

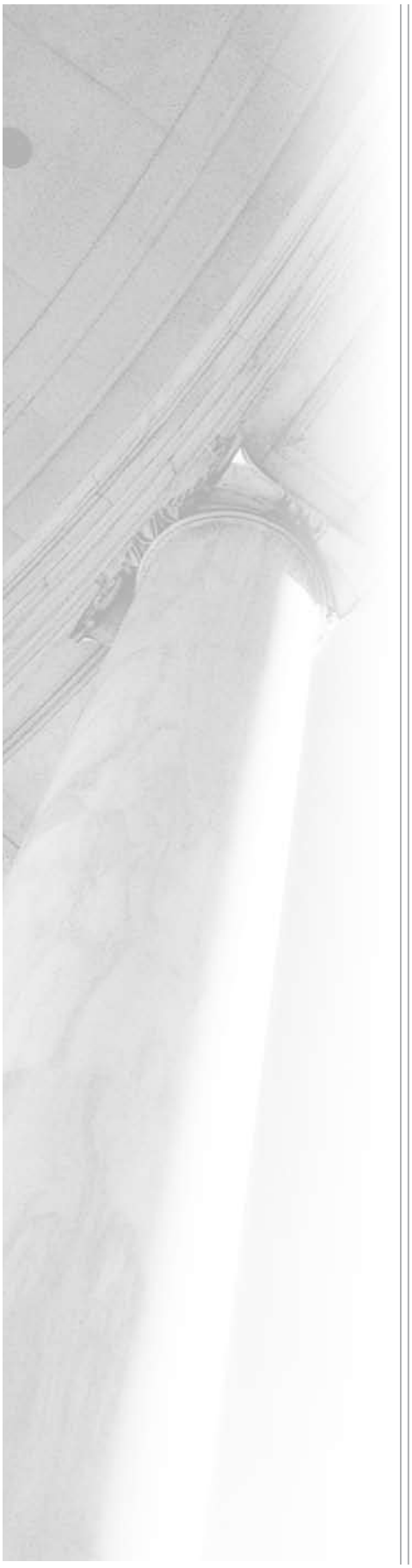
Issue:

Can charges and evidence of teacher molestation against public school students that are more than four years old be allowed in a school district dismissal proceeding?

Case Status:

This case has been pending before the California Supreme Court since 2003 and a ruling has finally been issued. The issue focused on an 18-year-old former student, who alleged to the police that he had been molested six years ago by his junior high track and field coach. Upon becoming aware of the charges, the district investigated and found credible evidence of his molestation as well as that of other students during the same time period. Because the District Attorney's office failed to promptly bring charges against the teacher, the district began dismissal proceedings.

The teacher argued that, because the Education Code prohibits the introduction of "charges and evidence" more than four years old, the district could not introduce evidence of molestation, even though the district had only recently become aware of the charges. The Office of Administrative Hearings found that such evidence could not be used, but the Merced County Superior Court disagreed. The teacher challenged the superior court's



decision in the appellate court and the appellate court reversed, holding that the four year time limit is absolute and could not be extended. The district appealed and the Supreme Court granted review.

While the case was pending, the teacher resigned and subsequently died, but because of the statewide importance, the court decided to hear the case anyway.

In a good decision for districts, the Supreme Court ruled that the district may introduce charges and evidence that are more than four years old when the court finds that certain equitable principles apply. In sexual molestation cases, equitable principles are often applied so that criminal and civil suits can be brought after the statute of limitations has expired, usually based on the fact that child did not come forward right away. The court's decision relied, in part, on one of the Alliance's key arguments that the court of appeal's decision created an unacceptable anomaly. Based on information that came to light more than four years after the molestation occurred, the teacher could be prosecuted criminally, the CTC could revoke the teacher's credential and a district could be sued for negligent hiring, but the district could not dismiss the employee based on the same set of facts.

OTHER ACTIVE CASES

The Alliance has filed amicus briefs in the following cases and is awaiting a court decision:

District Liability for Harassment Based on Sexual Orientation

Donavan/Ramelli v. Poway USD | California Court of Appeal

Issue:

What is the appropriate standard for district liability for student-on-student harassment on the basis of sexual orientation pursuant to Education Code §220?

Use of District Mailboxes for Campaign Purposes

San Leandro Teachers Association, CTA/NEA; California Teachers Association v. San Leandro Unified School District | California Court of Appeal

Issue:

Does Education Code §7054 require that a district prohibit the local association and others from using school mailboxes to distribute political material?

Update:

Oral arguments were held in the second week of June and a decision is pending.

Eligibility for Special Education Services

R.B. by F.B. v. Napa Valley USD | U.S. 9th Circuit Court of Appeal

Issue:

Have the criteria for IDEA eligibility due to an emotional disturbance or other health impairment been met? If so, do the facts support the provision of services given the findings that the student's educational performance was not affected?

Education Legal Alliance

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