Spring 2005

The California School Board Association's
Education Legal Alliance

Alliance REPORT

Important issues

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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 and county offices of education 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:

Williams v. State settlement implementation

With the enactment of the package of Williams bills implementing the settlement and notification of the settlement to members of the class represented by Plaintiffs, final court approval of the settlement and effective dismissal of the case has occurred. It is now up to county offices and school districts to comply with the new requirements. CSBA/Alliance conducted training sessions and developed sample board policies/administrative regulations on the new requirements. For further details of the settlement, please visit www.csba.org/ela.

County superintendents have begun visiting schools ranked in deciles 1-3. The California County Superintendents Educational Services Association (CCSESA) has provided training materials for county office staff to use in these visits.

CSBA/Alliance intervened in the Williams case to protect the interests of all school districts. With this settlement CSBA/Alliance were successful in minimizing establishment of new rules. From the outset the Alliance sought to establish that the real problem was a lack of resources not a lack of rules. Unfortunately, Plaintiffs' lawsuit was not about gaining more resources to schools.

Now, with the Williams case settled, CSBA and its Alliance are currently exploring ways to assure adequate funding for schools.

Administration of special education hearings - SEHO contract

In an interesting development, on March 23, the California Department of Education announced that the Office of Administrative Hearings (OAH) was the award-winning bid for the contract to administer special education mediations and due process hearings effective July 1. The bid from McGeorge School of Law, Special Education Hearing Office (SEHO), the long-time contract holder, was rejected. This is a bit of good news since the Alliance and attorneys representing school districts have long been concerned that the current SEHO hearing officers were not always well-versed in special education law and didn't have knowledge of K-12 operations, and, as a result, decisions were not well-balanced. It is likely that McGeorge will appeal the award of the contract and the issue may end up in court.

Also of interest is the fact that OAH plans on using its administrative law judges to conduct the mediations which precede the hearings. OAH has four offices (in Sacramento, Oakland, Los Angeles and San Diego) and plans on having the mediating parties come to their offices for mediation, resulting in increased expense for some parties to travel to the hearings.

County mental health services under IDEA

County of San Diego v. State of California
Tri-County SELPA v. County of Tuolumne

AB 3632 and AB 2726, enacted in 1984 and 1996 respectively, directed counties to provide mental health services for students with special needs. In the absence of this legislation, these services would be provided by the Local Education Agency (LEA) as the "providers of first resort" under the Individuals with Disabilities Education Act (IDEA). In recent years counties have grossly lacked state funding for this obligation and the mandate claim reimbursement process has not been viable due to the state's deferral of payment on claims.

Due to this lack of funding, the Board of Supervisors in Tuolumne County passed a resolution halting county mental health services to students. The Tri-County Special Education Local Plan Area (SELPA) sued but was denied relief by the trial court. In an appeal supported by the Alliance, the appellate court ruled against the SELPA. In July 2004, the Sacramento County Superior Court, in an action brought by the County of San Diego against the State of California, and joined in by the counties of Orange, Sacramento and Contra Costa, ruled that the counties were not obligated to provide the services "absent adequate, good faith funding from the state."

For the 2004-05 fiscal year, the state has appropriated a total of $100 million for mental health services. Of that amount $69 million (federal funds) is ultimately for the counties' services and $31 million is for SELPAs for pre-referral services now to be provided by LEAs and not counties. San Diego County continued to assert it was underfunded and claimed the 2004-05 funding constitutes a lack of "adequate, good faith" funding. The supervisors demanded that the San Diego County LEAs agree to a long-range funding solution or county mental health services would be terminated. As a result, the LEAs agreed to pay the county for any costs not funded by the state or other resources and in exchange the county agreed to continue to provide the services at least through the end of the year.

The governor now proposes to shift responsibility for mental health services needed by special education students from county mental health departments to school districts. For 2005-06, the governor proposes a total of $100 million for the services but all funds will go to SELPAs and school districts. It will be up to SELPAs and districts to contract for the

services with the counties or with other providers or to provide the services themselves. The counties estimate the cost of this program is $143 million, $43 million more than the budget would provide to school districts. The Legislative Analyst Office (LAO) agrees with the governor's shift proposal but recommends a total of $143 million in state and federal funds to support SELPAs and districts in providing these mental health services. Absent adoption of the LAO's recommendation school districts, "as the providers of first resort," will be responsible for payment of any cost over the governor's proposed $100 million. The Alliance is monitoring this situation and working with the interested parties.

Parcel tax litigation

Katz v. Santa Clara County Registrar of Voters (Mountain View-Whisman SD)

The Mountain View-Whisman School District is involved in litigation at the trial court level that may have far-reaching impact on school districts in California. In March 2004, a parcel tax was approved by 69% of the resident voters. Subsequently, a non-resident investment property owner sued claiming that his equal protection rights were violated because as a property owner he should have been allowed to vote on any tax that would be levied on his property.

The district believes that the law was followed since state law clearly restricts the right to vote on parcel taxes to school district residents. The Superior Court judge denied the district's request for a dismissal of the suit and also denied the Plaintiff's motion for an injunction to freeze the spending of the funds until after the trial, thus the district currently has no restrictions on the spending of the funds.

A trial was scheduled in April on the merits of the claim. The Alliance is continuing to monitor the situation and will continue to review the possibility of Alliance involvement.

Additional science graduation requirement

San Diego Unified School District v. Commission on State Mandates

In 1983, the Legislature modified high school graduation requirements to require two science courses instead of the one that had previously been required. After a lengthy process to determine if the additional science course requirement was a state mandate, the Commission on State Mandates (COSM) found a reimbursable state mandate with respect to increased staffing costs. The COSM determined, however, that a claimant district must offset any claim of increased staffing costs with any savings such as reductions in non-science classes resulting from the increase in required science classes. Ultimately the State Controller's Office (SCO) and COSM interpreted the "offset" requirement for salary savings as "automatic," i.e., districts should have done a corresponding lay-off of teachers in non-science classes which should have been eliminated as a result of the increased science requirement.

San Diego USD and other districts whose mandate claims were rejected under this "automatic offset" theory sued the COSM. The trial court judge noted that the reform legislation allowed for local governing boards to require other, additional coursework for graduation. The court essentially ruled that local control over curriculum prohibited the state from requiring school districts to reduce their local offerings to avoid incurring increased costs for the second year of science. Judgment was entered in favor of the Plaintiff districts.

The anticipated appeal, which no doubt would have involved the Alliance, was not filed by either the COSM or SCO. This means that the COSM and SCO may not require claimants to demonstrate why savings could not have been realized through layoffs of teachers in discretionary non-science classes.

Mandated cost claim audits by the State Controller's Office

Since 2002, the State Controller's Office (SCO) has been auditing reimbursable state mandate claims filed by LEAs. A number of problems have arisen with the auditing procedures relied upon by the SCO which have resulted in denial or substantial reduction in claims. Most typically, the problem arises from newly required supporting data for staff time. A "group" challenge of the new procedures is anticipated. Problems with the SCO procedures have been in the following mandate programs: collective bargaining, health fee elimination, school district of choice, intradistrict attendance, notification of truancy and graduation requirements. The Alliance is monitoring this important issue in consideration of possible involvement.

UPDATE ON NEW ALLIANCE CASES

Non-re-election of "shared" employee

Roberts v. Tichinin (Ukiah Unified School District and Mendocino County Office of Education)

Issue:

Is a teacher under contract with a COE but "lent" to the district part-time entitled to tenure and notice of layoff from the district?

What this case is about:

An ROP teacher with permanent status employed by the county office was "lent" to the school district under a series of one-year agreements. The district paid the county office a portion of the teacher's salary in proportion to the number of district classes he taught (about 60% district, 40% county). The district decided it would not renew the one-year agreement with the county office for the teacher's services. As a result, the county, as his employer, sent the teacher a notice of layoff. The district did not provide any lay-off notification.

The teacher sued both the district and the county office alleging that he had been laid off improperly and should be afforded tenure rights. While acknowledging that he never had an employment agreement with the district, the teacher argued that he should be "deemed" an employee based on conduct such as taking attendance, providing grades, as well as being evaluated by district administrators. The Superior Court ruled in favor of the teacher finding that he was a permanent employee of both the district and the county and thus he should have been provided with notice of layoff from the district. The court noted that even though he was under contract with the county office, he was "controlled" by the district.

Why this case is important:

This case is of statewide significance since this situation is common in rural areas where enrollment is not sufficient to sustain full-time employment of teachers with single

subject credentials. It is also common in special education classes and other categorical programs. The court's finding that Roberts was an employee of the district simply based on conduct and without an employment contract could create a bad precedent for other districts and county offices.

Role of the Alliance:

The Alliance has filed an amicus brief in support of the district describing situations in which county offices and districts share employees in a legal and proper manner.

RULINGS/SETTLEMENTS IN ACTIVE ALLIANCE CASES

Damages for breach of construction contracts

Lewis Jorge Construction Management, Inc. v. Pomona Unified School District

Issue:

Can a contractor sue a public entity for breach of contract to recover damages representing lost profits under hypothetical future contracts with other parties resulting from impaired bonding capacity?

Case status:

The Alliance filed an amicus brief in support of the district before the California Supreme Court. In this case, Pomona USD had terminated its construction contract with Lewis Jorge and made a claim on Jorge's performance bond to get the job completed. Jorge sued the district for breach of contract. The jury found that Jorge had not violated the contract and awarded damages to Jorge, including speculative damages in an amount exceeding $3,000,000 for lost potential profits from public works contracts in which Jorge could have bid but did not because of the loss of bonding capacity which resulted from Pomona's claims against the performance bond. Needless to say, the outcome of this case could have had far-reaching impact on school districts and county offices of education statewide.

Fortunately, the Supreme Court agreed with the district's and Alliance's position that the district was not liable for Jorge's loss of bonding capacity and the resultant loss of potential future profits. Although the court held that the district did breach the contract, it was only liable for the full payment of the contract price and whatever profits were built into that amount. If the jury's verdict had been allowed to stand, there could have been a chilling effect on school districts and county offices, preventing the exercise of their contractual right to terminate contractors and to obtain timely completion of school construction projects.

Facility fees for religious organizations

Child Evangelism Fellowship v. Upland USD

Issue:

Is it unconstitutional for a district to charge a non-profit religious organization a fee for use of school facilities pursuant to the Civic Center Act?

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Case status:

The issue in this case is whether a district's policy, and the Education Code upon which it is based, is unconstitutional because it discriminates against religious organizations. CEF is charged "direct costs" for the rental of school facilities, but CEF claims that the group should qualify for free use, like the Girl Scouts, Boy Scouts and other non-profit groups. Upland's defense is that the Education Code requires a district to charge direct costs for religious services, thus the district is also required to charge facilities fees to religious groups like CEF. The term religious service is not defined in the Education Code, but Upland policy states that any type of religious meeting is considered a religious service, and thus the law requires that fees be charged. The Alliance supported the district by funding purchase of the official legislative history of the Education Code provisions at issue.

The CEF requested a preliminary injunction in the case which would result in the district being immediately prohibited from enforcing its policy, without awaiting the results of a trial. The federal court agreed with the CEF's position that the district was illegally discriminating against the group by charging them a fee because of the content of the group's speech (i.e., religious) and therefore granted the injunction. Unfortunately, the Alliance's efforts to have the Attorney General become involved in the suit to help defend the Education Code were unsuccessful and it appeared unlikely that the district would succeed on the merits of the case at trial. Thus, Upland settled the suit in order to avoid incurring further legal costs. Legislation has been introduced to remedy this problem.

District liability for field trips

Allee v. Mark Twain Union Elementary School District

Issue:

Does the absolute immunity provision for field trips under the Education Code preclude liability from a near-drowning incident at an end-of-year pool party?

Case status:

In this case, a kindergarten student nearly drowned while attending an end-of-the-year swimming party at the home of his teacher. The only cause of action before the trial court was a claim of general negligence against the teacher and the school district. The district moved to dismiss the case on the grounds of absolute immunity based on long-standing statutory authority and case law. During the hearing, the Superior Court created a new test for determining whether absolute immunity applied. The court ruled that the teacher's supervision was not proper in that she was "absent" when the accident occurred since she was not standing next to the pool and was inside the house. The court also questioned whether the activity was voluntary since the district's permission slip did not quote the provisions of the Education Code which stated that field trips are voluntary.

The district took the extraordinary action of filing an action in the Appellate Court seeking the court's discretionary intervention to reverse the trial court's interim decision and end the matter. The Alliance filed an amicus brief in support of the higher court taking the case. The Appellate Court refused to review the trial court's interim decision, thus the case is back in the trial court and a trial will be held, unless, of course, the parties reach a settlement.

Currently, the trial court's initial order only applies to school districts in Calaveras County, the county in which Mark Twain Union ESD is located. Attorneys representing

the Alliance have notified districts in that county of the court's ruling so that they aware of the potential liability when conducting field trips. It must be stressed that the Appellate Court's refusal to hear the case at this time is not a decision on the merits and the immunity issue can be further litigated if an appeal is pursued.

If this case becomes the state of the law, districts, no doubt influenced by increased insurance premium costs, will have to "rethink" allowing field trips if there is this prospect of liability.

Non-re-election of emergency permit holders

Culbertson v. San Gabriel Unified School District

Issue:

Does time served as a temporary employee with an emergency permit count as a year of service for purposes of giving subsequent notice of non-re-election to a probationary employee?

Case status:

This case concerned a teacher who was hired during his first year as a temporary employee on an emergency credential. In the next year, the employee had a clear credential and was therefore rehired and classified as a probationary employee. During what the district believed to be his first year of probationary service, the district decided to non-re-elect the teacher for the next year and so notified him on May 23. The employee argued that he should have received the notice by March 15, the deadline for noticing second year probationary employees, since he was serving his "second" consecutive school year as an employee requiring certification qualifications.

This case was unusual in that last year the Appellate Court reached a decision favorable to the district. However, because the decision was not published, it could not be cited as precedent in the future. Lawyers representing the district asked the Alliance to write a letter supporting publication of the decision which the Alliance did (the Alliance had not previously been asked to participate in the case). Instead, the court, in a rare move, granted a re-hearing on its own motion to reconsider the case in its entirety. Correctly, after the re-hearing, the court upheld its prior decision and decided to publish the case.

Non-re-election of temporary employee

Schnee v. Alameda Unified School District

Issue:

Is a teacher initially hired as a temporary employee in a categorically funded program entitled to permanent status after one year of assignment in a regular program?

Case status:

This case concerns a teacher who was classified as a temporary employee and employed in a categorically-funded program. Ultimately, she was assigned to a third grade classroom and was classified as a second-year probationary teacher. In a timely manner, the district notified her that she would not be re-elected to teach in the next year. The teacher sued claiming that she was terminated in violation of the Education Code since, as an employee who had completed two or more years of categorical service, she should have been classified as a permanent employee once she was re-employed to teach third grade.

The Superior Court held that the district properly terminated her employment since the Education Code requires an employee in her position to serve one year as a probationary employee before achieving tenure. Schnee appealed and the Alliance filed an amicus brief supporting the district.

In a victory for the district and the Alliance, the Court of Appeal agreed with the trial court and held that the teacher was properly classified and terminated. The court found that the teacher's argument would have deprived the district of the opportunity to evaluate the teacher as a general curriculum teacher and would have required the district to grant tenure solely on the basis of performance in the categorically-funded program. This case is important because districts need clearly articulated procedures for the non-re-election of teachers who previously have been classified as temporary employees. If school districts were required to credit every year of categorically funded service toward permanent status, districts would have to "hire or fire" their categorically-funded employees after two years of service.

OTHER ACTIVE CASES

The Alliance has filed amicus briefs in the following cases:

Evidence of molestation in teacher dismissals

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

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?

Use of role-playing activities when teaching about religion

Eklund et al. v Byron Union School District et al.

Issue:

Did the district's use of role-playing activities to teach 7th grade world history students about Islam violate the Establishment Clause?

Charter school facilities under Proposition 39

Ridgecrest Charter School v. Sierra Sands Unified School District

Issue:

When providing facilities to a charter school pursuant to Proposition 39, does the requirement that a district provide "contiguous" facilities require the district to offer facilities at a single school site?

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