Fall 2008

The California School Board Association's
Education Legal Alliance

Alliance REPORT

IMPORTANT ISSUES

NEW ALLIANCE CASES

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 (COEs) 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 and COEs, 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 important issues that the Alliance has been working on, such as an issue on which the Alliance is initiating legal action, a legal issue before a state agency, or an issue in the trial court the Alliance is tracking:

Algebra I Mandate

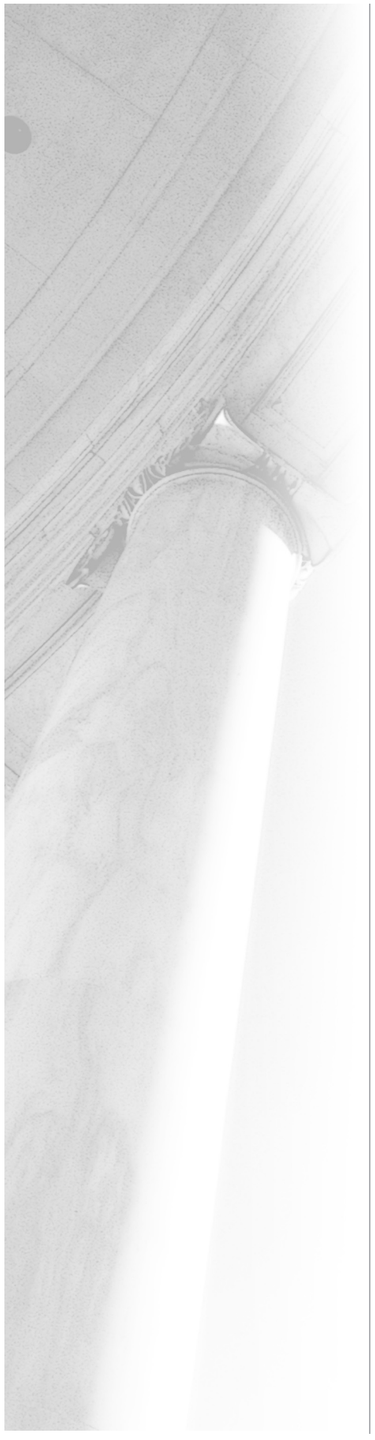
CSBA/ELA, ACSA v. SBE/Sacramento County Superior Court

Issue:

Did the State Board of Education's (SBE) July 9th action to designate Algebra I as the Grade 8 assessment violate the Bagley-Keene Open Meeting Act and exceed the SBE's legal authority?

Alliance activities:

In August, CSBA and ACSA sent a letter requesting the SBE to set aside its July 9 action on the grounds that it violated the notice and agenda requirements of the Bagley-Keene Open Meeting Act (similar to the Brown Act) in that the agenda item did not clearly state that the SBE was considering having all 8th graders take the Algebra I end-of-course assessment. The letter also outlined CSBA's contention that the action basically constitutes a revision to the state's content standards, which is beyond the scope of the



SBE's legal authority.

The SBE did not respond to the concerns in the letter, and because of strict legal timelines to challenge statewide assessments, CSBA/the Alliance and ACSA filed litigation in early September to invalidate the SBE's July action.

Background:

In the fall of 2007, the United States Department of Education (USDOE) found California's assessment system to be out of compliance with NCLB because two assessments are available for grade 8 level students: 1) Algebra I for students enrolled in Algebra I, and 2) Grade 8 General Math Assessment for students not enrolled in Algebra I. The General Math Assessment was based entirely on grade 6 and 7 academic content standards and was determined by USDOE not to be at "grade level," as required by NCLB.

At its July meeting, the SBE voted to direct the California Department of Education (CDE) to enter into a Compliance Agreement with USDOE to transition into implementing the Algebra I assessment for all 8th graders over a three year period.

Why this issue is important:

The SBE's decision is a significant change in statewide policy and results in a new mandate on districts, without any funds allocated to support the new mandate. While CSBA believes that it may be worthwhile to discuss at the statewide level when students should take Algebra I, CSBA disagrees with the process used by the SBE to make the decision and the fact that the agenda did not provide an opportunity for the public to express their views. In addition, the SBE's decision was made without any discussion as to the resources necessary to implement the new mandate nor was there any discussion as to other implementation issues, such as changes to laws regarding teacher preparation, instructional materials, and professional development.

Statewide Benefit Charter Schools

CSBA/ELA, CTA, ACSA, Stockton USD v. SBE/California Court of Appeal

Issue:

Must the SBE determine, based on credible evidence, whether a proposed statewide benefit charter will provide instructional services of statewide benefit that cannot be provided by a charter school operating in only one school district or county before granting the charter statewide?

Alliance activities:

The Alliance filed litigation to overturn the SBE's approval of the statewide charter petition filed by Aspire Public Schools, Inc. and requesting that the court direct closure of the two schools opened by Aspire pursuant to SBE approval of those statewide benefit charters at the end of the 2007-08 school year.

Recent update:

In its decision, the trial court did not accept CSBA's interpretation that local control is strongly favored or that statewide benefit charters are a "narrow exception" to the usual process for charter school authorization. The Alliance recently filed an appeal of the trial court's decision.

Background:

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 instructional services of statewide benefit that cannot be provided by a charter operating within only one district or county. In January 2007, the SBE approved the application of Aspire Public Schools to operate a statewide benefit charter, initially authorizing schools in the Stockton USD and LAUSD.

The Alliance requested that the SBE rescind its action for failing to substantiate the necessary finding of statewide benefit that cannot be provided at a local level. When the SBE declined to take action in response to the letter, litigation was filed. The litigation does not challenge Aspire charter schools operating with local school district or county board approval.

Why this issue is important:

The Alliance believes that the SBE is acting contrary to law by 1) approving statewide benefit charters without first determining that the charters could not be accommodated by a local district or COE, and 2) without requiring a petitioner to produce evidence of unique circumstances that would justify whether the charter is of statewide benefit. The concern is that charters will bypass local districts in an attempt to avoid local oversight and move straight to the SBE, where they are likely to receive a favorable reception.

Proposition 39 Charter School Facilities Regulations

CSBA v. SBE, CDE, SPI/Sacramento County Superior Court

Issue:

Has the SBE exceeded its authority in adopting revised regulations regarding Proposition 39 facility requests by charter schools?

Alliance activities:

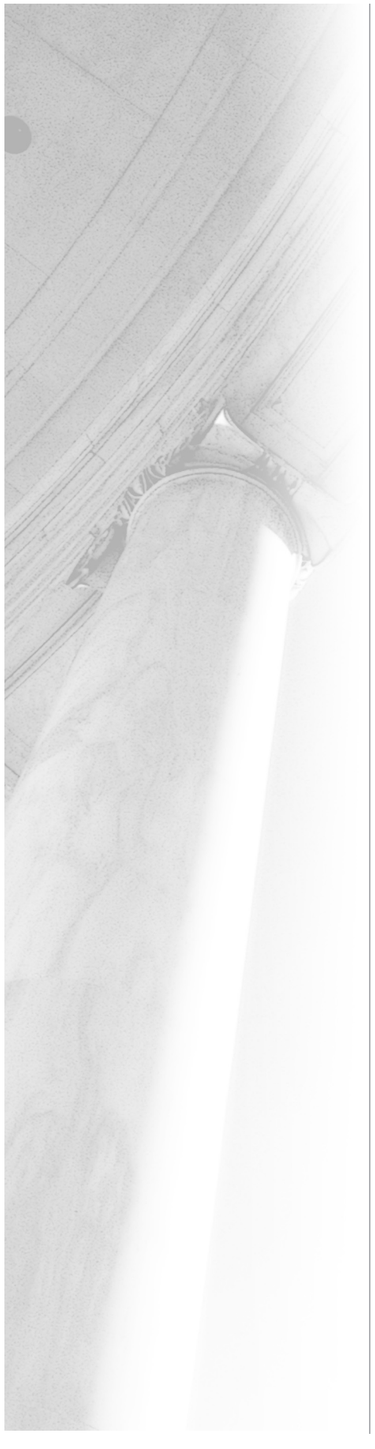
For over two years, the Alliance opposed SBE proposed amendments to its Proposition 39 facilities regulations, both at informal and formal stages.

Recent update:

On July 24, the Alliance filed litigation in the Sacramento County Superior Court challenging the regulations. A hearing has been scheduled for October 17. If the court fails to issue a final ruling at the hearing, the Alliance will seek a preliminary injunction from the court halting implementation of the regulations. A preliminary injunction is important because November 1st is the deadline for a charter school to request facilities from a district for the 2009-10 school year.

Background:

Since the passage of Proposition 39, there have been four court decisions relating to charter school facilities issues. The CDE held informal meetings in 2006, which included the Alliance and Policy Analysis staff. In 2007, the CDE proposed revisions to the existing SBE regulations to incorporate the court decisions and to reconsider proposed regulations



that would create a dispute resolution procedure. During the rulemaking process, the Alliance filed formal comments with the SBE.

Why this issue is important:

Many of these proposed revisions are detrimental to school districts. For example, the statutory requirement to furnish and equip facilities "for the charter school's average daily classroom attendance by in-district students" is expanded to include providing front office equipment and additional, though undefined, support furnishings and equipment ("student services that directly support classroom instruction"). In addition, attendance boundaries of an approved conversion charter school cannot be changed or the school removed from its site without a waiver from the SBE. The new regulations include a voluntary mediation process for dispute resolution.

With the SBE exceeding its authority, this has now become a battle over maintaining maximum district discretion when dealing with requests for facilities pursuant to Proposition 39.

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" or "reasonably within the scope of" a mandate expressly specified in a ballot measure approved by the voters?

Alliance activities:

In 2007, the Alliance initiated a lawsuit against the State and the Commission on State Mandates (COSM) and won in the trial court. The State and COSM have appealed. The Alliance also filed a cross-appeal. Based on arguments raised by the COSM in the first lawsuit, the Alliance has filed another lawsuit against the COSM concerning the School Accountability Report Card (SARC) mandates.

Recent update:

Briefs have been filed in the appellate court and the court will hopefully decide this case by the end of 2008.

Background:

The basis of the lawsuit is the approval of AB 138 (Chapter 72, Statutes of 2005) 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. AB 138 expanded an existing statute exempting the State from having to reimburse school districts for costs of mandates expressly specified in a voter-approved ballot measure to include costs of mandates "necessary to implement" or "reasonably within scope of" an expressly specified voter-approved mandate.

For many years, the COSM had determined that three state mandated programs were reimbursable mandates: the SARC, the Mandate Reimbursement Process (MRP), and certain Brown Act requirements. AB 138 "compelled" the COSM to change its prior determinations by requiring the COSM to either vacate or reconsider its decisions because the mandates were either "necessary to implement" or "reasonably within the scope of" an expressly specified voter-approved mandate. The SARC, MRP, and Brown Act changes were previously approved reimbursable mandates and, although not expressly included in a voter-approved ballot measure, have "roots" in voter-approved ballot measures.

Why this case is important:

The Legislature does not have the authority "to write its own ticket" to avoid paying for the mandates it imposes. AB 138, determined unconstitutional by the trial court, was part of that effort to avoid payment.

Mandate Deferral Lawsuit

CSBA/ELA et al. v. State of California et al./San Diego County Superior Court

Issue:

Does the State have the authority to simply appropriate $1,000 for each K-12 mandate and defer payment of the balance to another fiscal year?

Alliance activities:

The Alliance has filed a lawsuit challenging the State's authority to defer mandate payments and seeks to compel the State to fully reimburse districts and COEs for all new programs or higher levels of service.

Recent update:

A hearing had been scheduled for July, but was postponed at CSBA's request. An appellate court issued a ruling in another case dealing with mandates for counties and it was important that the court be briefed on the distinctions of that case. A new hearing has been scheduled for September.

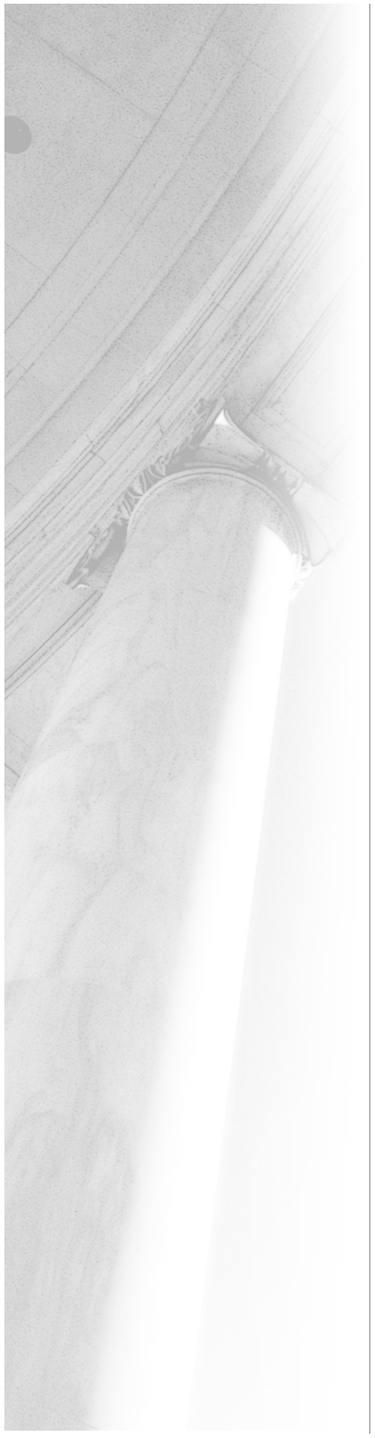
Background:

The State Constitution requires that whenever the State mandates a new program or higher level of service on any local government (including school districts) it must reimburse the local government for the costs incurred. However, beginning in the 2002-03 fiscal year, the State has deferred payment on the 38 K-12 reimbursable state mandated programs by approving only $1,000 per mandate, even though the costs of these mandates, and the claims submitted, far exceed that amount. This budget-balancing technique is used by the Legislature and Governor in an attempt to satisfy the state's Proposition 98 guarantee.

The 2006-07 state budget appropriated $900 million to fund payment of the accumulated debt and added some funding for 2006-07 mandates. However, this appropriation failed to pay off the past debt and was inadequate to cover the State's 2006-07 obligation. Although the estimated cost of the K-12 mandates for 2007-08 is estimated at $160 million, the 2007-08 state budget appropriates only $38,000, or $1,000 per mandate. The carry-over "credit card debt" from prior years is approximately $415 million.

Why this case is important:

School districts and COEs are being forced to bear the costs of new programs and higher levels of service mandated by the State, until some future time when the State chooses to appropriate funding.



Mandated Cost Claim Audits by the State Controller's Office

Clovis USD et al. v. Controller/Sacramento County Superior Court

Issue:

Has the State Controller's Office (SCO) imposed unreasonable documentation requirements in audits of mandated cost claims, thus thwarting districts and COEs from receiving reimbursement for state-mandated costs?

Alliance activities:

The Alliance is providing financial assistance to districts who have filed suit in the trial court against the SCO.

Recent update:

A trial was held April 25. The Alliance argued that the SCO's requirement of contemporaneous documents to verify claims for reimbursement was unreasonable in that districts did not know at the time of the claim that the documents were necessary and thus did not prepare or retain the documents; generally, districts prepare declarations and certifications that are filed with the reimbursement claims.

In August, the court held that the SCO's requirement of contemporaneous documents of employees' salaries is reasonable and otherwise allowable, except when applied to the Collective Bargaining and Intradistrict Attendance Programs where notice of the requirement was lacking. Thus, a substantial, but only partial, victory has been gained for school districts. The districts will seek further clarification from the judge which, if successful, could expand the victory to other challenged audits.

Background:

Since 2002, the SCO has audited reimbursable mandate claims filed by local educational agencies (LEAs). 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 staff time. The lawsuit filed against the SCO, led by Clovis USD, is focused on SCO procedures in the following mandate programs: collective bargaining, school district of choice, intra-district attendance, notification of truancy, and graduation requirements.

Why this case is important:

The new documentation requirements are not consistent with applicable government accounting standards and are part of the State's continuing strategy to reduce the State's liability for mandated costs.

Behavioral Intervention Plans

Commission on State Mandates and Sacramento Superior Court

Issue:

Do State requirements for behavioral intervention plans, specified in the Education Code and Title 5 regulations, require Legal Education Agencies (LEAs) to perform activities not required under federal law and thus constitute a state-mandated program subject to reimbursement?

Alliance activities:

The Alliance has retained legal counsel to represent test claimants before the COSM and to also represent the claiming LEAs in current negotiations with the Department of Finance (DOF) and in pending litigation filed by the DOF.

Recent update:

At the request of the Alliance, Special Education Local Plan Areas completed a cost study in order to determine how much this mandate costs LEAs. Meetings to negotiate a settlement are ongoing and results of the study will be relied upon in the negotiations. Resolution of this long-standing mandate claim is expected in 2008, either as a result of negotiations or litigation.

Background:

In 1990, legislation was enacted requiring the SBE to adopt regulations concerning behavioral intervention plans for pupils who exhibit serious behavior problems that interfere with their education. In 1994, a test claim was filed with the COSM claiming the behavioral intervention plan requirements imposed a reimbursable state-mandated program upon LEAs. In 2000, the COSM adopted a decision agreeing that the regulations imposed a reimbursable state mandate, but the COSM decision has not been implemented pending conclusion of what became stalled negotiations to settle the exact amount owed by the State. In 2003, the DOF filed litigation challenging the COSM's decision. Negotiations have now resumed.

Why this issue is important:

The State requirements for behavioral intervention plans are detailed and costly, and it is important to LEAs that this mandate be reimbursed. LEAs are being required to implement an increasing number of behavioral intervention plans as more students are identified as needing special education and related services.

NEW ALLIANCE CASES

The following section discusses cases in which the CSBA Executive Committee or the ELA Steering Committee has approved involvement of the Alliance.

Teacher Failure to Obtain Required Certification

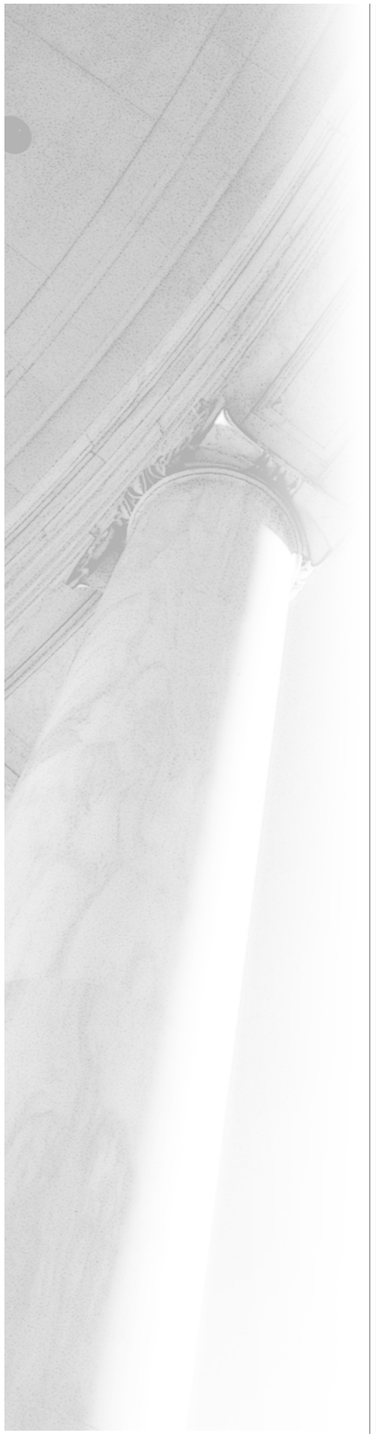
Woodland Education Association/CTA v. Woodland Jt. USD/Yolo County Superior Court

Issue:

May the district put a certificated teacher on unpaid administrative leave because of the teacher's failure to obtain English learner (EL) certification, as required by a governing board resolution?

Alliance activities:

The Alliance is providing limited financial support in order to help the district defray legal costs at the trial court. The Alliance will file also an amicus brief in support of the district in the probable appeal of this matter.



Background:

Two certificated teachers failed to obtain EL certificates after several years of notice that the certificates were required of all teachers as a condition of employment. The teachers were placed on unpaid administrative leave of absence until they obtained the certification. Both teachers ultimately received the certification.

The board adopted two resolutions which established the employment requirement that all classroom teachers obtain EL certification based on the fact that all district teachers were teaching EL students. The district provided teachers numerous notices and training opportunities regarding the requirement.

CTA and the local association filed in court on the grounds that the district had no legal authority to require the certification absent a state requirement which they argue is non-existent. According to CTA, the Commission on Teacher Credentialing controls certification in California and, since the teachers possess valid credentials and have attained permanent status, the district cannot require them to obtain additional credentials.

Why this case is important:

The board should have the right to require teachers to follow directives from the district and to satisfy district employment requirements.

In spring 2007, the Alliance was involved in another case (*Ripon USD v. Comm. on Professional Competence, Theresa Messick, RPI*) in which the district required teachers to obtain EL certification as part of the collective bargaining agreement. In that case, the trial court agreed Messick could be terminated for violating the requirement contained in the collective agreement, but the teacher and CTA have appealed that decision. The Alliance will file an amicus brief in support of the district.

Both cases are part of CTA's continuing legal strategy to challenge such requirements imposed by districts. Because it is very difficult for districts to balance classroom assignments of EL students from year to year based on the teacher's EL certification, it is reasonable that districts impose this requirement.

OTHER ACTIVE CASES

A court decision is pending in the following cases in which the Alliance has filed or will file amicus brief.

Use of District Mailboxes for Campaign Purposes

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

Issue:

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

Attorneys' Fees in Settlement of a Special Education Lawsuit

M.D. and S.D v. OAH and Saddleback Valley USD/U.S. 9th Circuit Court of Appeal

Issue:

Are attorneys' fees available to a parent who accepts a school district's written offer of settlement 10 days prior to the start of a due process hearing under the Individuals with Disabilities Education Act?

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?

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?

Right of Student to Attend a Protest During the School Day

Corales et al. v Bennett, Kinley et al. (Ontario-Montclair School District)/U.S. 9th Circuit Court of Appeal

Issue:

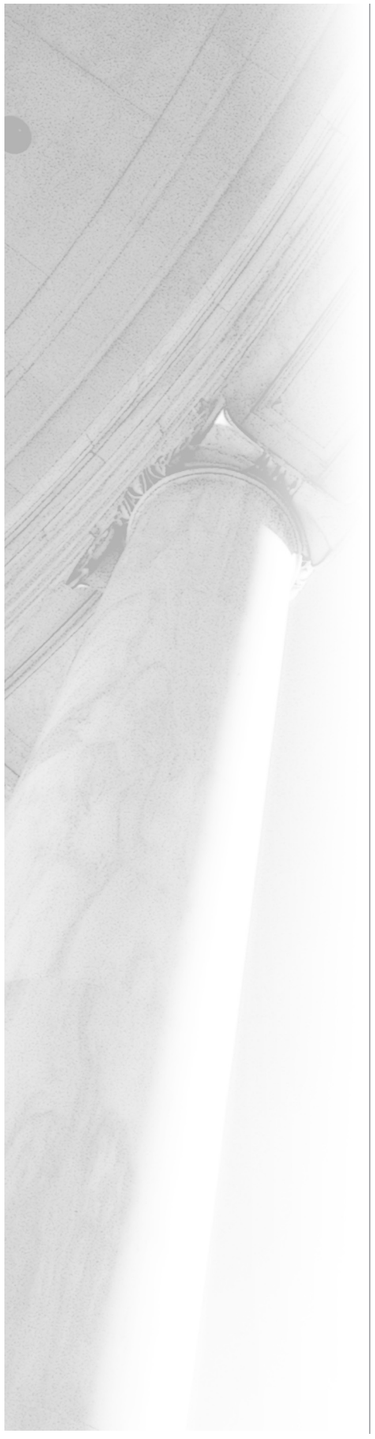
Is a middle school student's act of leaving school without permission or supervision of parents or school authorities to attend a protest during the school day expressive conduct protected by First Amendment free speech rights?

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?



Education Legal Alliance

2008 Steering Committee

Paul H. Chatman, Chair
CSBA President, Ocean View ESD

Paula S. Campbell, Vice-Chair
CSBA President-elect, Nevada City SD

Scott P. Plotkin
CSBA Executive Director

Peter Birdsall
Executive Director of Advocacy & Association Services, School Innovations & Advocacy

Mark Cooper
Board Member, Lake COE

Ron Dwyer-Voss
Delegate, Region 6, Natomas USD

Carmella Franco
Superintendent, Whittier City ESD

Sally Frazier
Superintendent, Madera COE

John Glaser
Superintendent, Napa Valley USD

Ken Hall
Founder & Chairman Emeritus, School Services of California, Inc.

Brian Heryford
Delegate, Region 10, Clovis USD

Steve Mitrovich
Superintendent, San Carlos ESD

Non-Voting Members

Brett McFadden
ACSA Liaison, Management Services Executive

Mike Smith
Shareholder, Lozano Smith

** As a result of an agreement with ACSA, the Alliance has a non-voting position on ACSA's Education Legal Support Fund board and ACSA likewise has a similar non-voting position on the Alliance Steering Committee.*

2008 Attorney Advisory Committee

Mike Smith, Chair
Lozano Smith

Ronald Wenkart, Vice-Chair
Orange County Office of Education

Spencer Covert
Parker & Covert

Sue Ann Salmon Evans
Miller, Brown & Dannis

Diana Halpenny
Kronick, Moskovitz, Tiedemann & Girard

Paul Loya
Atkinson, Andelson, Loya, Ruud & Romo

Education Legal Alliance

CSBA

California School Boards Association
3100 Beacon Blvd.,
West Sacramento, CA 95691
916-371-4691 Fax 916-371-3407
www.csba.org
E-mail: legal@csba.org

Non-Profit
U.S. Postage
PAID
Sacramento, CA
Permit No. 2097

Education Legal Alliance Staff

John Bukey
General Counsel

Richard Hamilton
Associate General Counsel

Judy Cias
Assistant General Counsel

Yvette Seibert
Legal Assistant