

CSBA'S EDUCATION LEGAL ALLIANCE



Alliance Report

SPRING/SUMMER 2012



Alliance Report

CSBA'S EDUCATION LEGAL ALLIANCE | SPRING/SUMMER 2012

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.

2012 STEERING COMMITTEE

Jill Wynns, Chair

CSBA President, San Francisco USD

Cindy Marks, Vice-Chair

CSBA President-elect, Modesto City Schools

Vernon Billy

CSBA Executive Director

Peter Birdsall

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

Mary Jane Burke

Superintendent, Marin COE

Ken Hall

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

Larry Miles

Delegate, Region 6, San Juan USD

Rick Miller

Superintendent, Riverside USD

Phil Quon

Superintendent, Cupertino USD

Anne White

Delegate, Region 7, Livermore Valley Joint USD

NON-VOTING MEMBERS

Mike Smith

Chair, ELA Attorney Advisory, Committee Lozano Smith

Laura Preston

Legislative Advocate, Association of California School Administrators

2012 ATTORNEY ADVISORY COMMITTEE

Mike Smith, Chair

Lozano Smith

Ronald Wenkart, Vice-Chair

Orange County Office of Education

Spencer Covert

Parker & Covert

Diana Halpeny

Kronick, Moskovitz, Tiedemann & Girard

Paul Loya

Atkinson, Andelson, Loya, Ruud & Romo

Sue Ann Salmon Evans

Dannis, Woliver & Kelley

EDUCATION LEGAL ALLIANCE STAFF



Keith Bray,
General Counsel
Director,
Education Legal Alliance



Elaine Yama-Garcia
Associate General Counsel

Shelley Cody

General Counsel Assistant

Anita Ceballos

Administrative Specialist



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

Table of contents

NEW ALLIANCE CASES

<i>Special Education Services to Incarcerated Adults</i>	3
<i>Revocation Proceedings for Charter Schools</i>	3

PENDING CASE UPDATES

<i>School Finance</i>	4
<i>Proposition 98</i>	4
<i>Mandate Redetermination</i>	4
<i>Board's authority to approve/deny Charter petitions</i>	5
<i>Administration of insulin</i>	5
<i>Parcel Tax</i>	5

LETTERS IN SUPPORT OF PETITION FOR REVIEW

<i>Temporary teachers hired in categorical programs</i>	6
<i>CEQA Categorical Exemptions</i>	6

RULINGS/SETTLEMENTS IN ACTIVE ALLIANCE CASES

<i>Algebra Requirement</i>	7
<i>Mandate Deferral</i>	7
<i>Invalidation of Aspire's State Charter</i>	7
<i>Classification of temporary teacher</i>	8
<i>District liability for employee misconduct</i>	8

New Alliance Cases

ALLIANCE HAS BECOME INVOLVED IN THE FOLLOWING MATTERS:

Special Education Services to Incarcerated Adults

LAUSD v. Garcia / California Supreme Court

Issue:

Since the legislation has been silent regarding which public entity is responsible to provide special education services to qualifying adult individuals ages 18 to 22 who are incarcerated in county jails, should the responsibility default to the state?

What this case is about and why it is important:

This case is of statewide significance in that there is no controlling authority addressing the application of Education Code Section 56041 to incarcerated students in need of special education services. Section 56041 states that where the “parents” reside is the responsible LEA. However, this is impractical. Los Angeles Unified School District (LAUSD) has argued that California law simply does not delegate responsibility for providing special education services to eligible adult students in adult county jails, and absent such delegation, that responsibility should otherwise default to the state. LAUSD contested these issues at the due process hearing but the ALJ ruled in favor of the student. LAUSD appealed the issue to the Federal District Court, which upheld the ALJ’s ruling. LAUSD appealed to the Ninth Circuit, which then sent the issue to the California Supreme Court to decide the “authoritative answer to California’s educational agencies.” It was accepted by the Supreme Court on March 28, 2012.

The Alliance will file an amicus brief in support of LAUSD’s position that the state should provide special education services to incarcerated adults between the ages of 18 and 22.

Revocation Proceedings for Charter Schools

Today’s Fresh Start v. Los Angeles County Office of Education (LACOE) / California Supreme Court

Issue:

Prior to revoking a charter, is a charter authorizer required to hold an evidentiary hearing before a neutral hearing officer?

What this case is about and why it is important:

This issue was raised by *Today’s Fresh Start* claiming that a charter school authorizer could not act to revoke a charter without bias if it was not first required to hold an evidentiary hearing before a hearing officer or other “neutral” decision maker who would then make a recommendation to the governing board. The Appellate Court rejected this analysis and found that LACOE relied on the due process established in Education Code Section 47607 (e), which requires only that following a public hearing, written factual findings which are supported by substantial evidence, be made by the charter authorizer prior to revocation. The Appellate Court also found that LACOE provided plenty of notice and opportunity to *Today’s Fresh Start* to address a possible revocation before action was taken by the Los Angeles County Board of Education. The Supreme Court granted *Today’s Fresh Start’s* request for review of the decision.

The Alliance filed an amicus brief on March 19, 2012 in support of the LACOE’s opposition to *Today’s Fresh Start’s* request to the California Supreme Court to overturn the appellate court’s decision in order to preserve the favorable appellate court ruling of keeping any formal evidentiary hearings requirement out of the charter school revocation process.

Pending Case Updates

THE FOLLOWING SECTION PROVIDES AN OVERVIEW AND UPDATE OF CASES FILED BY CSBA RELATING TO THE ALLIANCE'S ONGOING EFFORTS AND SUPPORT.

School Finance

Robles-Wong v. State of California

CSBA and several other associations and organizations filed the lawsuit of *Robles Wong v. State of California*, which alleges constitutional violations of both *Article IX* (the Education article) and equal protection. The trial court essentially dismissed the *Article IX* claims finding that the state constitution does not guarantee any particular level of education or funding, or any specific funding system. A second complaint was again dismissed, with the right to file another amended complaint. However, CSBA and the other plaintiffs declined to amend the complaint further and in January 2012, filed an appeal with the First Court of Appeal challenging the findings of the trial court. The initial briefs are expected to be filed with the court in June 2012.

Proposition 98

CSBA v. State of California

This case challenges the 2011-12 budget action and particularly the Proposition 98 calculation and appropriation. It alleges that when the state transferred certain revenues out of the general fund into a special local government fund, it was required to “re-bench” or re-calculate funding to hold education harmless. CSBA, Los Angeles USD, San Francisco USD, Turlock USD, and the Association of California School Administrators (ACSA) filed an action as plaintiffs in September 2011 with the San Francisco Superior Court. In March 2012, the court issued a tentative ruling holding that there was nothing in Proposition 98 and the ballot materials that precluded the Legislature from assigning revenue to a special fund or that required the Legislature to “re-bench” following the transfer of what previously were considered general funds into a special fund.

The Plaintiffs challenged the tentative ruling at a hearing on March 28, 2012, arguing that if the Legislature and the governor were able to manipulate Proposition 98 by merely taking sales and utility tax revenue from the general fund that had always been included in the Proposition 98 formula, and simply transferring it into a special fund set up solely to defeat the minimum guarantee established by Proposition 98 without holding public education harmless, this action would open the floodgates for the Legislature to take similar measures. This action leaves the voters without their guarantee and without their minimum funding for public education. At hearing, the ELA argued that Proposition 98 was approved by the voters to avoid this very type of evasion and manipulation by creating a formula-based funding mechanism in order to take the politics out of school funding. The trial court judge took the matter under submission and a decision is expected soon.

Mandate Redetermination

CSBA v. State of California

This case is a follow-up to the Mandate Deferral, wherein CSBA successfully prevailed by setting aside legislative attempts to dictate to the Commission on State Mandates on how to determine mandates in ways that were unfavorable to districts. CSBA prevailed on the Mandate Deferral case, receiving over \$290,000 in attorneys' fees. Pending the resolution of the Mandate Deferral case, the Legislature, in 2011, came up with a new series of statutory changes designed to eliminate payment on most education mandates through a “redetermination” process. By filing a writ of mandate in January, 2011, CSBA has challenged the new provisions, and in particular their application to the Behavioral Intervention Plan (BIP) mandate and the High School Science Graduation Requirements mandate. CSBA has also alleged that if the new provisions are legal, the entire mandate system violates the constitutional reimbursement requirement as it frustrates the districts' right to reimbursement. CSBA is joined by several districts including San Diego USD, and the two COEs involved in those mandates, Butte and San Joaquin. The matter is continuing and the litigation is in its “discovery stage,” which involves the exchange of documents and information in preparation for hearing.

In addition to the lawsuit, CSBA is participating in the Commission on State Mandates' regulatory effort to establish Parameters, Guidelines and Reasonable Reimbursement Methodologies for BIPs. The Commission is expected to review and adopt guidelines and reasonable reimbursement methodologies at its September 2012 meeting.

THE FOLLOWING ARE PENDING MATTERS WHERE AMICUS BRIEFS HAVE BEEN FILED OR JOINED BY CSBA/ELA

Board's authority to approve/deny Charter petitions

United Teachers Los Angeles v. Los Angeles USD

This case involves whether the courts may compel binding arbitration regarding alleged violations of a board's process concerning the approval of a charter petition, as presented pursuant to provisions of a collective bargaining agreement (CBA) upon which a grievance is based, even though CBAs are specifically preempted/invalidated by Education Code Section 47611.5. The code section states that a board's approval or denial of a charter school petition shall not be controlled by CBAs. The California Supreme Court is reviewing the appellate court's decision which held that Education Code 47611.5 is a defense to be presented to the arbitrator. The district argued that the Education Code should be read to exclude collective bargaining arbitration from the charter authority's decision-making, including any challenges pursuant to CBA provisions relating to the process and procedure of the board's authority of approving or denying charter petitions. Oral argument was heard by the California Supreme Court on May 1, 2012, and the court will render a decision within 90 days of the hearing.

Administration of insulin

American Nurses Association v. O'Connell

The California Department of Education (CDE) issued a legal advisory in 2009 which advised school districts that non-nursing personnel with the requisite training could administer insulin to students with diabetes. This advisory was based upon a settlement between the CDE and parents of students with diabetes. Nursing associations challenged the advisory and have been successful in both the trial and appellate court with its argument that only licensed nursing personnel may administer insulin to students. The California Supreme Court agreed to hear the appeal and CSBA filed an amicus brief in May 2011 supporting the position of the CDE that unlicensed personnel with the requisite training and guidance from medical personnel may administer insulin to students. It is expected that the new Chief Justice Cantil-Sakauye will not participate in the decision because she wrote the appellate court decision upholding the trial court ruling that only licensed nurses may administer insulin to students. Oral argument has not yet been scheduled.

Parcel Tax

Borikas v. Alameda Unified School District

The district's voters approved a parcel tax in 2008 that implemented variable tax rates for residential, commercial and industrial property. Taxpayers challenged the parcel tax claiming that taxes had to be the same or "uniform" regardless of the classification of the property. The taxpayer plaintiffs lost at the trial court and have appealed. CSBA filed its amicus brief in December 2011, supporting the decision by the school district to ask voters to approve different tax rates for different types of property, as had been approved by the voters in several other jurisdictions in California. Oral argument has not yet been scheduled.

Letters in Support of Petition for Review

AFTER DISCUSSION WITH THE ATTORNEY ADVISORY COMMITTEE, THE FOLLOWING AMICUS LETTERS WERE SUBMITTED TO THE CALIFORNIA SUPREME COURT IN SUPPORT OF PETITIONS FOR REVIEW.

Temporary teachers hired in categorical programs

Stockton Teachers Assn. v. Stockton USD

After an Administrative Law Judge, in 2009, found that the district was not prohibited from entering into temporary agreements with employees working in categorically funded programs under section 44909, the Stockton Teachers Association filed a petition for writ of mandate arguing that proper classification of teachers assigned to categorically funded programs is probationary rather than temporary. The trial court denied the writ, finding that a teacher may be classified as temporary where the teacher is working in categorically funded programs.

On appeal, the Third Appellate Court reversed the trial court's decision and held that except in very limited circumstances, employees hired for categorically funded programs must be classified as probationary employees and may only be released as temporary employees if they are terminated at the expiration of a categorically funded program. A request for re-hearing, which the Alliance supported with an amicus letter, was denied by the appellate court, and on April 10, 2012, the district filed a Petition for Review with the California Supreme Court.

This case has a wide-ranging impact on how districts and county offices of education classify and terminate employees hired for categorically funded programs. It also has potential immediate and long-term impacts on certificated temporary employee releases, and probationary and permanent employee layoffs. Therefore, on April 19, 2012, the Alliance submitted to the Supreme Court an amicus letter of support of Stockton USD's petition for review of the appellate court's decision.

CEQA Categorical Exemptions

Berkeley Hillside Preservation v. City of Berkeley

This case involves the application of the "significant effects" exception to the California Environmental Quality Act (CEQA) categorical exemptions. Berkeley Hillside Preservation ("Berkeley Hillside") filed a petition for writ of mandate challenging the city's approval of use permits to construct a large residence on property inside the city limits. The trial court denied the petition finding that the proposed construction was categorically exempt under the CEQA. The First Appellate Court reversed the judgment and ordered the trial court to issue a writ of mandate directing the city to set aside the approval of use permits and its finding of a categorical exemption, and to order the preparation of an Environmental Impact Report.

This case provides project opponents an easier method to challenge a categorical exemption for a project by eviscerating the "unusual circumstances" exception. As a result, agencies may be forced to undertake additional environmental analysis in order to justify the use of any categorical exemption. The court's decision to merge the two-part test of the "significant effects" exception into a single determination will have significant impacts on public agencies that have long used categorical exemptions as permitted on certain activities pursuant to the CEQA. School districts and county offices of education commonly use the categorical exemption that permits the location on school grounds of up to 10 classrooms including portables. To hold that simple allegations of significant impacts are *per se* "unusual circumstances" then preclude the use of a categorical exemption, will all but halt the use of categorical exemptions by public agencies, including school districts and county offices of education. Doing so would be contrary to the CEQA's intent and purpose. The case also potentially empowers any individual "expert" to offer an opinion in order to block the use of a categorical exemption.

On April 20, 2012, the Alliance submitted to the Supreme Court an amicus letter of support of City of Berkeley's petition for review of the appellate court's decision.

Rulings/Settlements in Active Alliance Cases

THE FOLLOWING MATTERS, IN WHICH THE ALLIANCE HAS PARTICIPATED,
HAVE BEEN RESOLVED:

Algebra Requirement

CSBA v. State Board of Education (SBE)

This case challenged SBE's decision in 2008 to require all 8th graders to be tested in Algebra. It was based on the argument that the SBE violated Bagley-Keene but also that it was trying to change the content standards and did not have the authority under the Education Code to do so. The California Teachers Association (CTA) and Superintendent of Public Instruction O'Connell intervened on behalf of CSBA.

The trial judge agreed and entered a preliminary injunction. The state appealed and the Court of Appeal affirmed the injunction. Last year, the Legislature created a new Standards Commission, which recommended new standards (which the SBE adopted), including 8th grade math. The parties agreed to dismiss the case as moot since new authority conferred on SBE resulted in new standards that superseded the standards at issue in the lawsuit. The court subsequently entered an award of \$163,199.96 for attorney fees and costs to CSBA, which was received in April 2012.

Mandate Deferral

CSBA v. State of California

A writ of mandate was filed to challenge the state's practice of appropriating \$1,000 for mandates and deferring the balance. CSBA also sought to recover some of the past due money. The trial court agreed with CSBA that the \$1,000 payments were unlawful and enjoined the state from doing this in the future. The trial court declined to allow recovery for past amounts because an appellate decision involving the counties came out during the litigation that precluded recovery for past amounts. The state appealed and CSBA cross-appealed. The Court of Appeal confirmed that partial payment violated the law and that recovery for the past amount was not permitted, but it also reversed the trial court's injunction based on separation of powers. The matter went back to the trial court for a revised judgment, and in November 2011, the parties settled the attorneys' fee motion, in which the state paid CSBA \$290,974.41 in April 2012.

Invalidation of Aspire's State Charter

CSBA v. State Board of Education

CSBA challenged the SBE's 2007 approval of Aspire Public Schools' statewide charter petition because it believed that SBE used an incorrect interpretation of the Education Code provision allowing state charters. The matter also included several procedural claims. CSBA was joined in this lawsuit by ACSA, CTA, and Stockton USD.

The trial court agreed with SBE and essentially dismissed the case on demurrer, but the Court of Appeal in July 2010 reversed and ruled in favor of CSBA. This allowed the case to go forward, but did not actually invalidate the approval, leaving the decision to the trial court. In May 2011, in order to prevent invalidation of the state charter by the trial court, SBE took action to "materially revise" the Aspire state charter and attempt to "fix" the problems with the original approval. CSBA continues to disagree that Aspire meets the legal requirements of what a finding of a "statewide benefit" the charter school is established to provide actually is, as SBE's actions would essentially allow any multi-site charter operator to become a state charter with no additional requirements. On March 15, 2012, the trial court granted CSBA's petition and will be issuing a writ of mandate directing SBE to set aside its approval of a statewide charter for Aspire, and directing SBE to use only policies and procedures that have been promulgated in compliance with the California Administrative Procedures Act in its consideration of petitioners for statewide charters.

Classification of temporary teacher

McIntyre v. Sonoma Valley Unified School District

A teacher employed by the district as a temporary teacher was hired and released during each of her first two years with the district and during her third year was hired as a temporary employee and reclassified as a probationary employee. Before March 15 of her third year, she was non-reelected. The teacher claimed that since she obtained permanent status, she was erroneously classified as a temporary employee because the district had not specified the teacher she was replacing. The district argued successfully at the trial court in opposition to the writ of mandate that it was only required to prove that the number of permanent and temporary employees on leaves of absence was no less than the number of certificated employees hired as temporary employees in any given school year. The teacher appealed. After CSBA filed an amicus brief in October 2011 in support of the district's position, and the district presented its oral argument in February 2012, the appellate court again ruled on May 1, 2012 in favor of the district's position and sustained the trial court's holding.

District liability for employee misconduct

C. A., a minor, v. William S. Hart Union High School District

CSBA filed an amicus brief in August 2011 with the California Supreme Court supporting the district's successful effort of having the appellate court uphold the demurrer issued by the trial court dismissing the complaint with prejudice. The student in his complaint sought to impose liability on the school district for allegations of sexual misconduct by a high school guidance counselor/advisor. Both courts found the employee's alleged conduct to be outside the scope of his employment and thus the district could not be held vicariously liable. In addition to CSBA, the League of California Cities and the California State Association of Counties also filed an amicus brief. However, on March 8, 2012, the Supreme Court overturned the lower courts' decisions and concluded that the minor's theory of vicarious liability for negligent hiring, retention and supervision was a legally viable one. It found that case authority established that school personnel owed students under their supervision a protective duty of ordinary care, for breach of which the school district could be held vicariously liable. If a supervisory or administrative employee of the school district were proven to have breached that duty of care by negligently exposing the minor to a foreseeable danger of molestation by his guidance counselor, resulting in his injuries, and assuming no immunity provision applied, liability would fall on the school district under Government Code Section 815.2.