CHAPTER IX

STUDENTS IN PUBLIC SCHOOLS

ATTENDANCE

Attendance at a public school is a legally protected and legally enforceable right.[1] However, the state's interest in public education does not empower the Legislature to compel school children to receive instruction from public schools only; parents have the right to direct the upbringing and education of their children and have the right to send their children to private school.[2]

All children who are residents of a school district, including children who are not legally admitted into the United States, are entitled to a public education.[3] To deny such children a public education violates the Equal Protection Clause of the Fourteenth Amendment.[4] A pupil cannot be denied enrollment or readmission to a public school solely on the basis that he or she has had contact with the juvenile justice system including, but not limited to, arrest, adjudication by a juvenile court, formal or informal supervision by a probation officer or detention for any length of time in a juvenile facility or enrollment in a juvenile court school.[5]

SEGREGATION OF STUDENTS

A. Brown v. Board of Education

On May 17, 1954, the United States Supreme Court in Brown v. Board of Education[6] overturned the separate but equal doctrine in Plessy v. Ferguson and ruled that separate but equal public school facilities violated the Fourteenth Amendment and denied black students equal protection of the laws. In a unanimous decision written by Chief Justice Earl Warren, the United States Supreme Court reviewed its prior cases and indicated that it could not turn the clock back to 1868 when the Fourteenth Amendment was adopted or even to 1896 when Plessy v. Ferguson was written. The court stated that it must consider public education in light of its full development and its present place in American life to determine if segregation in public schools deprived African-American students of the equal protection of the law. The court stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic

[1] Ward v. Flood, 48 Cal. 36 (1874). Wysigner v. Crookshank, 82 Cal. 588 (1890); Miller v. Dailey, 136 Cal. 212 (1902); Piper v. Big Pine School District, 193 Cal. 664 (1924).
[2] Roman Catholic Welfare Corporation v. City of Piedmont, 45 Cal.2d 325 (1955).
[3] Plyer v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982).
[4] Ibid.
[5] Education Code section 48645.5.
[6] 74 S.Ct. 686, 347 U.S. 483 (1954).

> society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, and preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms."[7]

The court then asked whether the segregation of children in public schools, solely on the basis of race, even though the physical facilities may be equal, deprived the children of the minority group of equal educational opportunities. The court concluded that in the field of public education, the doctrine of "separate but equal" has no place and that separate educational facilities are inherently unequal. Therefore, the court held that segregated schools deprived the minority students of equal protection of the laws guaranteed by the Fourteenth Amendment.[8]

B. Mendez v. Westminster School District

Prior to the U.S. Supreme Court's decision in Brown v. Board of Education, the Ninth Circuit Court of Appeal held that the segregation of students violated the Fourteenth Amendment. In September 1944, Gonzalo Mendez, a Mexican-born tenant farmer, who had moved to the town of Westminster during World War II, attempted to enroll his children at Westminster's "white" school. The school district refused to admit the Mendez children and told Mendez to enroll his children in the "Mexican" elementary school. In early 1945, Mendez, together with four other parents from three other Orange County school districts with segregated schools, filed a lawsuit on behalf of their children and 5,000 other "Mexican and Latin descent" children that challenged the school district's discriminatory policies.[9]

The other school districts named as defendants were Garden Grove School District, El Modena School District, and Santa Ana City Schools. The complaint alleged that the school districts had violated the Fourteenth Amendment of the Constitution of the United States, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of all citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[7] Id. at 493.
[8] Id. at 495.
[9] Mendez v. Westminster School District, 64 F.Supp. 544, 545 (S.D. Cal. 1946).

The complaint further alleged that the school districts maintained policies which were designed to discriminate against persons of Mexican or Latin descent by excluding these students from certain elementary schools. The complaint alleged that the districts' policies and actions denied these students equal protection of the law. The complaint demanded that the rules, regulations and customs of the school districts be adjudged unconstitutional and requested that an injunction be issued restraining the school districts from further excluding Mexican or Latin descent students from these schools.

The District Court Judge, Paul J. McCormick, stated the issue in the case for decision was, "Does such official action of defendant district school agencies and the usages and practices pursued by the respective school authorities, as shown by the evidence, operate to deny or deprive the so-called non-English speaking school children of Mexican ancestry or descent within such school districts of the equal protection of the laws?"[10]

The district court found that the policies and practices of the school districts constituted state action within the Fourteenth Amendment, and thus, the court had jurisdiction. The court then went on to decide whether the school districts, based on their segregation policies and practices, violated applicable law and constitutional safeguards and, ". . . thus have invaded the personal right which every public school pupil has to the equal protection provision of the Fourteenth Amendment to obtain the means of education."[11]

The district court noted that the California Constitution directs the Legislature to encourage the promotion of intellectual, scientific, moral and educational improvement of the pupil.[12] The court noted that this constitutional provision applies to all students and that the segregation practices of school authorities in Orange County pertain solely to children of Mexican ancestry, which is contrary to the general requirements of the school laws of the state.[13] The court stated:

> "We perceive in the laws relating to the public educational system in the State of California a clear purpose to avoid and forbid distinctions among pupils based upon race or ancestry, except in specific situations not pertinent to this action. Distinctions of that kind have recently been declared by the highest judicial authority of the United States 'by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' They are said to be 'utterly inconsistent with American traditions and ideals.'"[14]

The district court further stated that segregated schools violate equal protection of the laws. The court stated:

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[10] Id. at 546.
[11] Id. at 547.
[12] Id. at 548; citing Article IX, Section 1 of the California Constitution.
[13] Id. at 549.
[14] Id. at 548; citing Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375 (1943).

> "The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, textbooks and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage."[15]

The district court further found that the segregation practices of the school districts allegedly based upon English language deficiencies of some of the children of Mexican ancestry did not justify the general and continuous segregation and separate schools of the children of Mexican ancestry from the rest of the elementary school population. The court held that the evidence at trial clearly showed that Spanish speaking children are hurt in their efforts to learn English by a lack of exposure to its use because of segregation, and that the comingling of the entire student body instills and develops a common cultural attitude among the school children, which is imperative for the perpetuation of American institutions and ideals. The court also found that the evidence at trial showed that segregation fosters antagonisms in the children and suggests inferiority among them where none exists.[16]

The district court further stated that public school authorities may differentiate in the exercise of their reasonable discretion as to the pedagogical methods of instruction to be pursued with different pupils. Foreign language disabilities may require special treatment in separate classrooms. Such separate instruction can be lawfully made only after credible examination by the appropriate school authority of each child whose capacity to learn is under consideration and the determination of such segregation must be based wholly upon the foreign language needs of the individual child, regardless of the child's ethnic traits or ancestry.[17] The court found that no such individual assessment was done of each student and that the school districts involved made general assumptions about students of Mexican ancestry and segregated them into separate schools. For these reasons, the district court granted the request for injunctive relief and prohibited the school districts from further segregating pupils of Mexican descent in the public schools.[18]

The school districts appealed to the U.S. Ninth Circuit Court of Appeals. The Court of Appeals stated that the judgment entered by the district court stated that all segregation found to have been practiced was arbitrary, discriminatory and in violation of the rights guaranteed to plaintiffs by the Constitution of the United States. The school districts were enjoined against continuance of the segregation.[19] The Court of Appeals stated:

> "Summed up in a few words, it is the burden of the petition that the State of California has denied, and is denying, the school

[15] Id. at 549.
[16] Id. at 549.
[17] Id. at 550.
[18] Id. at 550-51.
[19] Westminster School District v. Mendez, 161 F.2d 774, 776 (9th Cir. 1947).

> children of Mexican descent, residing in the school districts described, to equal protection of the laws of the State of California and thereby have deprived, and are depriving, them of their liberty and property without due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States."[20]

The Court of Appeals went on to frame the issues in the case as whether the acts of segregation were done under color of state law, and do they deprive the students of Mexican descent of any constitutional rights. The Court of Appeals answered the question in the affirmative and found that the school districts were acting under color of California state law.[21]

The briefs filed by the ACLU, the NAACP and the Japanese American Citizens League urged the Ninth Circuit Court of Appeals to find that segregation of public school children violated the Fourteenth Amendment and to overturn the U.S. Supreme Court's holding in Plessy v. Ferguson[22] that separate but equal school facilities did not violate the Fourteenth Amendment. Since, at that time, the U.S. Supreme Court had not overruled Plessy v. Ferguson,[23] the Court of Appeals ruled more narrowly that the State of California had not passed a law that authorized the segregation of children of Mexican descent and that other provisions of state law required all parents to send their children to school between the ages of eight and 16 years.[24] The court noted that the only exceptions were Education Code sections 8003 and 8004. Section 8003 stated:

> "The governing board of any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States Government, and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese or Mongolian parentage."

Education Code section 8004 stated at that time:

> "When separate schools are established for Indian children or children of Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school."

The original Court of Appeals decision was issued on April 14, 1947. Education Code sections 8003 and 8004 were repealed on June 14, 1947, when Assembly Bill Number 375 was approved by the Legislature and signed by Governor Earl Warren, who later became Chief Justice of the U.S. Supreme Court. The Court of Appeals then corrected its decision and issued a

[20] Id. at 777; citing, Plessy v. Ferguson, 163 U.S. 537, 547, 16 S.Ct. 1138 (1896).
[21] Id. at 779.
[22] 163 U.S. 537, 16 S.Ct. 1138 (1896).
[23] In our judicial system, an appellate court may not overturn an established precedent of the United States Supreme Court.
[24] Id. at 780.

new decision on August 1, 1947, noting that Education Code sections 8003 and 8004 had been repealed by the Legislature. The Court of Appeals concluded:

> "By enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California, respondents have violated the federal law as provided in the Fourteenth Amendment to the Federal Constitution by depriving them of liberty and property without due process of law and by denying to them the equal protection of the laws."[25]

C. California Case Law

The California courts have held that school districts in California have a constitutional duty to take affirmative action, by means that are reasonably feasible, to alleviate racial segregation in the public schools whether such segregation is de jure or de facto.[26] For example, the Fourteenth Amendment is violated when school attendance zones are drawn as a subterfuge for producing or perpetuating racial segregation in the schools.[27]

The California courts have ruled that conformance to constitutional standards does not require school officials in California to alleviate every racial imbalance in the public schools but when minority student enrollment is so disproportionate as to isolate minority students from other students and thus deprive minority students of an integrated educational experience, then reasonable and feasible steps must be taken.[28] The Constitution does not require that each school within a district reflect the racial composition of the district as a whole but the role of the courts is to ascertain if the school board has initiated a course of action to alleviate the effects of segregation in its school and has made reasonable progress toward that goal.[29]

In some circumstances, the state courts have held that bussing is an appropriate and useful element in a desegregation plan and that the assignment of a student to a school beyond reasonable walking distance from his home for the purpose of improving racial balance within the school district does not violate the Fourteenth Amendment.[30] Article I, Section 7 of the California Constitution requires school boards in California to take reasonably feasible steps to alleviate school segregation regardless of whether the segregation was a result of purposeful discrimination.[31]

In Jackson v. Pasadena City School District, the California Supreme Court stated:

> "The segregation of school children into separate schools because of their race, even though the physical facilities and the

[25] Id. at 781.
[26] Jackson v. Pasadena City School District, 59 Cal.2d 876 (1963); N.A.A.C.P. v. San Bernardino City Unified School District, 17 Cal.3d 311 (1976).
[27] Jackson v. Pasadena City School District, 59 Cal.2d 876 (1963).
[28] Crawford v. Board of Education of the City of Los Angeles, 17 Cal.3d 280 (1976).
[29] Crawford v. Board of Education, 17 Cal.3d 280 (1976).
[30] Ibid. See, also, San Francisco Unified School District v. Johnson, 3 Cal.3d 937 (1971).
[31] Crawford v. Board of Education of the City of Los Angeles, 17 Cal.3d 280 (1976), NAACP v. San Bernardino Unified School District, 17 Cal.3d. 311 (1976), Jackson v. Pasadena City School District, 59 Cal.2d. 876 (1963), McKinny v. Board of Trustees, 31 Cal.3d. 79 (1982).

> methods and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of law. . . ."[32]

The California Supreme Court went on to state that when the Pasadena City School District considered readjusting junior high school boundaries, it could not gerrymander a particular area so as to intensify the segregation of African Americans in one junior high school. The court stated:

> "School authorities, of course, are not required to attain an exact apportionment of Negroes among the schools, and consideration must be given to the various factors in each case, including the practical necessities of governmental operation. For example, consideration should be given, on the one hand, to the degree of racial imbalance in the particular school and the extent to which it affects the opportunity for education and, on the other hand, to such matters as the difficulty and effectiveness of revising school boundaries so as to eliminate segregation and the availability of other facilities to which students can be transferred."[33]

The court went on to state that where housing segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographical basis without corrective measures. The court held that the school board is required to take reasonably feasible steps to alleviate racial imbalance in schools regardless of its cause.[34]

In Crawford v. Board of Education of the City of Los Angeles, the California Supreme Court reiterated that the California Constitution does not require that each school in the district reflect the racial composition of the district as a whole. The court in Crawford stated:

> "Our decisions, instead, require only that school districts take reasonable and feasible steps to eliminate segregated schools, i.e., schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience. . . .
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> "Moreover, in determining whether a particular school is 'segregated' for constitutional purposes, we do not believe set racial or ethnic percentages can be established, either in absolute

[32] Jackson, 59 Cal.2d at 880.
[33] Id. at 882.
[34] Id. at 881.

terms or in terms of the racial composition of a particular district's student population. . . .

"In sum, from a constitutional standpoint, we see nothing inherently invalid in the fact that percentages of various racial or ethnic groups may vary, even significantly, in different schools throughout a school district, or even that a particular minority group may be completely unrepresented in a particular school. On the other hand, if the minority enrollment in a school is so disproportionate as realistically to isolate minority students from other students in the district, a finding of unconstitutional segregation would generally be proper.

"We must also point out that in declaring that school districts bear an affirmative obligation to undertake 'corrective measures' to attempt to alleviate school segregation with its accompanying specific harm to minority children, our Jackson decision was by no means oblivious to the grave practical difficulties that such an effort posed for school boards . . ."[35]

For example, in NAACP v. San Bernardino City Unified School District, the court found that at the time the district's student population was 62.9% Caucasian and 37.1% minority. However, a number of schools had minority enrollments of close to 100%. The court held that under Crawford, there can be no question that the district bears a constitutional obligation to take reasonable and feasible steps which will provide meaningful progress in the alleviation of segregation in such schools.[36]

In McKinny v. Board of Trustees,[37] the California Supreme Court held that the determination by the Board of Trustees of the Oxnard Union High School District that Camarillo High School was not segregated, was not arbitrary, capricious, or lacking evidentiary support despite the fact that its racial composition was 86% Caucasian and 14% minority. Other high schools in the district's Caucasian student population had a range of 33.21% to 64.58% Caucasian.

Therefore, the court in McKinny concluded that if a racial minority predominates in a particular school to such an extent that the minority group is isolated from other students in the district, then reasonably feasible steps must be taken to alleviate that segregation.

D. Proposition 209

[35] Crawford v. Board of Education, 17 Cal.3d at 303-304.
[36] Id. at 326.
[37] 31 Cal.3d 79, 89.

In Crawford v. Huntington Beach Union High School District,[38] the Court of Appeal held that the Huntington Beach Union High School District's open transfer policy violated Proposition 209, California Constitution, Article I, Section 31.

As indicated in the court decision, the district has an open transfer policy for all of its high schools. The open transfer policy had a "racial and ethnic balance" component as required by Education Code section 35160.5. Section 35160.5 states that school districts shall retain the authority to maintain appropriate racial and ethnic balances among their respective schools at the school district's discretion.[39]

The Court of Appeal indicated that there are six high schools in the district, but only Westminster High School has been declared "ethnically isolated." The school district employed a private firm to do a demographic study of Westminster High School. The demographic study for the 1999-2000 academic year showed that the ethnic make-up of Westminster High School was approximately:

- Asian, 45.2%
- Hispanic, 30.5%
- White, 15.9%.[40]

As a result of the ethnic make-up of Westminster High School, the Court of Appeal noted that the school district put restrictions on white students seeking a transfer out of Westminster High School (transfers were allowed only if another white student was willing to transfer to Westminster High School to take that student's place). However, a non-white student could transfer out without restrictions. In addition, a non-white student could not transfer into Westminster High School unless another non-white student was willing to transfer out and take that student's place.[41]

Crawford, a taxpayer in the district, filed a lawsuit in September 1999, to challenge the constitutionality of the district's policy under Proposition 209. In December 2000, the Orange County Superior Court ruled in favor of the school district. The Court of Appeal reversed the superior court's decision.[42]

The Court of Appeal held that under the California Supreme Court's decision in High Voltage Wire Works, Inc. v. City of San Jose,[43] and an earlier Court of Appeal decision Connerly v. State Personnel Board,[44] the school district's policy was in violation of Proposition 209. Proposition 209 was passed by the voters in November 1996 and states in relevant part:

> "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of

[38] 121 Cal.Rptr.2d 96, 165 Ed.Law Rep. 712, 98 Cal.App.4th 1275 (2002).
[39] Id. at 1277.
[40] Id. at 1278.
[41] Ibid.
[42] Ibid.
[43] 24 Cal.4th 537 (2000).
[44] 92 Cal.App.4th 16 (2001).

> race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

In High Voltage, the California Supreme Court held that a contractor outreach program, which required general contractors to use a certain percentage of minority and women subcontractors or document their efforts to reach out to women and minority business enterprises violated Proposition 209.

In Connerly v. State Personnel Board, the Court of Appeal held that a number of government affirmative action programs violated Proposition 209. These programs included subcontracting programs requiring bidders to utilize subcontractors who are socially and economically disadvantaged (which included racial and ethnic minorities within the definition), community college affirmative action employment programs, which included hiring goals and timetables for ethnic minorities, and participation goals for state contracts.

In Crawford, the Court of Appeal concluded that the balancing component of Education Code section 35160.5 violated Proposition 209. The court noted that school districts could develop magnet schools which might lead to increased desegregation without offending Proposition 209. The Court of Appeal concluded by stating:

> "We do not dispute the evils of segregated schools and we recognize the potential benefits of attending a racially and ethnically diverse school, but the people have spoken. California Constitution, Article I, Section 31 is clear in its prohibition against discrimination or preferential treatment based on race, sex, color, ethnicity, or national origin. Thus, the racial balancing component of the district's open transfer policy is invalid under our State Constitution."[45]

E. Use of Race in Determining School Assignment

In Parents Involved in Community Schools v. Seattle School District No. 1,[46] the United States Supreme Court struck down as unconstitutional voluntary integration plans from two school districts that used race as a factor in determining school assignment. The Court held that race may not be used to determine school benefits and responsibilities. The decision is expected to have little effect in California as a result of the prior passage of Proposition 209 which barred preferences based on race.

The United States Supreme Court described the voluntary integration or student assignment plans in Jefferson County and in Seattle as plans that make school assignments and transfer requests based upon an individual student's race when assigning that student to a particular school so that racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these plans solely because of their race brought suit, contending that

[45] Id. at 1287.
[46] 127 S.Ct. 2738, 5510.5, 201, 220 Ed. Law Rep. 84, (2007).

allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection.[47]

The Supreme Court held that when the government distributes burdens or benefits on the base of individual racial classifications, that action is reviewed under a strict scrutiny standard.[48] The court held that racial classifications required that school districts demonstrate that the use of individual racial classifications and assignment plans are "narrowly tailored" to achieve a "compelling governmental interest."[49] The court recognized that there are two compelling interests that the courts have recognized in the past to support remedies using individual racial classifications. The first is the compelling interest of remedying the effects of past intentional discrimination.[50] The second is a compelling interest in diversity in higher education.[51] However, the court rejected the concept of racial balancing. The court stated:

> "Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simple components of a racial, religious, sexual, or national class."[52]

The court noted that the schools in Seattle were never segregated on the basis of race and that the schools in Jefferson County, Kentucky removed the vestiges of past segregation. Therefore, there is no need to use racial classifications to remedy intentional discrimination or segregation. The court stated:

> "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[53]

In a concurring opinion, Justice Anthony Kennedy joined in the opinion of the court and stated:

> "The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds . . . those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interest they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications."[54]

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[47] Id. at 2746-47.
[48] Johnson v. California, 533 U.S. 499, 505-506 (2005); Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
[49] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
[50] See, Freeman v. Pitts, 503 U.S. 467, 494 (1992).
[51] Grutter v. Bollinger, 539 U.S. 306 (2003).
[52] 127 S.Ct. 2738, 2757 (2007).
[53] Id. at 2768.
[54] Id. at 2797.

It appears that the United States Supreme Court's decision in Seattle School District No. 1 is similar to the California Court of Appeals decision under Proposition 209 in Crawford and that federal and state laws are now consistent with respect to the use of racial classifications to balance the racial or ethnic composition of public schools.

F. The Use of Social Diversity in School Assignment

In American Civil Rights Foundation v. Berkeley Unified School District,[55] the Court of Appeal held that the Berkeley Unified School District's policy, which aims to achieve social diversity by using neighborhood demographics when assigning students to schools, is not discriminatory and does not violate Proposition 209.

The Court of Appeal held that the challenged policy does not use racial classifications and does not consider an individual student's race when assigning the student to a school. Instead, the assignment policy looks at the student's residential neighborhood, and considers the average household income in the neighborhood, the average educational level of the adults residing in the neighborhood, and the racial composition of the neighborhood as a whole. Every student within a given neighborhood receives the same treatment, regardless of his or her individual race.[56] The Court of Appeal stated:

> "We find that educators who include a general recognition of the demographics of neighborhoods in student assignments, without classifying a student by his or her race, do not 'discriminate against, nor grant preferential treatment to, any individual or group on the basis of race'."[57]

The school district calculates a student's diversity category by dividing the district into 445 planning areas which are geographic divisions typically between four and eight city blocks. Each planning area receives a diversity category of 1, 2 or 3 that measures the area's composite diversity, which is based on three factors:

1. The average household income of those living in the planning area;

2. The average education level attained by adults living in the planning area; and

3. The percentage of minority students living within the planning area.[58]

Information on household income and education level is obtained from census data, and the percentage of minority students is derived from a multi-year pool of student data collected by the school district. The actual personal attributes of students is not relied upon in determining

[55] 172 Cal.App.4th 207, 90 Cal.Rptr.3d 789, 242 Ed. Law Rep. 285. (2009).
[56] Id. at 211.
[57] Id. at 211; citing, California Constitution Article I, section 31(a) [Proposition 209].
[58] Id. at 214-215.

student assignments. Instead, the diversity characteristics derived from the planning area in which the student lives are used to calculate a diversity category and students from each category are assigned proportionately to individual schools to approximate the racial and socioeconomic diversity of the geographic attendance zones as a whole.[59]

The Court of Appeal concluded that the challenged student assignment policy did not violate Proposition 209. The Court of Appeal held that nothing in Proposition 209 would preclude a school district from using neighborhood planning areas to determine student assignment.[60]

DISCRIMINATION AND AFFIRMATIVE ACTION

In Fisher v. University of Texas,[61] the United States Supreme Court reversed the decision of the Fifth Circuit, finding that the Fifth Circuit did not hold the university to the demanding burden of strict scrutiny and therefore its decision affirming the district's courts grant of summary judgment to the university must be reversed.[62]

The University of Texas adopted its present system for evaluating candidates for admission after the Fifth Circuit's decision in Hopwood v. Texas,[63] which ruled the university's consideration of race violated the Equal Protection Clause, because it did not further any compelling government interest. The university stopped considering race in admission and substituted instead a Personal Achievement Index (PAI) that measures student's leadership and work experience, awards, extracurricular activities, community service and other special circumstances that give insight to a student's background. The special circumstances include growing up in a single parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. In 2004, the university adopted a third admissions program in which the university explicitly considered the race of the applicant. Thus, a student's race became a component of the PAI score beginning in the Fall of 2004.

The court noted that any race conscious admissions program must be narrowly tailored. The court held that strict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the race classification is necessary to accomplish its purpose.

EQUAL TREATMENT AND BENEFITS UNDER TITLE IX

In Ollier v. Sweetwater Union High School District,[64] The U.S. District Court for the Southern District of California has issued a decision in a class action case holding that the Sweetwater Union High School District violated Title IX by failing to grant equal treatment and

[59] Ibid.
[60] Id. at 222-23.
[61] 133 S.Ct. 2411 (2013).
[62] See, Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
[63] 78 F.3d 932, 955 (5th Cir. 1996).
[64] Ollier v. Sweetwater Union High School District, 858 F.Supp.2d 1093 (S.D. Cal. 2012).

benefits to female athletes at Castle Park High School (CPHS) and by retaliating against a coach who complained about these issues. The court stated that Title IX requires "equal treatment," which has been interpreted by the U.S. Department of Education's Office for Civil Rights to require "equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes.[65]

Equal treatment claims allege sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics.[66] Compliance in the area of equal treatment and benefits is assessed based on an overall comparison of the male and female athletic programs, including an analysis of recruitment benefits, provision of equipment and supplies, scheduling of games and practices, availability of training facilities, opportunity to receive coaching, provision of locker rooms and other facilities and services, and publicity.[67] A disparity in one program component (i.e., scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school; however, a disparity in one program component can be offset by a comparable advantage to that sex in another area as long as the overall effect of any difference is negligible.[68]

The court found the district to be in violation of Title IX in the following areas:

A. Recruiting Benefits

The court found that the district has not instituted recruiting policies and has failed to monitor athletic recruiting that provides for equitable efforts to recruit female athletes at CPHS. The court found significant disparities in female athlete recruitment. For example, coaches for female athletic teams had higher turnover rates than coaches for male teams and as a result, there was less stable coaching for girls' teams, less successful teams and problems recruiting players. In addition, coaches for girls' teams were on several occasions appointed shortly before the start of the season and, therefore, there was no time for recruiting by the coach. One person served as head coach for three girls' teams; this was never the case for boys' teams.

B. Locker Rooms, Practice and Competition Facilities

Male and female athletes are required to have access to the same quality facilities on the same basis. The court found that the quality, size and location of the locker rooms were better for male athletes than female athletes at CPHS. The court also found that the male athletes have higher quality practice and competition facilities. For example, the CPHS football team had its own separate locker room that was rated superior in size and quality (i.e., located close to practice and competition facilities), whereas female athletes had access only to a generic locker room with lockers that were too small to store athletic equipment. Female athletes at CPHS were required to vacate the locker room whenever a visiting football team came to campus.

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[65] Department of Education, Office for Civil Rights, Policy Interpretation ("Policy Interpretation"), 44 Fed Reg. 71, 413, 71, 417-48.
[66] See, McCormick v. School District of Mamaroneck, 370 F.3d 275, 299 (2004).
[67] 34 C.F.R. Section 106.41(c).
[68] McCormick, *supra*, at 293; Policy Interpretation, 44 Fed. Reg. at 71, 415-17.

Moreover, while the boys' baseball facility had a netted instructional complex, a batting cage, a significant storage area, four spectator stands, protective screens, cinder block dugouts with benches, and a high quality playing surface, the Varsity softball field had a too-small backstop that was wooden and allowed for balls to ricochet off at a high rate of speed, and chain-link dugouts without a roof for sun and weather protection. The softball field had extremely hard infield dirt with many grooves and divots which caused players to be afraid of bad hops and reluctant to slide or dive for balls in the infield. The outfield grass was patchy, uneven and dangerous. The softball facility had numerous other shortcomings as well when compared with the baseball complex.

C. Equipment, Uniforms and Storage

The court found that the male athletes were provided with more and superior quality equipment and supplies than the female athletes, as well as more and better storage facilities. The court found the availability and type of uniforms provided to female athletes were not equitable as compared to male athletes. The court found the softball program had significantly less sport specific equipment, e.g., ball carts, buckets and balls, than the baseball program. The baseball field contained a large maintenance storage area for maintenance-related items; the softball field contained no such storage area.

With regard to uniforms, there was a nondiscriminatory uniform replacement schedule in place, but the coaches were permitted to violate it by using their budgets to purchase uniforms. The Athletic Director did not oversee whether the uniform replacement schedule was violated.

D. Scheduling Benefits

The court found that because of the district's consistent failure to timely hire coaches for girls' sports, girls were provided with fewer competitive opportunities than boys. The court also found that boys had greater access to times considered premium for competition (early evening) and practice (immediately after school). For example, girls' basketball games were played on Friday nights at 6:00 p.m. while the boys' basketball games were played on Friday nights at 7:30 p.m. No effort was made to alternate the times by week or season. Similar disparities occurred in other sports also. The Athletic Director permitted the coaches to determine practice times and failed to monitor the times for gender equity.

E. Equal Access to Coaching

The court found that the female teams' coaches were fewer in number, less experienced, and more overburdened than the male teams' coaches, which directly impacted the quantity and quality of the instructional benefits provided to female athletes. The court found that the Athletic Director allowed coaches of boys' teams to use their coaching salary for additional assistant coaches. As a result, there were more baseball coaches than softball coaches because the head baseball coach used his salary for assistant coaching salaries. Additionally, girls' field hockey, tennis, water polo and golf teams often lacked consistent coaching staffs. CPHS had no girls' field hockey team in 2005, 2007 or 2008, or girls' tennis team in 2007 or 2008 because no

coaches were hired for these sports. Girls' water polo and girls' lacrosse were not offered because no coaches were hired for these sports.

F. Medical and Training Services

The court found that male athletes at CPHS were provided with greater access to athletic trainers and medical services than female athletes. The weight training facility, while available for use by boys and girls, was used predominately by boys. The equipment in the facility was designed for absolute-strength based sports in which boys tend to participate.

G. Publicity and Promotional Support

The court found that girls' athletic activities were provided with less coverage and promotion in yearbooks, fewer announcements in the school's Daily Bulletin, less signage on the school's electronic marquee, and inferior signage. In addition, the band and cheerleaders performed at more boys' athletic events than at girls' athletic events.

H. Fund-Raising Benefits

The court found that the district failed to monitor athletic fund-raising opportunities and instead allowed coaches full discretion over fund-raising. A foundation supported the athletic program at CPHS but the girls' team coaches were not advised as to what they could request and the method for receiving foundation funds. The boys' team coaches were aware of the availability of and requirements for obtaining such funds because of their longevity in their positions. The Athletic Director did not ensure equitable access to the funds.

Aside from the above, the court also found that the district retaliated against the girls' softball coach when it fired him after he raised issues regarding gender equity. The court did not find the district's stated reasons for the dismissal to be credible.

The court held that since the filing of the lawsuit, the district made some improvements to facilities to try to bring the facilities and programs into Title IX compliance. However, the court found that the plaintiff class continues to suffer irreparable injury and, therefore, the court retained jurisdiction to ensure compliance with its orders. The court ordered the parties to submit a proposed compliance plan for its review.

This case is a reminder that districts should monitor their athletic programs to ensure gender equity in regard to the above components, as well as participation opportunities.[69] Districts should adopt and maintain a system for Title IX implementation and compliance. District Title IX Coordinators should be well-trained and should independently verify the information received from schools and coaches. Districts also should confirm that they completed a Title IX self-evaluation as required by the federal regulations.[70] Districts should

[69] Participation opportunities were not at issue in this decision because the court had already held in favor of the plaintiffs on that issue in granting the plaintiffs' motion for summary adjudication.
[70] 34 C.F.R. Section 106.3(c).

ensure that their policies and procedures are effective in identifying and curing areas of Title IX non-compliance.

DISCRIMINATION AGAINST PREGNANT STUDENTS

Title IX of the Education Amendments of 1972 (Title IX)[71] is the primary federal statutory guarantee of equal educational opportunity for pregnant and parenting students, which applies to a broad range of education institutions including elementary and secondary schools. Title IX states:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Although Title IX is most often associated with student athletics, it was intended to apply to many other aspects of students' schooling by strengthening the legal rights of pregnant teenagers and others who may not get a fair shot at an education because of gender.

Regulations promulgated pursuant to Title IX state that in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex subject any person to separate or different rules of behavior, sanctions, or other treatment, or otherwise limit any person in the enjoyment of any right or privilege.[72] Specifically, 34 C.F.R. Section 106.40 prohibits a recipient from applying any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

A recipient may require a pregnant student to obtain a physician's certification that the student is physically and emotionally able to continue participation in a school program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician. The recipient is required to treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability.[73] Therefore, unless the district currently documents other temporary disabilities, it could not document that girls are pregnant in without violating Title IX.

Additionally, documenting in AERIES (the student data system) that girls are pregnant may implicate the privacy rights of these students. In C.N. v. Wolf,[74] the United States District Court for the Central District of California held that a student had a legally protected privacy interest in information about her sexual orientation under the California Constitution, Article I, section 1, and thus the school violated the student's privacy rights when the principal disclosed the sexual orientation of the student to his parents in a disciplinary proceeding.

[71] 20 U.S.C. Section 1681 et seq.
[72] 34 C.F.R. Section 106.31(b)(4) and (7).
[73] 34 C.F.R. Section 106.40 (a) and (b).
[74] 410 F.Supp.2d 894 (2005).

Citing the second prong in Hill v. Nat'l Collegiate Athletic Ass'n,[75] which states "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference," the court in Wolf found the student had a reasonable expectation of privacy because "[t]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of information."[76]

Although the district may document in AERIES that girls are pregnant without violating Title IX, as long as it documents other temporary disabilities, a student has a privacy right under California law to not disclose her pregnancy. Therefore, unless a parent of a minor student or an adult student authorizes the district to document that a student is pregnant the district may not document in AERIES that a girl is pregnant.

Flagging only pregnant students would potentially violate federal and state laws. Under federal law, the regulations to Title IX explicitly note that schools shall not apply any rule which treats students differently on the basis of sex or parental status.[77] In addition, although schools may require a pregnant student to obtain medical certification for participation in school activities, this requirement would only be permissible if it is "required of all students for other physical or emotional conditions requiring the attention of a physician".[78] Schools must treat pregnancy and conditions related to pregnancy in the same manner, under the same policies, as any other temporary disability.[79] In short, pregnant students must be treated the same way, with the same rules, as all other students.[80]

Under state law, in addition to nondiscrimination provisions that parallel Title IX, the California Constitution establishes a right of privacy for all individuals. The California Supreme Court has recognized that the privacy rights of pregnant minors are a fundamental interest.[81] A court would review any policy or practice which results in divulging this sensitive information under a high standard, and the school would need to show that flagging pregnant students was necessary. This would be a difficult showing if only pregnant students are singled out, as other health issues may present similar risks to students. In addition, students are not obligated to disclose pregnancy status under privacy laws, so disclosure could not be required for participation in any programs or services.

Finally, documenting pregnancy status in pupil records would result in disclosure to school staff and parents/guardians of the student. Consent of the student and, if the student is under 18, the parent/guardian would be appropriate prior to including this information in pupil records, to ensure compliance with privacy protections and the Family Educational Rights and Privacy Act.[82]

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[75] 7 Cal.4th 1 (1994).
[76] Citing, U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989).
[77] 34 C.F.R. Section 106.40(a).
[78] 34 C.F.R. Section 106.40(b)(2).
[79] 34 C.F.R. Section 106.40(b)(4).
[80] 34 C.F.R. Section 106.31(b)(1), (4).
[81] American Academy of Pediatrics v. Lungren, 16 Cal.4th 307 (1997).
[82] 20 U.S.C. Section 1232g.

TRANSGENDER STUDENTS

On August 12, 2013, Governor Brown signed Assembly Bill 1266[83] which amends Education Code section 221.5, effective January 1, 2014.

Assembly Bill 1266 adds subsection (f) to Education Code section 221.5, which states that it is the policy of the State of California that elementary and secondary school classes and courses be conducted without regard to the sex of the pupil enrolled in these classes. Subsection (f) states:

> "A pupil shall be permitted to participate in sex segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."

Assembly Bill 1266 will likely generate a number of questions with respect to its implementation. Districts may also wish to adopt policies implementing Assembly Bill 1266.

ADMISSION TO KINDERGARTEN

Senate Bill 1381[84] amends Education Code sections 46300, 48000, and 48010, effective January 1, 2011. Section 48000, as amended, changed the requirements for admission to kindergarten. A child shall be admitted to kindergarten at the beginning of the school year if the child will have his or her fifth birthday on or before one of the following dates:

1. December 2 of the 2011-2012 school year;

2. November 1 of the 2012-2013 school year;

3. October 1 of the 2013-2014 school year; and

4. September 1 of the 2014-2015 school year, and each school year thereafter.

The governing board of a school district maintaining one or more kindergartens may, on a case-by-case basis, admit to kindergarten a child having attained the age of five years at any time during the school year, with the approval of the parent or guardian, if the governing board determines the admittance is in the best interest of the child and the parent or guardian is given information regarding the advantages and disadvantages of early admittance.

As a condition of receipt of apportionment for pupils in a transitional kindergarten program, a school district or charter school must ensure the following:

[83] Stats. 2013, ch. 85.
[84] Stats. 2010, ch. 705.

1. In the 2012-2013 school year, a child who will have his or her fifth birthday between November 2 and December 2 shall be admitted to a transitional kindergarten program maintained by the school district.

2. In the 2013-2014 school year, a child who will have his or her fifth birthday between October 2 and December 2 shall be admitted to a transitional kindergarten program maintained by the school district.

3. In the 2014-2015 school year and each school year thereafter, a child who will have his or her fifth birthday between September 2 and December 2 shall be admitted to a transitional kindergarten program maintained by the school district.[85]

For the purposes of Section 48000, transitional kindergarten is defined as the first year of a two-year kindergarten program that uses a modified kindergarten curriculum that is age and developmentally appropriate. A transitional kindergarten shall not be construed as a new program or higher level of service.[86] Pupils participating in transitional kindergarten are included in computing the average daily attendance of a school district for purposes of calculating school district apportionments.[87]

COMPULSORY ATTENDANCE

A. State Statutory Provisions

In addition to the right of students to attend public schools, the state has the power to require the compulsory attendance of students in public and private schools.[88] The state's authority to compel the attendance of children and the state's interest in universal education for children must be balanced against other fundamental rights and interests such as the Free Exercise Clause of the First Amendment and the judicial interest of parents with respect to the religious upbringing of their children.[89] Thus, if a state's compelling state interest in universal education infringes the free exercise of religion, in certain narrow circumstances, the courts may exempt students from compulsory attendance. The burden of proof to show an infringement of the free exercise rights lies with the parents while that of proving a compelling state interest lies with school officials.[90]

The state's interest in public education does not empower the state to compel school children to receive instruction from public school teachers only since this would take away the right of parents to direct the upbringing and education of their children.[91] The constitutional right of parents to send their children to private school rather than a public school has also been

[85] Education Code section 48000(c).
[86] Education Code section 48000(e).
[87] Stats. 2010, ch. 705, Section 5.
[88] Ex Parte Liddell, 93 Cal. 633 (1892); Veterans' Welfare Board v. Riley, 189 Cal. 159 (1922).
[89] Wisconsin v. Yoder, 406 U.S. 205, 921 S.Ct. 1526 (1972).
[90] Ibid.
[91] Roman Catholic Welfare Corporation v. City of Piedmont 45 Cal.2d 325 (1955).

recognized by the statute.[92] The instruction in private schools, in order for children to be exempt from the compulsory attendance laws, must be taught in the English language and offer instruction similar to the course of study offered by the public schools.[93] Private schools must also keep an attendance register or record of attendance and file an affidavit with the Superintendent of Public Instruction.[94]

In California, unless exempt, every person between the ages of six and eighteen years is subject to compulsory full-time education or compulsory continuation education.[95] Persons sixteen years of age or older and under eighteen years of age must attend continuation education classes if they are not otherwise enrolled.[96] Students between the ages of six and sixteen years must attend full-time day school for the full time designated as the length of the school day by the governing board of the school district.[97]

In addition to children attending private schools, students who are instructed by a private tutor holding a valid state credential and students holding valid work permits to work temporarily in the entertainment or allied industries, are exempt from attending full-time public day schools.[98] Any parent or person having control or charge of a pupil who fails to comply with the compulsory attendance laws is guilty of a misdemeanor and subject to a fine or imprisonment.[99] A system of school attendance review boards has been established to correct attendance or school behavior problems of minors and to promote the use of alternatives to the juvenile court system.[100]

Any student subject to compulsory full-time education or to compulsory continuation education who is absent from school without a valid excuse for more than three days or tardy without a valid excuse in excess of thirty minutes on each of more than three days in one school year is a truant.[101] Truants are required to be reported to the attendance supervisor or to the superintendent of the school district and any pupil who has been reported as truant three or more times during the school year, following an attempt to hold at least one conference with the parent or guardian of the pupil, is deemed a habitual truant.[102]

A pupil who is deemed to be a habitual truant or is irregular in attendance in school or who is habitually insubordinate or disorderly during attendance in school may be referred to a school attendance review board.[103] The school attendance review board may notify the district attorney or the probation officer of the county of the name of each pupil who has been classified as a truant if the district attorney or probation officer has elected to participate in a truancy

[92] Ibid.; see, also, Education Code section 48222.
[93] Education Code section 48222.
[94] Ibid.
[95] Education Code section 48200.
[96] Education Code section 48400.
[97] Education Code section 48200.
[98] Education Code sections 48220, 48224, 48225.
[99] Education Code section 48293.
[100] Education Code section 48320.
[101] Education Code section 48260.
[102] Education Code section 48262.
[103] Education Code section 48263.

mediation program.[104] To obtain the involvement of the district attorney or probation officer, the school attendance review board must indicate the name of each truant, that available community services cannot resolve the truancy or insubordination problem, that the pupil or the parents or guardian of the pupil or both have failed to respond to the directives of the school attendance review board or to the services provided. The district attorney or probation officer then may request the parents or guardians and the child to attend a meeting in the district attorney's office or at the probation department.[105]

The attendance supervisor, a peace officer or any school administrator or designee may arrest or assume temporary custody during school hours of any minor subject to compulsory full-time education or to compulsory continuation education found away from his home and who is absent from school without a valid excuse.[106] A person making the arrest or assuming temporary custody of the minor must deliver the minor either to the parent, guardian or other person having control or charge of the minor or to the school from which the minor is absent or to a nonsecure youth service or community center designated by the school district for counseling prior to returning such minor to his home or school or to a school counselor or pupil services and attendance officer located at a police station for the purpose of obtaining immediate counseling.[107]

Assembly Bill 1643,[108] Assembly Bill 2141,[109] and Assembly Bill 2195[110] went into effect January 1, 2015.

Assembly Bill 1643 amends Education Code section 48321 with regard to school attendance review boards ("SARBs"). Under these amendments, a county SARB may accept referrals or requests for hearing services from one or more school districts within its jurisdiction, pursuant to Education Code section 48321 (f), which as amended provides that a county SARB may provide guidance to local SARBs. A county SARB may be operated through a consortium or partnership of a county with one or more school districts or between two or more counties.[111] A county SARB may meet as needed for purposes of conducting hearings.[112]

AB 1643 also states that a representative of the county district attorney's office and a representative of the county public defender's office shall be included as members of county SARBs[113] or local school district SARBs.[114] However, Education Code section 48321 (a) (3) notes the following:

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[104] Education Code section 48263.5.
[105] Ibid.
[106] Education Code section 48264.
[107] Education Code section 48265.
[108] Stats. 2014, ch. 879.
[109] Stats. 2014, ch. 897.
[110] Stats. 2014, ch. 898.
[111] Education Code section 48321 (a) (1).
[112] Education Code section 48321 (a) (5) (B).
[113] Education Code section 48321 (a) (2) (L) and (M). If more than one county is represented in a county SARB, a representative from each district attorney's and public defender's office may be included.
[114] Education Code section 48321 (b) (1) (L) and (M).

> "Notwithstanding paragraph (2), for purposes of conducting hearings, the chairperson of the county school attendance review board is authorized to determine the members needed at a hearing, based on the needs of the pupil, in order to address attendance or behavioral problems."

Assembly Bill 2141 adds Education Code section 48297, which will require a state or local agency conducting a truancy mediation program or prosecuting a pupil or the pupil's parent or legal guardian[115] to provide the school district, school attendance review board, county superintendent of schools, probation department, or any other agency that referred a truancy-related mediation, criminal complaint, or petition with the outcome of each referral.[116]

The state or local agency or prosecutor shall provide this information using the most cost-effective method possible, including, but not limited to, by electronic mail or telephone.[117] For purposes of this section, "outcome" means the imposed conditions or terms placed on a pupil or a pupil's parent or legal guardian and the acts or actions taken by a state or local authority with respect to a truancy-related mediation, prosecution, criminal complaint, or petition.[118] Districts will want to take care in how the outcome information is documented; no guidance is provided in this statute, but outcomes may be documented as interventions for attendance issues or handled as juvenile court records, depending on the nature of the outcome and the existing protocols of the district. Finally, the new law states that the legislative intent behind the provision is to determine the best evidence-based practices to reduce truancy, and nothing in this section is intended to encourage additional referrals, complaints, petitions, or prosecutions, or to encourage more serious sanctions for pupils.[119]

Assembly Bill 2195 amends Welfare and Institutions Code section 256 to permit, subject to the orders of the juvenile court, a juvenile hearing officer to hear and dispose of any case in which a minor under the age of 18 years as of the date of the alleged offense is charged with a violation of subdivision (b) of Section 601 that is due to having four or more truancies, as described in Section 48260 of the Education Code, within one school year.

AB 2195 further added procedural requirements under Welfare and Institutions Code section 258 for hearings regarding truancy. These procedures include the following:

1. The judge, referee, or juvenile hearing officer shall not proceed with a hearing unless both of the following have been provided to the court:

    a. Evidence that the minor's school has undertaken the actions specified in subdivisions (a), (b), and (c) of Section 48264.5 of the

[115] This law applies to prosecutions pursuant to Education Code sections 48260 and 48454; Penal Code sections 270.1 and 272; or Welfare and Institutions Code section 601. Pursuant to Education Code section 48297 (a) (2), these provisions apply to, but are not limited to, the referrals referenced in Education Code sections 48260 and 48454; Penal Code sections 270.1 and 272; and Welfare and Institutions Code sections 601, 601.2, and 601.3.
[116] Education Code 48297
[117] Education Code section 48297 (a) (1).
[118] *Id.*
[119] Education Code section 48297 (b).

Education Code. If the school district does not have an attendance review board, the minor's school is not required to provide evidence to the court of any actions the school has undertaken that demonstrate the intervention of a school attendance review board.

b. The available record of previous attempts to address the minor's truancy.

2. The court is encouraged to set the hearing outside of school hours, so as to avoid causing the minor to miss additional school time.

3. The minor and his or her parents shall be advised of the minor's right to refuse consent to a hearing conducted upon a written notice to appear.

4. The minor's parents shall be permitted to participate in the hearing.

5. The judge, referee, or juvenile hearing officer may continue the hearing to allow the minor the opportunity to demonstrate improved attendance before imposing any of the orders specified below. Upon demonstration of improved attendance, the court may dismiss the case.

6. Upon a finding that the minor violated Welfare and Institutions Code section 601 (b), the judge, referee, or juvenile hearing officer shall direct his or her orders at improving the minor's school attendance. The judge, referee, or juvenile hearing officer may do any of the following:

a. Order the minor to perform community service work, as described in Section 48264.5 of the Education Code, which may be performed at the minor's school.

b. Order the payment of a fine by the minor of not more than fifty dollars ($50), for which a parent or legal guardian of the minor may be jointly liable. The fine described in this subparagraph shall not be subject to Section 1464 of the Penal Code or additional penalty pursuant to any other law. The minor, at his or her discretion, may perform community service in lieu of any fine imposed under this procedure.

c. Order a combination of community service work and payment of a portion of the fine, as specified.

d. Restrict driving privileges as specified. The minor may request removal of the driving restrictions if he or she provides proof of school attendance, high school graduation, GED completion, or enrollment in adult education, a community college, or a trade program. Any driving restriction shall be removed at the time the minor attains 18 years of age.[120]

[120] Welfare and Institutions Code section 258 (b).

School districts should note that these procedures include the court requiring information from the school about interventions and previous attempts to address truancy, and community service as described in Education Code section 48264.5 as an option for the minor to address an order under this procedure.

Finally, under these amended procedures, the judge, referee, or juvenile hearing officer shall retain jurisdiction of the case until all orders made under this section have been fully complied with, but if a minor is before the judge, referee, or juvenile hearing officer on the basis of truancy, jurisdiction shall be terminated upon the minor attaining 18 years of age.[121]

B. Detention of Truants

If the student is a habitual truant, the minor can be brought before the probation officer of the county.[122] The assumption of temporary custody of a truant has been upheld by the courts if there is reasonable suspicion, under the circumstances, to justify a detention.[123] In In Re James D., the California Supreme Court held that general youthful appearance and nothing more would not justify a detention to investigate whether a person is truant. However, the California Supreme Court held where youthful appearance and other circumstances existed, detention would be permissible.[124]

C. Home Schooling

In Jonathan L. v. Superior Court,[125] the Court of Appeal upheld the legality of home schooling in California. The court held that California statutes permit home schooling and that home schooling is similar to a private school. The court also held that the statutory authorization to home school children may be constitutionally overridden in order to protect the safety of a child who has been declared a dependent of the juvenile court.

The Court of Appeal conceded that interpreting the law of California with respect to home schooling was a difficult task due to legislative inaction. The Court of Appeal noted that the compulsory education law was enacted in 1903. In 1929, home schooling was amended out of the law and children who were not educated in public or private school could be taught privately only by a credentialed tutor. Case law in 1953 and 1961 confirmed this interpretation and specifically concluded that a home school could not be considered a private school. The court noted that while the Legislature could have amended the statutes in their response to Turner and Shinn to expressly provide that a home school could be a private school, the Legislature did not do so. [126]

However, the Court of Appeal noted that subsequent developments in the law demonstrate an apparent acceptance by the Legislature of the proposition that home schooling is taking place in California with home schools allowed as private schools. Recent statutes indicate

[121] Welfare and Institutions Code section 258 (c).
[122] Education Code section 48265.
[123] In re James D., 43 Cal.3d 903, 41 Ed.Law Rep.722 (1987).
[124] Ibid.
[125] 165 Cal.App. 1074, 81 Cal. Rptr.3d 571, 235, Ed Law Rep. 492 (2008).
[126] Id. at 1082-84. See, also, People v. Turner, 121 Cal.App.2d Supp. 861 (1953); In Re Shinn, 195 Cal.App.2d 683, 693 (1961).

that the Legislature is aware that some parents in California home school their children by declaring their homes to be private schools. The court noted that several statutory enactments indicate a legislative approval of home schooling by exempting home schools from requirements otherwise applicable to private schools.[127]

The Court of Appeal recognized that there are 166,000 children being home schooled in California and that it is a growing practice across the nation. The court noted that the Legislature is aware that home schooling parents file affidavits as private schools and have passed laws based on that awareness. For example, the court noted that private schools in which a parent or guardian works exclusively with their own children are exempt from fingerprint requirements set forth in Education Code section 44237.[128]

In addition, the Court of Appeal held that a dependency court, in the proper exercise of its discretion, may require a dependent child have regular contact with mandated reporters to protect a child's safety by ordering the child to be educated in a public or private school. The Court of Appeal held that a child's safety is a compelling governmental interest and that without contact with mandated reporters a child's safety may be in jeopardy in certain cases. In such cases the restriction on home schooling would be the least restrictive means of achieving the goal of protecting the children. The children would be permitted to continue to live at home with their parents, but the children would have contact with educators who are mandated child abuse reporters in order to provide them with an extra layer of protection.[129]

The Court of Appeal pointed out that other states have mechanisms for supervising home schooling but that California has few oversight provisions. The Court of Appeal discussed the fact that California has few enforcement mechanisms and stated:

> "Given the State's compelling interest in educating all of its children . . . in the absence of an express statutory and regulatory framework for home schooling in California, additional clarity in this area of the law would be helpful."[130]

The effect of the Court of Appeal's decision is to maintain the status quo with respect to home schooling.

D. 18 Year Old Students

A school district may drop 18 year old senior high school students from enrollment in the school district when the student is absent approximately half the days school is in session. The school district may drop an 18 year old senior high school student who has been absent approximately half the time school is in session since the student would be considered truant (if the student were a minor) and the student is no longer subject to compulsory education laws.

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[127] Id. at 1085-86.
[128] Ibid.
[129] Id. at 1097-98.
[130] Id. at 1106.

Education Code section 48200 requires students between the ages of 6 to 18 to attend school in California. However, a student who has reached the age of 18 years of age is no longer considered a minor and is considered an adult for legal purposes.[131] In addition, a student who is 18 years of age or older may verify his or her absences from school and has all the responsibilities and powers that formerly belonged to the parent or guardian in charge of or in control of the minor.[132]

There are no provisions in California law that require a school district to wait 60 days before it drops an 18 year old student from its rolls. However, once a student is found to be truant, the 18 year old student may be dropped by the school district. However, students who regularly attend and/or are 18 years of age should be allowed to continue their education until graduation.

In addition, there is no provision in California law that states that school districts may or may not allow students 18 years of age and older to enroll in regular education programs. School districts may direct these students to adult education programs, regional occupational programs, or a community college. Districts should adopt policies that are uniformly applied and enforced to avoid charges of discrimination or arbitrary conduct.

CHILD CUSTODY, GUARDIANSHIP AND ALTERNATIVES TO GUARDIANSHIP

A. Child Custody

Frequently, questions arise regarding child custody and how schools should respond to these conditions. The most common terms used in California law regarding child custody are joint custody, joint legal custody, joint physical custody, sole legal custody, and sole physical custody. Family Code section 3002 defines joint custody as joint physical custody and joint legal custody.

Family Code section 3003 defines joint legal custody as meaning that both parents share the right and the responsibility to make decisions relating to the health, education, and welfare of the child. Family Code section 3004 defines joint physical custody as meaning that each of the parents has significant periods of physical custody. "Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents." Family Code section 3006 defines sole legal custody as meaning that one parent shall have the right and the responsibility to make decisions relating to the health, education, and welfare of the child. Family Code section 3007 defines sole physical custody as meaning that a child shall reside with, and be under the supervision of, one parent subject to the power of the court to order visitation.

Under Family Code section 3003, which defines joint legal custody, both parents have the right and responsibility to make decisions relating to the child's education. There are no reported cases in California stating what occurs if the parents disagree. In practice, the family

[131] Family Code section 6500.
[132] Education Code section 46012.

court would have to resolve any dispute between the parents. In special education matters, this can be particularly problematic if the parents disagree with respect to the special education placement and services of the child and the contents of the child's Individualized Education Program (IEP). In such cases, districts should contact legal counsel for assistance.

Whenever a parent informs a school employee that the school should not allow the other parent to pick up their child from school, the school should immediately ask for a copy of the child custody order issued by the court. In the absence of a court order, the school may allow either parent to pick the child up from school. If the parent claims there is a possibility of violence or a threat of harm to a child, or a confrontation occurs, local law enforcement should be contacted immediately.

Regardless of the custody arrangement of a student, pursuant to Family Code section 3025 and Education Code sections 49061 and 49069, both parents have the right to copies of pupil records. A parent may not seek to bar the other parent from accessing their child's records unless a court order specifically states that one of the parents may not see a copy of the child's records. In addition, the school district is not obligated to routinely notify a parent that the other parent is seeking access to a pupil's records.

Education Code section 48904(a) provides that the parent or guardian of any minor shall be liable for up to $10,000.00 for damages caused by the minor's willfulness conduct. The statute places liability broadly on the parent or guardian and does not qualify the term by stating that the parent must have custody or control of the child. Civil Code section 1714.1 provides for liability for civil damages and places liability on the parent or guardian having custody or control of a minor. However, Education Code section 48904 does not contain such a limitation.

If a parent who has been granted visitation rights on certain days comes to the school to pick up a child on a day not specified in the court order, the school should explain that the court order on file with the school states that the non-custodial parent may only visit the child on certain days and that a non-custodial parent has been granted visitation rights on certain days only. The parent may not expand his or her visitation rights without amending the court order or obtaining the permission of the custodial parent who has physical custody at that time.

However, if the restraining order or court order specifically prohibits a parent from picking up the child at school, the school should not release the child in violation of the court order. The parents should have the restraining order rescinded or amended to allow the parent to pick up the child. Under such circumstances, school staff may need to contact legal counsel or law enforcement if there is a confrontation.

If a person claiming to be a child's parent contacts the school and the person is not known to school staff, school staff should require a picture ID from the individual and a birth certificate of the child verifying the name of the parent. The school may also wish to consult the emergency card and other enrollment information in the possession of the school. The parent that the school is familiar with or other persons listed on the emergency card may also be called for verification.

B. Caregiver Affidavit

A relative may enroll a child in school if the child lives with them using a caregiver affidavit.[133] A caregiver affidavit is legally sufficient to establish residency and is sufficient for enrollment. A relative or friend is not a required to obtain guardianship of the child. However, the caregiver affidavit does not authorize the relative or friend to make educational decisions concerning the child or to review student records. These rights are retained by the parent or guardian. Therefore, the parent or guardian should execute a power of attorney authorizing the caregiver to make educational decisions for the child and to review student records.

C. Guardianship

A Probate Guardianship takes place when the Probate Court appoints an adult who is not the child's parent to take care of the child or the child's property. The Probate Court can only grant a Probate Guardianship if the child is not involved in a Family Court or Juvenile Court action. There are two kinds of Probate Guardianships. There is Probate Guardianship of the Person and Probate Guardianship of the Estate. Probate Guardianship of the Person is appropriate when the child is living with an adult who is not a parent and the adult needs the legal authority to make decisions on behalf of the child. In a Probate Guardianship of the Estate, the guardian has full legal and physical custody of the child.[134]

The guardian generally has the same responsibilities as the parent. The guardian is responsible for the child's care, including providing the child with food, clothing and shelter, safety and protection, physical and emotional growth, medical and dental care, education, and any special needs.[135] The Guardian of the Estate manages the child's income, money or other property until the child turns eighteen. A child may need a Guardian of the Estate if he or she inherits money or assets. In most cases, the court appoints the surviving parent to be the guardian of the child's estate. In some cases, the same person can be the Guardian of the Person and of the Estate. In other cases, the court will appoint two different people.[136]

Guardianship is not always necessary. Many adults who have physical custody of the child do not wish to become the legal guardian of the child for a number of reasons. In some cases, the caretaker believes the child's parents will not consent to a legal guardianship or that filing for guardianship will cause more problems among family members. In some cases, the caretaker does not want the court to monitor the caretaker's personal life, or the caretaker wishes only to act as guardian for a short period of time and the parents are willing to sign a form called a Caregiver Authorization Affidavit.

To become a legal guardian of a child, an adult must file the appropriate documents with the Probate Court. A court investigator will interview the adult and the child. If the child's parents are alive and available, the court investigator may interview the parents as well. The court investigator will then make a recommendation to the judge. There will be a court hearing

[133] Family Code section 6550 et seq.
[134] Probate Code section 1510 et seq.
[135] Probate Code section 2350 et seq.
[136] Probate Code section 2400 et seq.

and the judge will review the case and decide whether to appoint a legal guardian. The court will only appoint a legal guardian if it is in the child's best interest. The court investigator will generally investigate cases involving relatives of the child. If a relative is not involved, the court will refer the matter to the county social services agency and social services will do an investigation.[137]

The court investigator, when doing a full report, will do a formal home study that includes a visit to the home where the child will live, personal interviews with the child and the proposed guardians, a review of school records and medical records, phone interviews with people involved to confirm the information, a review of the court documents that have been filed, and a criminal record check. The court, before appointing a guardian, will decide if there is a valid need for guardianship or if the child should be with the birth parents. The investigator will review available housing, schooling, family dynamics, health care issues and visitation, when the investigator believes there is a need for a guardianship. If the child is old enough and mature enough, the court investigator may also talk with the child about the guardianship. The court investigator will talk to the parents and let the judge know if the investigator believes that it would be harmful for the child to be returned to the parents. If there has been neglect or abuse, the court investigator will refer the case to the social services agency. The County Social Services Agency will do a dependency evaluation to see if the juvenile court should get involved and see if the parents should be offered reunification services. If there are no issues of neglect or abuse, the judge can recommend that the parents, proposed guardian and child try to reach an agreement. If the child is twelve years of age or older, the child can petition the court for appointment of a guardian.[138]

In most cases, the biological parents still have the legal responsibility for supporting their child. If the parents do not help support the child, the legal guardian can take legal action to get child support. If the legal guardian cannot get child support, the legal guardian is responsible for supporting the child. Any child support that is received must be used for the child's benefit.

Guardianship is a legal relationship that ends when the child turns 18, the child dies, or a judge decides the guardianship is no longer necessary.[139] A Guardian of the Person or Estate can resign. But first there must be a court hearing and notice of the hearing to all relatives and the court must approve the resignation. The court must be convinced that it is in the child's best interest for the legal guardian to resign. If the judge agrees, then the court will appoint a guardian to replace the legal guardian.[140]

In general, a legal guardian has the same responsibilities as a parent, including liability for damages the child may cause. The guardian must also manage the child's finances, keep careful records and give the court reports and ask the court permission to handle certain financial matters.[141]

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[137] Probate Code section 1513.
[138] Probate Code section 1500 et seq.
[139] Probate Code section 1600.
[140] Probate Code section 1600 et seq.
[141] Probate Code section 1600 et seq.; Probate Code sections 2351, 2358.

D. Power of Attorney

Parents may delegate to another individual the power to act as an agent of the parent regarding education decisions. The school district may ask parents to complete a Power of Attorney form designating individuals authorized to act as the parents' agents concerning school business and educational decisions such as the signing of field trip release forms, medical emergency forms, and special education documents.

A Power of Attorney is a written authorization by a parent that another adult may act as the parents' agent in all matters authorized by the written document. A Power of Attorney Form is attached and authorizes another adult to act on behalf of the parents in matters relating to the education of their child. Granting a Power of Attorney does not alter the rights of the parents with respect to custody and control of the child.[142]

A Power of Attorney is legally sufficient if all of the following requirements are met:

1. The Power of Attorney contains the date of its execution.

2. The Power of Attorney is signed either by the parents/legal guardian or in the parents'/legal guardian's name by another adult in the parents'/legal guardian's presence and at the parents'/legal guardian's direction.[143]

3. The Power of Attorney is either notarized or signed by at least two witnesses who are adults (the person authorized to act on behalf of the parents/legal guardian, referred to as the attorney-in-fact, may not sign as a witness).[144]

Each witness signing the Power of Attorney must witness either the signing of the actual Power of Attorney form by the parents/legal guardian or the parents'/legal guardian's acknowledgement of the signature on the Power of Attorney. District personnel should verify the identity of the person signing the Power of Attorney form by making or obtaining a copy (if signed away from the school) of the parents'/legal guardian's picture ID and the student's birth certificate and attaching it to the Power of Attorney form. The identities of the two witnesses should also be verified by making or obtaining copies of the witnesses' picture ID, unless the witnesses are school district employees. The person authorized to act on the parents'/legal guardian's behalf may not sign as a witness.

[142] Probate Code sections 4000 et seq.
[143] The parents/legal guardian who executes the Power of Attorney is referred to as the "principal" under the Probate Code provisions. Signing in the principal's (e.g., parent or other relative) name by another adult usually occurs when the principal is illiterate and or mentally or physically unable to sign their name. The principal is the person authorizing another person to act on their behalf.
[144] Probate Code sections 4121, 4122, 4200-4310.

RESIDENCY OF STUDENTS

A. Statutory Provisions

State law generally bases the residency of a student on the residency of their parent. Education Code sections 48204 and 56028 contain several exceptions.

Education Code section 48200 requires children between the ages of six and eighteen years of age to attend school in the school district in which the residency of either parent or legal guardian is located.

Education Code section 48204 contains several exceptions to the general residency rule in Section 48200. Section 48204 provides that a child is deemed to have complied with the residency requirements for school attendance if:

> (1)(A) A pupil placed within the boundaries of that school district in a regularly established licensed children's institution, or a licensed foster home, or a family home pursuant to a commitment or placement under Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.
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> (1)(B) An agency placing a pupil in the home or institution described in subparagraph (A) shall provide evidence to the school that the placement or commitment is pursuant to law.
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> (2) A pupil for whom interdistrict attendance has been approved pursuant to Chapter 5 (commencing with Section 46600) of Part 26.
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> (3) A pupil whose residence is located within the boundaries of that school district and whose parent or legal guardian is relieved of responsibility, control, and authority through emancipation.
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> (4) A pupil who lives in the home of a caregiving adult that is located within the boundaries of that school district. Execution of an affidavit under penalty of perjury pursuant to Part 1.5 (commencing with Section 6550) of Division 11 of the Family Code by the caregiving adult is a sufficient basis for a determination that the pupil lives in the home of the caregiver, unless the school district determines from actual facts that the pupil is not living in the home of the caregiver.
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> (5) A pupil residing in a state hospital located within the boundaries of that school district."

Education Code section 48204.2 states that if a school district elects to undertake an investigation to determine if a pupil is a resident of a school district and to determine if the documents submitted by the parent related to residency in the district are accurate, the governing board is required to adopt a policy regarding the investigation of the pupil to determine whether the pupil meets the residential requirements for school attendance in the school district before investigating any pupil.

Education Code 48204.2(b) states that the policy shall do all of the following:

1. Identify the circumstances upon which the school district may initiate an investigation, which shall, at a minimum, require the school district employee to be able to identify specific, articulable facts supporting the belief that the parent or legal guardian of the pupil has provided false or unreliable evidence of residency.

2. Describe the investigatory methods that may be used by the school district in the conduct of the investigation, including whether the school district will be employing the services of a private investigator.

3. Before hiring a private investigator, the policy shall require the school district to make reasonable efforts to determine whether the pupil resides in the school district.

4. Prohibit the surreptitious photographing or video-recording of pupils who are being investigated. Surreptitious photographing or video-recording is defined as the covert collection of photographic or videographic images of person or places subject to an investigation. The collection of images is not covert if the technology is used in open and public view.

5. Require that employees and contractors of the school district engaged in the investigation must identify themselves truthfully as such to individuals contacted or interviewed during the course of the investigation.

6. Provide a process whereby the determination of a school district as to whether a pupil meets the residency requirements for school attendance in the school district may be appealed, and shall specify the basis for that determination. If an appeal is made, the burden shall be on the appealing party to show why the decision of the school district should be overruled.

Education Code section 48204.2(c) states the policy required by Section 48204.2 shall be adopted at a public meeting of the governing board of the school district. Our office will be glad to assist districts in drafting an appropriate policy.

Senate Bill 200 amends Education Code section 48204, which establishes the requirements for pupil residency in California. Senate Bill 200 adds Education Code section 48204(a)(7) which grants residency in a school district to a pupil whose parent or legal guardian resides outside of the boundaries of the school district but is employed and lives with the pupil at the place of his or her employment within the boundaries of the school district for a minimum of three days during the school week. In essence, this language would grant school district residency to the children of parents or legal guardians who are employed and live at their place of employment within the boundaries of the school district for a minimum of three days during the school week. This provision will apply to housekeepers, nannies, maids and other domestic workers who live at their place of employment for a minimum of three days during the school week.

Education Code section 56028 defines "parent" as follows:

> "(1) A biological or adoptive parent of a child.
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> "(2) A foster parent if the authority of the biological or adoptive parents to make educational decisions on the child's behalf specifically has been limited by court order in accordance with Section 300.30(b)(1) or (2) of Title 34 of the Code of Federal Regulations.
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> "(3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child, including a responsible adult appointed for the child in accordance with Sections 361 and 726 of the Welfare and Institutions Code.
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> "(4) An individual acting in the place of a biological or adoptive parent, including a grandparent, stepparent, or other relative, with whom the child lives, or an individual who is legally responsible for the child's welfare.
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> "(5) A surrogate parent who has been appointed pursuant to Section 7579.5 or 7579.6 of the Government Code, and in accordance with Section 300.519 of Title 34 of the Code of Federal Regulations and Section 1439(a)(5) of Title 20 of the United States Code."

Another exception to the general rule with respect to residency occurs when children attend juvenile court schools.[145] The county board of education is responsible for providing education to children attending juvenile court schools. The definition of "juvenile court schools" includes public schools or classes and certain group homes, including any group home housing 25 or more children placed pursuant to Sections 362, 727 and 730 of the Welfare and Institutions Code, or any group home housing 25 or more children and operating one or more additional sites

[145] Education Code section 48645.2.

under central administration for children placed pursuant to Sections 326, 727 or 730 of the Welfare and Institutions Code.[146]

In summary, with the amendments to Section 56028, effective January 1, 2009, California law is clear. In most cases, the district of residence that is responsible for the cost of residential placement for special education students is the school district where the parent of the student resides. In a small number of cases, where the student does not have a parent, Education Code section 56028 mandates that the school district where the responsible adult appointed by the juvenile court resides is the district responsible for the cost of the residential placement.

B. Residency of Students in Residential Treatment Facilities

In a recent decision, the Ninth Circuit Court of Appeals held that under Education Code section 56028, the school district where the parent resides is responsible for funding a special education student's education at an out-of-state residential treatment facility.[147] The Court of Appeals held that the school district of residence is responsible for the cost, effective October 10, 2007, when Section 56028 was enacted. Prior to October 10, 2007, the Court of Appeals held that state law was unclear and the California Department of Education (CDE) was responsible for the cost of the child's residential placement.[148]

The Court of Appeals based its decision on the language of Education Code section 56028, which, effective October 10, 2007, stated that the definition of a "parent" includes a guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child.[149] Section 56028 was later amended to state that if a judicial decree or order identifies a specific person or persons to act as the parent of a child or to make education decisions on behalf of the child, then that person or persons shall be determined to be the parent for purposes of this part and Article 1 (commencing with Section 48200) of the Education Code.[150]

The Court of Appeals held that even though the language of Section 56028, from October 10, 2007 through December 31, 2008, did not specifically refer to the residency requirements in Education Code section 48200, the language was sufficiently clear to indicate that the definition of parent in Section 56028 applied to residency, and therefore, the school district where the responsible adult or de facto parent resided was responsible.[151]

The Court of Appeals held that prior to October 10, 2007, state law was unclear as to which agency was responsible for the cost of residential placement for children whose parents had their parental rights terminated. Therefore, the Court of Appeals held that under the

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[146] See, Education Code section 48645.1.
[147] Orange County Department of Education v. California Department of Education, 668 F.3d 1052, 277 Ed.Law Rep. 74 (9th Cir. 2011).
[148] Id. at 1057-66.
[149] Stats. 2007, ch. 454 (A.B. 1663), effective October 10, 2007.
[150] Stats. 2008, ch. 223 (A.B. 2057) effective January 1, 2009.
[151] 668 F.3d 1052, 1060-62.

Individuals with Disabilities Education Act (IDEA),[152] the state educational agency, or the CDE, was responsible.[153]

The decision in this case makes it clear that the school district where the responsible adult, surrogate parent or de facto parent resides will be deemed the school district of residence for purposes of funding out-of-state residential placements for special education students.

C. Residency of 18-21 Year Old Special Education Students

Education Code section 56041 states that notwithstanding any other provision of law, if it is determined by the IEP team that special education services are required beyond the pupil's eighteenth birthday, the district of residence responsible for providing special education and related services to pupils between the ages of eighteen to twenty-two years inclusive, for non-conserved pupils shall be the last district of residence in effect prior to the pupil's attaining the age of majority. Pursuant to Section 56041, that rule shall apply until the parent or parents relocate to a new district of residence and at that time, the new district of residence shall become the responsible local educational agency.

In Los Angeles Unified School District v. Garcia,[154] the California Supreme Court held that with few exceptions, Education Code section 56041 determines which school district is the responsible local educational agency for providing special education and related services to students between the ages of 18 and 22 years. The court stated:

> "Of the various statutes appearing in the Education Code that designate the entity responsible for providing special education services, Section 56041 is the only provision that expressly refers to pupils between the ages of 18 and 22 years." [155]

The Supreme Court stated that those pupils meeting the residency requirements for school attendance pursuant to Education Code section 48204(a) are the primary exceptions to Education Code section 56041. The court stated:

> "In accordance with those exceptions, Section 56041 does not apply when, for example, the eligible 18 to 22 year old pupil, prior to reaching the age of majority, had been placed in a licensed children institution or foster home by the juvenile court, or was residing in a state hospital…In those instances, the responsibility for providing special education and related services lies with the school district in which the institution or home is located."[156] [Emphasis added]

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[152] 20 U.S.C. Section 1400 et seq.
[153] 668 F.3d 1052, 1061-62.
[154] 58 Cal.4th 175 (2013).
[155] Id. at 187.
[156] Id. at 187-88.

The exceptions in Education Code section 48204(a) include the following:

1. A pupil placed within the boundaries of the school district in a regularly established licensed children's institution (LCI)[157] or licensed foster home, or a family home pursuant to a commitment or placement by the juvenile court.[158]

2. A pupil who is a foster child who remains in his or her school of origin.[159]

3. A pupil for whom interdistrict attendance has been approved.

4. A pupil whose residence is located within the boundaries of the school district and whose parent or legal guardian is relieved of responsibility, control and authority through emancipation.[160]

5. A pupil who lives in a home of a caregiving adult that is located within the boundaries of that school district.[161]

6. A pupil residing in a state hospital located within the boundaries of that school district.

Therefore, in circumstances where one of the above exceptions doesn't apply, for conserved students between the ages of 18 and 22 the district of residence of the conservator will be the responsible local educational agency.[162] For non-conserved pupils, the last district of residence in effect prior to the pupil's attaining the age of 18 shall become and remain as the responsible local agency until the parent or parents relocate to a new district of residence. At that time, the new district of residence shall be the responsible local educational agency.[163]

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[157] Education Code section 56155.5 defines a LCI as a residential facility that is licensed by the state to provide nonmedical care to children. Title 22, Section 80001 defines a group home as a facility which provides 24-hour care and supervision to children. In most cases, upon attaining the age of 18 years, students will be placed in "adult residential facilities" which are defined, pursuant to Title 22, Section 80001(a)(5) as a facility that provides 24-hour-a-day nonmedical care and supervision to persons 18 through 59 years of age.

[158] This exception would not include placement by other agencies such as social services or a regional center.

[159] By definition, under Education Code section 48853.5(a), a "foster child" is defined as a child who has been removed from his or her home. Therefore, a pupil between the ages of 18 and 22 years could not qualify for this exception.

[160] The California Supreme Court noted that when the legislature referred to emancipation in Section 48204(a)(4) it meant emancipation of a minor. Id. at 188.

[161] Family Code sections 6550 et seq. applies to minor students and authorize a caregiver 18 years of age or older to enroll a minor in school under specified conditions.

[162] Education Code section 56041(b).

[163] Education Code section 56041(a). Parent is defined in Education Code section 56028 as including a biological or adoptive parent of a child, a foster parent if the authority of the biological or adoptive parent to make educational decisions on the child's behalf specifically has been limited by court order, a guardian generally authorized to make educational decisions for the child, including a responsible adult appointed for the child, a relative acting in the place of a biological or adoptive parent, or a surrogate parent. In some cases, it will be difficult to determine who meets the legal definition of parent for residency purposes and a detailed factual analysis will be necessary. Districts should consult with legal counsel when the individual with parental rights for residency purposes is unclear.

D. Proof of Residency

Education Code section 48204.1(a)[164] states that a school district shall accept from the parent or legal guardian of a pupil, reasonable evidence that the pupil meets the residency requirements for school attendance in a school district as set forth in Sections 48200 and 48204. Reasonable evidence of residency for a pupil living with his or her parent or legal guardian shall be established by documentation showing the name and address of the parent or legal guardian within the school district, including, but not limited to, any of the following documentation:

1. Property tax payment receipts.
2. Rental property contract, lease or payment receipts.
3. Utilities service contract, statement or payment receipts.
4. Pay stubs.
5. Voter registration.
6. Correspondence from a government agency.
7. Declaration of residency executed by the parent or legal guardian of a pupil.

Section 48204.1(b) states that nothing in Section 48204.1 shall be construed to require a parent or legal guardian of a pupil to show all of the items of documentation listed above. Section 48204.1(c) states that if an employee of a school district reasonably believes that the parent or legal guardian of the pupil has provided false or unreliable evidence of residency, the school district may make reasonable efforts to determine that the pupil actually meets the residency requirements set forth in Sections 48200 and 48204.

Section 48204.1(d) states that nothing in this section shall be construed as limiting access to pupil enrollment in a school district as otherwise provided by federal and state statutes and regulations. This includes immediate enrollment and attendance guaranteed to a homeless child or youth as defined in the McKinney-Vento Homeless Assistance Act[165] without any proof of residency or other documentation. In addition, consistent with the federal McKinney-Vento Homeless Assistance Act, proof of residency of a parent within a school district shall not be required for an unaccompanied youth. The school district shall accept a declaration of residency executed by the unaccompanied youth in lieu of the declaration of residency executed by his or her parent or legal guardian.

[164] Stats. 2011, ch. 435.
[165] 42 U.S.C. Section 11434a.

E. Residency Based on Employment

Senate Bill 381[166] amends Education Code section 48204, effective January 1, 2011. Senate Bill 381 extends the operation of the provisions authorizing a school district in which a parent or legal guardian of the pupil is physically employed to allow the pupil to attend a school in that district through June 30, 2017. In addition, Education Code section 48204(b) is amended to require that a parent or legal guardian's employment take place within the boundaries of the school district for a minimum of ten hours during the school week to allow the pupil to attend school in that district.

ENROLLMENT OF IMMIGRANT CHILDREN IN SCHOOL

On May 8, 2014, the United States Department of Justice and the United States Department of Education sent out a "Dear Colleague" letter to school districts throughout the country. The letter included an attachment entitled, "Fact Sheet: Information on the Rights of All Children to Enroll in School."

The letter outlines the requirements of the federal law to enroll all children who are eligible into school regardless of their immigration status or their parents' immigration status.[167] The letter also cites the United States Supreme Court decision in Plyler v. Doe[168] in which the Supreme Court held that a state may not deny access to public education to any child residing in the state regardless of whether the child is undocumented or a non-citizen, or his parents are undocumented or a non-citizen. The letter states in part, "[School districts] must ensure that [they] do not discriminate on the basis of race, color, or national origin, and that students are not barred from enrolling in public schools at the elementary and secondary level on the basis of their own citizenship or immigration status or that of their parents or guardians."

The letter further states that districts may require students or their parents to provide proof of residency within the school district.[169] The fact sheet attached to the letter states that school officials may request documents verifying the age of the student but may not refuse to enroll a student because he or she lacks a birth certificate, or has records that indicate a foreign place of birth.

In California, the Legislature has enacted Education Code section 48204.1. Section 48204.1 states that school districts shall accept from the parent or legal guardian reasonable evidence that the pupil meets the residency requirements for school attendance in the school district. Reasonable evidence of residency is established by documentation showing the name and address of the pupil or legal guardian within the school district, including, but not limited to, any of the following documentation:

1. Property tax payment receipts.

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[166] Stats. 2011, ch. 447.
[167] See, 42 U.S.C. Section 2000.
[168] 457 U.S. 202 (1982).
[169] See, Martinez v. Bynum, 461 U.S. 321, 328 (1983). However, school districts must immediately enroll homeless children even if the child or the child's parents or guardian is unable to produce the records normally required for enrollment. See, 42 U.S.C. Section 11432(g)(3)(C)(1).

2. Rental property contract, lease or payment receipts.

3. Utility service contract, statement or payment receipts.

4. Paystubs.

5. Voter registration.

6. Correspondence from a government agency.

7. Declaration of Residency executed by the parent or legal guardian of the pupil.

Education Code section 48204.1(b) states that nothing in Section 48204.1 shall be construed to require a parent or legal guardian of the pupil to show all of the items of documentation listed above. Section 48204.1(c) states that if an employee of a school district reasonably believes that the parent or legal guardian of the pupil has provided false or unreliable evidence of residency, the school district may make reasonable efforts to determine that the pupil actually meets the residency requirements set forth in Sections 48200 and 48204.

Section 48204.1(d) states that nothing in this section shall be construed as limiting access to pupil enrollment in a school district as otherwise provided by federal and state statutes and regulations. This includes immediate enrollment and attendance guaranteed to a homeless child or youth as defined in the McKinney-Vento Homeless Assistance Act[170] without any proof of residency or other documentation. In addition, consistent with the federal McKinney-Vento Homeless Assistance Act, proof of residency of a parent within a school district shall not be required for an unaccompanied youth. The school district shall accept a declaration of residency executed by the unaccompanied youth in lieu of the declaration of residency executed by his or her parent or legal guardian.

In Hispanic Interest Coalition of Alabama v. Governor of Alabama,[171] the Eleventh Circuit Court of Appeals ruled that an Alabama law requiring public schools to verify, and collect data on the citizenship and immigration status of students enrolled in its public schools violates the Equal Protection Clause.

Under recently enacted legislation in Alabama, school districts were required to determine whether an enrolling child was born outside of the United States or is the child of an alien not lawfully present in the United States. That determination was based on the birth certificate. If no birth certificate was available or if the birth certificate showed the child was born outside of the United States or the child was unlawfully present in the United States, then the parent must notify the school of the actual citizenship or immigration status of the student.[172]

[170] 42 U.S.C. Section 11434a.
[171] 691 F.3d 1236 (11th Cir. 2012).
[172] Id. at 1240-41.

The Court of Appeals held that under Plyler v. Doe,[173] the United States Supreme Court held that states could not exclude undocumented children who entered the United States illegally from enrolling in public schools. In Plyler, the United States Supreme Court held it was a Fourteenth Amendment equal protection violation to exclude undocumented children from public school. The Court emphasized that the children were blameless and underscored the importance of providing education to children. In light of the fundamental role of education in maintaining the fabric of our society, the Supreme Court required states to justify excluding undocumented children from school due to debilitating effects that a lack of education can have on the specific community of individuals affected by the law and the country as a whole.

The Court of Appeals held that the law was unconstitutional and interfered with the educational rights of undocumented children. The court stated, "Given the important role of education in our society, and the injuries that would arise from deterring unlawfully present children from seeking the benefit of education, we conclude the equities favor enjoining this provision."[174]

The court remanded the matter back to the district court with instructions to issue an injunction enjoining the enforcement of the Alabama law.

IMMIGRATION STATUS OF STUDENTS

A. Introduction

While school districts may not inquire into the immigration status of potential students, districts may refuse admission to students whose parents voluntarily disclose that they are visiting the United States on a Tourist or B Visa and may ask the following questions relating to residency:

1. Where do you live or reside?

2. How long have you lived there?

3. How long do you plan to remain at this residence?

Districts may also ask parents to provide proof of residency such as utility bills, lease agreements, deeds or titles to property pursuant to Education Code section 48204.1.

B. B Visas or Tourist Visas

The purpose of a tourist or visitor visa (B Visa) is to allow individuals from other countries to visit the United States. Foreign visitors for business and tourists for pleasure are considered nonimmigrants.[175]

[173] 457 U.S. 202 (1982).
[174] 691 F.3d 1236, 1249 (11th Cir. 2012).
[175] 8 U.S.C. Section 1101(a)(15)(B).

Under a B Visa, the individual is coming to the United States temporarily, the individual has a foreign residence that he or she has no intention of abandoning and he or she does not intend to engage in skilled or unskilled labor or study. A B-1 Visa is for business visitors and a B-2 Visa is for visitors for pleasure (i.e., tourists). B-1 business visitors may engage in commercial transactions not involving gainful employment, such as taking sales orders or making purchases of inventory or supplies for a foreign employer. Business visitors may negotiate contracts, consult with business associates, engage in litigation or participate in scientific, educational, professional or business conventions or conferences. Both B-1 and B-2 Visa holders can be admitted for an initial period of one year, with extensions possible for six months at a time.[176]

Federal law prohibits an individual on a B-1 or B-2[177] visa from enrolling in the public schools. The federal regulations state:

> "An alien who is admitted as, or changes status to, a B-1 or B-2 nonimmigrant on or after April 12, 2002, or who files a request to extend the period of authorized stay in B-1 or B-2 nonimmigrant status on or after such date, violates the conditions of his or her B-1 or B-2 status if the alien enrolls in a course of study. Such an alien who desires to enroll in a course of study must either obtain an F-1 or M-1 nonimmigrant visa from a consular office abroad and seek readmission to the United States, or apply for and obtain a change of status under Section 248 of the Act and 8 C.F.R. Part 248. The alien may not enroll in the course of study until the service has admitted the alien as an F-1 or M-1 nonimmigrant or has approved the alien's application under Part 248 of this chapter and changed that alien status to that of an F-1 or M-1 nonimmigrant."[178]

In Anselmo v. Glendale Unified School District,[179] the Court of Appeal held that a parent who had gained admittance to the United States from Italy on the basis of a tourist visa was not entitled to enroll his child in the Glendale Unified School District. The Court of Appeal held that by the terms of Education Code section 48200, a pupil is eligible to enroll in a public school maintained by the governing board of a school district in which the pupil's parent resides. That section states that residency for the purpose of attendance in the public schools shall be determined by Welfare & Institutions Code section 17.1. Welfare & Institutions Code section 17.1 states that the residence of the parent with whom a child maintains his or her place of abode determines the residence of a child. A child who enters the United States with a tourist visa, or with a parent who has been issued a tourist visa, maintains their residence in their home country and is only temporarily visiting the United States, are not residents of the school district and the children are not eligible for admission to the public schools.

[176] 8 C.F.R. Section 214.2(b)(1).
[177] B-2 Visas are issued to the minor children of individuals with B-1 Visas.
[178] 8 C.F.R. Section 214.2(b)(7).
[179] 124 Cal.App.3d 520 (1981).

C. F Visas

Aliens seeking to enter the United States to engage in a full or, in some cases a part-time course of academic study may be admitted as F category, nonimmigrants.[180] The student is classified in the F-1 subcategory and accompanying family members are classified as F-2 nonimmigrants. The F-3 classification is reserved for border commuter students. These are students who are nationals of Canada or Mexico who maintain an actual residence in their country but are enrolled in a part-time or full-time course of study at an approved educational institution in the United States and who commute to the institution.

In order to qualify for student status, the student must meet certain requirements:

1. The student must be enrolled in an academic education program, not a vocational type program;

2. The educational institution must be approved by the Attorney General for attendance by foreign students;

3. The student must be enrolled in a full course of study at the school (except part-time studies are permitted for F-3 border commuter students);

4. The student must be proficient in English or enrolled in courses leading to English proficiency;

5. The student must have sufficient funds available to cover expenses for the full course of study; and

6. The student must maintain a residence abroad that he or she has no intention of abandoning.[181]

Under an F-1 Visa, students may not attend public elementary schools or publicly funded adult education programs. Students may attend a public secondary school if the period of attendance does not exceed 12 months and the student has reimbursed the local educational agency that administers the school for the full unsubsidized per capita cost of providing education at such school for the period of the student's attendance.[182]

These provisions only affect foreign students who request I-20 forms to obtain F-1 Student Visas and districts that accept F-1 students. A school district is not required to accept students with F-1 Visas.

The INS has established a system called Student and Exchange Visitor Information System (SEVIS) which is an Internet based computer system that enables schools and program

[180] 8 U.S.C. Section 1101(a)(15)(f).
[181] 8 C.F.R. Section 214.2(f).
[182] 8 U.S.C. Section 1184(m)(1).

sponsors to transmit electronic information to the Department of State and to immigration agencies. All schools participating in the program must utilize the SEVIS system in order to issue a certificate of eligibility for nonimmigrant students.

D. Exchange Visitor Program – J-1 and J-2 Visas

The purpose of the Exchange Visitor Program is to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges. Educational and cultural exchanges assist the Department of State in furthering the foreign policy objectives of the United States.[183]

The Secretary of State of the Department of State facilitates the Exchange Visitor Program by designating public and private entities to act as sponsors of the Exchange Visitor Program. Sponsors may act independently or with the assistance of third parties. The purpose of the program is to provide foreign nationals with opportunities to participate in educational and cultural programs in the United States and to return home to share their experiences and to encourage Americans to participate in educational and cultural programs in other countries. Exchange visitors enter the United States on a J Visa.[184]

The federal regulations define an accompanying spouse and dependents as the alien's spouse and minor unmarried children of an exchange visitor who are accompanying or following to join the exchange visitor and who are seeking to enter or have entered the United States temporarily on a J-2 Visa or are seeking to acquire or have acquired such status after admission. For purposes of the federal regulations, a minor is a person under the age of 21 years old.[185]

Accredited educational institutions are defined as any publicly or privately operated primary, secondary or post-secondary institution of learning duly recognized and declared as such by the appropriate authority of the state in which such institution is located.[186] The regulations define full course of study as enrollment in an academic program of classroom participation and study at an accredited educational institution. Secondary school students are required to satisfy the attendance and course requirements of the state in which the school is located.[187]

Entities eligible to apply for designation as a sponsor include federal, state and local agencies, international agencies or organizations of which the United States is a member, or reputable organizations which are citizens of the United States. To be eligible for designation as a sponsor, an entity is required to demonstrate to the Department of State's satisfaction, its ability to comply with the federal regulations for the Exchange Visitor Program.[188] Sponsors may select foreign nationals to participate in their exchange visitor programs. Participation by foreign nationals in an Exchange Visitor Program is limited to individuals who will be studying in the United States, pursuing a full course of study at a secondary accredited educational

[183] 22 U.S.C. Section 2451 et seq.; 22 C.F.R. Section 62.1.
[184] 22 C.F.R. Section 62.1(b).
[185] 22 C.F.R. Section 62.2.
[186] 22 C.F.R. Section 62.2.
[187] 22 C.F.R. Section 62.2.
[188] 22 C.F.R. Section 62.3.

institution or post-secondary accredited educational institution or engaged full-time in a prescribed course of study at a post-secondary accredited educational institution. Other categories include teachers, professors, research scholars, and other experts in fields with specialized knowledge or skill, coming to the United States for observing, consulting or demonstrating special skills.[189]

Sponsors are responsible for the effective administration of their exchange visitor programs. Sponsors are responsible for the selection of exchange visitors, including screening and selecting prospective exchange visitors and ensuring their suitability for entrance into the United States. Sponsors are required to make sure the program is suitable to the exchange visitor's background, needs and experience and that the exchange visitor possesses sufficient proficiency in the English language to participate in his or her program. Sponsors are required to provide pre-arrival information, orientation, and monitoring of exchange visitors.[190]

Under a J-1 Visa, secondary school students have the opportunity to study in the United States for up to one year at an accredited public or private secondary school while living with an American host family or residing at an accredited U.S. boarding school. Eligibility for designation as a secondary school student exchange visitor program sponsor is limited to organizations with tax exempt status. Secondary school student exchange visitor programs designated by the Department of State must:

1. Require all participants to be enrolled and participating in a full course of study at an accredited educational institution;

2. Allow entry of participants for not less than one academic semester or more than two academic semesters; and,

3. Be conducted on a U.S. academic calendar year basis, except for students from countries whose academic year is opposite that of the United States.

Exchange students may begin in the second semester of a U.S. academic year if specifically permitted to do so, in writing, by the school in which the exchange visitor is enrolled. Both the host family and school must be notified prior to the exchange student's arrival in the United States that the placement is for either an academic semester or year, or calendar year program.[191]

Sponsors must ensure that all participants in a designated secondary school student exchange visitor program:

1. Are secondary school students in their home country who have not completed more than eleven years of primary and secondary study, exclusive of kindergarten, or are at least fifteen years of age but not

[189] 22 C.F.R. Section 62.4.
[190] 22 C.F.R. Section 62.10.
[191] 22 C.F.R. Section 62.25.

more than eighteen years and six months of age as of the program start date;

2. Demonstrate maturity, good character and scholastic aptitude; and

3. Have not previously participated in an academic year or semester secondary school student exchange program in the United States or attended school in the United States in either F-1 or J-1 Visa status.[192]

Sponsors must secure prior written acceptance for the enrollment of any exchange student participant in a United States public or private secondary school. Public schools are not required to accept J-1 Visa students.[193]

The prior acceptance must be secured from the school principal or other authorized school administrator of the school or school system that the exchange student participant will attend and include written arrangements concerning the payment of tuition or waiver thereof, if applicable. Under no circumstances may a sponsor facilitate the entry into the United States of an exchange student for whom a written school placement has not been secured.[194]

Sponsors must maintain copies of all written acceptances and make such documents available for Department of State inspection upon request. Sponsors must provide the school with a translated written English language summary of the exchange student's complete academic coursework prior to the commencement of school in addition to any additional documents the school may require. Sponsors must inform the prospective host school of any student who has completed secondary school in his or her home country. Sponsors may not facilitate the enrollment of more than five exchange students in one school unless the school itself has requested, in writing, the placement of more than five students.[195]

All sponsors must provide exchange students with additional orientation prior to the departure from their home country, which includes a summary of all operating procedures, rules, and regulations governing student participation in the exchange visitor program, including information about sexual abuse or exploitation, a detailed profile of the host family in which the exchange student is placed, a detailed profile of the school and community in which the exchange student is placed, and an identification card which lists the exchange student's name, U.S. host family placement address and telephone number, and a telephone number which affords immediate contact with both the program sponsor, the program sponsor's organizational representative, and the Department of State, in case of emergency.[196]

Exchange students may participate in school sanctioned and sponsored extracurricular activities, including athletics, if authorized by the local school district in which the student is

[192] 22 C.F.R. Section 62.25(e).
[193] 22 C.F.R. Section 62.25(f).
[194] 22 C.F.R. Section 62.25(f)(1).
[195] 22 C.F.R. Section 62.25(f).
[196] 22 C.F.R. Section 62.25(f).

enrolled and if authorized by the state authority responsible for determining athletic eligibility. Exchange students may not be employed on either a full or part-time basis, but may accept sporadic or intermittent employment such as babysitting or yard work.[197]

Sponsors must adequately screen and select all potential host families and must provide potential host families with a detailed summary of the exchange visitor program, including conducting an in-person interview with all family members residing in the home. Sponsor must ensure that the host family is capable of providing a comfortable and nurturing home environment and ensure that the host family has a good reputation and character by securing two personal references for each host family from the school or community attesting to the host family's good reputation and character. The sponsor must ensure that the host family has adequate financial resources and must verify that each member of the host family eighteen years of age and older has undergone a criminal background check.[198]

Sponsors are required to provide a report of all final academic year and semester program participant placements by August 31 for the upcoming academic year, or January 15 for the spring semester and calendar year. The report must provide at a minimum the exchange visitor student's full name, host family placement and school address.[199] The sponsor must also report any sexual abuse of an exchange student participant and a summation of all situations which resulted in the placement of exchange student participants with more than one host family or school placement.[200]

The INS has established a system called SEVIS which is an Internet based computer system that enables schools and program sponsors to transmit electronic information to the Department of State and to immigration agencies. All schools participating in the program must utilize the SEVIS system in order to issue a certificate of eligibility for nonimmigrant students.

E. Other Nonimmigrant Visas

There are a number of different nonimmigrant visas ranging from A visas for foreign government officials to R visas for religious workers.

As discussed above, individuals with visitor or tourist visas (B Visas) may not enroll their children in school. However, many of the children of other nonimmigrant visa holders may enroll their minor children in K-12 schools.

INTERDISTRICT ATTENDANCE

A. State Statutes

The Legislature has enacted four separate statutory schemes relating to interdistrict attendance. These statutory schemes overlap and are not necessarily mutually exclusive.

[197] 22 C.F.R.Section 62.25(h), 22 C.F.R. Section 62.25(i).
[198] 22 C.F.R. Section 62.25(j).
[199] 22 C.F.R. Section 62.25(m).
[200] 22 C.F.R. Section 62.25(m).

In addition, a separate statutory scheme regulates intradistrict transfers within a school district.[201] Districts typically grant intradistrict transfers prior to granting interdistrict transfers. This practice is consistent with state law.

First, a system of interdistrict permits is found at Education Code section 46600 et seq. Second, a system by which students may obtain residency in a school district based on parental employment is found in Education Code section 48204. Third, school districts may, but are not required to, adopt a resolution to become school districts of choice found at Education Code section 48301 et seq. Fourth, the most recent legislation is the Open Enrollment Act which begins with Education Code section 48350.

Effective January 1, 2011, Education Code section 46600 was amended.[202] Section 46600 authorizes school districts to enter into interdistrict attendance agreements and to stipulate the terms and conditions under which interdistrict attendance will be permitted or denied. The agreement may contain standards for reapplication agreed to by the district of residence and the district of attendance, and may stipulate terms and conditions established by the district of residence and the district of enrollment under which the permit may be revoked.[203] If the interdistrict attendance agreements do not stipulate such terms and conditions, the provisions of Section 46600(a)(1) apply and once a pupil in Kindergarten or any of grades 1 through 12, inclusive, is enrolled in school pursuant to an interdistrict permit, the pupil does not have to reapply for an interdistrict transfer and the governing board of the school district must allow enrollment to continue in the school in which he or she is enrolled.

However, if the two districts involved have entered into interdistrict attendance agreements which contain standards for reapplication which require reapplication each year, the districts may enforce these provisions and require students to reapply for interdistrict attendance permits each year. However, the reapplication provisions of the interdistrict attendance agreement cannot be applied to students entering grades 11 or 12 in the subsequent school year and these students cannot be required to reapply each year. The addition of this language to Section 46600 also prohibits districts from enforcing attendance and behavior requirements for 10^{th}, 11^{th} and 12^{th} grade students by revoking the interdistrict attendance agreements. However, districts may suspend or expel 10^{th}, 11^{th} and 12^{th} grade students on interdistrict transfer permits under Education Code section 48900.

In summary, districts may continue to grant interdistrict permits in grades K-9 for a one year period and may revoke interdistrict permits or refuse to renew interdistrict permits for students in grades K-9 pursuant to the terms and conditions set forth in the interdistrict attendance agreements.[204]

[201] See, Education Code section 35160.5(b).
[202] Stats. 2010, ch. 263 (A.B. 2444).
[203] Education Code section 46600(a)(2).
[204] Since 10^{th} grade students would be entering 11^{th} grade in the subsequent school year, 10^{th} grade students cannot be required to reapply and cannot have their interdistrict permits revoked.

B. Interdistrict Permits

Assembly Bill 2444[205] amended Section 46600 to state that once a pupil in Kindergarten or any grades 1 through 12, inclusive, is enrolled in a school pursuant to the interdistrict attendance provisions, the pupil shall not have to reapply for an interdistrict transfer and the governing board of the school district of enrollment shall allow the pupil to continue to attend the school in which he or she is enrolled.[206] The recent amendments also created an exception to this general rule stating that an interdistrict attendance agreement between two or more districts may contain standards for reapplication agreed to by the district of residence and the district of attendance which may stipulate terms and conditions under which an interdistrict attendance shall be permitted or denied; the agreement may contain standards for reapplication agreed to by the district of residence and the district of attendance that require students to reapply annually, and may stipulate terms and conditions under which the interdistrict permit may be revoked. However, a school district of residence or a school district of enrollment is prohibited from rescinding existing transfer permits for pupils entering grades 11 or 12 in the subsequent school year.[207]

Therefore, school districts may enter into agreements that require annual renewals of interdistrict permits for K-9 students and allow revocation of interdistrict permits for K-9 students for poor behavior or poor attendance.

Education Code section 46600(a)(4) would prohibit a school district from rescinding existing transfer permits for poor attendance or poor behavior. However, districts may suspend or expel 10th, 11th and 12th grade students on interdistrict transfer permits under Education Code section 48900 in the same manner as students who reside in the school district.

In such cases, when the district of residence is not willing to enter into a separate agreement to provide for annual renewals of interdistrict agreements, the provisions of Section 46600 would apply. Under the provisions of Education Code section 46600(a)(1), in the absence of an agreement requiring annual renewals, once a pupil is enrolled in a school, the pupil is not required to reapply for an interdistrict transfer.

In the absence of an agreement between the district of residence and the district of enrollment requiring annual renewals of an interdistrict attendance agreement, once the district of enrollment accepts the student, the provisions of Section 46600(a)(1) apply and the pupil is not required to reapply for an interdistrict transfer. Therefore, the pupil's subsequent move from the original district of residence would have no effect on the original granting of the interdistrict permit. The pupil would not have to apply for a new permit, the original interdistrict attendance agreement would remain in effect and the student would be able to continue to attend the school in the district of enrollment.

[205] Stats. 2010, ch. 263 (AB 2444).
[206] Education Code section 46600(a)(1).
[207] Since 10th grade students will be entering 11th grade in the subsequent school year, the language would apply to 10th grade students as well.

Section 46600(a)(4) states that a school district of residence or a school district of enrollment shall not rescind existing transfer permits for pupils entering grades 11 or 12 in the subsequent school year. Therefore, once an interdistrict permit has been granted for these students, the students have the right to stay in the school to which they have enrolled.

Effective January 1, 2011, Education Code section 46600 was amended.[208] Section 46600 authorizes school districts to enter into interdistrict attendance agreements and to stipulate the terms and conditions under which interdistrict attendance will be permitted or denied. The agreement may contain standards for reapplication agreed to by the district of residence and the district of attendance, and may stipulate terms and conditions established by the district of residence and the district of enrollment under which the permit may be revoked.[209] If the interdistrict attendance agreements do not stipulate such terms and conditions the provisions of Section 46600(a)(1) apply and once a pupil in Kindergarten or any of grades 1 to 12, inclusive, is enrolled in school pursuant to an interdistrict permit, the pupil does not have to reapply for an interdistrict transfer and the governing board of the school district must allow enrollment to continue in the school in which he or she is enrolled.

However, if the two districts involved have entered into interdistrict attendance agreements which contain standards for reapplication which require reapplication each year, the districts may enforce these provisions and require students to reapply for interdistrict attendance permits each year. However, the reapplication provisions of the interdistrict attendance agreement cannot be applied to students entering grades 11 or 12 in the subsequent school year and these students cannot be required to reapply each year. The addition of this language to Section 46600 also prohibits districts from enforcing attendance and behavior requirements for 10^{th}, 11^{th} and 12^{th} grade students by revoking the interdistrict attendance agreements. However, districts may suspend or expel 10^{th}, 11^{th} and 12^{th} grade students on interdistrict transfer permits under Education Code section 48900.

In summary, districts may continue to grant interdistrict permits in grades K-9 for a one year period and may revoke interdistrict permits or refuse to renew interdistrict permits for students in grades K-9 pursuant to the terms and conditions set forth in the interdistrict attendance agreements.[210]

Effective July 1, 2012,[211] Education Code section 46600(b) states that a pupil who has been determined by personnel of either the district of residence or the district of proposed enrollment to have been the victim of an act of bullying, as defined in Education Code section 48900(r), committed by a pupil of the district of residence shall, at the request of the person having legal custody of the pupil be given priority for interdistrict attendance. The statute does not define the level of evidence or proof needed to determine whether bullying has occurred and leaves the determination of bullying to the discretion of the school district. Education Code section 48900(r) states:

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[208] Stats. 2010, ch. 263 (A.B. 2444).
[209] Education Code section 46600(a)(2).
[210] Since 10^{th} grade students would be entering 11^{th} grade in the subsequent school year, 10^{th} grade students cannot be required to reapply and cannot have their interdistrict permits revoked.
[211] Stats. 2011, ch. 232 (A.B. 1156), Section 5, operative July 1, 2012.

"(r) Engaged in an act of bullying. For purposes of this subdivision, the following terms have the following meanings:

(1) "Bullying" means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

(A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.

(B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.

(C) Causing a reasonable pupil to experience substantial interference with his or her academic performance.

(D) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

(2)(A) "Electronic act" means the transmission, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited to, any of the following:

(i) A message, text, sound, or image.

(ii) A post on a social network Internet Web site including, but not limited to:

(I) Posting to or creating a burn page. "Burn page" means an Internet Web site created for the purpose of having one or more of the effects listed in paragraph (1).

(II) Creating a credible impersonation of another actual pupil for the purpose of having one or more of the effects listed in paragraph (1). "Credible impersonation" means to knowingly and without consent impersonate a pupil for the purpose of bullying the pupil and such that another pupil would reasonably believe, or has reasonably believed, that the pupil was or is the pupil who was impersonated.

(III) Creating a false profile for the purpose of having one or more of the effects listed in paragraph (1). "False profile" means a profile of a fictitious pupil or a profile using the likeness or attributes of an actual pupil other than the pupil who created the false profile.

(B) Notwithstanding paragraph (1) and subparagraph (A), an electronic act shall not constitute pervasive conduct solely on the basis that it has been transmitted on the Internet or is currently posted on the Internet.

(3) "Reasonable pupil" means a pupil, including, but not limited to, an exception needs pupil, who exercises average care, skill, and judgment in conduct for a person of his or her age, or for a person of his or her age with his or her exceptional needs."

If the parent of the student has not been advised that the student must renew their interdistrict permit each year and that the school district of enrollment reserves the right to not renew the interdistrict permit each year, the student may be able to remain at the school of enrollment under Education Code section 46600. We would recommend that school districts in this situation review the documentation and consult with legal counsel before taking any action.

While Section 48204 focuses solely on parental employment, Section 46600 authorizes two school districts to enter into an interdistrict attendance agreement for a broad range of reasons including parental employment. In essence, districts **may** authorize interdistrict attendance under Section 46600 for such reasons as transportation, health and safety of the student, child care needs, class offerings not available in the district of residence, and for other reasons as the district deems appropriate.

Districts are no longer required to give consideration to the child care needs of the pupil, but may do so in considering the request. With the repeal of Education Code section 46601.5, it is now permissive rather than mandatory.

If districts enter into interdistrict agreements pursuant to Section 46600, which contain standards for reapplication, which require the applicant (grades K-9) to apply for an interdistrict permit each year. If the interdistrict agreement between the districts stipulates that an interdistrict permit may be revoked for poor behavior or poor attendance for students in grades K-9.

C. Residency Based on Parental Employment

Senate Bill 170[212] made several substantive changes in Education Code section 48204. Senate Bill 170 added the word "physically" to Section 48204(b) to state that the parent or legal guardian of the pupil is physically employed within the boundaries of the school district. Section

[212] Stats. 2007, ch. 33.

48204 also applies to all K-12 students. Senate Bill 170 extends the operation of Section 48204 until June 30, 2012.

Section 48204(b) now states that a school district may deem a pupil as having complied with the residency requirements for school attendance in the school district if one or both parents or legal guardians of the pupil are employed within the boundaries of the school district. Therefore, it is permissive. However, Section 48204(b)(1) states that even though districts are not required to admit students on the basis of employment, districts may not discriminate on the basis of race, ethnicity, sex, parental income, scholastic achievement, or any other arbitrary consideration. Therefore, districts should adopt consistent policies and criteria for the admission of students whose parents are employed within the boundaries of the school district.

Section 48204(b)(4) no longer requires a school district to communicate in writing to the parents the reason for not admitting a student. Section 48204(b)(4) now states that districts are encouraged to communicate in writing to parents. Therefore, it is now permissive, rather than a mandatory requirement.

A sending district may object to further transfer of students if more than 1% of the average daily attendance of the district or 75 pupils, whichever amount is greater, attempt to transfer when the district has an average daily attendance of 2501 or more. The numerical limit of 75 pupils or 1% of the average daily attendance of the district, whichever is greater, is calculated based on the net transfer of students out of the school district. The net number is calculated as the difference between the number of students exiting the district and the number of students entering the district in a fiscal year. If a school district has more than a net number of 75 students or 1% of its average daily attendance of students transferring out of the district, then the district may deny the request to attend other school districts.

Once the district grants residency based on Section 48204, the student does not have to reapply in the next school year to attend a school within that district, and the district is required to allow the pupil to attend the school through the 12th grade if the parent or guardian so chooses, and if one or both of the pupil's parents or guardians continues to be employed by an employer situated within the attendance boundaries of the district. If the parent's employment within the attendance boundaries of the school district ceases, the pupil's right to continue to attend a school in that district through the 12th grade ceases. The pupil has the right to attend a school within that district, but not a particular school.

Districts should adopt the same policies and practices for regular education and special education students even though Education Code section 48204(b)(3) states that a school district may prohibit the transfer of a pupil if the district determines that the additional cost of educating the pupil would exceed the amount of additional state aid received as a result of a transfer. The United States Department of Education, Office for Civil Rights (OCR), has concluded in a number of cases involving California school districts that federal law, Section 504 of the Rehabilitation Act, prohibits school districts from discriminating against disabled students. OCR concluded that districts must treat disabled students and non-disabled students in the same manner and the same criteria (e.g., space available, programs available and not impacted, etc.) should be utilized. Therefore, if a special education student needs a particular education program

and that program is filled to capacity, the school district may deny the student admission in the same manner as when a school district's regular education program is filled to capacity and a regular education student is denied admission.

D. School Districts of Choice

It is permissive as to whether a school district wishes to adopt a resolution to become a school district of choice.

Education Code section 48300 defines school district of choice as a school district for which a resolution is in effect as set forth in Education Code section 48301. Under Education Code section 48301, the governing board of a school district may adopt a resolution electing to accept interdistrict transfer students and determine the number of transfers it is willing to accept. If the school district adopts such a resolution, the pupils must be admitted through a random, unbiased process that prohibits an evaluation of whether or not the students should be enrolled based upon their academic or athletic performance. Any student accepted for transfer under the resolution shall be deemed to have fulfilled the residence requirements of Education Code section 48204, which means that the student will not have to renew their request for an interdistrict transfer each year.

Section 48301(a), as amended effective January 1, 2010, states that if the number of transfer applications exceeds the number of transfers the governing board of the school district elects to accept under its resolution, approval for transfer shall be determined by a random drawing held in public at a regularly scheduled meeting of the governing board of the school district.

Under Section 48301(b), either the student's school district of residence or the school district of choice may prohibit the transfer of the student under the school district's resolution, or limit the number of students so transferred if the governing board of the district determines that the transfer would negatively impact any of the following:

1. The court-ordered desegregation plan of the district;

2. The voluntary desegregation plan of the district;

3. The racial and ethnic balance of the district.

Under Section 48301(c), the school district of residence may not adopt policies that in any way block or discourage students from applying for transfer to another district. Section 48301(d), as amended effective January 1, 2010, states that communications to parents by districts electing to enroll students under the choice options provided shall be factually accurate and not target individual parents or guardians or residential neighborhoods on the basis of the child's actual or perceived academic or athletic performance or any other personal characteristic.

Section 48303 states that school districts of choice may not prohibit a transfer of the student based upon a determination by the governing board of that school district that the

additional cost of educating the student would exceed the amount of additional state aid received as a result of the transfer. A school district may reject the transfer of a student if the transfer of that student would require the district to create a new program to serve that student, except that a school district of choice shall not reject the transfer of a special needs student, including an individual with exceptional needs and an English learner.[213] Section 48303(b) states:

> "This section is intended to ensure that special education, bilingual, English learner, or other special needs pupils are not discriminated against by the school district of choice because of the costs associated with educating those pupils. Pupils with special needs may take full advantage of the choice options available under this section."[214]

An application of any student for transfer may not be approved if the transfer would require the displacement, from a school or program conducted within any attendance area of the school district of choice, of any other student who resides within that attendance area or is currently enrolled in that school.[215]

School districts of choice may employ existing entrance criteria for specialized schools or programs if the criteria are uniformly applied to all applicants.[216] A school district of choice shall give priority for attendance to siblings of children already in attendance in the district.[217] A school district of choice may give priority for attendance to children of military personnel.[218]

A school district of residence with an average daily attendance greater than 50,000 may limit the number of pupils transferring out each year to 1% of its current year estimated average daily attendance.[219] A school district of residence with an average daily attendance of less than 50,000 may limit the number of students transferring out to 3% of its current year an estimated average daily attendance and may limit the maximum number of students transferring out for the duration of the program authorized by the school of choice article to 10% of the average daily attendance for that period.[220]

A school district of residence that has a negative status on the most recent budget certification completed by the county superintendent of schools in any fiscal year, may limit the number of students who transfer out of the district in a fiscal year.[221] Notwithstanding any prior or existing certification of a school district of residence, only if the county superintendent of schools determines that the district would not meet the standards in criteria for fiscal stability specified in Education Code section 42131 for the subsequent fiscal year exclusively due to the impact of additional pupil transfers pursuant to the school of choice article in that year, the

[213] Education Code section 48303(a).
[214] Education Code section 48303(b).
[215] Education Code section 48304.
[216] Education Code section 48305.
[217] Education Code section 48306(a).
[218] Education Code section 48306(b).
[219] Education Code section 48307(a).
[220] Education Code section 48307(b).
[221] Education Code section 48307(c).

district may limit the number of additional pupils who transfer in the upcoming school year pursuant to this article, up to the number that the county superintendent identifies beyond which number of additional transfers would result in a qualified or negative certification in that year exclusively as a result of additional transfers.[222]

If a school district of residence limits the number of students who transfer out of the district, students who have already been enrolled or notified of eligibility for enrollment, including through the random, public selection process prior to the action of the district to limit transfers, shall be permitted to attend the school district of choice.[223] Notwithstanding any other provision of the schools of choice article, a pupil attending a school district of choice or a student who received a notice of eligibility to enroll in a school district of choice, including a student selected by means of a random selection process conducted on or before June 30, 2009, shall be permitted to attend the school district of choice.[224]

An application requesting a transfer pursuant to these schools of choice provisions shall be submitted by the parent or guardian of a student to the school district of choice that has elected to accept transfer students prior to January 1 of the school year preceding the school year for which the student is requesting to be transferred. This application deadline may be waived upon agreement of the school district of residence of the student and the school district of choice.[225] The application deadline does not apply to an application requesting a transfer if the parent or guardian of the pupil, with whom the pupil resides, is enlisted in the military and is relocated by the military within 90 days prior to submitting the application.[226] The application may be submitted on the form provided by the State Department of Education and may request enrollment of the student in a specific school or program of the school district.[227]

Not later than 90 days after the receipt by a school district of an application for transfer, the school district may notify the parent or guardian in writing whether the application has been provisionally accepted or rejected or the placement of the student on a waiting list. Final acceptance or rejection shall be made by May 15 preceding the school year for which the student is requesting to be transferred.[228]

Each school district electing to accept transfer students as a school district of choice shall keep an accounting of all requests made for alternative attendance and records of all dispositions of those requests that shall include, but are not limited to, all of the following:

1. The number of requests granted, denied, or withdrawn. In the case of denied requests, the records shall indicate the reasons for the denials.

2. The number of students transferred out of the district.

[222] Education Code section 48307(b).
[223] Education Code section 48307(e).
[224] Education Code section 48307(f).
[225] Education Code section 48308(a)(1).
[226] Education Code section 48308(a)(2).
[227] Education Code section 48308(b).
[228] Education Code section 48308(c)(1).

3. The number of students transferred into the district.

4. The race, ethnicity, gender, self-reported socioeconomic status and the school district of residence of each of the students that have transferred in and out.

5. The number of students who have transferred in and who have transferred out who are classified as English learners or special education students.[229]

The information contained shall be reported to the governing board of the school district at a regularly scheduled meeting of the governing board. No later than May 15 of each year, the school district shall report the information regarding the district's status as a school district of choice in the upcoming school year to each school district that is geographically adjacent to the district electing to accept transfer pupils, the county office of education in which the district is located, the Superintendent of Public Instruction, and the Department of Finance. The Department of Finance shall make the information reported to it available upon request to the Legislative Analyst.[230] The Legislative Analyst shall annually report the above information to the Governor and to the appropriate fiscal and policy committee of the Legislature.[231]

The Legislative Analyst shall conduct a comprehensive evaluation of the interdistrict transfer program and make recommendations regarding the extension of the program by November 1, 2014.[232] The school district of choice provisions become inoperative on July 1, 2016, and as of January 1, 2017, are repealed unless a later enacted statute, which becomes effective on or before January 1, 2017, deletes or extends the dates on which it becomes inoperative and is repealed.[233]

E. Open Enrollment Act

On January 7, 2010, Governor Schwarzenegger signed Senate Bill 4 5x (Romero) (the Open Enrollment Act).[234] This legislation takes effect 90 days from the end of the Legislature's fifth special session or April 12, 2010. This legislation will apply, in most cases, to "low achieving schools" identified by the State Superintendent of Public Instruction and schools where parents have filed a petition to restructure a school that fails to make adequate yearly progress under the No Child Left Behind Act (NCLB) and has an Academic Performance Index (API) score of less than 800.

The legislation adds Article 10, commencing with Education Code section 48350, and is entitled the Open Enrollment Act. Section 48351 states that the purpose of the legislation is to

[229] Education Code section 48313(a). The provisions relating to race, ethnicity, gender, self-reported socioeconomic status, school district of residence, English learners and special education students take effect January 1, 2010.
[230] Education Code section 48313(b).
[231] Education Code section 48313(c).
[232] Education Code section 48316.
[233] Education Code section 48315.
[234] Stats. 2010, ch. 3.

improve pupil achievement, in accordance with the regulations and guidelines for the federal Race to the Top Fund authorized under the federal American Recovery and Reinvestment Act of 2009[235] and to enhance parental choice in education by providing additional options to pupils enrolled in low achieving public schools throughout the state without regard to the residence of their parents.

Section 48352 defines a "low achieving school" as any school identified by the State Superintendent of Public Instruction under the following criteria:

1. Excluding court, community, or community day schools, the Superintendent of Public Instruction shall annually create a list of 1,000 schools ranked by increasing API with the same ratio of elementary, middle and high schools as existed in decile 1 in the 2008-2009 school year.

2. In constructing the list of 1,000 schools each year, the Superintendent shall ensure that no local educational agency shall have more than ten percent of the schools on the list, and court, community, or community day schools and charter schools shall not be included on the list.

"School district of enrollment" is defined as the school district other than the school district in which the parent of the pupil resides, but which the parent of the pupil intends to enroll the pupil.[236] "School district of residence" is defined as the school district in which the parent of the pupil resides.[237]

Section 48353 states that the State Board of Education shall adopt emergency regulations to implement this legislation.

Section 48354(a) states that the parent of a pupil enrolled in a low-achieving school may submit an application for the pupil to attend a school in a school district of enrollment. Section 48354(b)(1) states that, consistent with the requirements of the NCLB,[238] on or before the first day of the school year, or if later, on the date the notice of program improvement, corrective action or restructuring status is required to be provided under federal law, the district of residence shall provide the parents and guardians of all pupils enrolled in a school determined to be on the list of 1,000 schools created by the Superintendent of Public Instruction, with notice of the option to transfer to another public school served by the school district of residence or another school district.[239]

An application requesting a transfer shall be submitted by the parent of the pupil to the school district of enrollment prior to January 1 of the school year preceding the school year for which the pupil is requesting to transfer. The school district of enrollment may waive the

[235] Public Law 111-5.
[236] Education Code section 48352(c).
[237] Education Code section 48352(d).
[238] 20 U.S.C. Section 6301 et seq.
[239] Education Code section 48354(a) and (b)(1).

deadline. The application deadline does not apply if the parent is enlisted in the military and was relocated by the military within 90 days prior to submitting the application.[240]

The application may request enrollment of the pupil in a specific school or program within the school district of enrollment. A pupil may enroll in a school in the school district of enrollment in the school year immediately following the approval of his or her application. In order to provide priority enrollment opportunities for pupils residing in a school district, a school district of enrollment shall establish a period of time for resident pupil enrollment prior to accepting transfer applications pursuant to this legislation.[241]

Education Code section 48355 states that the school district of residence or the school district of enrollment to which a pupil has applied to attend may prohibit the transfer of the pupil or limit the number of pupils who transfer if the governing board of the district determines that the transfer will negatively impact a court-ordered or voluntary desegregation plan of the district or the ratio in ethnic balance of the district, provided that any policy adopted is consistent with federal and state law. A school district shall not adopt any other policies that in any way prevent or discourage pupils from applying for transfer to a school district of enrollment. Communications to parents or guardians by districts regarding the open enrollment options provided by this legislation shall be factually accurate and not target individual parents or guardians or residential neighborhoods on the basis of a child's actual or perceived academic or athletic performance or any other personal characteristic.

Education Code section 48356 states that a school district of enrollment may adopt specific written standards for acceptance and rejection of applications pursuant to this legislation. The standards may include consideration of the capacity of a program, class, grade level, school building or adverse financial impact. The standards shall not include consideration of a pupil's previous academic achievement, physical condition, proficiency in the English language, family income or any individual characteristics set forth in Education Code section 200.[242]

Section 48356(b) states that in considering an application pursuant to this article, a nonresident school district may apply its usual requirements for admission to a magnet school or a program designed to serve gifted and talented pupils. Section 48356(c) states that subject to the rules and standards that apply to pupils who reside in the school district of enrollment, a resident pupil who is enrolled in one of the district's schools pursuant to this article, shall not be required to submit an application in order to remain enrolled.

Section 48356(d) states that a school district of enrollment shall ensure that pupils enrolled pursuant to standards adopted pursuant to this Section, are enrolled in a school with a higher academic performance index than the school in which the pupil was previously enrolled, and are selected through a random, unbiased process that prohibits an evaluation of whether or

[240] Education Code section 48354(b).
[241] Education Code section 48354(b).
[242] Education Code section 200 states: "It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor."

not the pupil should be enrolled based on his or her individual academic or athletic performance. Pupils applying for a transfer pursuant to this article shall be assigned priority for approval as follows:

1. First priority for the siblings of children who already attend the desired school.

2. Second priority for pupils transferring from a program improvement school ranked in decile 1 on the Academic Performance Index.

3. If the number of pupils who request a particular school exceeds the number of spaces available at that school, a lottery shall be conducted in group priority order to select pupils at random until all the available spaces are filled.

Section 48356(e) states that the initial application of a pupil for transfer to a school within a district of enrollment shall not be approved if the transfer would require the displacement from the desired school of any pupil who resides within the attendance area of that school or is currently enrolled in that school. Section 48356(f) states that a pupil approved for a transfer to a school district of enrollment pursuant to this article shall be deemed to have fulfilled the requirements of Section 48204 (residency requirements for school attendance in a school district).

The Open Enrollment Act sets a timeline of January 1 of the prior year. However, the school district of enrollment may waive the deadline to coordinate the timelines with the timelines for other interdistrict transfers. There is no restriction on setting the timeline near the start of school. However, if a court finds that the timeline is impractical or a hardship to parents, a court might invalidate a late timeline.[243]

With respect to late enrollment, we would recommend that districts avoid this dilemma by estimating the number of late transfers based on past history and define "capacity" by including the number of estimated late transfers into the school. Once a transfer is granted, the courts may not allow school districts to revoke the approval. Another alternative would be to establish a waiting list and allow students to transfer during the year if there is capacity in the school.

The Open Enrollment Act does not require school districts to transport students. The parents are responsible for transporting their children to school. The school district may refuse to accept students when their special education programs are beyond capacity. Districts should develop standards for determining when their special education programs are beyond capacity so that districts can support any refusals to accept transfer students.

Parents may request specific schools or programs, but the school district may offer other schools or programs. The Open Enrollment Act is unclear as to whether school districts may refuse to place students in the programs requested for any reason.

[243] Education Code section 48354(b).

The Open Enrollment Act does not specifically prohibit placing a transfer student in a program improvement school but the intent of the legislation appears to allow students to transfer into non-program improvement schools. Therefore, we would recommend allowing students to transfer into non-program improvement schools if there is space available before offering non-program improvement schools unless the parent requests the program improvement school.

Section 48356 (c) states that a resident pupil who is enrolled in one of the district's schools pursuant to this law shall not be required to submit an application in order to remain enrolled. The district of enrollment **may** allow the pupil to matriculate to a middle or high school without having to reapply.[244] Section 4702(b) of Title 5 of the California Code of Regulations states that a pupil who transfers to a school pursuant to the Open Enrollment Act shall not be required to reapply for enrollment in that school, regardless of whether the pupil's school of residence remains on the list of 1,000 Open Enrollment schools.

The district would need to treat the student the same as any resident student. Education Code section 48356(e) states that the **initial** application for a pupil to transfer to a school shall not be approved if the transfer would require the displacement from the desired school of any other pupil who resides within the attendance area of that school or is currently enrolled in that school. However, as stated above, once the Open Enrollment Act transfer is approved by the school of enrollment, the student does not have to reapply to that school.

The Open Enrollment Act applies to the entire state and does not limit interdistrict transfers to the same county. The Open Enrollment Act does not authorize an appeal to the county board of education. If the parent feels that they have been discriminated against, the parent may file a uniform complaint under the Uniform Complaint Procedures.

Section 48359 encourages, but does not require, school districts to keep an accounting of all requests made for alternative attendance. We would recommend the districts document the number of requests granted, denied, or withdrawn, and the reasons for denial. Districts should also keep records of the number of pupils who transfer out of the district and into the district. Districts should also document the race, ethnicity, gender and other characteristics of each of the students, including English learners and special education students, and the school district of residence of each of the pupils who have transferred in or out of the district.

Section 48357 states that within 60 days of receiving an application pursuant to Section 48354, a school district of enrollment shall notify the applicant parent and the school district of residence in writing whether the application has been accepted or rejected. If an application is rejected, the school district of enrollment shall state in the notification the reasons for the rejection.

Section 48358 states that a school district of enrollment that enrolls a pupil pursuant to this article shall accept credits toward graduation that were awarded to the pupil by another school district and shall graduate the pupil if the pupil meets the graduation requirements of the school district of enrollment.

[244] 5 C.C.R. Section 4702(c).

Section 48359 states that each school district is encouraged to keep an accounting of all requests made for alternative attendance pursuant to this article, and records of all dispositions of those requests may include, but are not limited to, all of the following:

1. The number of requests granted, denied or withdrawn. In the case of denied requests, the records may indicate the reasons for the denials.

2. The number of pupils who transferred out of the district.

3. The number of pupils who transferred into the district.

4. The race, ethnicity, gender, self-reported socioeconomic status, and the school district of residence of each of the pupils who have transferred in or out of the district.
5. The number of pupils who have transferred in or out of the district who are classified as English learners or identified as individuals with exceptional needs (special education).

The information may be reported to the governing board of the school district at a regularly scheduled meeting of the board.

Section 48359.5 states that for a school district of enrollment that is a basic aid district, the apportionment of state funds for any average daily attendance credited shall be 70% of the district revenue limit that would have been apportioned to the school district of residence. Apportionment of these funds shall begin in the second consecutive year of enrollment, and continue annually until the pupil graduates from, or is no longer enrolled in, the school district of enrollment. A basic aid district is defined as a school district that does not receive an apportionment of state funds pursuant to Education Code section 42238(h) for any fiscal year.

Under Education Code section 48359.5, a basic aid district would have to accept students who wish to transfer into the district.

Education Code section 48356(a) states that a school district with enrollment may adopt specific written standards for acceptance and rejection of applications. The standards may include consideration of the capacity of the program, class, grade level, school building, or adverse financial impact. However, the standards shall not include consideration of a pupil's previous academic achievement, physical condition, proficiency in the English language, family income, or any of the other individual characteristics set forth in Section 200 of the Education Code (e.g., race, ethnicity, sex, religion.). If the number of pupils who request a particular school exceeds the number of spaces available at that school, a lottery must be conducted in group priority order, with first priority for siblings of children who already attend the desired school, and second priority for pupils transferring from a program improvement school ranked in decile 1 on the Academic Performance Index, and third priority to select pupils at random until all of the available spaces are filled.

Education Code section 48360 states that the Superintendent of Public Instruction shall contract for an independent evaluation of the open enrollment program using federal funds. The evaluation shall, at a minimum, consider all of the following:

1. The levels of, and changes in, academic achievement of pupils in school districts of residence and school districts of enrollment for pupils who do and do not elect to enroll in a school district of enrollment.

2. Fiscal and programmatic effects on school districts of residence and school districts of enrollment.

3. Numbers and demographic and socioeconomic characteristics of pupils who do and do not elect to enroll in a school district of enrollment.

The Superintendent of Public Instruction shall provide a final evaluation report to the Legislature, Governor and the State Board of Education on or before October 1, 2014. The State Board of Education has adopted regulations pursuant to the Open Enrollment Act.[245]

F. Revocation of Interdistrict Transfers

In G.C. v. Owensboro Public Schools,[246] the Sixth Circuit Court of Appeals held that the revocation of an authorization for interdistrict attendance during the school year was tantamount to expulsion and the requirements for expelling students, including an administrative hearing, apply. The Court of Appeals held that while a school district could refuse to renew a permit for interdistrict attendance for the following school year, once the interdistrict permit was granted, a student could not be sent back to their district of residence for disciplinary reasons without an expulsion hearing.

The Court of Appeals held that removing the student from the school district during the school year was an expulsion and all students must be afforded due process prior to an expulsion. Due process would include an administrative hearing prior to expulsion.[247]

While the decision in Owensboro may not be binding on California courts, California courts may rule in a similar manner in the future.

INTRADISTRICT ATTENDANCE

With respect to intradistrict attendance, the California Attorney General concluded that a "fundamental" school that has a districtwide attendance area is not exempt from "a random, unbiased process" in selecting students for enrollment. The Attorney General also concluded

[245] 5 C.C.R. Section 4700 et seq.
[246] 711 F.3d 623, 290 Ed.Law Rep. 527 (6th Cir. 2013).
[247] Id. at 629-32.

that a "first come, first served" selection policy does not constitute a "random, unbiased process."[248]

The Attorney General interpreted subdivision (b)(2)(B) of Education Code section 35160.5, which requires school districts to adopt "open enrollment" intradistrict transfer policies. That subdivision provides:

> "It shall include a selection policy for any school that receives requests for admission in excess of the capacity of the school that ensures that selection of pupils to enroll in the school is made through a random, unbiased process that prohibits an evaluation of whether any pupil should be enrolled based upon his or her academic or athletic performance. For purposes of this subdivision, the governing board of the school district shall determine the capacity of the schools in its district. However, school districts may employ existing entrance criteria for specialized schools or programs if the criteria are uniformly applied to all applicants. This subdivision shall not be construed to prohibit school districts from using academic performance to determine eligibility for, or placement in, programs for the gifted and talented pupils established pursuant to Chapter 8 (commencing with Section 52200) of Part 28."

The Attorney General noted that subdivision (b)(2)(B) contains two separate concepts that are relevant to the analysis. The first concept is "existing entrance criteria for specialized schools and programs." A district may continue to employ existing criteria to determine which students are qualified to enroll in a specialized school or program. The Attorney General gave the example of a specialized school program for gifted or talented pupils (GATE), for which existing "entrance criteria" may involve "intellectual, creative, specific academic, or leadership abilities, high achievement, performing and visual arts talent."[249]

The second concept is the "random, unbiased process." When requests for admission of "qualified" students exceed the capacity of a specialized school, students must be selected on a "random, unbiased" basis with the exception of certain priorities that are authorized by Section 35160.5.

The Attorney General also concluded that a "first come, first served" selection policy is not a "random, unbiased process."[250] The Attorney General cited with approval a program advisory[251] which was issued by the CDE when Education Code section 35160.5(b) was first enacted. The CDE Legal Office advised that a "first come, first served" selection process would not constitute a random and unbiased process. The advisory provided the following example:

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[248] 85 Ops.Cal.Atty.Gen. 95 (2002).
[249] Education Code section 52202.
[250] Ibid.
[251] No. CIL 93-94-05 (March 4, 1994).

> "[I]n a family in which only one parent works outside the home, the other parent may have time to spend in line for two days to ensure their application is first to be accepted. A family in which both parents work would not have this same opportunity."[252]

The Attorney General's opinion helps resolve an apparent ambiguity in Section 35160.5(b). Read in context, it was not altogether clear whether the "random, unbiased" requirement applied to schools, such as fundamental schools, which have districtwide attendance areas. The Attorney General's analysis indicates that the "random, unbiased" requirement does indeed apply to specialized schools.

SCHOOL CHOICE UNDER THE NCLB ACT

The NCLB and its implementing regulations contain provisions mandating school choice.[253] Section 6316(b)(1)(E) and Section 200.44 state that in the case of the school identified for school improvement, the local educational agency shall, not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, which may include a public charter school, that has not been identified for school improvement, "unless such an option is prohibited by state law." The federal statute goes on to state that in providing students the option to transfer to another public school, the local educational agency shall give priority to the lowest achieving children from low income families, as determined by the local educational agency.

California law does not prohibit intradistrict transfers. However, California law requires that intradistrict transfers be determined on a random, unbiased basis (i.e., a lottery). When limited space is available, Education Code section 35160.5 requires the governing board of each school district, as a condition of the receipt of school apportionments, to adopt rules and regulations establishing a policy of open enrollment within the district for residence of the district. The policy must include a selection policy for any school that receives requests for admission in excess of the capacity of the school that ensures that the selection of pupils is made through a random, unbiased process that prohibits an evaluation of whether any pupil should be enrolled based on his or her academic or athletic performance. The governing board of the school district is required to determine the capacity of the schools in its district.

It would appear that there is a direct conflict between federal and California law when the request for intradistrict transfers exceed the capacity of the schools in the district. Therefore, in our opinion, when there is limited space available and the demand for intradistrict transfers exceeds the space available, the provisions of the NCLB, Section 6316(b)(1)(E), do not apply in California since the federal law specifically exempts states where the use of academic criteria (e.g., giving priority to the lowest achieving children from low income families) is prohibited by state law.

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[252] Ibid.
[253] 20 U.S.C. Section 6316; see, also, 34 C.F.R. Sections 200.30-200.53.

The federal regulations support the position that these provisions are prohibited by California law and state law should be followed. Section 200.44(a)(2) states that the local educational agency must offer the option to transfer, not later than the first day of the school year following the year in which the local educational agency administered the assessments that resulted in its identification of the school for improvement, corrective action, or restructuring. The schools to which students may transfer may not include schools that the local educational agency has identified for improvement, corrective action, or restructuring, or are persistently dangerous as determined by the state, and may include one or more public charter schools. If more than one school meets the requirements of Section 200.44, the local educational agency must provide the parents of students eligible to transfer a choice of more than one such school, and take into account the parents' preferences among the choices offered.

Section 200.44(b) states that a local educational agency may invoke the state law prohibition on choice only if the state law prohibits choice through restrictions on public school assignments, or the transfer of students from one public school to another public school. It would appear that, in California, Education Code section 35160.5 prohibits choice through restrictions on the use of academic performance and requires choice be exercised through a random, unbiased process such as a lottery.

Therefore, it can be concluded that students who exercise their right of choice under the NCLB in California should be included in the lottery with other students through the use of a random, unbiased process.

Section 200.44(d) states that a local educational agency may not use lack of capacity to deny students the option to transfer. Section 200.44(e) states that the local educational agency must give priority to the lowest achieving students from low income families. These two provisions appear to be contradictory. By establishing a priority system, the NCLB (but not the United States Department of Education) recognized that there would be a lack of capacity in many school districts and, as a result, a priority system for low achieving students from low income families had to be established. The United States Department of Education's position, not recognizing the lack of capacity, appears to go beyond Congressional intent and may be subject to legal challenge. In practical terms, it is unworkable since school districts cannot ignore state and local health and safety laws, which limit the number of students in school buildings. In addition, the NCLB does not provide federal funds for the construction of additional school buildings.

Section 200.44(g) states that if a student exercises the public choice option to transfer to another public school in the district, the local educational agency must permit the student to remain in that school until the student has completed the highest grade in the school. Section 200.44(i) states that if a student exercises the option to transfer to another public school in the district, the local educational agency must, consistent with Section 200.48, provide or pay for the student's transportation to the school. The local educational agency's obligation to provide transportation for the student ends at the end of the school year in which the school from which the student transferred is no longer identified by the local educational agency for school improvement, corrective action, or restructuring. Section 200.48 authorizes a school district to pay for choice-related transportation and supplemental educational services from NCLB funds.

The local educational agency must spend a minimum of an amount equal to 5% of its federal funds for transportation. The local educational agency must spend an amount equal to 20% of its NCLB funds to provide or pay for transportation of students and to satisfy all requests for supplemental education services.

Section 200.44(j) states that for students with disabilities under the IDEA, and students covered under Section 504 of the Rehabilitation Act, the public school choice option must provide a free appropriate public education. It is unclear whether this requirement means that districts must create special education programs at schools which do not currently house these programs, particularly with respect to low incidence disabilities.

In a draft guidance[254] which is non-binding, the United States Department of Education stated school districts may consider whether the school the parents choose can meet the needs of the child and implement the child's IEP or 504 plan. If the school of choice can implement the child's existing IEP then the child may transfer without reconvening the IEP team. If the school of choice cannot implement the child's existing IEP then the IEP team must meet to decide if the child's placement should be changed, the IEP should be changed or how the matter should be resolved. If no resolution is reached the due process procedures of the IDEA may be used.

Section 6316(b)(11)[255] and Section 200.44(h)[256] state that if all the public schools served by a local educational agency to which a child may transfer are identified for school improvement, corrective action, or restructuring, the agency shall, to the extent practicable, establish a cooperative agreement with other local educational agencies in the area for a transfer. Section 200.44(h) also states that a local educational agency may offer supplemental educational services to eligible students in their first year of school improvement.

HOMELESS STUDENTS

A. Federal Law

The NCLB added the McKinney-Vento Homeless Education Assistance Improvements Act of 2001.[257] These amendments to the McKinney-Vento Act took effect on July 1, 2002. The amendments authorize the U.S. Secretary of Education to make grants to states to enable states to assist homeless students in accordance with the requirements set forth below.

Section 11434(a) defines the term "homeless children and youth" as individuals who lack a fixed, regular and adequate nighttime residence and includes:

1. Children and youth who are sharing the housing of other persons due to loss of housing, economic hardship or a similar reason; are living in motels, hotels, trailer parks or camping grounds due to the lack of alternative adequate accommodation; are living in

[254] Draft Non-Regulatory Guidance, Public School Choice, U.S. Department of Education (December 4, 2002), pages 13-14.
[255] 20 U.S.C. Section 6316(b)(11).
[256] 34 C.F.R. Section 200.44(h).
[257] 42 U.S.C. Section 11431 et seq.

emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement.

2. Children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings.

3. Children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations or similar settings.

4. Migratory children who qualify as homeless for the purpose of this part.

Section 11434(a)(6) defines an "unaccompanied youth" as a youth not in the physical custody of a parent or guardian.

Section 11431 states that it is the policy of Congress that each state educational agency receiving federal funds under the program shall ensure that each child of a homeless individual and each homeless youth has equal access to the same "free appropriate public education" as provided to other children and youths. Section 11431 does not specifically define the term "free appropriate public education." It is unclear whether the term in the context of homeless students has the same meaning as the term does with respect to disabled children under the IDEA.[258] Section 11431 also requires states that have compulsory residency requirements as a component of the state's compulsory school attendance law to review and undertake steps to revise such laws, regulations, practices or policies to ensure that homeless children and youths are afforded the same free appropriate public education as provided to other children and youths.

Section 11431 also states that homelessness alone is not sufficient reason to separate students from the mainstream school environment and homeless children and youths should have access to the education and other services that such children and youths need to ensure that such children and youths have an opportunity to meet the same challenging state student academic achievement standards to which all students are held. Other provisions of the NCLB Act require states as part of the state accountability system to develop the standards.

Section 11432 authorizes the U.S. Secretary of Education to make grants to states to carry out the provisions of the Act. Section 11432(e)(3) prohibits the segregation of homeless students in a separate school or in a separate program within a school based on the student's status as homeless. The Act exempts separate schools for homeless students that were operated in fiscal year 2000 under specified conditions which would include programs operated in Orange County such as Project Hope.

[258] 20 U.S.C. Section 1400 et seq.

Section 11432(e)(3)(C) sets forth requirements for receiving federal funds for homeless students. The school must provide written notice at the time any student seeks enrollment, and at least twice annually while the student is enrolled, to the parent or guardian that:

1. The student has a right to continue his or her education in the school of origin for the duration of homelessness in any case in which a family becomes homeless between academic years or during an academic year, or for the remainder of the academic year if the student becomes permanently housed during an academic year. Alternatively, the child may enroll in any public school that non-homeless students who live in the attendance area in which the student is actually living are eligible to attend. "School of origin" is the school that the student attended when permanently housed or the school in which the student was last enrolled.

2. No homeless student is required to attend a separate school for homeless students.

3. Homeless students shall be provided comparable services, including transportation services, educational services and meals through school meals programs.

4. Homeless students should not be stigmatized by school personnel.

Section 11432(g) outlines the requirements of state plans. Most states that receive funds under the Act must develop a plan that includes the following:

1. A description of how homeless children are or will be given the opportunity to meet the same challenging state academic achievement standards all students are expected to meet.

2. A description of the procedures the state educational agency will use to identify homeless students in the state and to assess their special needs.

3. A description of procedures for the prompt resolution of disputes regarding the educational placement of homeless students.

4. A description of programs for school personnel to heighten the awareness of such personnel of the specific needs of homeless students.

5. A description of the procedures that ensure that homeless students who meet the relevant eligibility criteria are able to participate in federal, state, or local food programs.

6. A description of the procedures that ensure that homeless students have equal access to the same public preschool programs as other children in the state; that homeless students are not separated from the public schools and are given equal access to appropriate secondary education and support services; and are able to participate in federal, state or local before and after school care programs.

7. Strategies to address problems identified by the state.

8. Strategies to address other problems with respect to the education of homeless students, including problems resulting from enrollment delay that are caused by immunization and medical records requirements, residency requirements, lack of birth certificates, school records or other documentation, guardianship issues, or uniform or dress requirements.

9. A demonstration that the state educational agency and local educational agencies in the state have developed policies to remove barriers to the enrollment and retention of homeless students in the schools of the state.

10. Assurances that the state educational agency and local educational agency in the state will adopt policies and practices to ensure that homeless students are not stigmatized or segregated on the basis of their status of homeless.

11. Local educational agencies will designate an appropriate staff person as a local educational liaison for homeless students to carry out the requirements of the Act.

12. The state and its local educational agencies will adopt policies and practices to ensure that transportation is provided, at the request of the parent or the student to and from the school of origin in accordance with the following requirements:

    A. If the homeless child or youth continues to live in the area served by the local educational agency in which the school of origin is located, the student's transportation to and from the school of origin shall be provided or arranged by the local educational agency in which the school of origin is located.

    B. If the homeless student's living arrangements in the area served by the local educational agency of origin terminate and the student, though continuing his or her education in the school of origin, begins living in an area served by

> another local educational agency, the local educational agency of origin and the local educational agency in which the homeless student is living shall agree upon a method to apportion the responsibility and costs for providing the child with transportation to and from the school of origin. If the local educational agencies are unable to agree upon such method, the responsibility and costs for transportation shall be shared equally.

Section 11432(g)(3) requires the local educational agency and states receiving funds to act in the child's best interest by continuing the child's education in the school of origin for the duration of homelessness in any case in which the family becomes homeless between academic years or during the academic year or for the remainder of the academic year if the child becomes permanently housed during the academic year or enroll the child or youth in any public school that non-homeless students who live in the attendance area in which the child is actually living are eligible to attend. In determining the best interest of the child, the local educational agency is required to:

1. To the extent feasible, keep a homeless child in the school of origin except when doing so was contrary to the wishes of the child's parent or guardian.

2. Provide a written explanation, including a statement regarding the right to appeal to the homeless child's parent or guardian if the local educational agency sends the child to a school other than the school of origin or a school requested by the parent.

3. In the case of an unaccompanied child or youth, ensure that the homeless liaison designated by the school district assists in placement or enrollment decisions, considers the views of the student and provides notice to the student of the right to appeal.

Section 11432(g)(3)(C) requires the school selected by the student's parents or the student to immediately enroll the homeless child or youth even if the child or youth is unable to produce records normally required for enrollment, such as previous academic records, medical records, proof of residency or other documentation. The enrolling school is required to immediately contact the school last attended by the child or youth or obtain relevant academic and other records. If the child or youth needs to obtain immunizations or immunization or medical records, the enrolling school shall immediately refer the parent or guardian of the child or youth to the local educational liaison designated by the school district who shall assist in obtaining necessary immunizations or immunization or medical records.

Section 11432(g)(3)(E) states that if a dispute arises over school selection or enrollment in a school, the student shall be immediately admitted to the school in which enrollment is sought pending resolution of dispute. The parent or guardian of the student shall be provided with a written explanation of the school's decision regarding school selection or enrollment,

including the rights of the parent or student to appeal the decision. The parent or student shall be referred to the local educational liaison who shall carry out the dispute resolution process as expeditiously as possible after receiving notice of the dispute. And in the case of an unaccompanied student, the homeless liaison shall ensure that the youth is immediately enrolled in school pending resolution of the dispute.

Section 11432(g)(3)(G) defines "school of origin" as a school that the student attended when permanently housed or the school in which the student was last enrolled. Section 11432(g)(3)(H)(4) states that each homeless student who is assisted under the Act shall be provided services comparable to services offered to other students in the school selected, including the following:

1. Transportation services.

2. Educational services for which the student is eligible.

3. Programs and vocational and technical education.

4. Programs for gifted and talented students.

5. School nutrition programs.

Section 11432(G)(3)(H)(6) requires the local educational liaison for homeless students to ensure that:

1. Homeless children are identified by school personnel and through coordinated activities with other entities and agencies.

2. Homeless students enroll in and have a full and equal opportunity to succeed in schools of that local educational agency.

3. Homeless students receive educational services for which such families, children and youth are eligible.

4. The parents of homeless students are informed of the educational and related opportunities available to their children and are provided with meaningful opportunities to participate in the education of their children.

5. Public notice of the educational rights of homeless students is disseminated where such children and youth receive services, such as schools, family shelters and soup kitchens.

6. Enrollment disputes are mediated in accordance with the Act.

7. The parents of homeless students and any unaccompanied student is fully informed of all transportation services, including transportation to the school of origin, as described in paragraph (1)(J)(iii), and has assisted in assessing transportation to that school that is selected under paragraph (3)(A).

B. State Law

Senate Bill 177[259] amends Education Code section 48850 and adds Education Code section 48852.5, effective January 1, 2014.

Education Code section 48850(a)(3)(A) states that pursuant to federal law, public schools, including charter schools, and county offices of education shall immediately enroll a homeless child or youth seeking enrollment, except where enrollment would be in conflict with the charter school admission requirements set forth in Education Code section 47605(d). Section 48850(a)(3)(B) states that the California Department of Education and the State Department of Social Services shall identify representatives that have experience in homeless youth issues to develop policies and practices to support homeless children and youth and to ensure the child abuse and neglect reporting requirements do not create barriers to the school enrollment and the attendance of homeless children or youths, including, but not limited to, ensuring that a pupil who is a homeless child or youth is not reported to law enforcement by school personnel if the sole reason for the report is the pupil's homelessness. The selected representative shall present the policies and practices to the State Superintendent of Public Instruction and the State Department of Social Services to be considered for implementation or dissemination, as appropriate.

Education Code section 48852.5 states that pursuant to the McKinney-Vento Act, a local educational agency liaison for homeless children and youth shall ensure that public notice of the educational rights of homeless children and youth is disseminated in schools within the liaison's local educational agency that provides services pursuant to the McKinney-Vento Act. For purposes of Section 48850 and 48852.5, the definition of "homeless children and youths" is defined in Section 11434a(2) of Title 42 of the United States Code.[260]

Assembly Bill 652[261] adds Penal Code section 11165.15, relating to the reporting of child abuse or child neglect, effective January 1, 2014.

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[259] Stats. 2013, ch. 491.

[260] The McKinney-Vento Act, 42 U.S.C. Section 11434a(2) defines homeless children and youths as follows: (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title; and (B) includes (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement; (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 11302(a)(2)(C) of this title); (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and (iv) migratory children (as such term is defined in section 6399 of Title 20) who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).

[261] Stats. 2013, ch. 486.

Penal Code section 11165.15 states that the fact that a child is homeless or is classified as an unaccompanied minor, as defined in federal law, is not, in and of itself, a sufficient basis for reporting child abuse or neglect. However, whenever a mandate reporter has knowledge of or observes an unaccompanied minor whom the mandated reporter knows or reasonably suspects to be the victim of child abuse or neglect, the mandated reporter shall report the possible child abuse or child neglect pursuant to Penal Code section 11166.

Penal Code section 11166 requires a mandated reporter to make a report to a child protective agency whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. The mandated reporter shall make an initial report by telephone to the child protective agency immediately or as soon as practically possible, and shall prepare and send, fax, or electronically transmit the written follow-up report within 36 hours of receiving information concerning the incident.

Assembly Bill 1733 establishes fee waivers for people experiencing homelessness, including homeless youth, who are requesting certified birth certificates and/or state-issued identification cards.

Health and Safety Code section 103577 provides that on or after July 1, 2015, each local registrar or county recorder shall issue a birth certificate to any person who can verify his/her status as a homeless child or youth. Verification of homeless status may be made by a homeless services provider with knowledge of the person's homeless status. Section 103577 (b) provides that the State Department of Public Health shall develop an affidavit attesting to an applicant's status as a homeless person or homeless child or youth. This affidavit must be signed by both the person making a request for a birth certificate and a homeless services provider that has knowledge of the applicant's housing status. Subsection (d) states that for the purposes of this statute, a "homeless child or youth" has the same meaning as the definition of "homeless children and youths" as set forth in the federal McKinney-Vento Homeless Assistance Act[262] and a "homeless services provider" includes a local educational agency liaison for homeless children and youth,[263] or a school social worker.

Vehicle Code section 14902 (d) provides that on and after January 1, 2016, the Department of Motor Vehicles shall issue, without a fee, an original or replacement identification card to a person who can verify his or her status as a homeless person or homeless child or youth. Similar to Health and Safety Code section 103577, Vehicle Code section 14902 uses the McKinney-Vento Homeless Assistance Act definition for "homeless children and youths" and includes a local educational agency liaison for homeless children and youth or a school social worker as a homeless services provider.

Effective January 1, 2015, Assembly Bill 1806 amends several sections of the Education Code that previously applied only to children and youth in foster care to also apply to children and youth experiencing homelessness. For purposes of these sections, a pupil who is a homeless

[262] 42 U.S.C. section 11301 et seq.
[263] 42 U.S.C. section 11432(g)(1)(J)(ii).

child or youth is defined by the McKinney-Vento Homeless Assistance Act.[264]

With these amendments, if a school district is holding a manifestation determination IEP meeting to consider a change of placement for a student with disabilities who is experiencing homelessness, Education Code section 48915.5 (e) will require the district to invite the homeless education liaison to the meeting. If a school district is recommending an expulsion for misconduct that is a discretionary recommendation, under Education Code section 48918.1 (b), the district must provide at least ten days' notice of the hearing to the homeless education liaison. This notice may be provided via email or telephone call.

Education Code section 51225.1 applies the exemption from local district board coursework and requirements for high school graduation that add to state minimum requirements to homeless youth who have transferred between schools any time after the completion of the pupil's second year of high school, unless the district determines the student can complete the local graduation requirements in time to graduate by the end of the pupil's fourth year of high school. Also similar to youth in foster care, this provision requires a school district, after determining the homeless youth is reasonably able to complete the district's graduation requirements within the pupil's fifth year of high school, to perform the following:

1. Inform the pupil of his or her option to remain in school for a fifth year to complete the school district's graduation requirements.

2. Inform the pupil, and the person holding the right to make educational decisions for the pupil, about how remaining in school for a fifth year to complete the school district's graduation requirements will affect the pupil's ability to gain admission to a postsecondary educational institution.

3. Provide information to the pupil about transfer opportunities available through the California Community Colleges.

4. Permit the pupil to stay in school for a fifth year to complete the school district's graduation requirements upon agreement with the

[264] The term "homeless children and youths"-- **(A)** means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title); and **(B)** includes--
(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
(ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 11302(a)(2)(C) of this title);
(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
(iv) migratory children (as such term is defined in section 6399 of Title 20) who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).
42 U.S.C. section 11434a (2).

> pupil, if the pupil is 18 years of age or older, or, if the pupil is under 18 years of age, upon agreement with the person holding the right to make educational decisions for the pupil.

To determine whether a pupil who is homeless is in the third or fourth year of high school, either the number of credits the pupil has earned to the date of transfer or the length of the pupil's school enrollment may be used, whichever will qualify the pupil for the exemption.[265]

Additional protections for pupils who are homeless parallel those in place for foster youth. For example, within 30 calendar days of the date that a pupil who is homeless may qualify for the exemption from local graduation requirements transfers into a school, the school district shall notify the pupil, the person holding the right to make educational decisions for the pupil, and the district's homeless education liaison of the availability of the exemption and whether the pupil qualifies for an exemption.[266] If the pupil is exempted and completes the statewide coursework requirements before the end of his or her fourth year in high school and would otherwise be entitled to remain in attendance at the school, the district shall not require or request that the pupil graduate before the end of his or her fourth year of high school.[267] If exempted, the school district shall notify the pupil and the person holding the right to make educational decisions for the pupil how any of the requirements that are waived will affect the pupil's ability to gain admission to a postsecondary educational institution and shall provide information about transfer opportunities available through the California Community Colleges.[268]

Furthermore, a pupil who is homeless and eligible for the exemption and otherwise is entitled to remain in attendance at the school shall not be required to accept the exemption or be denied enrollment in, or the ability to complete, courses for which he or she is otherwise eligible, including courses necessary to attend an institution of higher education, regardless of whether those courses are required for statewide graduation requirements.[269] A pupil who is homeless who previously declined the exemption and qualifies for it may still request and receive the exemption,[270] and once the exemption is granted, a school district shall not revoke it.[271] A school district shall not request or require,[272] nor the pupil, his/her educational rights holder, or homeless education liaison request, to transfer schools in order to qualify the pupil for an exemption pursuant to this section.[273]

Education Code section 51225.2 (b) provides that a school district and county office of education shall accept coursework satisfactorily completed by a pupil who is a homeless child while attending another public school, a juvenile court school, or a nonpublic, nonsectarian school or agency even if the pupil did not complete the entire course and shall issue that pupil

[265] Education Code section 51225.1 (c).
[266] Education Code section 51225.1 (d).
[267] Education Code section 51225.1 (e).
[268] Education Code section 51225.1 (f).
[269] Education Code section 51225.1 (g).
[270] Education Code section 51225.1 (h).
[271] Education Code section 51225.1 (i).
[272] Education Code section 51225.1 (k).
[273] Education Code section 51225.1 (l) (2).

full or partial credit for the coursework completed. The credits accepted under this provision shall be applied to the same or equivalent course, if applicable, as the coursework completed in the prior public school, juvenile court school, or nonpublic, nonsectarian school or agency.[274] Subsection (d), as amended, provides that a school district or county office of education shall not require a pupil who is a homeless child or youth to retake a course if the pupil has satisfactorily completed the entire course in a public school, a juvenile court school, or a nonpublic, nonsectarian school or agency. If the pupil did not complete the entire course, the school district or county office of education shall not require the pupil to retake the portion of the course the pupil completed unless the school district or county office of education, in consultation with the holder of educational rights for the pupil, finds that the pupil is reasonably able to complete the requirements in time to graduate from high school. When partial credit is awarded in a particular course, the pupil who is a homeless child or youth shall be enrolled in the same or equivalent course, if applicable, so that the pupil may continue and complete the entire course. Pursuant to the amended subsection (e), a pupil who is a homeless child or youth shall not be prevented from retaking or taking a course to meet the eligibility requirements for admission to the California State University or the University of California.

SB 1111, which goes into effect on January 1, 2015, amends the list of pupils who may be involuntarily enrolled in a county community school to limit the kind of probation referrals and remove homeless children. References to homeless students were deleted from Education Code sections 1981 (d) and 1981.2. SB 1111 also amended provisions regarding student expulsions, county community placements.

Education Code section 48859 applies the provisions related to homeless children to charter schools as well as school districts, county offices of education and SELPAs.

Education Code section 48852.7, effective January 1, 2016, states that once a child becomes a homeless child, the local educational agency serving the homeless child shall allow the homeless child to continue his or her education in the school of origin through the duration of homelessness. If the homeless child status changes before the end of the academic year so that he or she is no longer homeless, Section 48852.9(b) states that either of the following applies:

1. If the homeless child is in high school, the local educational agency shall allow a formerly homeless child to continue his or education in the school of origin through graduation.

2. If the homeless child is in Kindergarten or in any grades 1 through 8, inclusive, the local educational agency shall allow the formerly homeless child to continue his or her education in the school of origin through the duration of the academic year.

Education Code section 48852.7(c) states that to ensure that the homeless child has the benefit of matriculating with his or her peers in accordance with the established feeder patterns of school districts, the following apply:

[274] Education Code section 51225.2 (c).

1. If the homeless child is transitioning between school grade levels, the local educational agency shall allow the homeless child to continue in a school district of origin in the same attendance area.

2. If the homeless child is transitioning to a middle school or high school, and the school designated for matriculation is in another school district, the local educational agency shall allow the homeless child to continue to the school designated for matriculation in that school district.

3. The new school shall immediately enroll the homeless child even if the child has outstanding fees, fines, textbooks, or other items or money due to the school last attended or is unable to produce clothing or records normally required for enrollment such as previous academic records, medical records, including, but not limited to, records or other proof of other immunization history, other documentation or school uniforms.

Education Code section 48852.7(d) states that it is the intent of the Legislature that Section 48852.7 shall not supersede or exceed other laws governing special education services for eligible homeless children. Section 48852.7(e)(1) states that the federal law related to homeless children shall govern the procedures for transportation and dispute resolution with respect to homeless children and school of origin. Section 48852.7(e)(2) does not require the school district to provide transportation to a former homeless child who has an IEP that does not require transportation as a related service and who changes residence but remains in his or her school of origin pursuant to Section 48852.7, unless the IEP team determines that transportation is a necessary related service or federal law requires that transportation be provided. Section 48852.7(e)(3) does not require a school district to provide transportation services to allow a homeless child to attend a school or school district, unless otherwise required under the federal McKinney Vento Homeless Assistant Act or other federal law. A school district may, at its discretion, provide transportation services to allow a homeless child to attend a school or school district.

Education Code section 48852.7(f)(1), defines "homeless child" in the same manner as the federal McKinney Vento Act. Section 48852.7(f)(2) defines "school of origin" as the school that the homeless child attended when permanently housed or the school in which the homeless child was last enrolled. If the school the homeless child attended when permanently housed is different from the school in which the homeless child was last enrolled, or if there is some other school that the homeless child attended with which the homeless child is connected and that the homeless child attended within an immediately preceding 15 months, the educational liaison in consultation with, and with the agreement of, the homeless child and the person holding the right to make educational decisions for the homeless child, shall determine, in the best interest of the homeless child, the school that shall be deemed to be the school of origin.

RIGHTS OF FOSTER CHILDREN

A. Rights of Foster Children

Education Code section 48850 states that it is the intent of the Legislature to ensure all students in foster care and those who are homeless, as defined by the McKinney-Vento Act, have a meaningful opportunity to meet the challenging state academic achievement standards to which all students are held. Section 48850 states that in fulfilling their responsibilities to foster care children, educators, county placing agencies (e.g., probation and social services departments), care providers, advocates and the juvenile court shall work together to maintain stable school placements and to ensure that each student is placed in the least restrictive educational program and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all students. In all instances, "educational and school placement decisions must be based on the best interests of the child."

B. Placement of Foster Children

Section 48853 states that a student placed in a licensed children's institution or foster family home shall attend programs operated by the local educational agency, unless one of the following applies:

1. The pupil has an IEP requiring placement in a nonpublic, nonsectarian school or agency or in another local educational agency.

2. The parent or guardian, or other person holding the right to make educational decisions for the student, determines that it is in the best interest of the pupil to be placed in another educational program, or that the student continue in his or her school of origin.

Section 48853(b) states that before any decision is made to place a student in a juvenile court school, the parent or guardian or person holding the right to make any educational decisions for the student shall first consider placement in a regular public school. Section 48853(c) states that if any dispute arises as to the school placement of the student, the student has the right to remain in his or her school of origin, pending resolution of the dispute. However, 48853(d) states that Section 48853 does not supersede other laws that govern pupil expulsion. Therefore, if the student had been expelled from the school of origin, the student would not have the right to remain in his or her school of origin.

Section 48853(e) states that Section 48823 does not supersede any other law governing the educational placement in a juvenile court school, of a student detained in a county juvenile hall, or committed to a county juvenile ranch camp, forestry camp, or regional facility. Therefore, if the juvenile court or county placing agency has decided that the student should be placed in a county juvenile hall or committed to a court juvenile ranch camp, forestry camp, or other regional facility, pursuant to another law, Section 48853 does not supersede those provisions of law.

Section 48853(f) states that foster children living in emergency shelters may receive educational services at the emergency shelter, as necessary, for short periods of time for health and safety emergencies or to provide temporary, special and supplementary services to meet the child's unique needs if a decision regarding whether it is in the best interests of the child to attend the school of origin cannot be made promptly, it is not practical to transport the child to the school of origin and the child would otherwise not receive educational services. Educational services may be provided at the shelter pending a determination by the person holding the right to make decisions regarding the educational placement of the child.

Section 48853(g) states that all educational and school placement decisions shall be made to ensure that the child is placed in the least restrictive educational programs and has access to academic resources, services, and extracurricular and enrichment activities that are available to all students. In all instances, educational and school placement decisions shall be based on the best interests of the child.

C. Appointment of Educational Liaison

The legislation adds Education Code section 48853.5. Section 48853.5 applies to any foster child who has been removed from his or her home pursuant to Welfare & Institutions Code section 309 (temporary custody), is the subject of a petition filed under Section 300 (dependent-victim of abuse or neglect) or 602 (juvenile who has violated the law) of the Welfare & Institutions Code, or has been removed from his or her home and is the subject of a petition filed under Section 300 or 602 of the Welfare & Institutions Code.

Section 48853.5(b) requires each local educational agency to designate a staff person as the educational liaison for foster children. Section 48853.5(b) requires the educational liaison for foster children to do the following:

1. Ensure and facilitate the proper educational placement, enrollment in school, and checkout from school of foster children.

2. Assist foster children when transferring from one school to another or from one school district to another in ensuring proper transfer of credits, records and grades.

Section 48853(d) states that Section 48853.5 does not grant authority to the educational liaison that supersedes the authority granted under state and federal law to a parent or guardian retaining educational rights, a responsible adult appointed by the juvenile court to represent a child, a surrogate parent, or a foster parent exercising the authority granted under Education Code section 56055. The role of the educational liaison is advisory with respect to placement decisions and determination of school of origin.

Section 48853.5(e) states that the local educational agency serving the foster child shall allow the foster child to continue his or her education in the school of origin for the duration of the academic school year regardless of any initial detention or placement, or any subsequent change in placement if the foster child. The educational liaison for foster children, in

consultation and in agreement with the foster child and the person holding the right to make educational decisions for the foster child may, in accordance with the foster child's best interest, recommend that the foster child's right to attend the school of origin be waived and the foster child be enrolled in any public school that students living in the attendance area in which the foster child resides are eligible to attend.

Prior to making any recommendation to move a foster child from his or her school of origin, the educational liaison is required to provide the foster child and the person holding the right to make educational decisions for the foster child with a written explanation, stating the basis for the recommendation and how the recommendation serves the foster child's best interest. If the educational liaison, in consultation with the foster child and the person holding the right to make educational decisions for the foster child, agree that the best interests of the foster child would be served by his or her transfer to a school other than the school of origin, the foster child should immediately be enrolled in the new school.

The new school shall immediately enroll the child even if the foster child is unable to produce records, such as previous academic records, medical records, proof of residency, other documentation or clothing normally required for enrollment such as school uniforms. The educational liaison for the new school shall, within two business days of the foster child's request for enrollment, contact the school last attended by the foster child to obtain all academic and other records. The school liaison for the school last attended shall supply all records to the new school within two business days of receiving the request.[275]

If any dispute arises regarding the request of a foster child to remain in the school of origin, the foster child has the right to remain in the school of origin pending the resolution of the dispute. The local educational agency and the county placing agency are encouraged to collaborate to ensure maximum utilization of available federal funds and other funding sources to promote the well-being of foster children through educational stability.

Section 48853.5(f) defines "school of origin" as the school that the foster child attended when permanently housed, the school in which the foster child was last enrolled, or if there is some other school that the foster child attended with which the foster child is connected, and that the foster child attended within the immediately preceding 15 months. If the school the foster child attended when permanently housed is different from the school in which the foster child was last enrolled, or if there is some other school that the foster child attended with which the foster child is connected, the educational liaison, in consultation and agreement with the foster child and the person holding the right to make educational decisions for the foster child, shall determine in the best interest of the foster child, the school that shall be deemed the school of origin. Section 48853.5(f) states that 48853.5 does not supersede other laws governing the educational placements in juvenile court schools. A pupil who is a foster child who remains in his or her school of origin will be deemed to have met the residency requirements for school attendance in that school district.[276]

[275] Health and Safety Code section 120341 states that the governing authority shall admit a foster child whose immunization records are not available or missing. The school district is still obligated to obtain the immunization records and to ensure immunization of the child. Stats. 2011, ch. 463.
[276] Education Code section 48204(a)(2). Stats. 2012, ch. 93 (A.B. 1573), effective January 1, 2013.

If so designated by the superintendent of the local educational agency, the educational liaison shall notify a foster child's attorney and the appropriate representative of the county child welfare agency of pending expulsion proceedings, if the decision to recommend expulsion is a discretionary act, pending proceedings to extend a suspension until an expulsion decision is rendered, if the decision to recommend expulsion is a discretionary act, and, if the foster child is an individual with exceptional needs, pending manifestation determinations if the local educational agency has proposed a change in placement due to an act for which the decision to recommend expulsion is at the discretion of the principal or the district superintendent of schools. Although the term "discretionary act" is not defined, most likely, the term refers to permissive expulsions under Education Code section 48900, rather than mandatory recommendations to expel under Education Code section 48915.[277]

If the jurisdiction of the juvenile court is terminated while a foster child is in high school, the local educational agency shall allow the former foster child to continue his or her education in the school of origin through graduation.[278] A school district is not required to provide transportation to a former foster child who has an IEP that does not require transportation as a related service and who changes residence, but remains in his or her school of origin, unless the IEP team determines that transportation is a necessary related service.[279]

Section 48859 defines a county placing agency as the county social service department or county probation department.

D. Transfer of Student Records

Section 49069.5, as amended, states that the proper and timely transfer of student records between schools is the responsibility of both the local educational agency and the county placing agency. As soon as the county placing agency becomes aware of the need to transfer a student in foster care out of his or her current school, the county placing agency is required to contact the appropriate person at the local educational agency of the student. The county placing agency shall notify the local educational agency of the date that the student will be leaving the school and request that the student be transferred out. Upon receiving a transfer request from a county placing agency, the local educational agency must, within two business days, transfer the student out of school and deliver the educational information and records of the student to the next educational placement. As part of the transfer process, the local educational agency is required to compile the complete educational record of the student including a determination of seat time, full or partial credits earned, current classes and grades, immunization and other records, and, if applicable, a copy of the student's plan under Section 504 of the Rehabilitation Act or IEP.

Section 49069.5(f) states that the local educational agency shall assign the duties listed in Section 49069.5, regarding the transfer of records to "a person competent to handle the transfer procedure and aware of the specific educational record keeping needs of homeless, foster, and other transient children who transfer between schools." Section 49069.5(g) states, "The local

[277] Education Code section 48853.5(c). Stats. 2012, ch. 849 (A.B. 1909), effective January 1, 2003. See, also, Education Code section 48918.1.
[278] Education Code section 48853.5(e)(3)(A).
[279] Education Code section 48853.5(e)(3)(B).

educational agency shall ensure that if the student in foster care is absent from school due to a decision to change the placement of the student made by a court or placing agency, the grades and the credits of the student will be calculated as of the date the student left school, and no lowering of grades will occur as a result of the absence of the student under these circumstances." Section 49069.5(h) states that the local educational agency shall ensure that if the student in foster care is absent from school due to a verified court appearance or related court ordered activity, no lowering of his or her grade will occur as a result of the absence of the student under these circumstances.

Section 49076(a)(11) states that any county placing agency for the purpose of fulfilling the requirements of the health and education summary required under the Welfare & Institutions Code, or for the purpose of fulfilling educational case management responsibilities required by the juvenile court, or by law, or to assist with the school transfer or enrollment of a student shall be permitted access to student records without written parental consent or a judicial order. School districts, county offices of education, and county placing agencies may develop cooperative agreements to facilitate confidential access to and exchange of student information by electronic mail, facsimile, electronic format or other secure means.

Section 49076(c) states that notwithstanding any other provision of law, any school district, including any county office of education, may participate in an interagency data information system that permits access to a computerized database within and between governmental agencies or districts as to information or records which are nonprivileged, and where release is authorized as to the requesting agency under state or federal law. Each agency and school district is required to develop security procedures or devices to ensure that unauthorized personnel cannot access data contained in the system, and each agency and school district develops procedures or devices to secure privileged or confidential information from unauthorized disclosure.

E. Graduation Requirements

Assembly Bill 216[280] adds Education Code section 51225.1 as an urgency measure, effective September 23, 2013.

Education Code section 51225.1 states that "Notwithstanding any other law, a school district shall exempt a student in foster care who transfers between schools at any time after the completion of the pupil's second year of high school from all coursework and other requirements adopted by the governing board of the school district that are in addition to the statewide course requirements specified in Education Code section 51225.3, unless the school district makes a finding that the pupil is reasonably able to complete the school district's graduation requirements in time to graduate from high school by the end of the pupil's fourth year of high school." A pupil in foster care is defined as any child who has been removed from his or her home pursuant to state law, is the subject of a petition filed in juvenile court, or has been removed from his or her home, and is the subject of a petition filed under state law.[281]

[280] Stats. 2013, ch. 324.
[281] Education Code section 51225.2(a).

Education Code section 51225.1(b) states that if the school district determines that the pupil in foster care is reasonably able to complete the school district's graduation requirements within the pupil's fifth year of high school, the district shall do all of the following:

1. Inform the pupil of his or her option to remain in school for a fifth year to complete the school district's graduation requirements.

2. Inform the pupil, and the person holding the right to make educational decisions for the pupil, about how remaining in school for a fifth year to complete the school district's graduation requirements will affect the pupil's ability to gain admission to a postsecondary educational institution.

3. Provide information to the pupil about transfer opportunities available through the California Community Colleges.

4. Permit the pupil to stay in school for a fifth year to complete the school district's graduation requirements upon agreement with the pupil, even if the pupil is 18 years of age or older, or, if the pupil is under 18 years of age, upon agreement with the person holding the rights to make educational decisions for the pupil.

Education Code section 51225.1(c) states to determine whether a pupil in foster care is in the third or fourth year of high school, either the number of credits the pupil has earned to the date of transfer, or the length of the pupil's school enrollment may be used, whichever will qualify the pupil for the exemption. Section 51225.1(d) states that within 30 calendar days of the date that a pupil in foster care who may qualify for the exemption from local graduation requirements transfers into a school, the school district shall notify the pupil, the person holding the right to make educational decisions for the pupil, and the pupil's social worker, of the availability of the exemption and whether the pupil qualifies for an exemption. Section 51225.1(e) states that if a pupil in foster care is exempted from local graduation requirements and completes the statewide course requirements before the end of his or her fourth year in high school and that pupil would otherwise be entitled to remain in attendance at the school, a school or school district shall not require or request that the pupil graduate before the end of his or her fourth year of high school.

Education Code section 51225.1(f) states that if a pupil in foster care is exempted from local graduation requirements, the school district shall notify the pupil and the person holding the right to make educational decisions for the pupil how any of the requirements that are waived will affect the pupil's ability to gain admission to a postsecondary educational institution and shall provide information about transfer opportunities available through the California Community Colleges. Section 51225.1(g) states that a pupil in foster care who is eligible for the exemption from local graduation requirements and would otherwise be entitled to remain in attendance at the school shall not be required to accept the exemption or be denied enrollment in or the ability to complete courses for which he or she is otherwise eligible, including courses necessary to attend an institution of higher education, regardless of whether those courses are required for statewide graduation requirements.

Section 51225.1(h) states that if a pupil in foster care is not exempted from local graduation requirements or has previously declined the exemption, a school district shall exempt the pupil at any time if an exemption is requested by the pupil and the pupil qualifies for the exemption. Section 51225.1(i) states that if a pupil in foster care is exempted from local graduation requirements, a school district shall not revoke the exemption.

Education Code section 51225.1(j) states that if a pupil in foster care is exempted from local graduation requirements, the exemption shall continue to apply after the termination of the court's jurisdiction over the pupil while he or she is enrolled in school or if the pupil transfers to another school or school district. Section 51225.1(k) states that a school district shall not require or request a pupil in foster care to transfer schools in order to qualify the pupil for an exemption. Section 51225.1(l) states that a pupil in foster care, the person holding the right to make educational decisions for the pupil, the pupil's social worker, or the pupil's probation officer shall not request a transfer solely to qualify the pupil for an exemption.

F. Acceptance of Coursework

Section 51225.2 defines "pupils in foster care" as any child who has been removed from his or her home pursuant to Section 309 of the Welfare and Institutions Code, is the subject of a petition filed under Section 300 or 602 of the Welfare and Institutions Code, or has been removed from his or her home and is the subject of a petition filed under Section 300 or 602 of the Welfare and Institutions Code. Section 51225.2(b) states that notwithstanding any other law, a school district and county office of education shall accept coursework satisfactorily completed by a pupil in foster care while attending another public school, a juvenile court school, or a nonpublic, nonsectarian school or agency, even if the pupil did not complete the entire course, and shall issue that pupil full or partial credit for the coursework completed.

Section 51225.2(c) states that the credits accepted pursuant to subdivision (b) shall be applied to the same or equivalent course, if applicable, as the coursework completed in the prior public school, juvenile court school, or nonpublic, nonsectarian school or agency. Section 51225.2(d) states that a school district or county office of education shall not require a pupil in foster care to retake a course if the pupil has satisfactorily completed the entire course in a public school, a juvenile court school, or a nonpublic, nonsectarian school or agency. If the pupil did not complete the entire course, the school district or county office of education shall not require the pupil to retake the portion of the course the pupil completed unless the school district or county office of education, in consultation with the holder of educational rights for the pupil, finds that the pupil is reasonably able to complete the requirements in time to graduate from high school. When partial credit is awarded in a particular course, the pupil in foster care shall be enrolled in the same or equivalent course, if applicable, so that the pupil may continue and complete the entire course.

Section 51225.2(e) states that a pupil in foster care shall not be prevented from retaking or taking a course to meet the eligibility requirements for admission to the California State University or the University of California. Section 51225.3, as amended, requires school districts to exempt a student in foster care from all course work and other requirements adopted by the governing board of the school district that are in addition to the statewide course requirements for graduation if the student, while he or she is in grade 11 or 12, transfers into the

school district from another school district, or between high schools within the district, unless the school district makes a finding that the student is reasonably able to complete the additional requirements in time to graduate from high school while he or she remains eligible for foster care benefits pursuant to state law. State law continues to require that all foster youth must meet state requirements for graduation that are set forth in Education Code section 51225.3. These requirements include:

1. Three courses in English.

2. Two courses in Mathematics.

3. Two courses in Science, including Biological and Physical Sciences.

4. Three courses in Social Studies, including United States History and Geography, World History, Culture and Geography, a one-semester course in American Government and Civics, a one-semester course in Economics.

5. One course in a Visual or Performing Arts or Foreign Language.

6. Two courses in Physical Education, unless the pupil has been exempted pursuant to the Education Code.

Foster youth may only be exempted from additional graduation requirements adopted by the governing board of the school district in excess of the state requirements. If the school district grants an exemption to a student in foster care, the school district must notify the student and the person holding the right to make educational decisions for the student, if any of the requirements that are waived will affect the student's ability to gain admission to a post-secondary educational institution and the school district must provide information about transfer opportunities available through the California community colleges.

In summary, these statutory provisions do not exempt foster youth from state requirements for graduation, but only those additional requirements that may have been adopted by school districts, and only if the student is in the 11^{th} or 12^{th} grade and transfers into the school district or between high schools within the district. If the student is reasonably able to complete the additional local requirements in time to graduate from high school and the school district makes that finding, the school district is not required to grant the foster youth an exemption.

G. Authority of Foster Parents

Section 56055 authorizes a foster parent to exercise parental rights for the duration of the parent/foster child relationship in matters relating to identification, assessment, instructional planning and development, educational placement, IEP development, and all other matters relating to the provision of a free appropriate public education for the foster child. Section 56055 authorizes the foster parent to consent in writing to the IEP, including nonemergency medical services, mental health treatment services, and occupational or physical therapy. Section 56055 only applies if the juvenile court has limited the right of the parent or guardian to

make educational decisions on behalf of the child, and the child has been placed in a planned permanent living arrangement.

H. Responsibility of County Placing Agencies

Welfare & Institutions Code section 16000, as amended, states that it is the intent of the Legislature to ensure that all students in foster care and those who are homeless, as defined under the McKinney-Vento Act, have the opportunity to meet the challenging state student academic achievement standards to which all students are held. In fulfilling their responsibilities to students in foster care, educators, county placing agencies, care providers, advocates and the juvenile courts are required to work together to maintain stable school placements, and to ensure that each student is placed in the least restrictive educational program and has access to the academic resources and extracurricular and enrichment activities that are available to all students. In all instances, educational and school placement decisions must be based on the best interests of the child.

Welfare & Institutions Code section 16501.1, as amended, states that the foundation and central unifying tool in child welfare services is the case plan. Section 16501.1(c)(2) states that county placing agencies in developing a case plan shall take into consideration the selection of the most appropriate home that will meet the child's special needs and best interest and also promote educational stability by taking into consideration proximity to the child's school attendance area.

I. Temporary Appointment of Responsible Adult

The Welfare and Institutions Code authorizes the juvenile court to temporarily limit the right of the parent or guardian to make educational decisions for a child and temporarily appoint a responsible adult to make educational decisions for a child who has been adjudged a dependent child of the court if all of the following conditions are met:

1. The parent or guardian is unavailable, unable, or unwilling to exercise educational rights for the child.

2. The county placing agency has made diligent efforts to locate and secure the participation of the parent or guardian in educational decision making.

3. The child's educational needs cannot be met without the temporary appointment of a responsible adult.[282]

If the court cannot identify a responsible adult to make educational decisions for the child, and the appointment of a surrogate parent is not warranted, the court may, with the input of any interested person, make educational decisions for the child. If the court makes educational decisions for the child, the court shall also issue appropriate orders to ensure that every effort is made to identify a responsible adult to make further educational decisions for the child.

[282] Welfare and Institutions Code section 319(g) (Stats.2005, ch. 639).

Any temporary appointment of a responsible adult and temporary limitation on the right of the parent or guardian to make educational decisions for the child shall be specifically addressed in the court order. Any order made under Section 319 shall expire at the conclusion of the hearing held pursuant to Section 361 or upon dismissal of the petitioner. Upon entering the disposition orders, any additional needed limitation on the parent or guardian educational rights shall be addressed pursuant to Section 361.

Section 361(a)(5) states that if the court cannot identify a responsible adult to make educational decisions for the child, the appointment of a surrogate parent is not warranted and there is no foster parent to exercise the authority granted by Education Code section 56055, the court may, with the input of any interested person, make educational decisions for the child.

Under Section 361, in cases where a minor is adjudged a dependent child of the court, the court may limit the control to be exercised over the dependent child by any parent or guardian. Any limitation on the right of the parent or guardian to make educational decisions for the child shall be specifically addressed in the court order. The limitations may not exceed those necessary to protect the child. If the court specifically limits the right of the parent or guardian to make educational decisions for the child, the court must, at the same time, appoint a responsible adult to make educational decisions for the child until one of the following occurs:

1. The minor reaches 18 years of age, unless the child chooses not to make educational decisions for himself or herself, or is deemed by the court to be incompetent.

2. Another responsible adult is appointed to make educational decisions for the minor pursuant to Section 361.

3. The right of the parent or guardian to make educational decisions for the minor is fully restored.

4. A successor guardian or conservator is appointed.

5. The child is placed into a planned permanent living arrangement at which time the foster parent, relative, caretaker, or non-relative extended family member has the right to represent the child in educational matters pursuant to Education Code section 56055.

This legislation broadens the authority of the juvenile court to make educational decisions for a dependent child. In practice, the temporary appointment authorized under Section 319 could remain in effect until the minor reaches age 18.

WARDS AND DEPENDENTS OF THE JUVENILE COURT

A. Purpose of the Law

The purpose of the juvenile court law is to provide for protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible.[283]

B. Dependents

Minors under the jurisdiction of the juvenile court who are in need of protective services must receive care, treatment, and guidance consistent with their best interest and the best interest of the public. Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct must, in conformity with the interest of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances.[284]

An order adjudging a minor to be a ward of the juvenile court may not be deemed a conviction of a crime of any purpose, nor may a proceeding in the juvenile court be deemed a criminal proceeding.[285] Juvenile proceedings are considered to be fundamentally different than an adult criminal trial and are not criminal prosecutions since the state has a parental interest in preserving and promoting the welfare of the child. More recent cases have recognized the quasi-criminal nature of juvenile court proceedings because they often involve the possibility of a substantial loss of personal freedom. While some courts view juvenile court proceedings as similar to criminal proceedings, juvenile court proceedings are designed for the rehabilitation of minors and not for their punishment.[286]

Dependency proceedings are considered to be civil in nature. The underlying purpose of the dependency law is to protect the welfare and best interest of the child, not to prosecute the parent. However, a parent's fundamental right to care for and have custody of his or her child may be affected.[287]

C. Wards of the Court and Juvenile Delinquency

Each county is required to establish a probation department and appoint a chief probation officer.[288] The probation department is required to engage in activities designed to prevent juvenile delinquency, including rendering direct and indirect services to persons in the community. The probation department is not limited to providing services to those juveniles

[283] Welfare and Institutions Code section 202(a).
[284] Welfare and Institutions Code section 202(b).
[285] Welfare and Institutions Code section 203.
[286] See, Welfare and Institutions Code section 602; 27 A Cal.Jur.3d, Delinquent and Dependent Children, Section 4, pages 31-33 (2003).
[287] See, Welfare and Institutions Code section 300 et seq.
[288] Welfare and Institutions Code section 270.

who have been placed on informal or supervised probation, but may provide services to any juveniles in the community.[289]

A judge, referee or a police officer may detain a minor in any jail or lock up if authorized by state statute.[290] No person under fourteen years of age may be committed to a state prison and no person under the age of sixteen years may be housed in any facility under the jurisdiction of the Department of Corrections.[291]

A minor taken into custody or adjudged a ward of the court solely on the ground that he or she is a status offender, may not be detained in a jail, lockup, juvenile hall or other secure facility, except as provided by statute.[292] Minors who are status offenders must be detained in a sheltered care facility or crisis resolution hall. Facilities for minors alleged or adjudged to be dependent children must be non-secure.[293]

D. Facilities for Wards and Dependents

Juveniles alleged or adjudged to be dependent children by the juvenile court must be provided with separate facilities segregated from persons either alleged or adjudged status offenders or underage law violators. Separate segregated facilities may be provided in the juvenile hall or elsewhere.[294]

The board of supervisors in every county is required to provide and maintain, at the expense of the county, a suitable facility for the detention of wards and dependent children of the juvenile court, generally known as juvenile hall.[295] The juvenile hall is under the management and control of the probation officer.[296] Juvenile ranches or camps may also be established in order to provide appropriate facilities for the housing of wards of the juvenile court.[297]

County offices of education are required to provide for the administration and operation of juvenile court schools at juvenile halls, ranches, camps and correctional facilities, as well as group homes housing 25 or more wards or dependents.[298]

E. Juvenile Court

The juvenile court is a branch of the superior court and is generally limited to persons under the age of eighteen years of age who are deemed dependent children, status offenders, or who commit acts that constitute criminal offenses.[299] A juvenile court has jurisdiction over a child if, at the time of the hearing, the minor is at risk of harm. The purpose of the dependency

[289] Welfare and Institutions Code section 236.
[290] Welfare and Institutions Code section 207.1(a).
[291] Welfare and Institutions Code section 211(b).
[292] Welfare and Institutions Code section 207(a).
[293] Welfare and Institutions Code section 206.
[294] Welfare and Institutions Code sections 206 and 16514.
[295] Welfare and Institutions Code section 850.
[296] Welfare and Institutions Code section 852.
[297] Welfare and Institutions Code section 880.
[298] Education Code section 48645 et seq.
[299] See, Welfare and Institutions Code sections 300, 601, 602.

provisions of the juvenile court law is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, neglected, or exploited and to ensure the safety, protection and physical and emotional well-being of children who are at risk of harm.[300]

Any person under eighteen years of age who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian or custodian, or who is beyond the control of that person, or who is under the age of eighteen years when he or she violated any ordinance establishing a curfew may be determined to be a ward of the court and a status offender.[301] Status offenders may include minors who are habitual truants.[302]

Any person who is under the age of eighteen years when he or she violates any federal or state law may be adjudged or determined by the juvenile court to be a ward of the court.[303]

If a social worker or probation officer has reason to believe that a minor comes within the jurisdiction of the juvenile court as a dependent child or ward of the court, the social worker or probation officer must investigate and determine if proceedings in juvenile court should be commenced. [304] Proceedings are commenced in the juvenile court by the filing of a petition.[305]

F. Temporary Custody of a Minor

When a minor has been taken into temporary custody as a ward of the court, the probation officer is required to immediately investigate the circumstances of the minor and the facts surrounding the minor being taken into custody and immediately release the minor to the custody of his or her parent, legal guardian or responsible relative. The minor may be denied release if it is demonstrated on the evidence before the court that:

1. Continuance in the home is contrary to the minor's welfare and the minor is in need of proper and effective parental control and has no parent, legal guardian or responsible adult;

2. The minor is destitute;

3. The minor is provided with a home that is unfit;

4. The continued detention of the minor is as a matter of immediate and urgent necessity for the protection of the minor or others;

5. The minor is likely to flee the jurisdiction of the court;

6. The minor has violated an order of the juvenile court; or

[300] See, Welfare and Institutions Code section 300 et seq.
[301] Welfare and Institutions Code section 601(a).
[302] Welfare and Institutions Code section 601(b); Education Code section 48260.
[303] Welfare and Institutions Code section 602(a).
[304] Welfare and Institutions Code section 328.
[305] Welfare and Institutions Code sections 329, 653.

7. The minor is physically dangerous to the public.[306]

G. Limitations on Parental Rights

The court may limit the control exercised over a ward or dependent child by any parent or guardian. All limitations must be clearly and specifically set forth in the court's order.[307] Any limitation on the right of the parent or guardian to make educational decisions for the child must be specifically addressed in the court order. The limitations may not exceed those necessary to protect the child.[308]

In dependency and wardship proceedings, whenever the juvenile court specifically limits the rights of the parent or guardian to make educational decisions for the child, the court must appoint a responsible adult to make educational decisions for the child until the minor reaches eighteen years of age.[309]

A child may be removed from a parent's custody only upon showing by clear and convincing evidence that continued parental custody will be detrimental to the child.[310] When a minor is adjudged or determined to be a ward of the court, the juvenile court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance and support of the minor, including medical treatment.[311]

No ward may be taken from the physical custody of the parent or guardian, unless upon the hearing, the court finds one of the following facts:

1. That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor;

2. That the minor has been tried on probation while in custody and has failed to reform; or

3. That the welfare of the minor requires that custody be taken from the minor's parent or guardian.[312]

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[306] Welfare and Institutions Code section 628(a).
[307] Welfare and Institutions Code section 361(a); Cal. Rules of Court, rule 1456(c)(1) (Dependency Proceedings); Welfare and Institutions Code section 726(a); Cal. Rules of Court, rule 1493(b) (Wardship Proceedings).
[308] Welfare and Institutions Code section 361(a); Cal. Rules of Court, rules 1456(c)(3) (Dependency Proceedings); Cal. Rules of Court, rules 1493(e)(5) (Wardship Proceedings).
[309] Welfare and Institutions Code section 361(a), 726(b).
[310] In re Matthew Z., 80 Cal.App.4th 545, 95 Cal Rptr.2d 343 (2000).
[311] Welfare and Institutions Code section 727(a); Cal. Rules of Court, rule 1493(e).
[312] Welfare and Institutions Code section 726(a).

H. Confidentiality of Juvenile Court Records and Notice to Schools

Generally, juvenile court records are confidential. The juvenile court may release juvenile court records to third parties. The court is required to balance the interest of the child and other parties to the juvenile court proceedings against the interests of the public.[313]

Where the minor has found to have committed certain violent offenses specified by statute, the records may not be kept confidential unless the court so orders.[314] A major exception to the confidentiality of juvenile court records is a requirement that written notice be given to school officials when a minor is enrolled in school and has been found by the juvenile court to have committed any felony or any misdemeanor involving curfew, gambling, alcohol, drugs, tobacco products, carrying of weapons, a sex offense requiring registration as a sex offender, assault or battery, larceny, vandalism, or graffiti. Under such circumstances, notice must be provided by the court to the superintendent of the school district within seven days.[315]

The notice must include the offense that has been committed and the disposition of the case and may be distributed by the district superintendent to the principal of the school of attendance and to counselors directly supervising or reporting on the behavior or progress of the minor. In addition, the principal must disseminate the information to any teacher or administrator directly supervising or reporting on the behavior or progress of a minor whom the principal believes needs the information to work with the pupil in an appropriate manner, to avoid being needlessly vulnerable or to predict other persons for needless vulnerability.[316]

Any such information received by a teacher, counselor or school administrator must be kept confidential and used for the limited purpose of rehabilitating the minor and protecting students and staff and may not be further disseminated except to communicate with the minor, his or her parents or guardian, law enforcement personnel, and the juvenile's probation officer.[317] If the minor is removed from public school as a result of committing a crime and the minor is returned to a different school district, the parole or probation officer must notify the superintendent of the last district of attendance who must transmit the notice received from the court to the superintendent of the new district of attendance.[318]

When a petition is filed in juvenile court alleging that a minor enrolled in public school has used, sold or possessed narcotics or other hallucinogenic drugs or substances or has committed felonious assault, homicide or rape, the district attorney may, within 48 hours, provide written notice to the superintendent of the school district of attendance notwithstanding provisions of the Welfare and Institutions Code.[319]

A school district, police or security department may provide written notice to the superintendent of the school district of attendance that a minor has been found by the court to

[313] Welfare and Institutions Code section 827; Cal. Rules of Court, rule 1423.
[314] Welfare and Institutions Code section 676(c).
[315] Welfare and Institutions Code section 827(b)(2).
[316] Welfare and Institutions Code section 827(b)(2).
[317] Ibid.
[318] Welfare and Institutions Code section 827(b)(3).
[319] Education Code section 48909.

have illegally used, sold, or possessed a controlled substance, or they have committed any serious violent crime.[320] The information may be transmitted to any teacher, counselor or administrator with direct supervisorial or disciplinary responsibility over the minor, who the superintendent, or his or her designee, after consultation with the principal at the school of attendance, believes needs this information to work with the student in an appropriate fashion, to avoid being needlessly vulnerable or to protect other persons from needless vulnerability.[321]

Any such information must be kept confidential. An intentional violation of the confidentiality provisions is a misdemeanor, punishable by a fine.[322]

Information relating to the taking of a minor into custody on a basis that he or she has committed a crime against the property, students or personnel of a school district or a finding by the juvenile court that the minor has committed such a crime, may be exchanged between law enforcement personnel, the school district superintendent, and the principal of the public school in which the minor is enrolled as a student, if the offense was against the property, students, or personnel of that school.[323]

I. Appointment of Legal Guardian, Surrogate or Responsible Adult

The juvenile court may appoint a legal guardian for a ward or dependent of a juvenile court if the court determines that a guardianship is in the best interest of the child. No person can be appointed a legal guardian by the juvenile court unless an assessment is made of their suitability and the assessment is reviewed by the court.[324]

Government Code section 7579.5, as amended, effective January 1, 2003, limits situations in which a school district may appoint a surrogate parent. In cases involving dependents or wards of the court, a surrogate parent would only be appointed if the court has specifically limited the right of the parent or guardian to make educational decisions for the child, and the child has no responsible adult to represent him or her. Since Welfare and Institutions Code sections 361 and 726 require the juvenile court to appoint a responsible adult when the court limits parental rights, it is unlikely that the need to appoint a surrogate parent for a ward or dependent will arise very often.

In cases not involving wards or dependents, the provisions in Section 7579.5 that allow the appointment of a surrogate parent when no parent for the child can be identified, or the local educational agency, after reasonable efforts, cannot discover the location of the parent, are still intact. Therefore, under these latter two conditions, a school district may continue to appoint surrogate parents. However, if the child subsequently becomes a dependent or a ward of the court and the juvenile court limits the rights of the parents and appoints a responsible adult or a foster parent is appointed, then there would no longer be a need for a surrogate parent and that appointment would be superseded by the appointment of a responsible adult or a foster parent.

[320] Welfare and Institutions Code section 828.1(b).
[321] Welfare and Institutions Code section 828.1(b).
[322] Welfare and Institutions Code section 828.1(c).
[323] Welfare and Institutions Code section 828.3.
[324] Welfare and Institutions Code section 360.

Welfare and Institutions Code sections 361 and 726 state that whenever the juvenile court specifically limits the right of a parent or guardian to make educational decisions for the minor, the court shall, at the same time, appoint a responsible adult to make educational decisions for the child until the child reaches the age of 18 years of age, another responsible adult is appointed, the right of the parent or guardian to make educational decisions for the minor is fully restored, a successor guardian or conservator is appointed, or a child is placed into long term foster care, at which time the foster parents shall have the right to represent the child in educational matters pursuant to Education Code section 56055.

These individuals (e.g., foster parents, CASA employees, group home operators, etc.) may be appointed as responsible adults if they do not have a conflict of interest. Sections 361 and 726 define a conflict of interest as a person having any interest that might restrict or bias his or her ability to make educational decisions, including but not limited to, the receipt of compensation or attorneys' fees for the provision of services. A foster parent may not be deemed to have a conflict of interest solely because he or she receives compensation for the provision of services.

Government Code section 1126 prohibits a local agency officer or employee from engaging in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee, or with the duties, functions, or responsibilities of his or her appointing power, or the agency by which he or she is employed. The specific reference in Welfare and Institutions Code sections 361 and 726 prohibiting conflict of interest under Section 1126 would indicate that the juvenile court may not appoint employees of county agencies or school agencies to be a responsible adult since their functions and responsibilities could conflict with or be inimical to the functions of the probation department, social services department, county office of education, or school district.

In many cases, the responsible adult may be advocating on behalf of the child for services which may cost more money than the present services the child is receiving. An employee of the probation department, social services, county office of education, or school district might be uncomfortable advocating for services that might cost their employer more money, and thus, may advocate that another agency pay for the services. Sections 361 and 726 clearly intended to avoid this type of conflict.

Under both Welfare and Institutions Code sections 361 and 726, the juvenile court may reinstate or restore parental rights to make educational decisions. In our opinion, Welfare and Institutions Code sections 361 and 726 prohibit the juvenile court from appointing an employee of these agencies since Government Code section 1126 prohibits employees from engaging in any employment activity or enterprise which is inconsistent, incompatible, in conflict with or inimical to their duties as a local agency officer or employee.

A parent or legal guardian or a conservator of a minor ward or conservatee may sign educational documents for a minor child. If a juvenile court grants a petition removing the legal guardian or conservator of a minor, ward or conservatee, or suspends or limits the powers of the guardian or conservator to make educational decisions for a minor, ward or conservatee, state

law requires the juvenile court to appoint a responsible adult to make educational decisions for the minor, ward or conservatee until the guardian or conservator is again authorized to make educational decisions for the minor, ward or conservatee or a new guardian or conservator is appointed.[325]

In addition, if the juvenile court specifically limits the right of the parent or guardian to make educational decisions for the child, the court must, at the same time, appoint a responsible adult to make educational decisions for the child until one of the following conditions is met:

a. The minor reaches 18 years of age unless the child is deemed incompetent;

b. Another responsible adult is appointed to make educational decisions for the minor;

c. The right of the parent to make educational decisions for the minor is fully restored;

d. A successor guardian or conservator is appointed; or,

e. The child is placed into long term foster care at which time the foster parent shall have the right to represent the child in educational matters.[326]

A foster parent is authorized to represent the foster child for the duration of the foster parent/foster child relationship in matters relating to identification, assessment, instructional planning and development, educational placement, reviewing and revising an IEP, if necessary, and all other matters relating to the provisions of the free appropriate public education of the child. State law specifically authorizes the foster parent to provide written consent to an IEP, including non-emergency medical services, medical health treatment services, and occupational or physical therapy services. The foster parent may consult with the parent or guardian of the child to ensure continuity of health, mental health, or other services. The juvenile court may exclude by court order the foster parent from making educational decisions on behalf of the student.[327]

A group home operator has no legal authority to sign any educational documents on behalf of a student unless they are also the parent, legal guardian, conservator, foster parent, or responsible adult appointed by the juvenile court. A responsible adult may only be appointed by the juvenile court when the juvenile court specifically limits the right of the parent or guardian to make educational decisions for the child. If the group home operator does not fall into one of these categories, the group home operator may not sign any documents relating to the education of the child.

[325] Probate Code section 2662.
[326] See, Education Code section 56055.
[327] Ibid.

A school district may petition the juvenile court to rescind the appointment of the responsible adult and ask the court to appoint another responsible adult. The nature of the complaints and the reason for their request must be well documented.

Without limiting parental rights, the juvenile court would not have authority to authorize another individual to sign a special education assessment plan. The best practice would be for the juvenile court to order the parent to sign the special education assessment to authorize OCDE or the school district to proceed with the assessment.

As of January 1, 2003, this issue should not present itself since there is no legal authority for a local educational agency to appoint a surrogate parent when a responsible adult has been appointed by the juvenile court. The local educational agency may only appoint a surrogate parent when no responsible adult has been appointed or there is no foster parent.[328]

J. Appointment of CASA

Our office has been asked for a legal opinion regarding the release of pupil records to a Court Appointed Special Advocate (CASA). Specifically, we have been asked under what circumstances may school districts and county offices of education provide a CASA with copies of pupil records. As discussed below, if the Juvenile Court issues a specific court order directing the school district to permit the CASA to inspect student records, then the school district should comply with the specific court order by making the student records available.

The Juvenile Court has issued general orders appointing CASAs in a number of cases and specifically authorized CASAs to review pupil records. Pursuant to the Juvenile Court order, CASAs have requested access to the electronic student information systems operated by many school districts without parental consent or the consent of the educational rights holder.

We have been provided with a general Juvenile Court order issued in one of the cases and it orders the following with respect to the CASA agency:

1. It appoints a child advocate for the specific child.

2. It grants the CASA the authority to review specific relevant documents and interview parties involved in the case pursuant to Welfare and Institutions Code section 103(h).

3. It authorizes the child advocate to apply to the Juvenile Court and request a specific court order directing any school to permit the CASA to inspect and copy any records relating to the child involved in the case, without the consent of the child or parents, pursuant to Welfare and Institutions Code section 107.

[328] See, Welfare and Institutions Code sections 361, 726.

4. It states that the child advocate shall not disclose any information received in connection with this case to anyone other than the assigned social worker, attorneys representing the parties in this action, or the court, unless specifically authorized by the court pursuant to Welfare and Institutions Code section 105.

5. It states that the child advocate shall give notice of, and shall be authorized to attend all conferences and/or hearings regarding the child pursuant to Welfare and Institutions Code section 106.

6. It states that the child advocate shall be entitled to review the social services file and receive all reports from the social services agency that are served on the parties to the dependency proceedings.

7. It states that the child advocate shall follow the direction and orders of the Juvenile Court and shall provide the information specifically requested by the court. The child advocate shall prepare independent reports and file these reports with the court prior to the dependency hearing pursuant to Welfare and Institutions Code section 104.

8. It states that the child advocate is authorized to oversee and participate in education planning to ensure the child's educational rights are being protected.

9. It states that the order appointing the child advocate can only be modified by further order of the court.

Welfare and Institutions Code section 103 sets forth the qualifications for persons acting as a CASA. Section 103(h) states that the judge making the appointment of the CASA shall sign an order which may grant the CASA the authority to review specific relevant documents and interview parties involved in the case, as well as other persons having significant information relating to the child, to the same extent as any officer of the court appointed to investigate proceedings on behalf of the court.

Welfare and Institutions Code section 107 states that upon the presentation of a Juvenile Court order of his or her appointment by the CASA and upon specific court order, any school shall permit the CASA to inspect and copy any records relating to the child involved in the case of appointment without the consent of the child or parents. Welfare and Institutions Code section 105 requires the CASA to keep the records and information confidential and disclose the information only pursuant to a court order.

Welfare and Institutions Code section 106 states that the CASA shall be notified of hearings and other proceedings concerning the case to which he or she has been appointed. Section 104 states that the Juvenile Court shall determine the extent of the CASA's duties in each case. These duties may include an independent investigation of the circumstances

surrounding a case to which he or she has been appointed, interviewing and observing the child and other appropriate individuals, and reviewing appropriate records and reports. The CASA shall report the results of the investigation to the court and follow the direction and orders of the court, and provide information specifically requested by the court.

The Family Educational Rights and Privacy Act (FERPA)[329] protects the confidentiality of pupil records. Generally, pupil records may not be released without parental consent, with certain exceptions. One exception is the issuance of a subpoena or court order.[330]

Under state law, Education Code section 49077 states that information concerning a student shall be furnished in compliance with a court order or a lawfully issued subpoena. The school district is required to make a reasonable effort to notify the parent or legal guardian and the pupil in advance of compliance with a court order or a lawfully issued subpoena, if lawfully possible within the requirements of the order.

Therefore, if the Juvenile Court issues a specific court order directing a school district to permit the CASA to inspect any records relating to the child involved in the case of appointment without the consent of the parents, the school district should comply with the court order by making the records available. However, the school district is not required to provide the CASA access to the school district's student information system. The records should be provided to the CASA under the supervision of a school district employee pursuant to the terms of a specific court order.

K. Mental Health Evaluation of Minor

Government Code section 68553.5 states, to the extent resources are available, the Judicial Council shall provide education on mental health and developmental disability issues affecting juveniles in delinquency proceedings to judicial officers and other public officers as appropriate. Welfare and Institutions Code section 710 authorizes a county board of supervisors to establish a program for services related to mental health assessment, treatment and evaluation of minors in the juvenile justice system. Section 711 states that when it appears to the juvenile court that a delinquent minor may have a serious mental disorder, is seriously emotionally disturbed, or has a developmental disability, the juvenile court may order that the minor be referred for evaluation. Section 711(b) states that a minor, with the approval of his or her counsel, may decline the referral for mental health evaluation.

Welfare and Institutions Code section 712 states that the evaluation ordered by the court shall be conducted by an appropriate and licensed mental health professional (e.g., a licensed psychiatrist or licensed psychologist). The evaluator selected by the court shall personally examine the minor, conduct appropriate psychological or mental health screening, assessment, or testing according to a uniform protocol developed by the county mental health department, and prepare and submit to the court a written report indicating his or her findings and recommendations to guide the court in determining whether the minor has a serious mental

[329] 20 U.S.C. Section 1232(g).
[330] 34 C.F.R. Section 99.31(9) (The disclosure is to comply with judicial order or lawfully issued subpoena). See, also, Education Code section 49077.

disorder or is seriously emotionally disturbed or has a developmental disability. If the minor is detained, the examination shall occur within three court days of the court's order of referral for evaluation and the evaluator's report shall be submitted to the court not later than five court days after the evaluator has personally examined the minor, unless the submission date is extended by the court for good cause.

Section 712(c) states that based on the evaluator's written report, the court shall determine whether the minor has a serious mental disorder or is seriously emotionally disturbed or has a developmental disability. If the court determines that the minor has a serious mental disorder, is seriously emotionally disturbed, or has a developmental disability, the case shall proceed as described in Section 713. If the court determines that the minor does not have a serious mental disorder, is not seriously emotionally disturbed, or does not have a developmental disability, the matter shall proceed without the application of Section 713 and in accordance with all other applicable provisions of law. Section 712(d) states that Section 712 shall not be construed to interfere with the legal authority of the juvenile court or any other public or private agency or individual to refer a minor for mental health evaluation or treatment.

Section 713 states that for a minor described in Section 711, who is determined by the court under Section 712 to be seriously emotionally disturbed, have a serious mental disorder, or have a developmental disability, and who is adjudicated a ward of the court under Section 602, the dispositional procedures set forth in Section 713 shall apply. Section 713(b) states that prior to the preparation of the social study, the minor shall be referred to a multidisciplinary team for dispositional review and recommendation. The multidisciplinary team shall consist of qualified persons who are collectively able to evaluate the minor's full range of treatment needs and may include representatives from local probation, mental health, regional centers, regional resource development projects, child welfare, education, community based youth services and other agencies or service providers. The multidisciplinary team must include at least one licensed mental health professional. If the minor is determined to have both a mental disorder and a developmental disorder, the multidisciplinary team may include both an appropriate mental health agency and a regional center.

Section 713(c) states that the multidisciplinary team shall review the nature and circumstances of the case, including the minor's family circumstances, as well as the minor's relevant tests, evaluations, records, medical and psychiatric history, and any existing individual educational plan or individual program plans. The multidisciplinary team shall provide for the involvement of the minor's available parent, guardian, or primary caretaker in its review, including any direct participation in multidisciplinary team proceedings as may be helpful or appropriate for development of a treatment plan in the case. The team shall identify the mental health or other treatment services, including in-home and community based services that are available and appropriate for the minor, including services that may be available to the minor under federal and state programs and initiatives such as wraparound service programs. At the conclusion of its review, the team shall then produce a recommended disposition and written treatment plan for the minor, to be appended to, or incorporated into, the probation social study presented to the court.

Section 713(d) states that the court shall review the treatment plan and the dispositional recommendations prepared by the multidisciplinary team and shall take them into account when making the dispositional order in the case. The dispositional order in the case shall be consistent with the protection of the public and the primary treatment needs of the minor as identified in the report of the multidisciplinary team. The minor's dispositional order shall incorporate, to the extent feasible, the treatment plan submitted by the multidisciplinary team, with any adjustments deemed appropriate by the court.

Section 713(e) states the dispositional order in the case shall authorize placement of the minor in the least restrictive setting that is consistent with the protection of the public and the minor's treatment needs, and with the treatment plan approved by the court. The court shall, in making the dispositional order, give preferential consideration to the return of the minor to the home of his or her family, guardian, or responsible relative with appropriate in-home, outpatient, or wraparound services, unless that action would be, in the reasonable judgment of the court, inconsistent with the need to protect the public or the minor, or with the minor's treatment needs.

Section 713(f) states that whenever a minor is recommended for placement at a state developmental center, the regional center director or designee shall submit a report for the director of the department of developmental services. The regional center report shall include the assessments, individual program plan, and a statement describing the necessity for a developmental center placement. The director of developmental services or his or her designee may, within 60 days of receiving the regional center report, submit to the court a written report evaluating the ability of an alternative community option or a developmental center to achieve the purposes of treatment for the minor and whether a developmental center placement can adequately provide the security measures or systems required to protect the public health and safety from the potential dangers posed by the minor's known behaviors.

Section 714 states that a regional center shall not be required to provide assessments or services to minors solely on the basis of a finding by the court that the minor is developmentally disabled. Regional center representatives may, at their option and on a case-by-case basis, participate in the multidisciplinary teams described in Section 713. However, any assessment provided by or through a regional center to a minor determined by the court to be developmentally disabled shall be provided in accordance with the provisions and procedures that relate to regional centers.

MILITARY CHILDREN

A. Purpose of the Interstate Compact

In 2009, legislation was signed by the Governor ratifying the Interstate Compact on Educational Opportunity for Military Children.[331] Effective January 1, 2010, California is bound by the requirements of the Interstate Compact.[332]

[331] Stats. 2009, ch. 237 (A.B. 343)
[332] See, Education Code section 49700 et seq.

Education Code section 49700 states that the Legislature finds and declares that the purpose of the Interstate Compact on Educational Opportunity for Military Children is to remove barriers to educational success imposed on children of military families due to the frequent relocation and deployment of their parents by doing all of the following:

1. Facilitating the timely enrollment of children in military families and ensuring that they are not placed at a disadvantage due to difficulty in the transfer of educational records from the previous school district or variations in entrance or age requirements.

2. Facilitating the pupil placement process through which children of military families are not disadvantaged by variations in attendance requirements, scheduling, sequencing, grading, course content, or assessment.

3. Facilitating the qualification and eligibility of children of military families for enrollment, educational programs, and participation in extracurricular, academic, athletic, and social activities.

4. Facilitating the on time graduation of children of military families.

5. Providing for the promulgation and enforcement of administrative rules implementing the provisions of the Compact.

6. Providing for the uniform collection and sharing of information between and among member states, schools and military families pursuant to the Compact.

7. Promoting coordination between the Compact and other compacts affecting military children.

8. Promoting flexibility and cooperation between the educational systems, parents, and the pupils in order to achieve educational success for the pupil.

Education Code section 49701 incorporates into state law the provisions of the Interstate Compact on Educational Opportunity for Military Children.

B. Article III of the Interstate Compact

Article III of the Compact indicates that the Compact applies to the children of active duty members of the uniformed services, members or veterans of the uniformed services who are severely injured and medically discharged or retired for a period of one year after medical discharge or retirement, and members of the uniformed services who die on active duty or as a result of injuries sustained on active duty for a period of one year after death.

C. Article IV of the Interstate Compact

Article IV of the Compact states that in the event that official educational records cannot be released to the parents for the purpose of transfer, the custodian of records in the sending state shall prepare and furnish to the parent a complete set of unofficial educational records containing uniform information as determined by the Interstate Compact to the extent feasible. Upon receipt of the unofficial education records by a school in the receiving district, the school shall enroll and appropriately place the student based on the information provided in the unofficial records pending validation by the official records.

At the same time, the school in the receiving state shall request the student's official education records from the school in the sending state. The school in the sending state must process and furnish the official education records to the school in the receiving state within 10 days of the receipt of the request or within such time as is reasonably determined under the rules promulgated by the Interstate Commission.

States are required to give 30 days from the date of enrollment or within such time as is reasonably determined under the rules promulgated by the Interstate Commission, for students to obtain any immunizations required by the receiving state. For a series of immunizations, initial vaccinations must be obtained within 30 days or within such time as is reasonably determined under the rules promulgated by the Interstate Commission.

Students shall be allowed to continue their enrollment at grade level in the receiving state commensurate with the grade level from a local educational agency in the sending state at the time of transition, regardless of age. A student that has satisfactorily completed the prerequisite grade level in the local educational agency in the sending state shall be eligible for enrollment in the next highest grade level in the receiving state regardless of age. A student transferring after the start of the school year in the receiving state shall enter the school in the receiving state on his or her validated level from an accredited school in the sending state.

D. Article V of the Interstate Compact

Article V of the Compact states when the student transfers before or during the school year, the receiving state shall initially honor placement of the student in educational courses based on the student's enrollment in the sending state and/or educational assessments conducted at the school in the sending state if the courses are offered and there is space available, as determined by the school district. Continuing the student's academic program from the previous school and promoting placement in academically and career-challenging courses should be paramount when considering placement. The receiving state may perform subsequent evaluations to ensure appropriate placement and continued enrollment of the student. The receiving state must initially honor placement of the student in educational programs based on current educational assessments conducted at the school in the sending state or participation and/or placement in like programs in the sending state, provided that the program exists in the school and there is space available, as determined by the school district. Such programs include, but are not limited to, gifted and talented programs and English as a second language programs.

In compliance with the federal requirements of the IDEA, the receiving state must initially provide comparable services to a student with disabilities based on his or her current IEP. In compliance with the requirements of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, the receiving state shall make reasonable accommodations and modifications to address the needs of incoming students with disabilities, subject to an existing Section 504 plan, to provide the student with equal access to education. This does not preclude the school in the receiving state from performing subsequent evaluations to ensure appropriate placement of the student.

Local educational agency officials shall have flexibility in waiving course and/or program prerequisites, or other preconditions for placement in courses or programs offered under the jurisdiction of the local educational agency. A student whose parent or legal guardian is an active duty member of the uniformed services, as defined by the Interstate Compact, and has been called to duty for, is on leave from, or immediately returned from deployment to a combat zone or combat support posting, shall be granted additional excused absences at the discretion of the local educational agency superintendent to visit with his or her parent or legal guardian relative to such leave or deployment of the parent or guardian.

E. Article VI of the Interstate Compact

Article VI of the Interstate Compact states that a special power of attorney relative to the guardianship of a child of a military family and executed under applicable law, shall be sufficient for the purposes of enrollment and all other actions requiring parental participation and consent. A local educational agency shall be prohibited from charging local tuition to transitioning military children placed in the care of a noncustodial parent or other persons standing in loco parentis who live in a jurisdiction other than that of the custodial parent. A transitioning military child, placed in the care of a noncustodial parent or other persons standing in loco parentis, who live in a jurisdiction other than that of the custodial parent, may continue to attend the school in which he or she was enrolled while residing with the custodial parent. State and local educational agencies shall facilitate the opportunity for transitioning military children's inclusion in extracurricular activities, regardless of application deadlines, to the extent they are otherwise qualified and space is available, as determined by the school district.

F. Article VII of the Interstate Compact

Article VII of the Interstate Compact states that in order to facilitate the on time graduation of children of military families, state and local educational agencies shall incorporate the following procedures:

1. Waiver Requirements – Local educational agency administrative officials shall use best efforts to waive specific courses required for graduation if similar coursework has been satisfactorily completed in another local educational agency or shall provide reasonable justification for denial. Should a waiver not be granted to a student who would qualify to graduate from the sending school, the local educational agency shall use best efforts to provide an alternative

means of acquiring required coursework so that graduation may occur on time.

2. Exit Exams – States shall accept exit or end of course exams required for graduation from the sending state or a national norm-reference achievement test or alternative testing, in lieu of test requirements for graduation in the receiving state or, in California, the passage of the exit exam adopted pursuant to Education Code section 60850. In the event the above alternatives cannot be accommodated by the receiving state for a student transferring in his or her senior year, the sending and receiving local educational agencies shall make best efforts to ensure the receipt of a diploma from the sending local educational agency, if the student meets the graduation requirements of the sending local educational agency. In the event that one of the states in question is not a member of this Compact, the member state shall use best efforts to facilitate the on time graduation of the student.

3. Transfers During Senior Year – If a military student transferring during his or her senior year is ineligible to graduate from high school from the receiving district after all alternatives have been considered, the sending and receiving local educational agencies shall make best efforts to ensure the receipt of a diploma from the sending local educational agency, if the student meets the graduation requirements of the sending local educational agency.

G. Article VIII of the Interstate Compact

Article VIII of the Interstate Compact states that each member state shall, through the creation of a state council or use of an existing body or board, provide for the coordination among its agencies of government, local educational agencies, and military installations concerning the state's participation in, and compliance with, the Interstate Compact. Each state may determine the membership of its own state council, but it must include the state superintendent of education, a superintendent of a school district with a high concentration of military children, a representative from a military installation, one representative each from the legislative and executive branches of government, and other offices and stakeholder groups the state council deems appropriate. In California, the state council will include all of the following:

1. The State Superintendent of Public Instruction or his or her designee.

2. A school superintendent or his or her designee from a school district with a high concentration of military children, selected by the State Superintendent of Public Instruction.

3. A representative from a military installation.

4. A member of the Senate appointed by the Senate Committee on Rules or his or her designee, who represents a legislative district with a high concentration of military children.

5. A member of the Assembly appointed by the Speaker of the Assembly, or his or her designee, who represents a legislative district with a high concentration of military children.

6. The Secretary of Education or his or her designee.

7. Any other persons appointed by the State Superintendent of Public Instruction.

In California, the state Superintendent of Public Instruction shall appoint a Compact Commissioner. The Compact Commissioner and the Military Family Education Liaison will be ex-officio members of the state council unless either is already a full voting member of the state council.

H. Article IX of the Interstate Compact

Article IX of the Interstate Compact creates an Interstate Commission on Educational Opportunity for Military Children. The Interstate Commission formulates public policy regarding educational opportunity for military children. Each member state has a voting representative on the Interstate Commission who shall be that state's Compact Commissioner. The Interstate Commission formulates policies, collects standardized data, and creates a process that permits military officials, educational officials, and parents to inform the Interstate Commission if and when there are alleged violations of the Interstate Compact. However, the Interstate Compact does not create a private right of action against the Interstate Commission or any member state.

I. Article X of the Interstate Compact

Article X of the Interstate Compact sets forth the powers of the Interstate Commission which include:

1. A process for dispute resolution among member states.

2. The power to promulgate rules and take necessary action to effect the goals, purposes and obligations of the Compact. The rules shall have the full force and effect of statutory law and shall be binding in the Compact states to the extent and in the manner provided in the Compact.

3. The power to issue, upon request of a member state, advisory opinions concerning the meaning or interpretation of the Interstate Compact, its bylaws, rules and actions.

4. The power to establish and maintain offices.

5. The power to elect or appoint such officers, attorneys, employees, agents or consultants as needed.

6. The power to establish a budget and make expenditures.

J. Article XI of the Interstate Compact

Article XI states that the Interstate Commission shall adopt bylaws to govern its conduct as may be necessary. The Interstate Commission may establish an executive committee and such other committees as may be necessary. The Interstate Commission, by a majority of the members, elects annually from among its members, a chairperson, a vice chairperson and a treasurer, who shall have such authority and duties as may be specified in the bylaws. The Interstate Commission shall have the authority to appoint an executive director and additional employees as needed.

K. Article XII of the Interstate Compact

Article XII sets forth the rule-making functions of the Interstate Commission. Article XII authorizes the Interstate Commission to promulgate reasonable rules in order to effectively and efficiently achieve the purposes of the Interstate Compact. If a majority of the legislatures of the compacting states reject a rule by enactment of a statute or resolution in the same manner used to adopt the Compact, then such rule shall have no further force and effect in any compacting state.

L. Article XIII of the Interstate Compact

Article XIII states that the executive, legislative and judicial branches of state government in each member state shall enforce the Interstate Compact and shall take all actions necessary and appropriate to effectuate the Compact's purposes and intent. The provisions of the Interstate Compact and the rules promulgated thereunder shall have the same standing as statutory law. All courts must take judicial notice of the Compact and the rules in any judicial or administrative proceeding in a member state. The Interstate Commission is required to attempt, upon the request of a member state, to resolve disputes which are subject to the Compact and which may arise among member states and between member and non-member states.

M. Article XIV of the Interstate Compact

Article XIV indicates that the Interstate Commission may levy on and collect an annual assessment from each member state to cover the cost of the operations and activities of the Interstate Commission and its staff. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the Interstate Commission, which shall promulgate a rule binding upon all member states.

N. Article XV of the Interstate Compact

Article XV indicates that any state is eligible to become a member state. The Compact shall become effective and binding upon legislative enactment of the Compact into law by no less than ten of the states. The effective date shall be no earlier than December 1, 2007.

Thereafter, it shall become effective and binding as to any other member state upon enactment of the Compact into law by that state.

O. Article XVI of the Interstate Compact

Article XVI indicates that states may withdraw from the Interstate Compact by the enactment of a statute, but such action shall not take effect until one year after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other member jurisdiction. The Interstate Compact shall dissolve effective upon the date of withdrawal or default of the member state which reduces the membership in the Compact to one member state.

P. State Implementation of the Interstate Compact

Education Code section 49703 states that the Superintendent of Public Instruction may develop procedures for the training of employees of local educational agencies in the implementation of the Interstate Compact on Educational Opportunity for Military Children. Education Code section 49704 states that on or after July 1, 2012, and on or before September 1, 2012, the Superintendent of Public Instruction shall reconvene the task force for the purpose of reviewing and making recommendations regarding the Interstate Compact on Educational Opportunity for Military Children.

STUDENT FEES AND TRANSPORTATION

A. The Free School Guarantee

The California Constitution requires the Legislature to provide for a system of common schools in which a free school shall be kept up and supported in each district at least six months in every year after the first year in which the school has been established.[333] This constitutional provision has been interpreted as requiring the youth of the state to be educated at public expense.[334] Thus, the free school guarantee prohibits the imposition of fees upon students to participate in the school curriculum.[335]

In Hartzell v. Connell,[336] the California Supreme Court decided that the free school guarantee contained in the California Constitution prohibited school districts from charging fees for extracurricular activities. The Santa Barbara High School District was charging students a fee for a wide variety of extracurricular activities from cheerleading to drama and football. Students were required to pay $25.00 for each athletic team in which they participated and $25.00 per category for any and all activities. The activities did not yield any credit toward graduation.

The California Supreme Court reviewed the history of the free school guarantee contained in the California Constitution and noted that public education forms the basis of self-

[333] Cal. Const., Article IX, section 5.
[334] Ward v. Flood, 48 Cal. 36, 51 (1874).
[335] Hartzell v. Connell, 35 Cal.3d 899 (1984).
[336] 35 Cal.3d 899 (1984).

government and constitutes the very cornerstone of republican institutions.[337] The court noted that extracurricular activities constitute an integral component of public education and that courts had emphasized the vital importance of student participation in extracurricular programs.[338] In addition to the particular skills taught, group activities encourage active participation in community affairs, promote the development of leadership qualities, and instill a spirit of collective endeavor, all of which are directly linked to the constitutional role of education in preserving democracy.[339]

The California Supreme Court stated:

> "Accordingly, this court holds that all educational activities – curricular or 'extra-curricular' – offered to students by school districts fall within the free school guarantee of Article IX, section 5. Since it is not disputed that the programs involved in this case are 'educational' in character, they fall within that guarantee. . . .
>
> "In guaranteeing 'free' public schools, article IX, section 5, fixes the precise extent of the financial burden which may be imposed on the right to a education – none. . . . A school which conditions a student's participation in educational activities upon the payment of a fee clearly is not a 'free school.'
>
> "The free school guarantee reflects the people's judgment that a child's public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and nonneedy families."[340]

Thus, the California Supreme Court in Hartzell v. Connell prohibited the imposition of student fees for educational activities. The court did not prohibit fees for purely recreational activities such as weekend dances or athletic events.[341]

The question left unanswered by the California Supreme Court in Hartzell v. Connell was whether school districts may charge a fee to students for transportation. The Education Code provides that the governing board of a school district may provide for the transportation of pupils to and from school whenever in the judgment of the board such transportation is advisable.[342] The Education Code authorizes the governing board of a school district providing for the transportation of pupils to and from schools to require the parents or guardian of the students to pay a portion of the cost of the transportation.[343]

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[337] Hartzell, at 906.
[338] Id. at 909.
[339] Id. at 911.
[340] Ibid.
[341] Hartzell, at 911.
[342] Education Code section 39800.
[343] Education Code section 39807.5.

B. Assembly Bill 1575

On September 29, 2012, Governor Brown signed Assembly Bill 1575,[344] effective January 1, 2013. Assembly Bill 1575 adds Education Code sections 49010 through 49013, and is declaratory of existing law that school districts may not charge students fees for many educational activities and adds additional requirements related to student fees.

The passage of Assembly Bill 1575 is an outgrowth of litigation filed by the American Civil Liberties Union (ACLU) challenging the state's alleged failure to prevent school districts from charging fees. Prior legislation, Assembly Bill 165, was vetoed by Governor Brown last year.

Education Code section 49010(a) defines "educational activity" as any activity offered by a school, school district, charter school, or county office of education that constitutes an integral fundamental part of elementary and secondary education, including, but not limited to, curricular and extracurricular activities. Section 49010(b) defines a "pupil fee" as a fee, deposit, or other charge imposed on pupils, or pupils' parents or guardians, in violation of Education Code section 49011 and Section 5 of Article IX of the California Constitution, which require educational activities to be provided free of charge to all pupils without regard to their family's ability or willingness to pay fees or request special waivers, as set forth in Hartzell v. Connell.[345] A pupil fee includes, but is not limited to, all of the following:

1. A fee charged to a pupil as a condition for registering for school or classes, or as a condition for participation in a class or an extracurricular activity, regardless of whether the class or activity is elective or compulsory, or is for credit.

2. A security deposit, or other payment, that a pupil is required to make to obtain a lock, locker, book, class apparatus, musical instrument, uniform, or other materials or equipment.

3. A purchase that a pupil is required to make to obtain materials, supplies, equipment, or uniforms associated with an educational activity.

Education Code section 49011(a) states that a pupil enrolled in a public school shall not be required to pay a pupil fee for participation in an educational activity. Section 49011(b) states that all of the following requirements apply to the prohibition on student fees:

1. All supplies, materials, and equipment needed to participate in educational activities shall be provided pupils free of charge.

2. A fee waiver policy shall not make a fee permissible.

[344] Stats. 2012, ch. 776.
[345] 35 Cal.3d 899 (1984).

3. School districts and schools shall not establish a two-tier educational system by requiring a minimal educational standard and also offering a second, higher educational standard that pupils may only obtain through payment of a fee or purchase of additional supplies that the school district or school does not provide.

4. A school district or a school shall not offer course credit or privileges related to educational activities in exchange for money or donations of goods or services from a pupil or pupil's parents or guardians, and a school district or a school shall not remove course credit or privileges related to educational activities, or otherwise discriminate against a pupil, because the pupil or the pupil's parents or guardians did not or will not provide money or donations of goods or services to the school district or school.

Education Code section 49011(c) states that this article shall not be interpreted to prohibit solicitation of voluntary donations of funds or property, voluntary participation in fundraising activities, or school districts, schools, and other entities from providing pupils prizes or other recognition for voluntarily participating in fundraising activities. Section 49011(d) states that the prohibition on student fees applies to all public schools, including but not limited to, charter schools and alternative schools. Section 49011(e) states that these statutory provisions are declarative of existing law and shall not be interpreted to prohibit the imposition of a fee, deposit, or other charge otherwise allowed by law.

Education Code section 49012(a) states that commencing with the 2014-15 fiscal year, and every three years thereafter, the California Department of Education shall develop and distribute guidance for county superintendents of schools, district superintendents, and charter school administrators regarding the imposition of pupil fees for participation in educational activities in public schools. The Department of Education is required to post the guidance on the Department's Internet website. Education Code section 49012(b) states that the guidance developed by the Department of Education shall not constitute a regulation subject to the Administrative Procedures Act.

Education Code section 49013 states that a complaint of noncompliance with the requirements prohibiting pupil fees may be filed with the principal of a school under the Uniform Complaint Procedures set forth in the California Code of Regulations.[346] Section 49013(b) states that a complaint may be filed anonymously if the complaint provides evidence or information leading to evidence to support an allegation of noncompliance with the requirements prohibiting pupil fees.

Education Code section 49013(c) states that a complainant not satisfied with the decision of a public school may appeal the decision to the California Department of Education and shall receive a written appeal decision within sixty (60) days of the Department's receipt of the appeal. Section 49013(d) states that if a public school finds merit in a complaint, or the Department of Education finds merit in an appeal, the public school shall provide a remedy to all affected

[346] California Code of Regulations, Title 5, Section 4600 et seq.

pupils, parents, and guardians that, where applicable, includes reasonable efforts by the public school to ensure full reimbursement to all affected pupils, parents, and guardians, subject to procedures established through regulations adopted by the State Board of Education. Education Code section 49013(e) states that information regarding the requirements of the prohibition on pupil fees shall be included in the annual notification distributed to pupils, parents and guardians, employees, and other interested parties.[347] Section 49013(f) states that public schools shall establish local policies and procedures to implement these provisions on or before **March 1, 2013**.

Assembly Bill 1575 also amends Government Code section 905, which relates to the filing of tort claims or claims for money or damages against local public entities to include claims made pursuant to Education Code section 49013 for reimbursement of pupil fees for participation in educational activities. Districts should follow tort claim procedures when they receive claims alleging that school districts have charged impermissible student fees.

C. Home-to-School Transportation

In Arcadia Unified School District v. State Department of Education, the California Supreme Court upheld the constitutionality of Education Code section 39807.5, which authorized charges for home-to-school transportation.[348] The California Supreme Court held that the statute did not on its face violate the free school guarantee of the California Constitution.[349] The court held that since transportation is neither an educational activity nor an essential element of school activity it did not violate the constitutional guarantee.[350]

The California Supreme Court stated:

> "Students are not required to use the same means of transportation as their classmates in order to get to school to receive an education; individual students may choose different modes of transportation to suit their own circumstances. Unlike textbooks or teachers' salaries, transportation is not an expense peculiar to education. Without doubt, school-provided transportation may enhance or be useful to school activity, but it is not a necessary element which each student must utilize or be denied the opportunity to receive an education."[351]

The California Supreme Court reaffirmed this decision in Salazar v. Eastin.[352] It held that the plaintiffs failed to show that the school districts improperly applied Education Code section 39807.5 in determining which parents were indigent and exempt from home-to-school transportation fees.[353]

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[347] See, California Code of Regulations, Title 5, Section 4622.
[348] 2 Cal.4th 251, 5 Cal.Rptr.2d 545 (1992).
[349] Cal. Const., Article IX, Section 5.
[350] Arcadia Unified School District v. State Department of Education, 2 Cal.4th 251, 5 Cal.Rptr.2d 545 (1992).
[351] Id. at 263-264.
[352] 95 Daily Journal D.A.R. 3479 (1995).
[353] The court's decision does not authorize charging students a fee for transportation to and from athletic activities. The

D. Field Trips, Athletic Events, and Sports Camps

School districts may not charge fees to students for transportation to athletic events or charge fees to attend a summer sport camp as these activities do not fall within the definitions of field trip or school camp programs and student fees are, therefore, not authorized by law.

Education Code section 35330(a) states in part:

> "The governing board of a school district or the county superintendent of schools of a county may:
>
> "(1) Conduct field trips or excursions in connection with courses of instruction or school-related social, educational, cultural, athletic, or school band activities to and from places in the state, any other state, the District of Columbia, or a foreign country for pupils enrolled in elementary or secondary schools. A field trip or excursion to and from a foreign country may be permitted to familiarize students with the language, history, geography, natural sciences, and other studies relative to the district's course of study for pupils."

The dictionary defines a field trip as "a visit (as to a factory, farm, or museum) made (as by students and a teacher) for purposes of first hand observation."[354] Although the Education Code does not define a field trip, in our opinion, transportation by an athletic team to a competition, tournament or game would not fall within the definition of a field trip.

In Hartzell v. Connell,[355] the California Supreme Court specifically stated that fees for participation on athletic teams was an activity for which school districts could not charge.[356] The court stated that only fees authorized by statute may be charged to students.[357] The only transportation fee that is authorized by law is home-to-school transportation.[358]

Education Code section 35335 states:

> "The governing board of any elementary, high, or unified school district may charge a fee for school camp programs, provided that payment of such fee is not mandatory. No pupil shall be denied the opportunity to participate in a school camp program because of nonpayment of the fee.

California Department of Education issued a fiscal management advisory outlining what student fees may be charged and what fees may not.

[354] Merriam-Webster's Collegiate Dictionary, 11th Edition (2008).

[355] 35 Cal.3d 899, 201 Cal.Rptr. 601 (1984).

[356] Id. at 913.

[357] Id. at 913-14.

[358] See, Education Code section 39807.5; Arcadia Unified School District v. State Department of Education, 2 Cal.4th 251, 5 Cal.Rptr.2d 545 (1992).

> "The amount of the fee may not exceed the difference between any state, local, or federal funds generated by such a program and the cost of the services actually provided.
>
> "For purposes of this section a school camp program is one which is operated pursuant to Article 5 (commending with Section 8760) of Chapter 4 of Part 6."

Education Code section 8760 defines a school camp program as an outdoor science program that conducts programs and classes in outdoor science education and conservation education within or without the boundaries of the district and for that purpose employs instructors, supervisors, and other personnel and provides necessary equipment and supplies. In our opinion, the definition contained in Section 8760 is not broad enough to include summer sports camps. Therefore, school districts may not charge fees to students for summer sports programs.

E. Parking Fees

However, the free school guarantee in the California Constitution does apply to parking fees to park in a student parking lot on school property.[359] Just as transportation is neither an educational activity nor an essential element of school activity, parking one's vehicle in a student parking lot on school property is, most likely, neither an educational activity nor an essential element of school activity. In our opinion, Education Code section 35160 and Vehicle Code section 21113 authorize a school district or ASB to charge a parking fee to students who wish to park their vehicle in a student parking lot on school property.

Education Code section 35160 states:

> "On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established."

We cannot find any prohibition on charging parking fees in the Education Code, nor does the imposition of parking fees appear to be inconsistent with or preempted by any other provision of law.

In fact, Vehicle Code section 21113 gives school districts and other public agencies authority to regulate the conditions upon which persons may drive their vehicle onto school property. All persons are required to comply with any condition or regulation which may be imposed by the governing board of the school district under Vehicle Code section 21113.

[359] In our opinion, the passage of A.B. 1575 does not change the authority of school districts to establish parking fees. Education Code section 49011(e) states, "This article is declarative of existing law and shall not be interpreted to prohibit the imposition of a fee, deposit, or other charge otherwise allowed by law."

Vehicle Code section 21113(b) requires the governing board to erect or place appropriate signs giving notice of any special conditions or regulations that are imposed and require the school district to keep available at its principal administrative office a written statement of all those special conditions and regulations adopted by the governing board.

In a 1959 opinion,[360] the Attorney General reviewed the provisions of Vehicle Code section 21113 and stated, "Thus, the parking of a vehicle on state college grounds is of itself, by virtue of Vehicle Code section 21113, a misdemeanor unless the parking is done with the permission of and upon and subject to such conditions and regulations as may have been imposed by the state college."[361] These conditions may include paying a parking fee for the privilege of parking on school property.

Therefore, in our opinion, while not free from doubt, a school district or an ASB authorized by the school district may charge students a parking fee for the privilege of parking in a student parking lot on school property.

LAW ENFORCEMENT AND STUDENT RIGHTS

In general, law enforcement agencies have broad authority to arrest students anywhere in California and school district officials have a duty to cooperate with the law enforcement agencies. The duty of school district officials to cooperate with law enforcement agencies would include providing access to police officers at school for investigations, whether the investigations relate to school activities or to non-school activities.

A peace officer may arrest students without a warrant if they commit a public offense in the officer's presence,[362] if students commit a misdemeanor, even if it is outside the officer's presence,[363] or if a person commits an assault or battery on school grounds.[364] Law enforcement is authorized to cite and release juvenile offenders charged with violations listed in Welfare and Institutions Code section 256, other than an offense involving a firearm. The violations specified are misdemeanors or other infractions including truancy.

In addition, law enforcement officers have the right to come on campus to interview students who are suspects, witnesses to a crime or victims of suspected child abuse. Parental permission to interview or remove a student from school is not required.[365] The California Attorney General recommends the following procedures for both law enforcement and schools:

- Law enforcement officers should notify school authorities before questioning a student or removing the student from school.

[360] 34 Ops.Cal.Atty.Gen. 283 (1959).
[361] Id. at 284.
[362] Penal Code section 836(a)(1).
[363] Welfare and Institutions Code section 625.
[364] Penal Code section 243.5.
[365] Law in the School (6th Edition), California Department of Justice (2000), page 117.

- School administrators should verify the peace officer's identity and credentials, the authority under which he or she acts, and the reasons for the student's interview or removal.

- The peace officer may request help from school officials to accomplish his or her duty. While the student is being interviewed, school officials do not have the authority or right to be present. However, a student who is the victim of suspected child abuse must be afforded the option of being interviewed in private or selecting any adult who is a member of the school staff, including any credentialed or classified employee or volunteer aide, to be present during the interview. In all other cases, the officer may, at his or her discretion, allow a school official to be present.[366]

- If a principal or school official releases a minor to a peace officer for removal from school, the school official must take immediate steps to notify the student's parent, guardian or responsible relative of the action and place where the minor was taken. The only exception to this requirement is when a minor student has been taken into custody as a victim of suspected child abuse.[367]

Education Code section 48906 states in part:

> "When a principal or other school official releases a minor pupil to a peace officer for the purpose of removing the minor from the school premises, the school official shall take immediate steps to notify the parent, guardian, or responsible relative of the minor regarding the release of the minor to the officer, and regarding the place to which the minor is reportedly being taken, except when a minor has been taken into custody as a victim of suspected child abuse, as defined in Section 11165.6 of the Penal Code, or pursuant to Section 305 of the Welfare and Institutions Code. In those cases, the school official shall provide the peace officer with the address and telephone number of the minor's parent or guardian . . ."

It should be noted that the rules governing the taking of confessions or admissions by law enforcement do not apply to school staff who are not peace officers or who are not acting at the direction of peace officers.[368] Therefore, public school officials who are not classified as law enforcement officers or agents of law enforcement may question students who are arrested about suspected violations of the law or school rules without advising them of their "Miranda Rights." However, statements made by students to school staff must be voluntary and cannot be coerced or disclosed as a result of threats.

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[366] Penal Code section 11174.3.
[367] Education Code section 48906.
[368] In Re Christopher W., 29 Cal.App.3d 777 (1973); In Re Corey L., 203 Cal.App.3d (1988).

Implicit in all of these statutory provisions is that school officials should cooperate with law enforcement and should not interfere in law enforcement investigations.

STUDENT SEARCHES

A. Searches in General

The Fourth Amendment limits the ability of the government to search for and seize evidence without a warrant. The Fourth Amendment states:

> "The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The United States Supreme Court has held that a seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property.[369] The interception of an intangible communication has also been held to be a seizure.[370] The courts have held that a search occurs when the expectation of privacy that society is prepared to consider reasonable is infringed.[371] If the search does not violate a person's "reasonable expectation of privacy," then it does not constitute a Fourth Amendment search and no warrant is required.[372] A warrantless search that violates a person's reasonable expectation of privacy will be held to be constitutional if it falls within an established exception to the warrant requirement.[373] Accordingly, the courts will ask:

1. Does the search violate a reasonable expectation of privacy?

2. If so, is the search nonetheless permissible because it falls within an exception to the warrant requirement?

Whether an expectation of privacy is constitutionally reasonable has been decided on a case-by-case basis.[374] Generally, the courts have held that a person has a reasonable expectation of privacy in property located inside a person's home.[375] The courts have also held that a person has a reasonable expectation of privacy in the conversations taking place in an enclosed phone booth, in the contents of an opaque container, or in the thermal images of the various rooms of their home.[376] Conversely, the courts have held that a person does not have a reasonable expectation of privacy in activities conducted in open fields, in garbage deposited at the outskirts

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[369] United States v. Jacobsen, 466 U.S. 109, 113 (1984).
[370] See, Berger v. New York, 388 U.S. 41, 59-60 (1967).
[371] United States v. Jacobsen, 466 U.S. 109 (1984).
[372] See, Illinois v. Andreas, 463 U.S. 765, 771 (1983).
[373] See, Illinois v. Rodriguez, 497 U.S. 177, 185-186 (1990).
[374] See, O'Connor v. Ortega, 480 U.S. 709, 715 (1987).
[375] See, Payton v. New York, 445 U.S. 573, 589-90 (1980).
[376] See, Katz v. United States, 389 U.S. 347 (1967); United States v. Ross, 456 U.S. 798 (1982); Kyllo v. United States, 533 U.S. 27 (2001).

of real property, or in a stranger's house that a person has entered without the owner's consent in order to commit a theft.[377]

The United States Supreme Court held that the Fourth Amendment gives to the people the right to be secure in their persons against unreasonable searches and seizures. Generally, a search requires probable cause. Probable cause exists where the facts and circumstances within a police officer's knowledge is reasonably trustworthy and is sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed and that the evidence of that offense will be found in the place to be searched.[378]

B. Student Searches – Reasonable Suspicion

In contrast, school administrators may search students if they have a reasonable suspicion that a student has violated or is violating either the law or the rules of the school. In the landmark decision of New Jersey v. T.L.O.,[379] the United States Supreme Court considered the proper application of the Fourth Amendment's prohibition against unreasonable search and seizure to student searches conducted by public school officials and held that the appropriate standard for authorizing searches by school officials should be reasonable suspicion rather than probable cause.[380]

In New Jersey v. T.L.O., the teacher at a high school in New Jersey discovered two girls smoking in a lavatory. One of the two girls was a fourteen year old high school freshman. Smoking in the school restroom was a violation of school rules. The teacher took the two girls to the principal's office where the assistant principal questioned the students. T.L.O.'s companion admitted they had violated the smoking rule. T.L.O. denied smoking in the restroom.

The assistant principal asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes. As he reached into the purse for the cigarettes, the assistant principal noticed a package of cigarette rolling papers. In the assistant principal's experience, possession of rolling papers by high school students was closely associated with the use of marijuana. Suspecting that an examination of the purse might yield further evidence of drug use, the assistant principal proceeded to search the purse thoroughly. The search revealed a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one dollar bills, an index card that appeared to be a list of students who owed T.L.O. money and two letters that implicated T.L.O. in marijuana dealing. The assistant principal notified T.L.O.'s mother and the police and turned the evidence of drug dealing over to the police.[381]

On the basis of T.L.O.'s subsequent confession and the evidence seized by the assistant principal, the state of New Jersey brought delinquency charges against T.L.O. in the juvenile

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[377] See, Oliver v. United States, 466 U.S. 170, 177 (1984); California v. Greenwood, 486 U.S. 35 (1988); Rakas v. Illinois, 439 U.S. 128, 143, n. 12 (1978).
[378] Brinegar v. United States, 338 U.S. 160, 175-176 (1949).
[379] 105 S.Ct. 733, 744, 21 Ed.Law Rep. 1122, 1133 (1985).
[380] Ibid.
[381] T.L.O. at 736-737, 21 Ed.Law Rep. 1122, 1125-6.

court. T.L.O. moved to suppress the evidence found in her purse, as well as her confession, contending that the assistant principal's search of her purse violated the Fourth Amendment.[382]

The United States Supreme Court reviewed the case and held that the Fourth Amendment prohibition against unreasonable searches and seizures applies to searches conducted by public school officials.[383] In the past, lower courts had relied on the doctrine of in loco parentis (in place of the parent) to allow school officials broader powers to search students. However, the United States Supreme Court rejected the use of the doctrine of in loco parentis and stated:

> "Teachers and school administrators, it is said, act in loco parentis in their dealings with students: their authority is that of the parent, not the State, and is, therefore not subject to the limits of the Fourth Amendment. . . .
>
> "Such reasoning is in tension with contemporary reality and the teachings of this Court. . . . Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."[384]

In New Jersey v. T.L.O., the United States Supreme Court sought to strike a balance between the student's legitimate expectation of privacy and the school district's equally legitimate need to maintain an environment in which learning can take place and concluded that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.[385] The court held that the warrant requirement is unsuited to the school environment and rejected the notion that a teacher or school administrator must obtain a warrant before searching a child suspected of an infraction of school rules or of criminal law since this would unduly interfere with the maintenance of swift and informal disciplinary procedures needed in the schools.[386]

In New Jersey v. TLO,[387] the United States Supreme Court recognized that the school setting requires some modification of the level of suspicion of illicit activity needed to justify a search and established a reasonable suspicion standard for determining the "reasonableness" of searches in school settings.[388] According to the Court, the search of a student by a public school official is reasonable under the Fourth Amendment if it is both:

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[382] T.L.O. at 21 Ed.Law Rep. 1122, 1125.
[383] T.L.O. at 739, 21 Ed.Law Rep. at 1128.
[384] T.L.O. at 721, 21 Ed.Law Rep. at 1130.
[385] T.L.O. at 743, 21 Ed.Law Rep. at 1132.
[386] Ibid.
[387] 469 U.S. 325 (1985).
[388] See, also, Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002).

1. Justified at its inception; and

2. Reasonably related in scope to the circumstances which justified the interference in the first place.[389]

Under New Jersey v. T.L.O., a search is justified at its inception if there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[390] A search is permissible in its scope if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[391]

The California Supreme Court reached a similar conclusion with respect to searches of students under the federal and state Constitution. The California Supreme Court in In Re William G.,[392] also used the standard of reasonable suspicion but held that in that particular case, that standard had not been met.[393]

William G. was a sixteen year old student at Chatsworth High School in the Los Angeles Unified School District. At approximately 1:10 p.m., the assistant principal noticed William G. and two other male students walking through the center of the campus. The assistant principal was approximately 35 yards away from the students. As the assistant principal proceeded toward the students, he noticed that William G. was carrying a small black bag, later identified as a vinyl calculator case, to which the students' attention was momentarily drawn. The assistant principal thought that the case had an odd looking bulge.

Upon reaching the students, the assistant principal asked where they were heading and why they were late for class. William G. did not have a class after 12:00 noon. As the assistant principal spoke, William G. placed the case in a palm like gesture to his side and then behind his back. The assistant principal asked William G. what he had in his hand to which William G. replied "nothing." When the assistant principal attempted to see the case, William G. responded, "You can't search me and you need a warrant for this." Following more discussion, the assistant principal took William G. by the arm and escorted him into the assistant principal's office.[394]

After repeated unsuccessful attempts to convince William G. to hand over the case, the assistant principal took it and unzipped it. Inside were four small bags of marijuana, totaling less than one-half ounce, a small milligram weight scale and some cigarette papers. The assistant principal immediately called the police and William G. was arrested. A juvenile court hearing was then held and William G. moved to suppress the evidence obtained from the calculator case on the ground that the search was conducted in violation of the Fourth Amendment of the United States Constitution and Article I, Section 13, of the California Constitution.[395]

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[389] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).
[390] Id. at 1081-83.
[391] Id. at 1082.
[392] 40 Cal.3d 550 (1985).
[393] Id. at 554-555.
[394] Id. at 555.
[395] Ibid.

The California Supreme Court reversed a lower court ruling and found that the Fourth Amendment's protections against unreasonable search and seizure apply to governmental action and that public school officials are agents of the government. Therefore, searches by school officials involve governmental action.[396] The California Supreme Court then weighed the student's right of privacy against the school district's right to maintain a suitable learning environment and concluded that the assistant principal articulated insufficient facts to support a reasonable suspicion that William G. was engaged in a prescribed activity justifying a search.[397] The court found that there was a complete lack of any prior knowledge or information on the part of the assistant principal relating to William G.'s possession, use, or sale of illegal drugs or other contraband and that the assistant principal's suspicion that William G. was tardy or truant from class provided no reasonable basis for conducting a search of any kind.[398]

The court further noted that William G.'s attempt to hide his calculator case from the assistant principal's view, standing alone, was not sufficient cause to justify a search.[399] The court also stated that William G.'s demand for a warrant and his assertion of his constitutional right to privacy did not give rise to reasonable suspicion since a student should not be penalized for demanding respect for his or her constitutional rights.[400]

In summary, based on the holdings in New Jersey v. T.L.O. and In Re William G., a school administrator should be able to articulate facts which would lead a person to believe that a student had violated a school rule or the law in order to justify a search. The facts should indicate that a school rule has been broken such as smoking cigarettes or possession of drugs. Mere tardiness alone is insufficient.

In the case of In Re Lisa G.,[401] the Court of Appeal held that a search of a student's purse was not justified at its inception when the student left the class without permission from the teacher. The teacher decided to write a disciplinary referral and opened the student's purse to look for the student's identification number and found a knife in the purse. The Court of Appeal held that mere disruptive behavior did not authorize a school official to search through a student's personal belongings. The court held that a correlation between the wrongful behavior of the student and the intended findings of the search is essential for a valid search of the student under the Fourth Amendment.[402]

C. Searches of Cell Phones

In Klump v. Nazareth Area School District,[403] the U.S. District Court denied the school district's motion to dismiss a student's lawsuit which alleged that the school district had unlawfully searched the student's cell phone. In their first amended complaint, the plaintiffs alleged that Shawn Kocher, a teacher, confiscated the student's cell phone because he displayed

[396] In re William G. at 558-561.
[397] Id. at 562-566.
[398] Id. at 566.
[399] Id. at 567.
[400] Ibid.
[401] 125 Cal.App.4th 801, 23 Cal.Rptr.3d 163 (2004).
[402] Id. at 807.
[403] 425 F.Supp.2d 622, 209 Ed.Law Rptr. 82 (E.D.PA. 2006).

it during school hours, in violation of a school policy prohibiting the use or display of a cell phone during school. Subsequently, Ms. Kocher and the Assistant Principal, Ms. Grube, called nine other students listed in Christopher's phone number directory to determine whether they too were violating the school's cell phone policy.[404]

The assistant principal and teacher also accessed Christopher's text messages and voicemail and held a conversation with Christopher's younger brother by using the cell phone's instant messaging feature. They did not identify themselves as being anyone other than Christopher, according to the allegations in the First Amended Complaint.[405]

At a meeting with Christopher Klump's parents, Ms. Grube told Mr. and Mrs. Klump that while she was in possession of their son's phone Christopher received a text message from his girlfriend requesting that he get her a "tampon," which Ms. Grube stated at the meeting was a reference to a large marijuana cigarette. Ms. Grube stated that the text message referring to marijuana prompted her search and use of the phone. Christopher, however, alleged that he had received his girlfriend's text message the day before the search and seizure of his phone.[406]

The court reviewed the allegations in the complaint that the school district violated the Fourth Amendment rights of Christopher Klump because the search was not justified at its inception and was not reasonable in scope. The district court allowed the Fourth Amendment claim to go to trial. The court stated, based upon the facts alleged in the complaint, as follows:

> "Here, defendant Kocher was justified in seizing the cell phone, as plaintiff Christopher Klump had violated the school's policy prohibiting use or display of cell phones during school hours. In calling other students, however, defendants Grube and Kocher were conducting a search to find evidence of other student's misconduct, which they may not do under the standard articulated above. They had no reason to suspect at the outset that such a search would reveal that Christopher Klump himself was violating another school policy; rather, they hoped to utilize his phone as a tool to catch other students' violations."[407]

Based on the allegations in the complaint, which the court must accept as true when deciding whether to grant or deny a motion to dismiss, the court ruled that there was no justification for the school officials to search Christopher's phone for evidence of drug activity.[408]

Based on the holding in Klump, it would appear that school officials need reasonable suspicion that the student was using the cell phone to buy or sell illegal drugs, engage in bullying or harassment, cheat on exams, sext, or commit a crime before school officials could search the phone, review the logs, text messages, voice messages, or photographs or videos on the phone.

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[404] Id. at 627.
[405] Ibid.
[406] Id. at 631.
[407] Id. at 640.
[408] Id. at 640-641.

For a violation of the district policy against possession of a cell phone during school hours, school officials could seize the phone but would not have sufficient reasonable suspicion to justify a search of the phone at its inception, nor would school officials have justification to expand the scope of the search of the cell phone by reading the text messages or listening to the voicemails.

In summary, the search of a student's cell phone at school or a school activity would be governed by Fourth Amendment standards. Under the Fourth Amendment, the United States Supreme Court in New Jersey v. T.L.O., held that the search of a student by a school official is reasonable under the Fourth Amendment if it is both justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place. The search would be justified at its inception if there are reasonable grounds for suspecting that the search would turn up evidence that the student has violated or is violating either the law or the rules of the school. A search is permissible in its scope if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[409]

In G.C. v. Owensboro Public Schools,[410] the Sixth Circuit Court of Appeals held that school officials could not search a student's cell phone simply because the student was sending a text message on his cell phone during class. The court also rejected the school district's contention that it had prior knowledge of the student's drug use and suicidal tendencies and therefore that justified the search.

The Court of Appeals held that the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a two-fold inquiry:

1. Whether the action was justified at its inception.

2. Whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place.[411]

The Court of Appeals held that a search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. The court held that using a cell phone on school grounds does not automatically trigger an unlimited right to search the content stored on the phone that is not related to the infraction. The court focused on the events that occurred when G.C. was texting in class. When his phone was confiscated by his teacher, there was no indication that a search of the phone would reveal evidence of criminal activity, pending contravention of additional school rules, or potential harm to anyone in the school. Therefore, the Court of Appeals concluded that the school district did not have reasonable suspicion to justify the search of the student's cell phone at its inception.[412]

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[409] Id. at 1081-83.
[410] 711 F.3d 623, 290 Ed.Law Rep. 527 (6th Cir. 2013).
[411] Id. at 632.
[412] Id. at 633-34.

In summary, school administrators may search a student's cell phone if they have reasonable suspicion that the student has violated the law or the rules of the school with respect to the possession or use of weapons, sale, use, or purchase of illegal drugs, cyberbullying, cheating on exams, harassment or making threats. However, school administrators may not search a student's cell phone for violating rules regulating the possession of a cell phone at school or the use of a cell phone at school. School administrators may confiscate or seize the phone for violation of school rules regulating the possession and use of cell phones at school, but may not search the cell phone unless the school administrator has information that would lead the administrator to have a reasonable suspicion that the cell phone was used to either violate the law or the rules of the school.

Therefore, we would strongly recommend that school administrators only search student's cell phones when they have reasonable suspicion that a student has used the cell phone to violate the law or the rules of the school.

D. Strip Searches

In Safford Unified School District v. Redding,[413] the United States Supreme Court held that the strip search of a 13 year old student violated the student's Fourth Amendment rights and was unconstitutional. The court further held that since the lower courts had rendered conflicting opinions on the issue, the assistant principal was entitled to qualified immunity from liability, but held that the school district could be held liable and remanded the matter back to the lower court.

It should be noted that in California, strip searches are prohibited. Education Code section 49050 states:

> "No school employee shall conduct a search that involves:
>
> "(a) Conducting a body cavity search of a pupil manually or with an instrument.
>
> "(b) Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil."[414]

Savana Redding was a 13 year old eighth grade student at Safford Middle School at the time of the search. In October 2003, the assistant principal of the school asked Savana to come to his office. The assistant principal opened her day planner and found several knives, lighters, a permanent marker and a cigarette. Savana stated that a few days before she had lent the day planner to her friend, Marissa, and that none of the items in the day planner belonged to her.[415]

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[413] 557 U.S. 364, 129 S.Ct. 2633, 245 Ed.Law Rep. 626 (2009).

[414] It should be noted that the Redding decision involved an Arizona school district. However, Ninth Circuit decisions are binding precedent in California.

[415] Id. at 2637-38.

The assistant principal then showed Savana four white prescription strength Ibuprofen 400 mg pills and one over-the-counter blue Naproxen 200 mg pill, which are used for pain and inflammation, but banned under school rules without advance permission. The assistant principal asked Savana if she knew anything about the pills and Savana answered that she did not. The assistant principal then asked Savana if she was giving these pills to fellow students. Savana denied that she was giving these pills to other students and allowed the assistant principal to search her belongings. Savana's backpack was searched and then Savana was instructed to go to the school nurse's office to search her clothes for pills. Savana was asked to remove her jacket, socks and shoes as well as her pants and t-shirt. Savana was told to pull her bra out to the side and shake it and to pull at the elastic on her underpants, exposing her to some degree. No pills were found.[416]

The district court granted summary judgment in favor of the school district. A panel of the Ninth Circuit affirmed. The Ninth Circuit, sitting en banc, reversed and found that the strip search was unjustified under the Fourth Amendment and that the assistant principal is not entitled to qualified immunity. The Supreme Court then affirmed the search was unconstitutional and held that qualified immunity should apply.[417]

The United States Supreme Court held that the Fourth Amendment gives to the people the right to be secure in their persons against unreasonable search and seizures. Generally, a search requires probable cause. Probable cause exists where the facts and circumstances within a police officer's knowledge is reasonably trustworthy and is sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed and that the evidence of that offense will be found in the place to be searched.[418]

The court held that a search of the student's outer clothing was justified but in analyzing whether the strip search was justified at its inception, the Supreme Court held that the assistant principal had insufficient information to justify such an intrusive search. The court noted that the assistant principal knew that the pills were prescription strength but not illegal. The assistant principal had no reason to suspect that large amounts of the drugs were being passed around or that individual students were receiving great numbers of pills, and the assistant principal had no information that Savana was hiding pills in her underwear.[419] The court stated:

> "In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable . . .
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> "We do mean, though, to make it clear that the T.L.O. concern to limit a school search to reasonable scope requires the

[416] Id. at 2638.
[417] Ibid.
[418] Id. at 2639. See, Brinegar v. United States, 338 U.S. 160, 175-176 (1949).
[419] Id. at 2640-43.

> support of reasonable suspicion of danger or of resort to underwear for hiding of evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."[420]

In summary, districts must have sufficient facts to justify the search of a student at the inception of the search. The search must be reasonably related in scope to the circumstances which justify the search and the intrusion into the student's privacy rights. There must be reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school, such as, for example, possession of illegal drugs. A search is permissible in its scope if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

As the Supreme Court indicated, for an intrusive strip search to be reasonable, there must be specific facts justifying such a search. However, in California, strip searches are prohibited.

Districts should consult with legal counsel if the district is considering searching a student where there is no evidence that a particular student had violated the law with respect to illegal weapons or drugs but the student may have been involved in a violation of school rules of a less serious nature.

E. Pat Down Search of Minors

In In Re Jose Y.,[421] the Court of Appeal held that the pat down search of a minor was proper where the police officer had cause to believe that the minor was not authorized to be on the school campus. The minor did not identify himself, the minor did not explain his reason for being on campus, and the police officer was alone as he prepared to escort the minor and his two companions to the office. The Court of Appeal held that the governmental interest in preventing violence on school campuses outweighed the minimal invasion of the minor's privacy rights.

The underlying facts were that on May 23, 2004, a campus security officer at South Gate High School saw three young men who appeared to be students, sitting on the front lawn area of the school grounds during school hours. The security officer estimated the three young men were 16 to 18 years of age. The security officer reported their presence to an officer with the Los Angeles Police Department assigned to work at the school. The police officer approached the three minors and asked if any of them had identification. All three initially said they did not.[422]

The police officer decided to escort the three students to his office to try to verify their identity and what school, if any, they attended. Since there were three individuals and he was

[420] Id. at 2642-43.
[421] 141 Cal.App.4th 748, 46 Cal.Rptr. 3268 (2006).
[422] Id. at 750.

alone, for his safety, the police officer decided to conduct a pat down search. When he conducted the pat down on the minor, he discovered a hard object in the minor's pants pocket. The minor indicated that the object was a knife and the officer confiscated the weapon. The minor was charged with unlawful possession of a knife on school property in violation of Penal Code section 626.10(a).[423]

The minor challenged the legality of the pat down search in juvenile court. The juvenile court denied the minor's motion to suppress the knife and appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the juvenile court and held that the pat down search under these circumstances was legal.[424]

This decision should be helpful to school districts, particularly when nonstudents enter onto school campuses during school hours.

F. Role of Police in Search of Students

In In Re K.S.,[425] the Court of Appeal held that when a school official independently decides to search a student and then conducts that search, the reasonable suspicion standard applies, even if the police provide information justifying a search and are present when it occurs. This decision is consistent with the practices of many school districts and validates those practices.

The underlying facts were that on September 25, 2008, Livermore Narcotics Detective Harrison received a message from a confidential informant that a student at Livermore High School possessed Ecstasy pills hidden in a slit in his pants. Harrison had used this informant before, the informant's information had led to two prior arrests and no information Harrison received from the informant had previously been found untruthful.[426]

After receiving a tip, Harrison contacted Livermore Police Officer Cabral, the School Resource Officer at Granada High School. Harrison advised Cabral of the tip and asked him to follow up on it. Cabral then contacted Ann Harder Dolid, the Vice Principal of Livermore High School, and summarized what Harrison had told him. Cabral did not ask Dolid to search or further investigate the student. Cabral then informed Harrison he had contacted Dolid and provided her with the information. Thereafter, Harrison went to the school to see if the school was going to follow up on the information given to Dolid. Harrison did not ask the school to do any follow up.[427]

Since the information came from Cabral, Dolid believed the tip to be reliable. Thereafter, Dolid confirmed the student was at school that day. She then decided to search the student to ensure the safety of the school's students. According to Dolid, having drugs on the school campus compromises the safety of the students at the school. Dolid ascertained that the student

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[423] Ibid.
[424] Id. at 751.
[425] 183 Cal.App.4th 72, 108 Cal.Rptr.3d 32 (2010).
[426] Id. at 76.
[427] Ibid.

was scheduled for a physical education class, and she had a school security officer verify that the student was present at that class, and dressed for physical education. After learning that the student was in the physical education class and was not wearing his street clothes, Dolid decided to search the student's physical education locker.[428]

Dolid, accompanied by Harrison and Livermore Police Detective Sergeant Conley, went to the student's P.E. locker and a campus supervisor opened it. Dolid said she had the police officers accompany her because she did not feel comfortable if she found something, keeping it on her person across campus. She wanted to be able to have them with her so that she felt comfortable and safe. However, she did not ask Harrison or Conley to conduct the search.[429]

Dolid searched the locker and found the jeans with the slit. Inside the slit was a plastic bag containing several pills. Dolid then took the pants to the school office and the student was detained. Dolid suspected that the pills found were Ecstasy and Harrison later confirmed that suspicion. Cabral arrived at the school after the search was completed and told Dolid the amount of Ecstasy found was consistent with possession for sale.[430]

A juvenile court petition was subsequently filed against the student alleging he possessed Ecstasy. After filing an unsuccessful motion to suppress the evidence, the student admitted to the offense. The student then appealed.[431]

The Court of Appeal held that school officials have a strong interest in creating and maintaining a safe and secure learning environment.[432] In Randy G., the California Supreme Court concluded that school officials have the power to detain a student for investigation of misconduct in the absence of reasonable suspicion if their authority is not exercised in an arbitrary, capricious or harassing manner.[433] The court held that the governmental interest at stake was of the highest order and that education was perhaps the most important function of state and local government. The court noted that some modicum of discipline and order is essential if the educational function is to be performed, and school personnel must be permitted to exercise their broad supervisory and disciplinary powers, without worrying that every encounter with a student will be converted into an opportunity for constitutional review.[434]

The Court of Appeal in K.S. noted that a certain level of cooperation between school and police officials is likely when violations of the criminal law, as well as the student code of conduct, are the basis for discipline.[435] In a prior case, the Court of Appeal held that a police officer assigned to a school as a school resource officer may search a student under the reasonable suspicion standard.[436]

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[428] Ibid.
[429] Ibid.
[430] Id. at 76-77.
[431] Id. at 77.
[432] See, In Re: Randy G., 26 Cal.4th 556, 562-563 (2001).
[433] Id. at 565.
[434] Ibid.
[435] See, In Re: William V., 111 Cal.App.4th, 1464, 4 Cal.Rptr.3d 695 (2003).
[436] Id. at 1468-1472.

The Court of Appeal rejected the argument that the police role in providing the information supporting this search and the presence of police officers at the search necessitated the use of a higher standard than reasonable suspicion. The Court of Appeals stated:

> "First, it would be senseless for the propriety of the search to depend on whether an informant called Vice Principal Dolid directly or, instead, called a police officer, who relayed the information to Dolid. The officer's involvement as a mere information conduit does not change the balance of interest that led to the decision in T.L.O. Neither Harrison nor Cabral advised, instructed, or directed Dolid to conduct the search; they merely provided the information that she independently evaluated. It is noteworthy that before conducting the search, Dolid learned that appellant was in a P.E. class and his pants could be searched without compelling him to disrobe or be subject to a pat down search. Ms. Dolid gathered additional information before acting on the informant's tip . . .
>
> "Second, Harrison's presence during Dolid's search should not change the result. So long as the school official independently decides to search and invites law enforcement personnel to attend the search to help ensure the safety and security of the school, it would be unwise to discourage the school official from doing so, at least where it is reasonable to suspect that contraband inimical to a secure learning environment is present."[437]

The Court of Appeal held that the extent of the police role in a student search at school will govern whether the T.L.O. reasonable suspicion standard applies. In making this determination, courts must review the totality of the circumstances. The court determined that substantial evidence supported the trial court's findings and it affirmed the trial court's conclusion that the T.L.O. reasonable suspicion standard applies.[438]

G. Administrative Proceedings

The cases of New Jersey v. T.L.O. and In Re William G. involved appeals from juvenile court proceedings.[439] Both cases involved the application of the Fourth Amendment to certain searches and whether the evidence should be excluded.[440] Neither case determined what the applicable rule should be in an administrative proceeding such as a student expulsion hearing. This issue was decided by the Court of Appeal in Gordon J. v. Santa Ana Unified School District.[441]

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[437] 183 Cal.App.4th 72, 80-81 (2010). See, also, State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (Wash. 1977); Vassallo v. Lando, 591 F.Supp.2d 172 (E.D.N.Y. 2008).
[438] Id. at 81-83.
[439] 105 S.Ct. 733 (1985); 40 Cal.3d 550 (1985).
[440] Ibid.
[441] 162 Cal.App.3d 530 (1984).

In Gordon J. v. Santa Ana Unified School District, the Court of Appeal held that the exclusionary rule was inapplicable to high school disciplinary proceedings even if the student's Fourth Amendment rights were violated.[442] However, school districts may still be liable for damages if they search a student without reasonable suspicion or search a student in an inappropriate manner.

H. Metal Detectors

In People v. Latisha W. , [443] the California Court of Appeal held that random metal detector weapon searches of high school students do not violate the Fourth Amendment constitutional ban on unreasonable searches and seizures.

The Appellant in Latisha W. was a high school student whose school had instituted a written policy for daily weapon searches. Parents and students were given notice before institution of the policy and again at frequent intervals. The searches were to be made at random, using a hand-held metal detector waved next to a student's person. Students were asked to open jackets or pockets to reveal items which triggered the detector.[444]

On the day Latisha W. was searched, the assistant principal had decided that there would be a search of all students who entered the attendance office without hall passes, or who were late to school. The appellant was one of several students who met these criteria and was searched. After the metal detector beeped, the appellant was asked to open her pocket, revealing a knife. Since the knife's blade was longer than 2.5 inches, the appellant was charged in a juvenile court petition. The appellant challenged the trial court's denial of her motion to suppress the knife as unlawfully seized.[445]

Although the court noted that there was no California case addressing the propriety of such a search, the court cited several school cases in which other states had upheld similar searches of students without individualized suspicion (i.e., without a reasonable suspicion that a particular student is in possession of a weapon or other contraband). The court stated that the cited cases are part of a larger body of law holding that special needs administrative searches, conducted without individualized suspicion, do not violate the Fourth Amendment where the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion is unworkable.[446]

The court found that the need of schools to keep weapons off campuses is substantial, since guns and knives pose a threat of death or serious injury to students and staff. The court found that the searches were minimally intrusive, since students were not touched and were required to open pockets or jackets only if they triggered the metal detector. Finally, the court found that a more rigorous standard of suspicion was unworkable, since schools have no

[442] Id. at 531.
[443] 60 Cal.App.4th 1524 (1998).
[444] Id. at 1526.
[445] Ibid.
[446] Id. at 1527.

practical way to monitor students before they arrive at school in the morning, and hence no feasible way to learn whether individual students have concealed guns or other weapons.[447]

A district that wishes to implement metal detector searches should adopt a policy containing certain safeguards. The following safeguards were suggested in an Attorney General's opinion[448] and are also consistent with the policy adopted by the high school in the Latisha W. decision:

1. The governing board should make an explicit finding, stating the reasons for introducing metal detectors in the schools of the district. However, a specific weapons accident or incident need not precede the introduction of metal detectors.

2. School officials should provide prior notice of metal detector searches, including the use of signs or public announcements. For example, school officials could provide students and parents/guardians with written notice prior to the school year, that metal detector searches will take place under specified circumstances at district schools. Advance notice allows for the removal of items which might otherwise cause embarrassment if revealed during a metal detector scan.

3. In addition to prior notice, other steps may be employed with the goal of minimizing the intrusion into privacy during each phase of the search;

   (a) Prior to the metal detector scan, all students may be asked to empty their pockets and belongings of all metal objects.

   (b) If an initial metal detector activation occurs, a second walk-through may be requested.

   (c) If a second activation results, a hand-held magnetometer could be used, if available, to focus on and discover the location of the metal source.

   (d) If the activation is still not explained, a physical frisk and/or searches of purses, bookbags, etc., may be indicated. At this stage, intrusions on privacy may be minimized by asking students to proceed to a private area. Expanded searches should be conducted by school officials of the same sex as the student searched.

[447] Ibid.
[448] 75 Ops.Cal.Atty.Gen. 155 (1992).

4. One suggested manner of conducting metal detector searches is on a blanket or indiscriminate basis, by use of fixed, permanent metal detectors which are applied to all students. Alternatively, random searches conducted pursuant to a uniform, established procedure, may satisfy the requirement of "reasonableness" under the Fourth Amendment. For example, school officials could use neutral criteria to determine that every fifth person entering the school would be subject to the metal detector scan. This would eliminate any exercise of official discretion in determining whether any specific person would be searched, and would minimize inconvenience and delay associated with searching an entire school's population.[449]

I. Random Searches by Drug-Sniffing Dogs

In B.C. v. Plumas Unified School District,[450] the Court of Appeals held that the random and suspicionless search of a high school student by a drug-sniffing dog was unreasonable under the circumstances.

The plaintiff was a student at Quincy High School in Plumas County, California. On May 21, 1996, the principal and vice principal told B.C. and his classmates to exit their classroom. As they exited, the students passed a deputy sheriff and a drug-sniffing dog who were stationed outside the classroom door. The dog alerted to a student other than B.C. The students were told to wait outside the classroom while the dog sniffed backpacks, jackets, and other belongings which the students had left in the room. When the students were allowed to return to the classroom, they again walked past the dog who again alerted to the same student. That student was searched by school officials but no drugs were found.[451]

B.C. sued the district, the district superintendent, the principal, and the vice-principal. B.C. sought money damages against the defendants in their individual capacities, alleging that their actions constituted an illegal search in violation of the Fourth Amendment to the United States Constitution.[452]

Citing the Fifth Circuit Court of Appeals' decision in Horton v. Goose Creek Independent School District,[453] the Ninth Circuit Court of Appeals agreed with the Fifth Circuit that "close proximity sniffing of the person is offensive whether the sniffer be canine or human." Because the court believed that the dog sniff infringed B.C.'s reasonable expectation of privacy, the court held that it constituted a search. The court then addressed whether the search was constitutional, emphasizing that the constitutionality of a search is measured by its "reasonableness in the

[449] Id. at 176-182.
[450] 192 F.3d 1260, 138 Ed.Law Rep. 1003 (9th Cir. 1999).
[451] Id. at 1263.
[452] Id. at 1262-63.
[453] 690 F.2d 470 (5th Cir. 1982).

circumstances." First, the court concluded that the students' privacy interests were not minimal. Second, the court found that there was no important governmental interest furthered by the intrusion, in that the record did not disclose that there was any drug crisis or even a drug problem at the high school. The court therefore concluded that the random and suspicionless search of B.C. by the drug-sniffing dog was unreasonable under the circumstances.[454]

The California Attorney General in a 2000 opinion stated that public school administrators may not direct students to vacate their classrooms and leave their personal belongings behind for sniffing by dogs trained in the detection of drugs.[455]

The opinion of the Attorney General was requested on the following questions:

> "May school administrators at a public high school implement a policy requiring on an unannounced, random, and neutral basis that (1) pupils be directed to vacate their classrooms and leave behind their personal belongings, including backpacks, purses, jackets, and outer garments, for sniffing by canines trained in the detection of drugs, (2) the pupils would proceed to a location not within the immediate vicinity of the canines and would remain away from the canines at all times, and (3) if a canine's behavior indicated the presence of drugs, the pupil's personal belongings would be searched by the school administrators without the pupil's consent?"[456]

The Attorney General concluded, first, that separating students from their personal belongings would constitute a "seizure" of property for purposes of the Fourth Amendment to the United States Constitution. Second, the Attorney General concluded that such a seizure would be "unreasonable," in violation of the Fourth Amendment. The Attorney General reasoned that implementation of the proposed policy would be random and without suspicion or probable cause, nor would it be based upon a known drug crisis at the school. Application of the standard requirement for individualized suspicion would not have jeopardized the interests of school administrators. Accordingly, the Attorney General concluded that it would be unreasonable and thus unconstitutional to separate the students from their personal belongings in order to have the belongings sniffed by drug detection dogs.[457]

J. Truant Students

In In Re Sean A.,[458] the Court of Appeal upheld the legality of a search. The school district had a policy of searching every student who left school during the day and who returned to the campus in the middle of the day. The school stated that the purpose of the rule was to

[454] Id. at 1265-1269.
[455] 83 Ops.Cal.Atty.Gen. 257 (2000).
[456] Id. at 258.
[457] Id. at 259.
[458] 191 Cal.App.4th 182, 120 Cal.Rptr.3d 72, 263 Ed.Law Rep. 824 (2010).

keep students who are on campus safe and to protect schools from weapons and drugs that students may bring onto the campus.

The Court of Appeal reviewed the case law and held that under In Re Randy G.,[459] the societal interest in safe schools was compelling. The court stated that the governmental interest at stake is of the highest order, that education is perhaps the most important function of state and local government, and that some modicum of discipline and order is essential if the educational function is to be performed. The court held in In Re Randy G. that school officials must be permitted to exercise their broad supervisory and disciplinary powers without worrying that every encounter with a student will be converted into an opportunity for constitutional review.[460]

The Court of Appeal also noted in In Re Latasha W.[461] that there was a large body of law holding that the special needs of public schools allowed searches to be conducted without individualized suspicion. The court in In Re Latasha W. upheld a policy of random weapons screening with a handheld metal detector. The court noted that the need of schools to keep weapons off campus is substantial. Guns and knives pose a threat of death or serious injury to students.[462]

Based on these prior cases, the Court of Appeal upheld the search. The court stated:

> "In sum, the search in this case was consistent with the type of action on the part of the school administrator that falls well within the definition of 'special needs' of a governmental agency as we have outlined in the case law above. Given the general application of the policy to all students engaged in a form of rule violation that can easily lend itself to the introduction of drugs or weapons into the school environment, we conclude that further individualized suspicion was not required. Accordingly, we find the trial court correctly denied the motion to suppress evidence."[463]

K. School Resource Officers

In In Re William V.,[464] the Court of Appeal ruled that a police officer assigned as a school resource officer may search a student based on reasonable suspicion that the student broke the law or violated school rules. The student had argued that since the school resource officer was a police officer, the higher standard of probable cause must apply.

The police officer involved was employed as a police officer by the City of Hayward and was assigned to Hayward High School as a school resource officer for a two year term. As part of the assignment, the police officer maintained an office at the school and was on the school campus approximately eight hours a day.

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[459] 26 Cal.4th 556, 567 (2001).
[460] Id. at 566.
[461] 60 Cal.App.4th 1524, 1527 (1998).
[462] Id. at 1527.
[463] 191 Cal.App.4th 182, 189-90 (2010).
[464] 111 Cal.App.4th 1464, 4 Cal.Rptr.3d 695, 180 Ed.Law Rep. 840 (2003).

On September 6, 2001, the resource officer was walking toward the administration building and observed William standing alone in the hallway. The resource officer noticed that William had a neatly folded red bandana hanging from the back pocket of his pants. Possession of a bandana on campus is a violation of school rules because colored bandanas commonly indicate gang affiliation.

When the officer made eye contact with William, William became nervous and started pacing. The officer approached William and asked him to remove the bandana. The officer took the bandana and decided to take William to the principal's office for discipline.

Before taking the student to the principal's office, the officer conducted a pat search for weapons. The officer was aware that the school had recently experienced gang activity and the color of the bandana suggested that it was gang related. In the officer's experience, the manner in which the bandana was folded and hanging from the pocket indicated that something was about to happen or that William was getting ready for a confrontation. The officer explained that he also conducted the search because William was trembling during the pat search and the officer felt something bulky around the waistband. The officer lifted William's jacket and observed a handle protruding from William's front pocket. The officer removed what turned out to be a steak knife with a five inch serrated metal blade. William admitted that he had the knife for protection. The officer escorted William to the school administration office.

On November 25, 2001, the Alameda County District Attorney filed a petition in juvenile court alleging one count of felony possession of a knife on school grounds in violation of Penal Code section 626.10(a). The student moved to suppress the evidence of a knife on the basis that an illegal search was conducted. The juvenile court denied the motion and the student appealed.

The Court of Appeal noted that both under New Jersey v. T.L.O.,[465] and In Re William G.,[466] the United States and California Supreme Courts have applied a reasonable suspicion standard to searches by school officials if a school official reasonably believes that a student has violated or is violating either the law or the rules of the school.

The Court of Appeal noted that In Re Randy G.,[467] the California Supreme Court refused to draw a distinction between school officials and law enforcement agencies and noted that the Illinois Supreme Court in People v. Dilworth[468] held that a school resource officer was a school official for purposes of assessing the legality of a search on school grounds. The Court of Appeal held that if a court were to rule that a school security officer has less authority to enforce school regulations and investigate misconduct than other school personnel, there would be no reason for a school to employ school resource officers or delegate to them duties related to school safety. Schools would be forced to assign certificated or classified personnel to yard and hall monitoring duties which many school districts cannot afford.

[465] 469 U.S. 325 (1985).
[466] 40 Cal.3d 550, 564 (1985).
[467] 26 Cal.4th 556 (2001).
[468] 661 N.E.2d 310 (Ill. 1996).

Therefore, the Court of Appeal concluded that a school resource officer has the same authority as other school officials to search a student based on reasonable suspicion. The Court of Appeal held that there was sufficient reasonable suspicion in the present case to justify the search at its inception and that the scope of the search was reasonable given the circumstances.

In In Re J.D.,[469] the Court of Appeal upheld a search by high school security officers of a locker. The Court of Appeal concluded that the conduct undertaken by school security officers was reasonable.

School security officers were informed by a student that a student named T.H. pulled out a gun and shot someone on a transit bus the previous day. School security officers contacted police to determine if T.H. was on the campus and if he had a weapon on the premises. Campus security officers had observed T.H. hanging out near Locker 2499, even though that locker was not assigned to him. The security officers searched Locker 2499 and did not find any weapons. The security officers decided to search Locker 2501 which was next to Locker 2499 since T.H. had been seen in the area. A backpack was found in Locker 2501 and inside the backpack was a sawed-off shotgun.[470]

At the same time, T.H. was contacted by school security officers and T.H. admitted that he had a handgun in his backpack. The officers secured the handgun.[471]

In searching Locker 2501, it appeared that the backpack belonged to another student, J.D. J.D. was contacted by security officers and waived his Miranda rights and admitted that the shotgun belonged to him. J.D. was arrested. He sought to suppress the evidence of the sawed-off shotgun in juvenile court. The juvenile court denied the motion and the Court of Appeal affirmed.[472]

The Court of Appeal held that the test for searches in schools is reasonableness. Courts must first consider whether the action was justified at its inception, and second, whether the search conducted was reasonably related in scope to the circumstances which justified the search in the first place.[473]

The Court of Appeal upheld the reasonableness of the search noting that school security officers were dealing with a shooting by a Richmond High School student on a public bus the previous day who was believed to be on school grounds on the day in question. The decision to detain the alleged shooter and check particular places on the campus T.H. frequented was a limited response and checking the locker adjacent to Locker 2501 was reasonable. The fact that student J.D., rather than T.H., had stored an illegal weapon in Locker 2501 did not affect the validity of the search.[474]

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[469] 225 Cal.App.4th 709, 170 Cal.Rptr.3d 464 (2014).
[470] Id. at 712-13.
[471] Id. at 713.
[472] Id. at 713-14.
[473] Id. at 718. With respect to cases involving locker searches in other states, see, In Re Patrick Y., 746 A.2d 405 (2000); State v. Jones, 666 N.W.2d 142 (Iowa 2003); Commonwealth v Carey, 554 N.E.2d 1199 (Mass. 1990).
[474] Id. at 719.

The Court of Appeal also noted that Richmond Police Officers assisted school security personnel but played a secondary role. The court held that the secondary role of the police officers does not cancel the fundamental feature of the search which was to secure the school premises from potential for violence.[475]

L. Videotaping of Students

A school district may videotape a student without parental permission and it would not be considered an illegal search in violation of the Fourth Amendment, under certain circumstances. The purpose of the videotaping would be to document the student's behavior. The videotape would be shared with school administrators, teachers, and parents and may possibly be used in a special education due process hearing or a student discipline proceeding.

There have been several cases where school staff has been concerned about student behavior and wished to videotape what occurred. In one case a high school sophomore was sent to the school office for allegedly being under the influence of alcohol. When told he was being suspended from school, the student allegedly made death threats against the staff which he later denied. In another case a special education student had to be physically contained due to the student's behavior and the parents later complained about the staff's conduct.

Under certain circumstances, school personnel may videotape students to protect the safety of students and staff. As discussed below, the courts have held that videotaping is not appropriate in locker rooms where students change their clothes and where students have a reasonable expectation of privacy. However, the courts have also held that students have a diminished expectation of privacy in public places such as hallways, offices, classrooms and playgrounds and, therefore, videotaping in public areas is permissible to protect the safety of students, staff and others and is not an illegal search.

In Brannum v. Overton County School Board,[476] the Sixth Circuit Court of Appeals held that a policy of setting up video surveillance equipment throughout a school for security purposes is subject to Fourth Amendment limitations on search and seizure. The court held that the scope and manner in which the video surveillance was conducted must be justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place.[477] The Court of Appeals held that any search conducted must be conducted in a light of the student's reasonable expectations of privacy, the nature of the intrusion, and the severity of the school official's need in enacting such policies.

In Brannum, the school district installed and operated video surveillance equipment in the boys and girls locker rooms at the middle school while the students were changing their clothes. The Court of Appeals held that there is a significant privacy interest when students are changing

[475] Id. at 719-20. See, also, In Re K.S., 183 Cal.App.4th 72 (2010) (assistance of police officers in conducting search for drugs did not invalidate the search).
[476] 516 F.3d 489 (6th Cir. 2008).
[477] Id. at 496.

their clothes. The court noted that video surveillance is inherently intrusive and that the video camera "sees all, and forgets nothing."[478]

The Court of Appeals stated that in determining whether a search is excessive in its scope, the nature and immediacy of the governmental concern that prompted the search must be considered. For example, the court stated that surveillance of school hallways and other areas in which students mingle in the normal course of student life is one thing, but camera surveillance of students dressing and undressing in the locker room is quite another. The court stated that reasonableness with respect to videotaping is the congruence or incongruence of the policy to be served (e.g., student safety) and the means adopted to serve it.[479]

In M.R. v. Lincolnwood Board of Education,[480] the United States District Court held that the videotaping of a special education student by school officials to document the student's behavior in public areas does not violate any constitutional right of privacy, nor constitute an illegal search or seizure.[481]

In Lincolnwood Board of Education, M.R. was a thirteen year old student in the eighth grade who is diagnosed as having an emotional disorder. The student was recommended for a therapeutic day school, but the parents objected. The student remained at the public school pending resolution of the matter. The school district videotaped the student to document his bizarre behavior, such as barking and acting like a dog, biting his thumbs and pulling his hair, physically threatening others, laying on the floor in the hall on his side and going around in circles, kicking at all of the students that are in the immediate area, and then remaining still and unresponsive, getting in fights with other students at recess, interrupting other students' recess activities, being disruptive in an assembly to the extent of having to be removed, making fun of other students' names, excessive crying, increasing use of verbal threats against teachers and students, hitting a teacher and an aide, screaming and swearing over the office intercom system, and turning the lights off and on.

In Berkeley County School District, the Family Privacy Compliance Office (FPCO) of the United States Department of Education[482] stated that if the child of the parent requesting the videotape is the only student pictured fighting in the tape, the parent would have a right to inspect and review it under FERPA. However, if another student was pictured fighting in the video, then the parent would not have FERPA inspection rights over that portion of the tape.

The letter states that if the education records of a student contain information of more than one student, the parent requesting access to education records has the right to inspect and review, or be informed of, only the information in the record directly related to his or her child. If another student is pictured fighting in the videotape, the parent would not have the right to inspect and review that portion of the videotape.

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[478] Id. at 496.
[479] Id. at 497-98.
[480] 843 F.Supp. 1236 (N.D.Ill. 1994).
[481] Id. at 1239. See, also, United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991); United States v. Boden, 854 F.2d 983, 990 (7th Cir. 1988); United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991); United States v. Gonzalez, 328 F.3d 543 (9th Cir. 2003).
[482] 104 LRP 44490 (Feb. 10, 2004).

In Magnolia Independent School District,[483] the FPCO wrote in a letter that a videotape of routine activities by students riding a school bus is not directly related to any particular student and therefore not an educational record under FERPA.[484] If, however, a videotape of a school bus ride records a student involved in an assault on another student, then that part of the videotape would be considered directly related to a student and therefore an educational record of both students.

FPCO noted that under FERPA, the standard is whether the information is directly related to a student and not whether a student is simply personally identifiable. Once a determination has been made that a particular record or a part of a record is directly related to a student, then the record becomes an educational record under FERPA and it may not be disclosed without a parent's prior written consent. If all personally related information has been redacted, the record may be released without parental consent.[485] If a determination is made that a videotape or other record is not directly related to any particular student, then that record may be released without parental consent under FERPA. FERPA does not prevent an educational agency or institution from releasing a videotape of routine school activities solely because students are personally identified.

It should be noted that under California law, Education Code section 51512 prohibits any person, including a pupil, from recording conduct in any classroom without the prior consent of the teacher and the principal of the school. Any person other than a pupil, who willfully violates Section 51512 is guilty of a misdemeanor. Therefore, it is essential that the principal and teacher consent to the videotaping of the student in a classroom.[486]

In summary, school personnel may videotape students in public places if the videotaping is justified at its inception (i.e., to protect the safety of students, staff and others) and reasonably related in scope to the circumstances which justified the videotaping (i.e. the videotaping should be limited in time and scope to the need for the videotaping and should avoid videotaping other students, if possible). In the examples given, where a student is making serious verbal threats to school personnel in the school office, it would be permissible to videotape the threats to protect the school staff and for use in a future student disciplinary proceeding. Where a student has to be restrained due to the student's erratic behavior, school staff may videotape the physical containment measures taken by staff to document staff conduct and protect the safety of all concerned.

It should be kept in mind that the videotaping of students should be used sparingly and must be justified at its inception (e.g., to protect the safety of students, staff and others) and reasonably related in scope to the circumstances involved (e.g. to avoid the videotaping of others, if possible). The unjustified and unnecessary videotaping of students should be avoided.

[483] 107 LRP 685 (Aug. 23, 2006).
[484] 20 U.S.C. § 1232g; 34 CFR § 99.3.
[485] See, 34 CFR § 99.3; 99.30.
[486] See, also, Evens v. Superior Court, 77 Cal.App.4th 320, 91 Cal.Rptr. 2d 497 (2000).

STUDENT DRUG TESTING

In Vernonia School District v. Acton,[487] the United States Supreme Court upheld the constitutionality of random drug testing of student athletes. The court did not rule on the question of random drug testing of all students.

In Vernonia School District v. Acton, the United States Supreme Court upheld a random urinalysis drug testing program established by the Vernonia School District for students who participated in the school district's athletic programs.[488]

A. The School District's Policy

The policy applied to all students participating in interscholastic athletics. Students wishing to participate in sports and their parents were required to sign a form consenting to the testing.

Athletes were tested at the beginning of each season. In addition, once each week during the season, the names of athletes were placed in a pool from which a student, with the supervision of two adults, drew out names of 10% of the athletes for random testing. Those selected were notified, tested that same day, if possible, and were required to produce a sample. The boys remained fully clothed with their back to the monitor when providing a sample. The monitor would stand approximately 12 to 15 feet behind the male students. Girls produced samples in an enclosed bathroom stall so that they could be heard but not observed. After the sample was produced it was given to the monitor who checked it for tampering and then transferred it to a vial. The samples were sent to an independent laboratory which routinely tested them for amphetamines, cocaine and marijuana. The laboratory's procedures were found by the court to be 99.94% accurate. The school district followed strict procedures regarding the chain of custody and access to test results. The laboratory was not told of the identity of the students whose samples it tested.[489]

Only the superintendent, principals, vice-principals, and athletic directors had access to the test results, and the test results were not kept for more than one year. If a sample tested positive, a second test was administered as soon as possible to confirm the result. If the second test was negative, no further action was taken. If the second test was positive, the athlete's parents were notified and the school principal convened a meeting with the student and his or her parents and the student was given the option of participating for six weeks in an assistance program that included weekly urinalysis or accepting suspension from athletics for the remainder of the current season and the next athletic season. The student was then retested prior to the start of the next athletic season. The policy stated that the second offense resulted in automatic imposition of a suspension for the remainder of the current season and the next athletic season. A third offense resulted in a suspension for the remainder of the current season and the next two athletic seasons.[490]

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[487] 115 S.Ct. 2386 (1995).
[488] Ibid.
[489] Vernonia School District v. Acton, 115 S.Ct. 2386 (1995).
[490] Ibid.

B. Procedural Background

In the fall of 1991, James Acton, a seventh-grader in the district, signed up to play football at one of the district's schools. He was denied participation because he and his parents refused to sign the testing consent forms. The parents filed suit and a trial was held before the district court. The district court denied the Actons' claims and dismissed the action. The United States Court of Appeals for the Ninth Circuit reversed, holding that the policy was unconstitutional. The United States Supreme Court then granted a hearing and held the policy to be constitutional.[491]

C. Review of Case Law on Search and Seizure

The United States Supreme Court reviewed the case law with respect to the Fourth Amendment of the United States Constitution which states in part, "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, . . ."[492] In New Jersey v. T.L.O.,[493] the United States Supreme Court held that the Fourth Amendment and the Fourteenth Amendment provide a constitutional guarantee with respect to searches and seizures by public school officials. In Skinner v. Railway Labor Executives' Association,[494] the United States Supreme Court held that state-compelled collection and testing of urine constituted a search subject to the demands of the Fourth Amendment.

The court held that the ultimate test of the constitutionality of a governmental search under the Fourth Amendment is "reasonableness." Whether a particular search is reasonable is determined by balancing the intrusion on the individual's Fourth Amendment interest of privacy against the governmental interest in the search.[495]

The court noted that in previous cases they found special circumstances to exist in the public school context. In T.L.O., the court found that a warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed in public schools and strict adherence to the requirement that searches be based upon probable cause would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools.[496]

In T.L.O., the court upheld searches based on individualized suspicion of wrongdoing without probable cause and without a warrant.[497] In Skinner,[498] the United States Supreme Court upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents and in Treasury Employees v. VonRaab,[499] the court upheld random drug testing of federal customs officers who carry arms who are involved in drug interdiction.

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[491] Ibid.
[492] United State Constitution, Fourth Amendment; Vernonia School District v. Acton, 115 S.Ct. 2386 (1995).
[493] 469 U.S. 325 (1985).
[494] 489 U.S. 602 (1989).
[495] Vernonia School District v. Acton, 115 S.Ct. 2386 (1995).
[496] Ibid.
[497] New Jersey v. T.L.O., 469 U.S. 325 (1985).
[498] 489 U.S. 602 (1989).
[499] 489 U.S. 656 (1989).

The court noted that student expectations of privacy in the public schools were not as great as an adult in the general society. The court noted that while the notion of in loco parentis had been rejected by the court in T.L.O., school administrators still had custodial and tutelary power over public school students permitting them a degree of supervision and control that could not be exercised over free adults and noted that a proper educational environment requires close supervision of school children as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. Thus, while children do not shed their constitutional rights at the schoolhouse gate, the nature of those rights is substantially different from the rights of adults in the general society.[500] The court stated:

> "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children. . . ."[501]

The court went on to note that legitimate privacy expectations are even less with regard to student athletes. Public school locker rooms afford little privacy to students. There are no individual dressing rooms, there is a communal shower, and students dress and undress in front of each other. The court also noted that extracurricular activities involved a higher degree of regulation than attendance at school. There may be a pre-season physical exam, insurance coverage may be required, and a minimum grade point average may be required.[502]

D. Compelling Governmental Interest

The court then went on to discuss the immediacy of the governmental concern at issue. The court found that the deterring of drug use by the nation's school children is at least as important as enhancing efficient enforcement of the nation's laws against the importation of drugs which was the governmental concern in Von Rabb or deterring drug use by engineers and trainmen which was the governmental concern in Skinner.[503]

The court noted that students are of an age when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than adult ones and the childhood losses in learning are lifelong and profound. The court also noted that the effect of drug-infested schools affects not only the users but the entire student body and faculty as the educational process is disrupted. The court stated:

> "In the present case, moreover, the necessity for the state to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children from whom it has undertaken a special responsibility of care and direction."[504]

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[500] Vernonia School District v. Acton, 115 S.Ct. 2386 (1995).
[501] Id. at 2392.
[502] Vernonia School District v. Acton, 115 S.Ct. 2386 (1995).
[503] Vernonia School District v. Acton, 115 S.Ct. 2386 (1995).
[504] Ibid.

E. Necessity for Random Drug Testing

The court went on to note the negative effects that drug use has upon athletic performance and the physical harm it can cause to school athletes. The court found that random drug testing was an effective means of dealing with the drug problem which was largely fueled by the role model effect of athletes' drug use and was a particular danger to athletes. The court rejected the argument that a less intrusive means was available such as drug testing based on individualized suspicion. The court found that individualized suspicion drug testing would entail substantial difficulties and would be impractical.[505] The court stated:

> "Respondents' alternative entails substantial difficulties – if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. . . . And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. . . .
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> ". . . In many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse.
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> "Taking into account all the factors we have considered above – the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search – we conclude Vernonia's Policy is reasonable and hence constitutional."[506]

The court went on to caution against the assumption that suspicionless random drug testing would be constitutional in other contexts. In a concurring opinion, Justice Ginsburg noted that the most severe sanction allowed under the policy in question was suspension from extracurricular activities and indicated that she comprehended the court's opinion as reserving to a later decision the question of whether a school district could constitutionally impose routine drug testing on all students required to attend school.[507]

Given the fact that the court did not directly address a random drug policy applied to all students, but one only applied to student athletes, and given Justice Ginsburg's concurring opinion, it is unclear whether random drug testing of all students would be constitutional. It is also unclear whether a policy which suspended or expelled students who tested positive or resulted in referral to law enforcement would be constitutional.

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[505] Vernonia School District v. Acton, 115 S.Ct. 2383 (1995).
[506] Id. at 2386.
[507] Vernonia School District v. Acton, 115 S.Ct. 2386 (1995).

In Board of Education v. Earls,[508] the United States Supreme Court upheld the constitutionality of a school district's drug testing policy which required all students participating in competitive extracurricular activities to submit to drug testing.

In the fall of 1998, the school district in Tecumseh, Oklahoma, adopted a drug testing policy which required all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. In practice, the policy only applied to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, cheerleading, and athletics. Under the policy, students were required to take a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion. The urinalysis tests are designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbiturates, not medical conditions or the presence of authorized prescription medications.[509]

The Supreme Court noted that the Fourth Amendment to the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Therefore, the court held, that a school district's policy must be reasonable to be constitutional. The court held that the probable cause standard applies in criminal investigations but is unsuited to determine the reasonableness of administrative searches where the government seeks to prevent the development of hazardous conditions.[510]

In a previous case, Vernonia School District v. Acton,[511] the United States Supreme Court upheld a drug policy requiring the drug testing of athletes. In Earls, the United States Supreme Court extended the Vernonia decision to students involved in extracurricular activities beyond athletics.[512]

The Supreme Court noted drug abuse is a nationwide epidemic that makes the war against drugs a pressing concern in every school district in the nation. Therefore, school districts do not have to show that there was a demonstrated problem of drug abuse in their particular school. The court stated:

> "Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.
>
> "Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was

[508] 122 S.Ct. 2559, 166 Ed.Law Rep. 79 (2002).
[509] Id. at 2562-2563.
[510] Id. at 2564.
[511] 515 U.S. 646 (1995).
[512] 122 S.Ct. 2559, 2569 (2002).

entirely reasonable for the school district to enact this particular drug testing policy."[513]

SUPERVISION OF STUDENTS AND SCHOOL SAFETY

A. Duty of Pupils

All pupils are required to attend school punctually and regularly, conform to the regulations of the school, obey promptly all directions of teachers and school administrators, observe good order and propriety of deportment, be diligent in their studies, respectful to their teachers and other school employees, kind and courteous to their schoolmates and refrain entirely from the use of profane and vulgar language. Students may be required to remain at school to participate in activities and for purposes of detention.[514]

B. Right to Safe Schools and Supervision of Students

School districts have a duty to supervise students in their conduct and to enforce rules and regulations necessary for the protection of students.[515] However, the duty of supervision does not require round-the-clock supervision on school premises and is limited to school-related or school-sponsored functions and activities taking place during school hours.[516] School districts, however, may be liable for injuries to students which occur during school hours or which result from school district's failure to warn parents of possible danger.[517]

The passage by the voters in 1982 of Article I, Section 28(c) of the California Constitution has added an additional element to the duty of public schools to protect students. The amendment states:

> "Right to safe schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."[518]

To discharge this duty, teachers and administrators are authorized to exercise reasonable control over students but only such physical control as is necessary to maintain order, protect property, and the health and safety of other students.[519] To maintain order, school districts are authorized to establish security departments.[520]

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[513] Id. at 2568.
[514] 5 California Code of Regulations, sections 300, 307, 353.
[515] Dailey v. Los Angeles Unified School District, 2 Cal.3d 741 (1970).
[516] Bartell v. Palos Verdes Peninsula School District, 83 Cal.App.3d 492, 499-500 (1978).
[517] See, also, M.W. v. Panama Buena Vista Union School District, 110 Cal.App.4th 508, 1 Cal.Rptr.3d 673, 178 Ed.Law Rep. 404 (2003) (district may be liable for molestation of student by another student in school restroom before school). Joyce v. Simi Valley Unified School District, 110 Cal.App.4th 292, 1Cal.Rptr.3d 712, 178 Ed.Law Rep. 421 (district may be liable where open gate encouraged students to use unregulated crossing).
[518] Cal. Const., Article I, section 28(c).
[519] Education Code section 44807.
[520] Education Code section 44807. Education Code section 39670 et seq.

C. Applicability of Criminal Law

Criminal law is applicable everywhere in the state including the public schools.[521] The power and authority of law enforcement officers extend to any place in the state including school grounds, and the police are available to assist school officials in maintaining order on school campuses.[522] School officials are required to cooperate with law enforcement officers and law enforcement officers have the right to come on campus to interview students who are suspects or witnesses.[523]

When a principal or other school official releases a minor pupil to a peace officer for the purpose of removing the minor from the school premises, the school official shall take immediate steps to notify the parent, guardian, or responsible relative of the minor regarding the release of the minor to the officer and regarding the place to which the minor is being taken.[524] However, in cases where the minor is taken into custody as a victim of suspected child abuse, the school official is required to provide the peace officer with the address and telephone number of the minor's parent or guardian and it is the responsibility of the peace officer to take immediate steps to notify the parent, guardian, or responsible relative of the minor that the minor is in custody and the place where he or she is being held. The peace officer, under certain conditions, may refuse to disclose the place where the minor is being held for a period not to exceed twenty-four hours.[525]

Teachers and school administrators have the duty to maintain peace and order on school campuses. When the breach of discipline or order involves criminal behavior, such as drug possession, sale of drugs, drug use, alcohol use, weapons possession, explosives, assault and battery, false imprisonment, disturbing the peace, theft, robbery, extortion and receiving stolen property, school officials should contact law enforcement.[526]

D. Parental Liability

Parents are liable for damage or injury to pupils or school property willfully caused by a pupil up to the amount of $25,000.00.[527] Parents may also be liable for any reward up to $25,000.00 which is offered by the school district.[528] School officials also have the authority to order students, school employees and persons who do not have lawful business on a school campus to leave.[529] If it appears that a person has entered the campus for the purpose of

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[521] Penal Code section 777.
[522] Penal Code sections 777, 830.1.
[523] 54 Ops.Cal.Atty.Gen. 96 (1971); 34 Ops.Cal.Atty.Gen. 93 (1959).
[524] Education Code section 48906.
[525] Ibid.
[526] The following are examples of criminal offenses which may occur on school campus: Health and Safety Code section 11350 et seq., Business and Professions Code section 25608; Penal Code sections 626.9, 12001, 12021.5, 12072, 12551, 12552, 12028, 468, 12094, 12001.5, 12220, 12520, 12025, 417, 653(k), 12020, 626.10, 12582, 417, 12303.2.
[527] Civil Code section 1714.1; Education Code section 48904 still provides for damage up to $10,000. Since Civil Code section 1714.1 covers a broad range of activities, its $25,000 limit will most likely apply. The Juvenile Court may also order the student to pay restitution to the school district which may include the school district's labor costs to repair school property. See, In Re Johnny M., 100 Cal.App.4th 1128, 123 Cal.Rptr. 316 (2002).
[528] Civil Code section 1714.1; Education Code section 48904 sets a limit of $10,000, but since Civil Code section 1714.1 covers a broad range of activities, it would, most likely, apply.
[529] Penal Code section 626.2.

committing an act likely to interfere with the peaceful conduct of the activities of the campus or that the person's presence would be disruptive of the educational process, he may be asked to leave. If he refuses to leave or returns within a specified time, he may be fined or imprisoned.[530] In addition, any person who possesses a firearm within 1,000 feet of a school or on school grounds may be imprisoned.[531] A school district is required to inform teachers of each student who has engaged in or is reasonably suspected to have engaged in conduct that is an expellable or suspendable offense.[532] Failure to provide the information to teachers is a misdemeanor.[533]

E. Notice to Teachers

In Skinner v. Vacaville Unified School District,[534] the Court of Appeal stated that Education Code section 49079 may impose on a school district a mandatory duty to inform teachers of a student's record of physical violence. Many districts advise teachers that there is a list of students who have engaged in such acts available at the school office for their review. Teachers who come to the office to see the list will be informed of each pupil who has engaged in such acts and the district will have provided the information to the teacher based on records that the district maintains. Whether the courts would say that requiring teachers to come to the office to see this information, rather than delivering the information to them is a violation of Section 49079, is difficult to say. It could be argued that this procedure better protects the confidential nature of the information.

The issue will most likely come up in the context of a civil action in which a teacher or student is injured, such as in Skinner. If, for example, a student is injured by another student who had previously engaged in such acts and the injury could have been prevented by a teacher more closely supervising the situation if the teacher had gone to the office to obtain the information, a jury might find the teacher and the school district were negligent for failing to obtain the information and thereby failing to maintain higher supervision over a student with such a discipline history.

ACCESS TO SCHOOL CAMPUSES

Assembly Bill 123[535] amended Penal Code section 626.8, effective January 1, 2012. Penal Code section 626.8 provides that a person who comes into any school building or upon any school ground, or adjacent street, sidewalk, or public way, whose presence or acts interfere with or disrupt a school activity, without lawful business, or who remains after having been asked to leave, is guilty of a misdemeanor. A school is defined to include a preschool or public or private school operating classes for grades K-12.

Assembly Bill 123 expands the provisions of Penal Code section 626.8 to also apply to any person who comes into any school building or upon any school ground, or adjacent street, sidewalk, or public way, and willfully or knowingly creates a disruption with the intent to

[530] Ibid.
[531] Penal Code section 626.9.
[532] Education Code section 49079.
[533] Ibid.
[534] 37 Cal.App.4th 31, 39 (1995).
[535] Stats. 2011, ch. 161.

threaten the immediate physical safety of any pupil in preschool, kindergarten, or any of grades 1-8, inclusive, arriving at, attending, or leaving from school.

Assembly Bill 123 also added Penal Code section 626.8(e), which states, "This section shall not be utilized to impinge upon the lawful exercise of constitutionally-protected rights of speech or assembly." Therefore, districts cannot remove individuals from school property if they are engaging in protected First Amendment activity (e.g., individual seeks a meeting with the principal to discuss a school policy).[536]

In Reeves v. Rocklin Unified School District,[537] the Court of Appeal held that outside political groups may be barred from entering a school campus to hand out literature if the principal or other school administrator believes that it will cause a disruption.

In Reeves, a member of a protest group wanted to hand out literature to students before class on the campus of Rocklin High School. The principal of the school was concerned that their presence and activities would cause a disruption to the educational process at the school and refused to let them enter the campus.[538]

The group distributed its pamphlets on nearby public streets and traffic was backed up for nearly two miles. The group also obstructed sidewalks, causing students to walk in the street on their way to school. As a result, many students were late to class.[539]

The group then filed a lawsuit in Superior Court and, after a trial, the Superior Court judge upheld the school district's actions. The group then appealed to the Court of Appeal.[540]

The Court of Appeal reviewed Penal Code section 627 et seq., which regulates access by outsiders to school campuses. The Court of Appeal held that these provisions were enacted by the Legislature to promote safety and security of public schools, and to restrict the access of unauthorized persons on school campuses. The Court of Appeal found that the purpose of these statutory provisions was to implement Article I, Section 28 of the California Constitution, which guarantees all students and staff the constitutional right to attend safe, secure and peaceful public schools. These statutory provisions require outsiders to register with the principal before entering school campuses. Section 627.4(a) authorizes the principal or the principal's designee to refuse to register an outsider if he or she has a reasonable basis for concluding that the outsider's presence or acts would disrupt the school, its students, its teachers, or employees, or

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[536] The following cases have upheld barring individuals from school property: Putman v. Keller, 332 F.3d 541 (8th Cir. 2003) (banning a suspended employee from campus); Frost v. Hawkins County Board of Education, 851 F.2d 822 (6th Cir. 1988) (banning a parent who insisted on teaching her child reading at school); Lovern v. Edwards, 190 F.3d 648 (4th Cir. 1999) (banning a noncustodial parent from school); Cina v. Waters, 779 N.Y.S.2d 289 (N.Y. App. Div. 2004) (banning a parent with a gun); Nichols v. Western Local Board of Education, 805 N.E.2d 206 (Ohio Com. Pl. 2003) (banning parent for altercation with volleyball coach); Henley v. Octorara Area School District, 701 F.Supp. 545 (E.D. Pa 1988) (banning a person who vandalized a school); Embry v. Lewis, 215 F.3d 884 (8th Cir. 2000) (banning political activists); Royer v. City of Oak Grove, 374 F.3d 685 (8th Cir. 2004) (banning man who sexually harassed an employee); and, Bowman v. White, 444 F.3d 967 (8th Cir. 2006) (banning street preacher).

[537] 109 Cal.App.4th 652, 135 Cal.Rptr.2d 177 Ed.Law Rep. 414 (2003).

[538] Id. at 654-55.

[539] Id. at 655.

[540] Ibid.

would result in damage to property or would result in the distribution or use of unlawful or controlled substances.[541]

Section 627.4(b) authorizes the principal or the principal's designee or school security officer to revoke an outsider's registration if he or she has a reasonable basis for concluding that the outsider's presence on school grounds would interfere or is interfering with the peaceful conduct of the activities of the school, or would disrupt the school, its students, teachers, or other employees.[542]

Penal Code section 627.7(a) makes it a misdemeanor to enter or remain on school grounds without having registered, after being denied registration or after registration has been revoked. A person whose registration has been denied or revoked may request a hearing before the principal or superintendent pursuant to Penal Code section 627.5. Education Code section 32211 also authorizes a principal to request that an outsider leave public school grounds if that person's continued presence would be disruptive to classes or other activities of the public school program.[543]

The Court of Appeal held that these statutory provisions were constitutional and did not violate the First Amendment of the United States Constitution. The Court of Appeal cited the United States Supreme Court's decision in Perry Education Association v. Perry Local Educational Association,[544] which held that not all public property is an open forum, and that government may limit access to government property with appropriate time, place, and manner regulations, and may reserve the public property for its intended purposes (i.e., public school).

The Court of Appeal noted that the courts have found schools to be non-public forums and may restrict access.[545] In DiLoreto v. Board of Education,[546] the Court of Appeal held that Downey High School was a non-public forum and that the school district retained the right to regulate access to the school.

The Court of Appeal noted that public high schools have a special nature and function, and have a unique relationship to their students due to the compulsory character of school attendance, the expectation and reliance of parents and students on schools and staff for safe buildings and grounds, and the importance to society of the learning activity which is to take place in public schools. The Court of Appeal defined disruption in the context of school access laws as conduct or acts that would disrupt the normal activities of the school campus, and held that under the First Amendment, school administrators may reasonably regulate access to school grounds and impose conditions so as to preserve the property under their control for the use for which it was lawfully dedicated (i.e., education). The court went on to state that the First Amendment does not require school officials to wait until disruption actually occurs before they

[541] Id. at 656-58.
[542] Id. at 657-58.
[543] Id. at 658.
[544] 460 U.S. 37, 44 (1983).
[545] See, Grattan v. Board of School Commissioners, 805 F.2d 1160 (4th Cir.1986) (a school parking lot is not a public forum and a school district may deny access).
[546] 74 Cal.App. 4th 267 (1999).

may act. The court held that school officials have a duty to prevent the occurrence of disturbances.[547]

The holding in this case should be very helpful to school districts in the future should similar situations arise.

DO NOT RESUSCITATE (DNR) REQUESTS

A. Parent Request for DNR Order

Frequently, districts receive requests from parents to not resuscitate their child. Recently, a parent submitted a Physician Order for Life Sustaining Treatment (POLST) with boxes checked stating, do not attempt to resuscitation/DNR (allow natural death) and limited additional interventions. Also checked was a box which states, "Transfer to hospital only if comfort needs cannot be met in current location." The emergency medical services pre-hospital do not resuscitate (DNR) form submitted by the parent states the following:

> "I understand DNR means that if my heart stops beating or if I stop breathing, no medical procedure to restart breathing or heart functioning will be instituted.
>
> "I understand this decision will not prevent me from obtaining other emergency medical care by pre-hospital emergency medical care personnel and/or medical care directed by a physician prior to my death.
>
> "I understand that I may revoke this directive at any time by destroying this form and removing any 'DNR' medallions."

The form prepared by the California Medical Association and the Emergency Medical Services Authority of California was signed by the student's parent. The form was also signed by the student's treating physician.

In our opinion, California law does not authorize a school district to honor DNR requests, and therefore, the school district should not honor the parents' DNR request but should attempt to resuscitate the student and contact emergency medical services.[548]

B. 2010 AMA Journal Article

In an article in the American Medical Association (AMA) Journal of Ethics (July 2010)[549] an article entitled, "Do Not Attempt Resuscitation Orders in Public Schools" discussed

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[547] Id. at 662-66.

[548] As a practical matter, it should be noted that when 911 is called, the paramedics normally arrive within a very short period of time. The parents can provide a copy of their DNR order to emergency services and request that the paramedics honor the DNR order.

[549] Volume 12, No. 7: 569-572.

a parent's request to honor DNR orders in the public school setting. The article made the following arguments in favor of school districts honoring DNR requests:

- Avoiding resuscitation efforts may be in the best interest of the child (by the parent's assessment)

- Honoring the DNR request would honor carefully considered goals of care in accord with medical or non-medical caregiver's duties and obligations to treat a child kindly and not to harm.

- DNR requests placed decisions about end of life issues in the hands of those seen as having the most personal and accurate viewpoint from which to make plans for an individual child, rather than leaving decisions about interventions to others who are not experiencing the child's life as closely.[550]

The article summarized the arguments against school districts honoring DNR requests in public school settings as follows:

- Not honoring DNR requests would protect vulnerable children from discrimination based on disability.

- Not honoring DNR orders prevents possible traumatic experiences for non-medical school personnel and classmates who might be asked to refrain from resuscitating a child and witness the death of a child.

- Implementing DNR orders would raise practical issues of comprehension and implementation by non-medical personnel.

- Not honoring DNR requests would protect chronically ill children who are at risk of being unfairly treated. If disabling conditions that may eventually be life shortening are confused or conflated with terminal conditions (that even medical specialists have difficulty determining), non-medical school personnel would be placed in a vulnerable position of making medical decisions for which they are not trained.

- Onlookers will be traumatized by doing nothing because it feels like abandonment of a child.

- Schools already have legal mandates to ensure best practice for providing instruction to children with special health care needs,

[550] American Medical Association Journal of Ethics (July 2010), Volume 12, No. 7, pg. 570.

making additional guidance less necessary and potentially constraining.[551]

The article goes on to state that professional societies including the National Association of School Nurses and the American Academy of Pediatrics have supported the use of DNR orders or requests in the school setting.[552]

C. 2010 AAP Statement

In 2010, the American Academy of Pediatrics (AAP) issued a policy statement entitled, "Honoring Do Not Attempt Resuscitation Requests in Schools."[553] In the article, it states that DNR requests are not orders to "do nothing" nor do they represent a decrease in the quality or intensity of care. Rather, DNR requests should be implemented in the context of palliative care,[554] including plans for managing pain and other symptoms, as well as addressing emotional and spiritual needs. The article states that although DNR requests have become accepted within inpatient health care facilities, such as hospitals and nursing homes, there have been challenges to coordinating end of life care in other settings, particularly in situations in which the use of CPR is an established standard of care.

The article further states that recent health care and societal trends have made it possible for children with chronic conditions to attend school. The article notes that under the IDEA, schools are exempt from providing "medical services." The article states that DNR requests are becoming more accepted in schools but notes that more than just the cooperation of the school district is required. The article notes that changes in local and state laws are needed.[555]

The AAP article notes that school staff members lack the training and perspective to implement DNR requests. When faced with developing symptoms that may culminate in a cardiac or respiratory arrest in a child, school personnel may be uncertain how to proceed. A student's cardiac or respiratory arrest may not be the result of the underlying disease process but rather caused by another, reversible cause.

The AAP article states that it is important for pediatricians to understand, acknowledge, and address the concerns of school employees, and understand that school employees may not wish to withhold CPR or other resuscitation measure for legal or moral reasons. It may be a startling event for school employees to witness and potentially traumatic for bystanders when CPR is withheld.[556]

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[551] Ibid.
[552] Ibid.
[553] Pediatrics, Official Journal of the American Academy of Pediatrics (April 26, 2010).
[554] Palliative care is generally used to ease the symptoms of a disease without curing the disease or to moderate the intensity of a disease. See, Merriam-Webster's Collegiate Dictionary, Eleventh Edition (2008), page 893.
[555] Id. at 1073-1075. As discussed later in this legal opinion, California law does not authorize school employees to implement DNR requests. California law would have to be amended by the Legislature to authorize school employees to implement DNR requests in school settings. California law would also have to be amended to provide immunity from liability to school employees when implementing DNR requests.
[556] Id. at 1075.

The AAP article recommends that pediatricians understand, acknowledge, and address these concerns openly and sympathetically. The article recommends that the pediatrician approach the school nurse in an attempt to persuade the school staff to implement DNR requests.[557] The article recommends that pediatricians work with school nurses to incorporate family's preferences within the individual health plan including withholding CPR.[558]

D. State of Massachusetts – DNR Requests

In the State of Massachusetts, state law authorizes DNR orders executed by a physician with the consent of the parent or legal guardian and issued according to the current standard of care. If a child has a DNR order, a physician can submit a Comfort Care/DNR order verification to the Office of Emergency Medical Services in the Massachusetts Department of Public Health and obtain a Comfort Care Form and identifying bracelet.

Emergency medical technicians and first responders called to a school will honor a DNR only if the child has a Comfort Care identification. Without a Comfort Care bracelet or original form, emergency medical technicians and the other first responders who are called to a school will provide emergency treatment, including resuscitation, in accordance with standard emergency medical service protocols and transport the child to a hospital.[559]

E. Case Law Involving Adult Patients

The American Law Reports defines a do not resuscitate (DNR) order as an order placed on a patient's chart that directs health care providers to refrain from administering certain emergency treatments in the event that the patient suffers a specified emergency medical event, usually a cardiac arrest, while under the provider's care.[560]

We reviewed the case law with respect to the withholding of medical treatment. All of the reported cases prior to 2000 involved adults.[561]

In the Matter of Karen Quinlan, the New Jersey Supreme Court held that life support apparatus could be discontinued with the concurrence of the guardian and family of Karen Quinlan, if the responsible attending physicians concluded that there was no reasonable possibility of Karen Quinlan emerging from her present comatose condition.

In Barber v. Superior Court, the California Court of Appeal held that two physicians could not be tried for murder after they terminated life support measures for a deeply comatose patient in accordance with the wishes of the patient=s immediate family. The Court of Appeal

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[557] Id. at 1075.
[558] Id. at 1076.
[559] See, Website of the Massachusetts Department of Elementary and Secondary Education at http://www.doe.mass.edu. More information can be obtained from the website of the Massachusetts Department of Health and Human Services at http://www.mass.gov/dph/oems/comfort/ccprot2a.htm.
[560] 46 ALR, 5th 793 (1997).
[561] See, In the Matter of Karen Quinlan, 355 A.2d 647 (1976); Cruzan v. Director, Missouri Department of Health, 110 S.Ct. 2841 (1990); Barber v. Superior Court, 147 Cal.App.3d 1006 (1983); Bartling v. Superior Court, 163 Cal.App.3d 186 (1984); Bouvia v. Superior Court, 179 Cal.App.3d 1127 (1986); Conservatorship of Drabick, 200 C.A.3d 185 (1988).

held the termination or withdrawal of further treatment was not unlawful given the fact that the patient had virtually no chance of recovering and given the wishes of the family. The Court of Appeal held that the family was not required to institute formal guardianship proceedings since there was no statutory requirement to do so and that under the circumstances the patient=s wife was the proper person to act as surrogate for the patient. The court also held that there was no legal requirement for prior judicial approval of a decision to withdraw treatment.

In Bartling v. Superior Court, the California Court of Appeal held that the right to have life support equipment disconnected was not limited to comatose, terminally ill patients. In Bartling, William Bartling was a competent adult patient with a serious illness which was probably incurable. He and his wife petitioned the court to have life support equipment disconnected despite the fact that the withdrawal of such devices would surely hasten his death. The Court of Appeal held that a competent adult patient has the right to refuse medical treatment and cited Article I, Section 1, of the California Constitution, which sets forth the constitutional right of privacy. The court also cited the Fifth and Ninth Amendments of the United States Constitution and Griswold v. Connecticut.[562] The court stated, "The constitutional right of privacy guarantees to the individual the freedom to choose or reject, or refuse to consent to, intrusions of his bodily integrity."[563]

In Bouvia v. Superior Court, the California Court of Appeal held that a person=s right to privacy encompasses a right to refuse medical treatment even when the treatment may be lifesaving and in its absence leads to an earlier death. The court stated, "It follows that such a patient has the right to refuse any medical treatment, even that which may save or prolong her life."[564]

In Conservatorship of Drabick, the California Court of Appeal held that the conservator of a patient in a persistent vegetative state need not obtain judicial approval in determining whether to continue life sustaining treatment. The court held that an adult patient has the right to determine the scope of his or her own medical treatment and this right survives incompetence and may be exercised on the patient=s behalf by his or her conservator.

In Cruzan v. Director, Missouri Department of Health, the United States Supreme Court upheld a Missouri statute which stated that evidence of a patient's request for the withdrawal of life sustaining treatment must be proved by clear and convincing evidence. The ruling was a narrow one and did not rule on the broader issue addressed by the California and New Jersey courts as to whether a patient has a fundamental right to refuse medical treatment.

F. California Case Law Involving Children

In Christopher I. v. Orange County Social Services Agency,[565] the California Court of Appeal held that a juvenile court had the authority to make decisions regarding medical treatment for dependent children within its jurisdiction. The Court of Appeal held that the

[562] 85 S.Ct. 1678 (1965).
[563] Id. at 195.
[564] Id. at 1137.
[565] 106 Cal.App. 4th 533, 131, Cal.Rptr. 122 (2003).

authority to make decisions regarding medical treatment for dependent children necessarily included decisions to refuse or withdraw medical treatment, including life sustaining medical treatment.

Christopher I. was a dependent of the juvenile court as a result of suffering severe physical abuse. The juvenile court made findings by clear and convincing evidence that Christopher was violently shaken and thrown against his crib railing by his biological father who had shaken Christopher on prior occasions. The court found that Christopher's biological mother was unable or unwilling to protect Christopher. Evidence at the hearing showed that Christopher had been comatose, hospitalized in intensive care, and dependent on a ventilator to breathe. Christopher was neurologically devastated, was in a persistent vegetative condition, and had no cognitive function.[566]

The juvenile court ordered the withholding of medical treatment and the biological father appealed.

The Court of Appeal noted that all of the testifying doctors agreed that Christopher was in a persistent vegetative state with no cognitive function. Christopher had no hope of any meaningful recovery and there were no treatments that might help him. The court found that maintenance of Christopher's life sustaining medical treatment was futile, his condition would not improve, and his current treatment only kept his bodily functions operating without any hope for future cognitive or neurological improvement. The consensus among the testifying doctors was that Christopher will likely die as a result of some type of collateral problem, such as lung damage caused by repeated bouts of pneumonia and bronchitis. All testifying doctors supported the removal of life sustaining medical treatment or at least a DNR order.[567]

The physicians also testified that there was no evidence of a functioning mind, but that it appeared that Christopher was experiencing pain and discomfort as a result of the treatment. The Court of Appeal held that when a person is not legally competent to make their own medical decisions, the court should decide what is the best course of action based on the best interest of the child.[568] Under this model, the decision maker is guided by a determination of what medical treatment is in the best interest of the patient.[569]

The Court of Appeal noted that Probate Code section 4650 grants adult patients the right to make their own decisions regarding health care, including the right to refuse life sustaining medical treatment. Section 4650 also provides the court with further guidance regarding the information a court should consider in deciding whether life sustaining medical treatment should be withheld or withdrawn from a dependent child. The court held that the following factors should be considered when making a decision to withhold or withdraw life sustaining medical treatment from a dependent child:

[566] Id. at 538-539.
[567] Id. at 542-545.
[568] Id. at 549-550.
[569] Id. at 550.

1. The child's present levels of physical, sensory, emotional and cognitive functioning.

2. The quality of life, life expectancy, and prognosis for recovery with or without treatment, including the futility of continued treatment.

3. The various treatment options and the risks, side effects and benefits of each.

4. The nature and degree of physical pain or suffering resulting from the medical condition.

5. Whether the medical treatment being provided is causing or may cause pain, suffering, or serious complications.

6. The pain or suffering to the child if the medical treatment is withdrawn.

7. Whether any particular treatment would be proportionate or disproportionate in terms of the benefits to be gained by the child versus the burdens caused to the child.

8. The likelihood that pain or suffering resulting from withholding or withdrawal of treatment could be avoided or minimized.

9. The degree of humiliation, dependence and loss of dignity resulting from the condition and treatment.

10. The opinions of the family, the reasons behind those opinions, and the reasons why the family either has no opinion or cannot agree on a course of treatment.

11. The motivations of the family in advocating a particular course of treatment.

12. The child's preference if it can be ascertained, for treatment.[570]

The Court of Appeal went on to hold that the standard of proof should be clear and convincing evidence at the trial court level. The Court of Appeal further held that there was substantial evidence to support the juvenile court's determination that the withdrawal of life sustaining medical treatment was in Christopher's best interest.[571]

The Court of Appeal noted that a competent adult has the right to decide what medical care to receive and also has the right to refuse medical treatment.[572] Therefore, the Court of

[570] Id. at 551.
[571] Id. at 553-554.
[572] Id. at 555, citing, Cobbs v. Grant, 8 Cal.3d 229, 240, 104 Cal.Rptr. 505 (1972); Barber v. Superior Court, 147, Cal.App.3d

Appeal held the juvenile court's authority pursuant to Welfare and Institutions Code section 362(a) to make decisions regarding medical treatment for dependent children within its jurisdiction necessarily including decisions to refuse or withdraw medical treatment, including life sustaining life medical treatment.[573]

The Court of Appeal noted that while an adult or emancipated minor has the right to determine the scope of their medical treatment or to refuse medical treatment, Christopher was a minor and not competent to make his own medical decisions. The court stated:

> "Nevertheless, Christopher has the right to have an appropriate decision maker determine whether withdrawal of life sustaining medical treatment is in his best interest. While it would generally be the right of Christopher's parents to make that determination of what medical treatment (or cessation thereof) is in his best interest, there are two reasons why it was appropriate for the juvenile court in this case to advocate those rights. First, Moises and Tamara, by their actions, forfeited their rights to determine what is and what is not in Christopher's best interest. . . . There was proof by clear and convincing evidence that Moises' actions in severely shaking Christopher and throwing him against his crib rails directly caused Christopher's current vegetative state. Such proof showed that Tamara failed to protect Christopher from Moises, despite witnessing episodes of shaking prior to the ultimate one."[574]

Thus, the Court of Appeal affirmed that under California law, parents have the right to request the withholding of medical treatment for their child when it is in the child's best interest. However, the Court of Appeal held that when the child's parents have a fundamental disagreement over what medical care is appropriate, or when the child is a dependent of the court, then the juvenile court has the authority to make a decision that is in the child's best interest.[575]

In J.N. v. Superior Court,[576] the Court of Appeal reaffirmed the jurisdiction of a juvenile court to make decisions to withhold life sustaining medical treatment and held that the decision must be made after the child has been declared a dependent of the court.[577] The Court of Appeal held that a juvenile court cannot issue a DNR directive without considering appropriate factors at a full evidentiary hearing.[578]

1006, 1015.
[573] Id. at 555.
[574] Id. at 557.
[575] Id. at 557. In Belcher v. Charleston Area Medical Center, 422 S.E. 2d 827, 838 (W.Va. 1992), the West Virginia Supreme Court of Appeals ruled that a 17 year old minor with muscular dystrophy should have been required to consent to a DNR order if the minor had the capacity to appreciate the nature, risks and consequences of the medical procedure. The court held that obtaining parental consent was insufficient.
[576] 156 Cal.App.4th 523, 67 Cal.Rptr.3d 384 (2007).
[577] Id. at 531-532.
[578] Id. at 534.

G. California's Statutory Provisions

Effective July 1, 2000, the California Legislature enacted the Health Care Decisions Law.[579] Probate Code section 4617 defines "health care decision" as a decision made by a patient or the patient's agent, conservator, or surrogate, regarding the patient's health care, including directions to provide, withhold, or withdraw artificial nutrition, hydration and all other forms of health care, including cardiopulmonary resuscitation (CPR).

Probate Code section 4619 defines a "health care institution" as an institution, facility, or agency licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business. Probate Code section 4621 defines "health care provider" as an individual licensed, certified, or otherwise authorized or permitted by the law of the state to provide health care in the ordinary course of business or practice of a profession. Probate Code section 4643 defines "surrogate" as an adult, other than a patient's agent or conservator, authorized under the Health Care Decisions Law to make a health care decision for the patient.

Probate Code section 4650 (a) states, "In recognition of the dignity and privacy a person has a right to expect, the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care including the decision to have life sustaining treatment withheld or withdrawn." [Emphasis added.]

Probate Code section 4653 states that nothing in the Health Care Decisions Law shall be construed to condone, authorize or approve mercy killing, assisted suicide or euthanasia. Section 4653 further states that the Health Care Decisions Law is not intended to permit any affirmative or deliberate act or omission to end life other than withholding or withdrawing health care, pursuant to an advance health care directive, by a surrogate, or as otherwise provided, so as to permit the natural process of dying.

Probate Code section 4654 states that the Health Care Decisions Law does not authorize or require a health care provider or health care institution to provide health care contrary to generally accepted health care standards applicable to the health care provider or health care institution. Section 4655 states that the Health Care Decisions Law does not create a presumption concerning the intention of a patient who has not made or who has revoked an advance health care directive.

Probate Code section 4656 states that death resulting from withholding or withdrawing health care in accordance with the Health Care Decisions Law does not, for any purpose, constitute a suicide or homicide or legally impair, or invalidate a policy of insurance or annuity providing a death benefit, notwithstanding any term of the policy or annuity to the contrary. Section 4657 states that a patient is presumed to have the capacity to make a health care decision to give or revoke an advanced health care directive, and to designate or disqualify a surrogate.

Probate Code section 4658 states that unless otherwise specified in a written advance health care directive, for the purposes of the Health Care Decisions Law, a determination that a

[579] Probation Code section 4600.

patient lacks or has recovered capacity, or that another condition exists that affects an individual health care instruction or the authority of agent or surrogate, shall be made by the primary physician. Section 4659 prohibits the following persons from making health care decisions as an agent under a power of attorney for health care or a surrogate under the Health Care Decisions Law:

1. The supervising health care provider or an employee of the health care institution where the patient is receiving care.

2. An operator or employee of a community care facility or residential care facility where the patient is receiving care.

Probate Code sections 4700 and 4701 established state forms that may be used for an advance health care directive.

Probate Code section 4711 authorizes a patient to designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider. A designation of a surrogate must be properly recorded in the patient's health care record. A surrogate designation is effective only during the course of treatment or illness or during the stay in the health care institution where the surrogate designation is made, or for 60 days, or whichever period is shorter. Section 4714 states that a surrogate shall make health care decisions in accordance with the patient's individual health care instructions, if any, or otherwise make decisions in accordance with the surrogate's determination of the patient's best interest.

Probate Code section 4740 states that a health care provider or a health care institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for any actions in compliance with the Health Care Decisions Law, including but not limited to, any of the following conduct:

1. Complying with a health care decision of a person that the health care provider or health care institution believe in good faith has the authority to make a health care decision for a patient, including a decision to withhold or withdraw health care.

2. Declining to comply with a health care decision of a person based on a belief that the person lacked authority.

3. Complying with an advanced health care directive and assuming that the directive was valid when made and has not been revoked or terminated.

4. Declining to comply with an individual instruction or health care decision in accordance with Section 4734 through 4736, inclusive.

Probate Code section 4741 states that a person acting as agent or surrogate under the Health Care Decisions Law is not subject to civil or criminal liability or to discipline for

unprofessional conduct or health care decisions made in good faith. Section 4742 states that a health care provider or a health care institution that intentionally violates the Health Care Decisions Law is subject to liability. Section 4743 states that any person who alters or forges a written advance health care directive of another, or willfully conceals or withholds personal knowledge of a revocation of an advanced directive, with the intent to cause a withholding or withdrawal of health care necessary to keep the patient alive contrary to the desires of the patient, and thereby directly causes health care necessary to keep the patient alive to be withheld or withdrawn and the death of the patient thereby to be hastened, is subject to prosecution for unlawful homicide.

Probate Code section 4750 states that an advance health care directive, a health care decision made by an agent for a principal, or a health care decision made by a surrogate for a patient are effective without judicial approval. Therefore, a parent of a minor child may make health decisions for their child including possibly requesting a DNR order from the child's physician. In most cases, a court order or judicial intervention would not be needed.

Probate Code sections 4765 and 4766 authorize a family member or other interested party to file a petition in Superior Court for the following reasons:

1. Determining whether or not the patient has capacity to make health care decisions.

2. Determining whether an advance health care directive is in effect or has terminated.

3. Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.

4. Declaring that the authority of an agent or surrogate is terminated, upon a determination by the court that the agent or surrogate has made a health care decision for the patient that authorizes anything illegal or upon a determination that the agent or surrogate has violated, failed to perform, or is unfit to perform, the duty under an advance health care directive to act consistent with the patient's desires or in the best interest of the patient.

Probate Code sections 4780 through 4786 outline the procedures for request DNR orders and POLST. The provisions authorize health care providers in hospital and pre-hospital settings to implement DNR requests and provide immunity from liability for health care providers.

Probate Code section 4780 states:

"(a) As used in this part:

(1) 'Request regarding resuscitative measures' means a written document, signed by (A) an individual with capacity, or a legally recognized health care decisionmaker, and (B) the individual's physician, that directs a health care provider regarding resuscitative measures. A request regarding resuscitative measures is not an advance health care directive.

(2) 'Request regarding resuscitative measures' includes one, or both of, the following:

(A) A prehospital 'do not resuscitate' form as developed by the Emergency Medical Services Authority or other substantially similar form.

(B) A Physician Orders for Life Sustaining Treatment form, as approved by the Emergency Medical Services Authority.

(3) 'Physician Orders for Life Sustaining Treatment form' means a request regarding resuscitative measures that directs a health care provider regarding resuscitative and life-sustaining measures.

(b) A legally recognized health care decisionmaker may execute the Physician Orders for Life Sustaining Treatment form only if the individual lacks capacity, or the individual has designated that the decisionmaker's authority is effective pursuant to Section 4682.

(c) The Physician Order for Life Sustaining Treatment form and medical intervention and procedures offered by the form shall be explained by a health care provider, as defined in Section 4621. The form shall be completed by a health care provider based on patient preferences and medical indications, and signed by a physician and the patient or his or her legally recognized health care decisionmaker. The health care provider, during the process of completing the Physician Orders for Life Sustaining Treatment form, should inform the patient about the difference

between an advance health care directive and the Physician Orders for Life Sustaining Treatment form.

(d) An individual having capacity may revoke a Physician Orders for Life Sustaining Treatment form at any time and in any manner that communicates an intent to revoke, consistent with Section 4695.

(e) A request regarding resuscitative measures may also be evidenced by a medallion engraved with the words 'do not resuscitate' or the letters 'DNR,' a patient identification number, and a 24-hour toll-free telephone number, issued by a person pursuant to an agreement with the Emergency medical Services Authority."

The definition of a "health care provider" expressly includes emergency response employees, including firefighters, law enforcement officers and paramedics.[580] The definition does not include school employees.

A health care provider is required to treat an individual in accordance with a POLST form.[581] Again, the definition of health care provider does not include school employees.

A health care provider who honors a request to forego resuscitative measures is immune from civil and criminal liability, if the provider believes in good faith that his or action or decision is consistent with those provisions of the health care law pertaining to requests to forego resuscitative measures and the provider has no knowledge that his or her action or decision would be inconsistent with the health care decision that the person signing the request would have made on his or her own behalf under like circumstances.[582]

H. California DNR Forms

In California, the California Emergency Medical Services Authority and the California Medical Association have developed a publication entitled, "Emergency Medical Services Pre-Hospital Do Not Resuscitate (DNR)."[583] The purpose of the publication is to instruct emergency medical service personnel to forego resuscitation attempts in the event of a patient's cardiopulmonary arrest. Resuscitative measures to be withheld include chest compression, assisted ventilation, endotracheal intubation, palliative treatment for pain, dyspnea, major hemorrhage, or other medical conditions. The form is designed for use in pre-hospital settings and hospitals are encouraged to honor the form when a patient is transported to an emergency room.

[580] Probate Code section 4781.
[581] Probate Code section 4781.2.
[582] Probate Code section 4782.
[583] A copy of the publication is attached.

California law protects any health care provider (including emergency response personnel) who honors a properly completed pre-hospital Do Not Resuscitate Form (or an approved wrist or neck medallion) from criminal prosecution, civil liability, discipline for unprofessional conduct, administrative sanction, or any other sanction, if the provider believes in good faith that the action or decision is consistent with the law and the provider has no knowledge that the action or decision would be inconsistent with a healthcare decision that the individual who signed the request would have made on his or her own behalf under like circumstances. This form does not replace other DNR orders that may be required pursuant to a health care facility's own policies and procedures governing resuscitation attempts by facility personnel.

The California Emergency Medical Services Authority has also published, "Recommended Guidelines for EMS Personnel Regarding Do Not Resuscitate (DNR) and Other Patient Designated Directives Limiting Pre-Hospital Care."[584] The Guidelines are intended to assist local emergency medical services agencies in developing policies that honor patient designated choices regarding refusing unwanted resuscitation attempts and other out of hospital interventions. These policies allow patients to refuse unwanted resuscitation attempts in medical interventions and ensure that a patient's rights are honored and are a necessary part of EMS symptoms.

Health and Safety Code section 1797.220 gives local EMS agencies the authority to establish policies and procedures approved by the medical director of the local EMS agency to assure medical control of the EMS system which include patient care guidelines. Probate Code section 4780 defines what constitutes a request regarding resuscitative measures or a DNR, as well as what forms must be accepted statewide. The EMS authority is responsible for developing a pre-hospital DNR form and for approving other forms.

I. CSBA Sample Board Policy

The California School Boards Association (CSBA) Sample Board Policy, BP 5141, states:

> "The Board believes that staff members should not be placed in the position of determining whether or not to follow any parental or medical "do not resuscitate" orders. Staff shall not accept or follow any such orders unless they have been informed by the Superintendent or designee that the request to accept such an order has been submitted to the Superintendent or designee, signed by the parent/guardian, and supported by a written statement from the student's physician and an order from an appropriate court."

[584] A copy of the publication is attached.

J. Failure to Honor DNR Requests

In a number of cases, the courts have held that a cause of action exists for the failure to honor a DNR request or order but that damages would not be awarded. In Anderson v. St. Francis – St. George Hospital,[585] the Ohio Supreme Court held that a hospital could not be found liable for its violation of a DNR order, notwithstanding the fact that soon after the ailing patient was resuscitated, he suffered a stroke which left him paralyzed for life.

In Anderson, a competent 82 year old patient with multiple cardiac problems was admitted to the hospital. The patient asked his doctors, in lay terms, to enter a DNR order on his chart. The physician honored his request and made the appropriate notation on the chart. Three days later, the patient developed an irregular heart rhythm. A nurse resuscitated the patient. Although, the resuscitation was immediately successful, two days later the patient suffered a stroke which the patient survived by more than two years but which left him paralyzed on the right side, unable to walk and incontinent and he had difficulties performing other activities of daily living.[586] The court observed that a claim for "wrongful life" was not recognized in the State of Ohio.[587] The court held that the only possible damages that the patient could recover would be limited to any injury suffered as a direct result of the resuscitation. Where the resuscitation caused no immediate physical harm only nominal (e.g., $1.00) damages would be available.[588]

K. Summary

In summary, California law does not authorize a county office of education or school district to honor DNR requests. Only health care providers, including paramedics, firefighters, and law enforcement officers, are authorized by state law to honor DNR requests, and only health care providers are provided with immunity from liability if they act in good faith in compliance with the Probate Code and other state laws when implementing DNR requests. School district employees do not enjoy the same immunity from liability under state law.

Therefore, school districts should not implement the parent's DNR request but should attempt to resuscitate the student and contact emergency medical services.

SEXUAL HARASSMENT INVOLVING STUDENTS

In the last few years there has been a growing awareness of student-to-student or peer-to-peer sexual harassment. The Education Code makes sexual harassment an expellable offense.[589] However, what rights do victims of sexual harassment have to obtain compensation from the school district for their injuries? What responsibility do school districts have to victims of sexual harassment?

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[585] 671 N.E. 2nd 225 (1996).
[586] Id. at 226.
[587] Id. at 228.
[588] Id. at 229.
[589] Education Code section 48900.2.

In Davis v. Monroe County Board of Education,[590] the United States Supreme Court held that students who are harassed by other students may sue their school district for monetary damages under federal law.[591]

Under federal law, Title IX prohibits discrimination on the basis of gender by educational institutions receiving federal funds. In Cannon v. University of Chicago,[592] the Supreme Court held that individuals had a right to sue in court under Title IX. In Franklin v. Gwinnett County Public Schools,[593] the Supreme Court held that students may be awarded monetary damages under Title IX for intentional acts of discrimination. The court in Franklin, stated that sexual harassment of a student by a teacher constituted a form of discrimination under Title IX but did not define the standard for determining liability under Title IX.

In Gebser v. Lago Vista Independent School District,[594] the Supreme Court defined the standard of liability for sexual harassment of a student by a teacher holding that a school official who had authority to stop the alleged discrimination must have actual knowledge of the misconduct and display deliberate indifference to the harassment for the school district to be liable under Title IX. The court rejected less stringent standards.

In Davis, it was alleged that a fifth grade boy taunted and touched a female student numerous times over a five month period and that three teachers and the principal failed to help her. The court adopted the standard in Gebser and held that school districts may be held liable under Title IX when a school official has actual knowledge of the harassment and is deliberately indifferent to it. In order to prevail in a cause of action against a school district a student would have to prove:

1. Gender-oriented conduct that is severe, pervasive and objectively offensive.
2. The alleged harassment has denied the student an equal opportunity or benefit to an education.
3. The school district had actual knowledge of the alleged harassment.
4. The school district was deliberately indifferent to the harassment.
5. Damages as a result of the harassment. [595]

A school district may also be held liable for sexual harassment of students under state law. The standard of liability has not been determined by the state courts.

In Sauls v. Pierce County School District,[596] the United States Court of Appeals for the Eleventh Circuit held that a school district was not liable for sexual harassment allegedly

[590] 119 S.Ct. 1661, 526 U.S. 629, 134 Ed.Law Rep. 477 (1999).
[591] Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681.
[592] 441 U.S. 677 (1979).
[593] 502 U.S. 60 (1992).
[594] 118 S.Ct. 1989, 524 U.S. 274, 125 Ed.Law Rep. 1055 (1998).
[595] Id. at 1998-2000.

perpetrated by a teacher upon a student. The Court of Appeals held that the school district had conducted an appropriate investigation and did not act with deliberate indifference.

The underlying allegations in the case were that the teacher sexually harassed and engaged in sexual activity with a 16 year old student. The matter was not pursued under state criminal law in Georgia because Georgia defines statutory rape as sex with someone under the age of 16. In California unlawful sexual intercourse with a minor is defined as sex with someone under the age of 18.

The parents brought a civil action under federal law, Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681.

The Court of Appeals noted that, under federal law, in cases involving teachers sexually harassing students, the school district will not be liable for damages unless an official of the school district who had authority to institute corrective measures on the district's behalf, had actual notice of, and was deliberately indifferent to, the teacher's misconduct.[597] The United States Supreme Court defined deliberate indifference as an official decision by a school district not to remedy the violation.[598]

The Court of Appeals held that the student's Title IX claim failed because they could not demonstrate that school district officials acted with deliberate indifference. The record showed that the school district responded to each report of misconduct the district received by interviewing the alleged victim several times. In each of the cases, the alleged victim denied that any misconduct had occurred. The school district also consistently monitored the teacher's conduct and warned the teacher about her interaction with students. The teacher was admonished both orally and in writing to avoid even the appearance of impropriety when dealing with students. In a prior incident involving another student and the incident involving the student filing the lawsuit, both students denied any misconduct occurred. It was not until a written note from the student was discovered that concrete evidence of an inappropriate relationship was found. The school district then asked the state agency certifying teachers to investigate.

Based on these facts, the Court of Appeals held that the school district was not deliberately indifferent and could not be held liable since a thorough investigation was conducted and the school district monitored the activities of the teacher.

STUDENT GRADES

Generally, the grades for each course of instruction taught in the school district are determined by the teacher of the course.[599] The governing board of the district and the superintendent of the district may not order a grade changed in the absence of clerical or

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[596] 399 F.3d. 1279 (11th Cir. 2005).
[597] Gebser v. Lago Vista Independent School District, 524 U.S. 274, 118 S. Ct. 1989 (1998).
[598] Ibid.
[599] Education Code section 49066.

mechanical mistake, fraud, bad faith or incompetency.[600] Prior to any change in the grade, the governing board of the school district and the superintendent to the extent practicable must give the teacher the opportunity to state orally, in writing, or both, the reasons such grade was given and to the extent practicable include the teacher in all discussions relating to the changing of the grade.[601]

The governing board of a school district is required to prescribe regulations requiring the evaluation of each pupil's achievement for each marking period and require a conference with or a written report to the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course.[602] The refusal of a parent to attend a conference or respond to the written report does not preclude the teacher from failing the pupil at the end of the grading period.[603]

The governing board of a school district may also adopt regulations authorizing a teacher to assign a failing grade to any pupil whose unexcused absences from the teacher's class equal or exceed a maximum number specified by the governing board. However, these regulations must provide for a reasonable opportunity for the pupil or the pupil's parents or guardian to explain the absences and a method for identification in the pupil's record that the failing grade was assigned to the pupil on the basis of excessive unexcused absences.[604]

State law requires school districts to accept credit for full or partial coursework from public schools, juvenile court schools and nonpublic schools providing education to special education students. Education Code section 48645.5 states:

> "Each public school district and county office of education shall accept for credit full or partial coursework satisfactorily completed by a pupil while attending a public school, juvenile court school, or nonpublic, nonsectarian school or agency. The coursework shall be transferred by means of the standard state transcript. If a pupil completes the graduation requirements of his or her school district of residence while being detained, the school district of residence shall issue the pupil a diploma from the school the pupil last attended before detention or in the alternative, the county superintendent of schools may issue the diploma."[605]

Districts are not required to accept all coursework from private schools but may review the content of the courses to determine if credit should be given.

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[600] Ibid.
[601] Education Code section 49066. See, Johnson v. Board of Education of Santa Monica-Malibu Unified School District, 179 Cal.App.3d 593, 224 Cal.Rptr. 885 (1986); Eureka Teachers Association v. Board of Education of Eureka City Schools, 199 Cal.App.3d 353, 244 Cal.Rtr. 240 (1988).
[602] Education Code section 49067(a).
[603] Ibid.
[604] Education Code section 49067(b).
[605] Stats. 2003, ch. 862 (A.B. 490).

ANNUAL NOTICE OF PARENT RIGHTS AND RESPONSIBILITIES

Education Code section 48980 requires school districts, at the beginning of the first semester or quarter of each school year, to notify parents or guardians of minor pupils of specified rights and responsibilities of the parent or guardian and of specified school district policies and procedures. Sections 48989 and 48982 provide that the notice may be sent by regular mail or by any other method normally used to communicate with parents or guardians in writing. Sections 48989 and 48982 require the notice to be signed by the parent or guardian and returned to the school. Section 48985 requires that if 15% or more of the pupils enrolled in a public school speak a single primary language other than English, all notices, reports, statements, or records sent to the parent or guardian of such pupil be written in English and that primary language.

Assembly Bill 2262[606] amended Education Code sections 48981 and 48982, effective January 1, 2013. Section 48981, as amended, authorizes school districts to send annual notice to parents of specified rights and responsibilities of the parent or guardian in an electronic format if the parent or guardian makes a request. Notice provided in the electronic format must conform to the primary language requirements in Section 48985. Section 48982 states that if the notice is provided in the electronic format pursuant to Section 48981(b), the parent or guardian must submit to the school a signed acknowledgement of receipt of the notice.

Consistent with Education Code section 48980 and other state and federal laws which require districts to annually notify students, parents, and guardians of their legal rights and responsibilities, attached is the model Annual Notification of Parent-Student Rights and Responsibilities ("Annual Notice") appropriate for use for the requisite mandatory notices for the 2012-2013 school year.

There were three substantive revisions to the mandatory notifications in the model Annual Notice, as follows:

1. Under the pupil records section, directory information was redefined to no longer include place of birth and to include a pupil's email address. Under legitimate educational interests a counsel of record for a minor was added as a person authorized to have access to a pupil's record without written parental consent or under judicial order.

2. Under the health and safety section, for those district who offer athletic programs language was added regarding the information sheet on concussions and head injuries that is required to be signed and returned by parents annually.

3. Under the miscellaneous section, for those districts electing to allow a career technical education course to satisfy graduation requirements language was added giving the required notice that a

[606] Stats. 2012, ch. 17.

list of career technical education courses offered by the district that satisfy the subject matter requirements for admission to the Cal State and UC systems is attached.

As always each district is required to provide, in addition to the Annual Notice, documents that are specific to each individual district. The following documents must be included with the Annual Notice:

- [Optional] Model FERPA Notice (sample attached);
- Type 2 diabetes information (copy attached);
- A list of pesticides that will be used at each school site in your district (including the Internet address developed by the Department of Pesticide Regulations), as well as the parent option to register to receive notification of individual pesticide applications at the school facility;
- Statutory attendance options (copy attached);
- Education Code section 48205 (copy attached; amended this year);
- The schedule of all minimum and pupil-free staff development days for the individual district (school calendar);
- The individual district's policy on sexual harassment;
- Updated CAHSEE information;
- Notice of Alternative Schools (copy attached);
- The individual district's Uniform Complaint Procedure, which should include an explanation of the process, opportunity to appeal to the CDE, district staff member responsible for processing complaints, and a statement that additional civil law remedies may be available under state and federal discrimination laws; and
- The individual district's policy on parent classroom visits.

As described above, state and federal law require that many documents and other information also be made available to parents/guardians upon request, including, but not limited to each school's Prospectus of School Curriculum and non-discrimination policies. In satisfaction of these requirements the 2012-2013 Annual Notice provides that such information may be obtained either from the student's school or the district office (as appropriate to each district). Accordingly, please review the model Annual Notice carefully to ensure that your district's policies and procedures are consistent with the requirements.

For districts that may receive Title I and/or any other federal funds, please note that the model Annual Notice is not intended to satisfy other specific notification obligations you may have under federal law, including the No Child Left Behind Act ("NCLB"). Although the notice does contain some parent notifications in satisfaction of NCLB, the scope of such notice is limited to providing only those notices universally required of all districts. Districts should

consult with their Title I and other special program coordinators with respect to any additional notifications that may be required.

Beginning with the 2013-2014 school year, the school district may notify parents that they may receive the notice in electronic form and provide them with a form to request such electronic notice. If the parent requests to receive the notice in electronic form, the district may post the information online. The parent must submit to the school a signed acknowledgement of receipt of the notice.

For the 2013-2014 school year, it would be permissible to mail a notice home to the parents informing them of the ability to receive the notice in electronic format and having them respond by indicating that they would prefer to access the information online. If the parent requests to receive the notice in electronic format, then they may do so. Parents who do not wish to receive the notice in electronic format would receive the notice in written form. Parents would also need to submit to the school a signed acknowledgment of receipt of the notice.

Pursuant to Education Code section 48981, one book may be sent to each family with enough forms for all siblings.

Beginning with the 2013-2014 school year, the district may e-mail a notification to the parents stating that the information in the annual notice is available online in electronic format and parents may request to receive the notice in an electronic format. If the parent makes such a request, the parent or guardian must submit to the school a signed acknowledgment of receipt of the notice.

STUDENT RECORDS

A. Parental Access to Student Records

The governing boards of school districts are required to establish, maintain, and destroy pupil records according to regulations adopted by the State Board of Education.[607] The State Department of Education has adopted administrative regulations which classify records and indicate the length of time these records must be kept.[608]

Under federal law, all agencies which receive federal funds (including school districts) must provide parents and legal guardians with access and the right to challenge educational records.[609] In California, the Legislature has adopted statutory provisions which set forth the rights of parents with respect to pupil records including access and the right to copy such records.[610] Access must be granted no later than five business days following the date of the request.[611] Where the parents are divorced, either parent is entitled to access, regardless of who

[607] Education Code section 49062.
[608] 5 California Code of Regulations section 430 et seq.
[609] 20 U.S.C. Section 1232(g).
[610] Education Code section 49069.
[611] Education Code section 49069; see, also, Education Code section 56043(h), 56504.

has physical custody of the child.[612] School districts may charge a reasonable fee for copying student records.[613]

Following an inspection and review of the pupil's records, the parent of a pupil or former pupil may challenge the content of any pupil's record. The parent of a pupil may file a written request with the superintendent of the district to correct or remove any information recorded in the written records concerning his or her child which he or she alleges to be inaccurate, misleading, an unsubstantiated personal conclusion or inference, a conclusion or inference outside the observer's area of competence, not based on the personal observation of the named person with the time and place of the observation noted or in violation of the privacy or other rights of the pupil.[614]

Within thirty days of the receipt of the request, the superintendent, or his designee, shall meet with the parent and the certificated employee who recorded the information in question if the employee is presently employed by the school district. The superintendent shall then sustain or deny the allegations. If the superintendent sustains any or all of the allegations, he or she shall order the correction or removal and destruction of the information.[615] However, in accordance with Education Code section 49066, the superintendent shall not order a pupil's grade to be changed unless the teacher who determined the grade is, to the extent practicable, given an opportunity to state orally, in writing, or both, the reasons for which the grade was given and is, to the extent practicable, included in all discussions relating to the changing of the grade.[616]

If the superintendent denies any or all of the allegations and refuses to order the correction of removal of the information, the parent may, within thirty days of the refusal, appeal the decision in writing to the governing board of the school district.

Within thirty days of the receipt of an appeal, the governing board shall meet in closed session with the parent and the certificated employee (if such employee is presently employed by the school district) who recorded the information in question to determine whether or not to sustain or deny the allegations.[617] Prior to any grade being changed, the teacher who assigned the grade shall be given an opportunity to explain the grade given, to the extent practicable. If the governing board sustains any or all of the allegations, it shall order the superintendent to immediately correct or remove and destroy the information from the written records of the pupil. The decision of the governing board shall be final. If the final decision of the governing board is unfavorable to the parent or if the parent accepts an unfavorable decision by the district superintendent, the parent shall have the right to submit a written statement of the parent's objections to the information. This statement shall become a part of the pupil's school record until such time as the information objected to is corrected or removed.[618]

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[612] Civil Code section 4600.5(g); Family Code section 3025.
[613] Education Code section 49065.
[614] Education Code section 49070.
[615] Ibid.
[616] Education Code section 49070. To change a grade the procedures in Section 49066 must be followed. See, Johnson v. Board of Education of Santa Monica-Malibu Unified School District, 179 Cal.App.3d 593 (1986).
[617] Education Code section 49070.
[618] Ibid.

B. Access to Student Records by Others

No persons other than the parents and specified agencies shall have access to school records without parental permission unless it is directory information.[619] Directory information is defined as the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous private or public school attended by the student. Directory information may be released according to local policy as to any pupil or former pupil provided that notice is given at least on an annual basis of the categories of information which the school plans to release.[620] However, directory information may not be released regarding any pupil when a parent has notified the school district that such information should not be released.[621]

A school district shall not permit access to pupil records to a person without written parental consent or under judicial order, except as set forth in Section 49076 of the Education Code, and as permitted by Part 99 (commencing with Section 99.1) of Title 34 of the Code of Federal Regulations. Access to those particular records relevant to the legitimate educational interests of the requestor shall be permitted to the following:

1. School officials and employees of the school district, members of a school attendance review board appointed pursuant to Section 48321 who are authorized representatives of the school district, and any volunteer aide, eighteen years of age or older, who has been investigated, selected and trained by a school attendance review board for the purpose of providing follow up services to pupils referred to the school attendance review board, provided that person has a legitimate educational interest to inspect a record.

2. Officials and employees of other public schools or school systems, including local, county, or state correctional facilities, or educational programs leading to high school graduation are provided, or where the pupil intends to or is directed to enroll, subject to the rights of parents.

3. Authorized representatives of the Controller General of the United States, the Secretary of Education, and state and local educational authorities, or the U.S. Department of Education's Office for Civil Rights, if the information is necessary to audit or evaluate a state or federally supported education program, or in connection with the enforcement of, or compliance with, the federal legal requirements that relate to such a program. Records released shall comply with the requirements of the Code of Federal Regulations.

[619] Education Code sections 49070, 49073, 49074, 49076, 49077, 49078.
[620] Education Code section 49061.
[621] Education Code section 49073.

4. Other state and local officials to the extent that information is specifically required to be reported pursuant to state law adopted before November 19, 1974.

5. Parents of pupils eighteen years of age or older who is a dependent.

6. A pupil sixteen years of age or older or having completed the tenth grade who request access.

7. A district attorney who is participating in or conducting a truancy mediation program or participating in the presentation of evidence in a truancy petition.

8. A district attorney's office for consideration against a parent or guardian for failure to comply with the compulsory education law or with the compulsory continuation education law.

9. A probation officer, district attorney or counsel of record for a minor for purposes of conducting a criminal investigation or an investigation in regards to declaring a person a ward of the court or involving a violation of a condition of probation.

10. A judge or probation officer for the purpose of conducting a truancy mediation program for a pupil, or for purposes of presenting evidence in a truancy petition.

11. A county placing agency, when acting as an authorized representative of state or local educational agency.

School districts, county offices of education and county placing agencies may develop cooperative agreements to facilitate confidential access to an exchange of the pupil information by e-mail, facsimile, electronic format or other secure means, provided the agreement complies with the federal regulations.[622]

School districts <u>may</u> release information from pupil records to the following:

1. Appropriate persons in connection with an emergency, if the knowledge of the information is necessary to protect the health or safety of a pupil or other person. Schools or school districts releasing the information shall comply with federal regulations.

2. Agencies or organizations in connection with the application of a pupil for financial aid.

[622] Education Code section 49076(a).

3. Pursuant to the federal regulations, a county elections official, for the purpose of identifying pupils eligible to register to vote, or for conducting programs to offer pupils an opportunity to register to vote.

4. Accrediting associations in order to carry out their accrediting functions.

5. Organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating or administering predictive tests, administering student aid programs, and improving instruction, if the studies are conducted in a manner that will not permit the personal identification of pupils or their parents by persons other than representatives of the organizations, the information will be destroyed when no longer needed for the purpose for which it is obtained, and the organization enters into a written agreement with the educational agency or institution that complies with the federal regulations.

6. Officials and employees of private schools or school systems where the pupil is enrolled or intends to enroll in compliance with federal regulations.

7. A contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant. A disclosure pursuant to this provision shall not be permitted to a volunteer or other party.[623]

A person, persons, agency or organization permitted access to pupil records shall not permit access to any information obtained from those records by any other person, persons, agency or organization, except as allowed under the federal regulations or state law without the written consent of the pupil's parent. A school district, including a county office of education or county superintendent of schools, may participate in an interagency data information system that permits access to a computerized data-based system within and between governmental agencies or school districts as to information or records that are nonprivileged and where release is authorized as to the requesting agency under state or federal law or regulation, if each of the following requirements are met:

1. Each agency and school district shall develop security procedures or devices by which unauthorized personnel cannot access data contained in the system.

[623] Education Code section 49076(a)(2).

2. Each agency and school district shall develop procedures or devices to secure privileged or confidential data from unauthorized disclosure.

3. Each school district shall comply with the access log requirements.

4. The right of access granted shall not include the right to add, to read or alter data without the written permission of the agency holding the data.

5. An agency or school district shall not make public or otherwise release information on an individual contained in the database if the information is protected from disclosure or release as to the requesting agency by state or federal law or regulation.[624]

Each school district shall release the information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within the state or any other state or to a private school in the state to a designated peace officer, upon his or her request when a proper police purpose exists for the use of that information. As permitted in the federal regulations, the designated peace officer or law enforcement agency shall show the school district that the peace officer or law enforcement agency has obtained prior written consent from one parent, or provide information indicating that there is an emergency in which the information is necessary to protect the health or safety of the pupil or other individuals, or that the peace officer or law enforcement agency has obtained a lawfully issued subpoena or a court order.[625]

In order to protect the privacy interests of the pupil, a request to a school district for pupil record information pursuant to Section 49076.5 shall meet the following requirements:

1. For purposes of this section, "proper police purpose" means that probable cause exists that the pupil has been kidnapped and that his or her abductor may have enrolled the pupil in a school and that the agency has begun an active investigation.

2. Only designated peace officers and federal criminal investigators and federal law enforcement officers whose names have been submitted to the school district in writing by a law enforcement agency, may request and receive the information. Each law enforcement agency shall ensure that each school district has at all times a current list of the names of designated peace officers authorized to request pupil record information.

[624] Education Code section 49076(b).
[625] Education Code section 49076.5(a).

3. This section does not authorize designated peace officers to obtain any pupil record information other than that authorized by Section 49076.5.

4. The law enforcement agency requesting the information shall ensure that at no time shall information obtained be disclosed or used for a purpose other than to assist in the investigation of suspected criminal conduct or a kidnapping. A violation of this paragraph shall be punishable as a misdemeanor.

5. The designated peace officer requesting information authorized for release shall make a record on a form created and maintained by the law enforcement agency that shall include the name of the pupil about whom the inquiry was made, the consent of a parent having legal custody of the pupil or a legal guardian, the name of the officer making the inquiry, the date of the inquiry, the name of the school district, the school district employee to whom the request was made, and the information that was requested.

6. Whenever the designated peace officer requesting information authorized for release does so in person, by telephone, or by some means other than in writing, the officer shall provide the school district with a letter confirming the request for pupil record information before any release of information.

7. A school district, or officer or employee of the school district, shall not be subject to criminal or civil liability for the release of pupil record information in good faith as authorized by Section 49076.5.[626]

As a result of recent amendments to Education Code section 49076, contractors and consultants may have access to student records under certain limited conditions.[627]

Pursuant to Education Code section 49076(a)(2)(g), a school district may release information from pupil records to a contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant. A legitimate educational interest would include school discipline and the investigation of alleged misconduct by students for the purpose of student discipline.

Therefore, a school district may enter into formal agreements with local law enforcement agencies to provide support to the school district to maintain school discipline and allow School Resource Officers limited access to pupil records when necessary to assist school administrators with school discipline. That limited access may be provided upon request of the School

[626] Education Code section 49076.5(b).
[627] Stats. 2012, ch. 388 (A.B. 733), effective January 1, 2013.

Resource Officer to see the records or have copies of the records of an individual student who is being investigated for a school disciplinary offense.

Under federal law, all agencies which receive federal funds must protect the confidentiality of pupil records.[628] Under most circumstances, parental consent is required to disclose student records to third parties, including law enforcement.[629] A school district may disclose personally identifiable information from an education record of a student without the consent of the parent if the disclosure is to other school officials who are determined to have legitimate educational interests, to contractors or consultants under certain limited conditions, or to state and local officials specifically authorized by law.[630] School districts may disclose student records to comply with a judicial order or lawfully issued subpoena, or in connection with a health or safety emergency.[631]

In the preamble to the FERPA Final Rule issued December 9, 2008,[632] the United States Department of Education stated that police officers who are not employees of the school district to whom the school has outsourced its safety and security functions do not qualify as "school officials" under FERPA, unless they meet the following three requirements:

1. The individuals perform an institutional service or function for which the agency or institution would otherwise use employees;

2. The individual is under the direct control of the agency or institution with respect to the use and maintenance of educational records; and

3. The individual is subject to the requirements of Section 99.3(g) governing the use and redisclosure of personally identifiable information from educational records.[633]

If these requirements are met, the district would need to use reasonable methods to ensure that the school resource officers have access only to those educational records in which the school resource officer has a legitimate interest.[634] In addition, the school district must identify the school resource officers as school officials in their annual notification to parents before disclosure would be permissible, and define the types of records in which the school resource officer might have a legitimate educational interest. Such notice would provide prior notice to parents and students that information from student records may be disclosed to school resource officers for the purpose of ensuring safe schools.

State law does allow school districts to share student records with law enforcement officers when there is an emergency if knowledge of the information is necessary to protect the

[628] Family Educational and Privacy Rights Act (FERPA), 20 U.S.C. Section 1232g.
[629] 34 C.F.R. Section 99.30.
[630] 34 C.F.R. Section 99.31.
[631] 34 C.F.R. Section 99.31(a)(9), (a)(10).
[632] http://www2.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf
[633] 34 C.F.R. Section 99.31(a)(1)(i)(B).
[634] 34 C.F.R. Section 99.31(a)(1)(ii).

health or safety of the student or other persons.[635] In addition, school districts are required to release information regarding a pupil's identity or location to a designated peace officer when there is an ongoing police investigation and probable cause that the pupil has been kidnapped or that the student's abductor may have enrolled the pupil in a school.[636] However, peace officers are not listed as appropriate recipients of student records pursuant to criminal investigation or an investigation in regards to declaring a person a ward of the court or involving a violation of a condition of probation. Only probation officers or deputy district attorneys are permitted access in situations involving a criminal investigation, an investigation declaring a person a ward of the court, or an investigation involving a violation of a condition of probation.[637]

Education Code section 49068.6 requires law enforcement agencies to notify a school district or private school within 10 days of a child's disappearance. The notice is required to be given in writing with a copy of a photograph of the child, if available. A school must place a copy of the notice in the front of each missing child's school record that the child has been reported missing. If the school receives an inquiry or request from any person or entity for information about the missing child, they are required to notify the investigating law enforcement agency immediately.

Moreover, Section 49068.5 urges principals of public or private elementary schools to check to see if the child being enrolled or transferring into their school resembles a child listed as missing by the Department of Justice.

The California Attorney General works in partnership with the National Center for Missing & Exploited Children registry who issues the missing children bulletins. Other than the requirement under Section 49068.6, there is no legal requirement for school to post them on school grounds.

Information concerning a student must be furnished in compliance with a court order and the school district must make a reasonable effort to notify the parent and the pupil in advance of such compliance, if lawfully possible, within the requirements of the judicial order.[638]

C. Transfer of Student Records

The California Administrative Code, Title 5, Section 438, states that when a student transfers to another school district or to a private school a copy of the student's Mandatory Permanent Pupil Record shall be transferred upon request from the other district or private school. The original or a copy must also be retained permanently by the sending district. If the transfer is to another California public school, the student's entire Mandatory Interim Pupil Record shall be forwarded. If the transfer is to a private school or an out of state public school, the Mandatory Interim Pupil Record may be forwarded. Permitted student records may also be forwarded.

[635] Education Code section 49076(b)(1).
[636] Education Code section 49076.5.
[637] Education Code section 49076(a)(9).
[638] Education Code section 49077.

D. Mandatory Permanent Pupil Records

Section 432 defines Mandatory Permanent Pupil Records as those records which schools have been directed to compile by California statute or regulation. The Mandatory Permanent Pupil Record includes the following:

1. Legal name of pupil;
2. Date of birth;
3. Method of verification of birth date;
4. Sex of pupil;
5. Place of birth;
6. Name and address of parent of minor pupil;
7. Address of minor pupil if different than the above;
8. An annual verification of the name and address of the parent and the residence of the pupil;
9. Entering and leaving date of each school year and for any summer session or other extra session;
10. Subjects taken during each year, half year, summer session or quarter;
11. If marks or credits are given, the mark or number of credits toward graduation allowed for work taken;
12. Verification of or exemption from required immunization;
13. Date of high school graduation or equivalent.

E. Mandatory Interim Pupil Records

The Mandatory Interim Pupil Records include the following;

1. A log or record identifying those persons (except authorized school personnel) or organizations requesting or receiving information from the record. The log or record shall be accessible only to the legal parent or guardian or the eligible pupil, or a dependent adult pupil, or an adult pupil, or the custodian of records;

2. Health information, including Child Health Developmental Disabilities Prevention Program verification or waiver;

3. Participation in special education programs including required tests, case studies, authorizations, and actions necessary to establish eligibility for admission or discharge;

4. Language training records;

5. Progress slips and/or notices as required by Education Code sections 49066 and 49067;

6. Parental restrictions regarding access to directory information or related stipulations;

7. Parent or adult pupil rejoinders to challenged records and to disciplinary action;

8. Parental authorizations or prohibitions of pupil participation in specific programs;

9. Results of standardized tests administered within the preceding three years.

In addition, Education Code section 48918(k) states that records of expulsions shall be a non-privileged disclosable public record and that, ". . . the expulsion order and the causes therefore show the recorded in the Mandatory Interim Record and shall be forwarded to any school in which the pupil subsequently enrolls upon receipt of a request from the admitting school for the pupil's school records."

Education Code section 48201(b)(1) states:

> "Upon a pupil's transfer from one school district to another, the school district into which the pupil is transferring shall request that the school district in which the pupil was last enrolled provide any records that the district maintains in its ordinary course of business or receives from a law enforcement agency regarding acts committed by the transferring pupil that resulted in the pupil's suspension from school or expulsion from the school district. Upon receipt of this information, the receiving school district shall inform any teacher of the pupil that the pupil was suspended from school or expelled from the school district and shall inform the teacher of the act that resulted in that action."

Based on Section 48201(b)(1), the receiving district is required to request records of suspension and expulsion. Therefore, the suspension records must be transferred as well.

All other pupil records are classified as Permitted Pupil Records.

F. Destruction of Pupil Records

Mandatory Permanent Pupil Records must be preserved in perpetuity by all California schools. Mandatory Interim Pupil Records may be determined to be disposable when the student leaves the district or when their usefulness ceases. Destruction of Mandatory Interim Pupil Records may be destroyed during the third school year after the school year in which they originated. Permitted Pupil Records may be destroyed when their usefulness ceases, which is defined as six months following the pupil's completion of or withdrawal from the educational program.[639]

G. Definition of Educational Records

In Owasso Independent School District v. Falvo,[640] the United States Supreme Court ruled that allowing students to grade each other's test papers and assignments as the teacher explains the correct answers to the entire class, does not violate federal privacy laws relating to the confidentiality of school records.

The parent of three school-aged children filed a lawsuit against a school district in Oklahoma, alleging that the school district's practice of allowing teachers to ask students to grade each other's papers in class while the teacher explains the correct answers to the entire class, violated FERPA. FERPA provides that all agencies receiving federal financial assistance must keep student records confidential and may not release such records without parental consent. If school districts violate FERPA, federal funds may be withheld from the school district.[641]

The phrase "educational records" is defined under FERPA as records, files, documents, and other materials containing information directly related to a student, which are maintained by an educational agency or institution, or by a person acting for such agency or institution. The question before the United States Supreme Court was whether peer graded classroom work and assignments are educational records.[642]

The Supreme Court held that peer graded classroom work and assignments were not educational records within the meaning of FERPA, because the records were not maintained by an educational agency or institution, and were not maintained by a person acting for such agency or institution.[643]

The Supreme Court noted that, if such records were considered educational records under FERPA, it would, ". . . effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would

[639] California Code of Regulations, Title 5, Sections 437 and 16027.
[640] 122 S.Ct. 934, 161 Ed.Law Rep. 33 (2002).
[641] Id. at 937.
[642] Id. at 937-938.
[643] Id. at 940-941.

hesitate before interpreting the statute to effect such a substantial change in the balance of federalism, unless that is the manifest purpose of the legislation. This principle guides our decision."[644]

The court noted that if peer graded records were considered to be education records, it would require every teacher to keep a separate record of access for each student's assignments. The court indicated that it doubted that Congress would have imposed such a weighty administrative burden on every teacher and require all instructors to take time which could otherwise be spent teaching.[645]

The court did not rule on when a document becomes an education record subject to FERPA, and in particular, did not determine whether the assignments would become confidential upon the grades being recorded in the teacher' grade book. Later cases will have to decide these issues.

H. Private Cause of Action

In Gonzaga University v. Doe,[646] the United States Supreme Court held that a student may not sue a university for damages to enforce the provisions of the FERPA, which prohibits the federal funding of educational institutions that have a policy or practice of releasing educational records to unauthorized persons. The court held that under federal law, enforcement of FERPA was left to the United States Department of Education and that an individual student could not receive an award of damages under FERPA.

The student, John Doe, was a former undergraduate in the School of Education at Gonzaga University. He planned to graduate and teach at a Washington public elementary school. The State of Washington at the time required all of its new teachers to obtain an Affidavit of Good Moral Character from a dean of their graduating college or university. In October 1993, the University's Teacher Certification Specialist overheard one student tell another that Doe had engaged in acts of sexual misconduct against a female student. The University employee launched an investigation and contacted the state agency responsible for teacher certification identifying Doe by name and discussing the allegations against him. Doe did not learn of the investigation or that information about him until March 1994, when he was told he would not receive the affidavit required for certification as a Washington school teacher.[647]

Doe then sued the University and the University's employee alleging violations of Washington State law, as well as a federal cause of action under 42 U.S.C. Section 1983 for the release of personal information to an unauthorized person in violation of FERPA. A jury found for Doe on all accounts, awarding him $1,155,000, including $150,000 in compensatory damages and $300,000 in punitive damages on the FERPA claim.[648]

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[644] Id. at 939.
[645] Id. at 940.
[646] 122 S.Ct. 2268, 165 Ed.Law Rep.458 (2002).
[647] Id. at 2272.
[648] Ibid.

The Washington Court of Appeals reversed in relevant part concluding that FERPA does not create individual rights, and thus, cannot be enforced under Section 1983. The Washington Supreme Court reversed that decision and ordered the FERPA damages reinstated. The United States Supreme Court granted a hearing to resolve the conflict among the lower courts and held that there was no right of action for damages under Section 1983 to enforce FERPA.[649]

The United States Supreme Court held that Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records. FERPA directs the U.S. Secretary of Education to withhold federal funds from any public or private educational agency or institution that fails to comply with these conditions, which include maintaining the confidentiality of educational records. Federal funds may be terminated if the Secretary of Education determines that a recipient institution is failing to comply with the requirements of FERPA. The United States Supreme Court concluded:

> "Our conclusion that FERPA's non-disclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions. Congress expressly authorized the Secretary of Education to 'deal with violations' of the Act . . . and required the Secretary to 'establish or designate a review board' for investigating and adjudicating such violations. . . ."[650]

The United States Supreme Court's decision only addressed the issues involving the FERPA violations. The court did not address the underlying state violations of tort and contract law, which also served as a basis for the total damage award.

Under California law, it has not been decided whether an individual has a cause of action for violation of the confidentiality of student records. However, a student might be able to bring an action for violation of privacy rights under state law if confidential student information is improperly disclosed. Therefore, districts should be careful to comply with the provisions of federal and state law regarding the confidentiality of student records.

The decision in Gonzaga University eliminates the possibility of a large damages award under FERPA for disclosing confidential student information contained in student records. However, a student could still possibly obtain a damage award on state law causes of action for such violations.

I. Student Records and the NCLB

The NCLB of 2001, Public Law 107-110, amended existing provisions of federal laws relating to student records and student privacy, including FERPA.

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[649] Ibid.
[650] Id. at 2278.

The Act amended 20 U.S.C. Section 1232 by creating an exception to the release of student records when the United States Attorney General or an Assistant Attorney General of the United States who has been designated by the U.S. Attorney General, submits a written application to a court of competent jurisdiction for a court order requiring an educational agency to permit the Attorney General, or the Attorney General's designee, to collect educational records in the possession of the educational agency that are relevant to an authorized investigation or prosecution of a terrorism offense or an act of domestic or international terrorism. An educational agency or institution that, in good faith, produces educational records in accordance with the order issued by the court is immune from liability to any person for that production. In addition, the educational institution is not required to maintain a record of the Attorney General's access to the student's educational records. It is expected that the major impact of this provision will be on community colleges, colleges and universities.

The Act amended 20 U.S.C. Section 1232 relating to the protection of student rights by requiring the development of local policies concerning student privacy, parental access to information and the administration of certain physical examinations to minors. Section 1232(c) requires that all local educational agencies that receive federal funds develop and adopt policies in consultation with parents regarding the following:

1. The right of a parent to inspect, upon the request of the parent, a survey created by a third party before the survey is administered or distributed by a school to a student.

2. Arrangements to protect student privacy that in the event of the administration or distribution of a survey to a student.

3. The right of a parent to inspect, upon the request of the parent, any instructional material used as part of the educational curriculum for the student.

4. The administration of physical examinations or screenings that the school or agency may administer to a student.

5. The collection, disclosure or use of personal information collected from students for the purpose of marketing or selling that information.

6. The right of a parent to inspect upon the request of the parent, any instrument used in the collection of personal information before the instrument is administered or distributed to a student.

The parent has a right to inspect, upon the request of the parent, any survey which contains or inquires into one or more of the following items:

1. Political affiliations or beliefs of the student or the student's parent.

2. Mental or psychological problems of the student or the student's family.

3. Sex, behavior or attitudes.

4. Illegal, antisocial, self-incriminating, or demeaning behavior.

5. Critical appraisals of other individuals with whom respondents have close family relationships.

6. Legally recognized, privileged, or analogous relationships, such as those of lawyers, physicians, and ministers.

7. Religious practices, affiliations or beliefs of the student or the student's parents.

8. Income.

The policies developed by a local educational agency shall provide for reasonable notice of the adoption or continued use of such policies directly to the parents of students enrolled in schools served by that agency. The notice, at a minimum, shall be provided at least annually at the beginning of the school year and within a reasonable period of time after any substantive change in such policies, and offer an opportunity for the parent to opt the student out of participation in an activity the parent finds objectionable based on the criteria discussed above. The local agency is required to directly notify the parent of a student, at least annually at the beginning of the school year, of the specific or approximate dates during the school year when the following activities are scheduled or expected to be scheduled:

1. Activities involving the collection, disclosure or use of personal information collected from students for the purpose of marketing or selling that information.

2. The administration of any survey containing one or more of the items discussed above.

3. Any non-emergency invasive physical examination or screening that is required as a condition of attendance administered by the school and scheduled by the school in advance and not necessary to protect the immediate health and safety of the student or other students.

If a local agency has in place, on or before January 8, 2002, policies meeting the requirements of the new federal law, the agency is not required to develop and adopt new policies.

Section 1232(c)(4) states that the following items are not subject to the requirements of the Act:

1. College or other post-secondary education recruitment or military recruitment.

2. Book clubs, magazines and programs providing access to low cost literary products.

3. Curriculum and instructional materials used by elementary schools and secondary schools.

4. Tests and assessments used by elementary schools and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students and the subsequent analysis and public release of the aggregate data from such tests and assessments.

5. The sale by students of products or services to raise for school related or educational related activities.

6. Student recognition programs.

In addition, the provisions of Section 1232 do not apply to surveys administered to students in accordance with the IDEA.[651] The term "invasive physical examination" is defined as any medical examination that involves the exposure of private body parts or any act during such examination that includes incision, insertion, or injection into the body, but does not include a hearing, vision or scoliosis screening. The term "personal information" is defined as individually identifiable information, including a student's or parent's first and last name, a home or physical address, a telephone number, or a social security identification number. The term "survey" includes an evaluation.

J. Student Health Records – FERPA and HIPAA

In November 2008, the U.S. Department of Health and Human Services and the U.S. Department of Education issued the "Joint Guidance on the Application of the Family Education Rights and Privacy Act and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records."

The purpose of the Guidance is to explain the relationship between FERPA and HIPAA and to address any possible confusion as to how these two laws apply to records maintained on students. The Guidance also addresses certain disclosures that are allowed without consent or authorization under FERPA and HIPAA, especially those related to health and safety emergency situations.

In general, most records, including student health records, maintained by community college districts and school districts are "education records" subject to FERPA and not subject to HIPAA. Only in very limited circumstances would HIPAA apply.

[651] 20 U.S.C. section 1400 et seq.

The HIPAA Privacy Rule specifically excludes from its coverage those records that are protected by FERPA including student health records. In determining whether personally identifiable information from student health records maintained by a community college district or school district may be disclosed, districts should refer to FERPA and its requirements and consult with legal counsel.

K. Overview of FERPA

FERPA is a federal law that protects the privacy of education records.[652] FERPA applies to educational agencies and institutions, such as community colleges and school districts that receive federal funds under any program administered by the U.S. Department of Education.

A community college district or school district subject to FERPA may not have a policy or practice of disclosing the education records of students, or personally identifiable information from education records, without a parent or eligible student's written consent.[653] FERPA contains several exceptions to this general consent rule.[654] An eligible student is a student who is at least 18 years of age or who attends a postsecondary institution at any age.[655] Under FERPA, parents and eligible students have the right to inspect and review the student's education records and to seek to have the records amended under certain circumstances.[656]

The term "education records" is broadly defined under FERPA to mean those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.[657] At the elementary or secondary level, a student's health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are "education records" subject to FERPA. In addition, records that schools maintain on special education students, including records on services provided to students under the IDEA are education records under FERPA. Such records are directly related to a student, maintained by the school or a party acting for the school, and are not excluded from the definition of "education records."

At postsecondary institutions, such as community colleges, medical and psychological treatment records of eligible students are excluded from the definition of "education records" if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment.[658] Such records are generally referred to as "treatment records." An eligible student's treatment records may be disclosed for purposes other than the student's treatment provided the records are disclosed under one of the exceptions to written consent or with the student's consent.[659] If a community college discloses an eligible student's treatment records for purposes other than treatment, the records are no longer excluded from the definition of "education records" and are subject to all other FERPA requirements.

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[652] See, 20 U.S.C. Section 1232(g); 34 C.F.R. Section 99.
[653] 34 C.F.R. Section 99.30.
[654] 34 C.F.R. Section 99.31.
[655] 34 C.F.R. Sections 99.3 and 99.5(a).
[656] 34 C.F.R. Sections 99.10-99.12 and 99.20-99.22.
[657] 34 C.F.R. Section 99.3.
[658] 34 C.F.R. Section 99.3.
[659] See, 34 C.F.R. Section 99.31(a); 34 C.F.R. Section 99.30.

L. Overview of HIPAA

Congress enacted HIPAA in 1996 to improve the efficiency and effectiveness of the health care system through the establishment of national standards and requirements for electronic health care transactions and to protect the privacy and security of individually identifiable health information. Under HIPAA, "covered entities" include health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with covered transactions.[660] "Health care providers" include institutional providers of health or medical services, such as hospitals, as well as non-institutional providers, such as physicians, dentists and other practitioners, along with any other person or organization that furnishes bills or has paid for health care in the normal course of business. Covered transactions are those for which the U.S. Department of Health and Human Services has adopted a standard, such as health care claims submitted to a health plan.[661]

The HIPAA Privacy Rule requires covered entities to protect individuals' health records and other identifiable health information by requiring appropriate safeguards to protect privacy, and setting limits and conditions on the uses and disclosures that may be made of such information without patient authorization. HIPAA gives patients rights over their health information, including the right to examine and obtain a copy of their health records and to request corrections.

M. Intersection of FERPA and HIPAA

When a school provides health care to students in the normal course of business, such as through its health clinic, it is also a "health care provider" as defined by HIPAA. If a school also conducts any covered transactions electronically in connection with that health care, it is then a covered entity under HIPAA. As a covered entity, the school must comply with HIPAA with respect to its transactions. However, many schools, even those that are HIPAA covered entities, are not required to comply with HIPAA because the only health records maintained by the school are "education records" or "treatment records" of eligible students under FERPA, both of which are excluded from coverage under HIPAA.[662]

N. 2008 Changes to FERPA Regulations

On Tuesday, December 9, 2008, several important changes were made to the regulations implementing the FERPA.[663] The changes went into effect on January 9, 2009.

O. Summary of Significant 2008 Changes

The following is a brief summary of the most significant changes to the regulations:

[660] 45 C.F.R. Section 160.103.
[661] See, 45 C.F.R. Section 160.103; 45 C.F.R. Section 162.
[662] 45 C.F.R. Section 160.103.
[663] 34 C.F.R. Part 99.

Section 99.3 (Definitions):

Directory Information; Disclosure of Social Security Numbers (SSN's) and ID Numbers. An educational agency or institution may designate and disclose student ID numbers as directory information if the number cannot be used by itself to gain access to education records. Such disclosure is permissible only if the ID number functions as a name; that is, it cannot be used without a PIN, password, or some other authentication factor to gain access to education records. Social security numbers may never be disclosed as directory information.

Education Records; Former Students. The regulations clarify that records pertaining to an individual that are created or received after the individual is no longer a student at the school are nevertheless considered "education records," unless the records are not directly related to the individual's attendance as a student.

Education Records; Grades. Grades on peer-graded papers are not "education records" until they are collected and recorded by a teacher.

Personally Identifiable Information. The regulations clarify that "Personally Identifiable Information" includes, among other things, "any information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." In addition, "Personally Identifiable Information" also includes information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.[664]

Section 99.31 (Disclosure):

Disclosure to Contractors, Volunteers and Other Non-Employees. Educational agencies and institutions may disclose education records, or personally identifiable information from education records, without consent to contractors, volunteers, and other non-employees, as long as the individual is performing an institutional service that otherwise would be performed by an employee, and the individual is performing such service under the direct control of the educational agency or institution. The individual must have a legitimate educational interest in the record. Educational agencies and institutions will have to amend their annual notification of FERPA rights to include these parties as school officials with legitimate educational interests. 99.31(a)(1)(i)(B).

Access Control and Tracking. Educational agencies and institutions must use reasonable methods to ensure that teachers and other school officials (as well as contractors, volunteers and other non-employees) obtain access to only those education records in which they have legitimate educational interests. 99.31(a)(1)(ii).

Disclosure to Other Educational Institutions. An educational agency or institution may disclose education records, or personally identifiable information from education records, to a

[664] 34 C.F.R. Section 99.3 (Definitions).

student's new school even after the student is already attending the new school so long as the disclosure relates to the student's enrollment in the new school. 99.31(a)(2).

Educational Research. Educational agencies and institutions are required to enter into a written agreement before disclosing personally identifiable information from education records, without consent, to organizations conducting studies for, or on behalf of, the educational agency or institution to: (a) Develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. The regulations specifically prescribe the matters that must be addressed in such written agreements. 99.31(a)(6).

Identification and Authentication of Identity. Educational agencies and institutions must use reasonable methods to identify and authenticate the identity of parents, students, school officials and other parties to whom the agency or institution discloses personally identifiable information from education records. One reasonable method to confirm identity is to use a PIN process to provide access to records for parents, students, and school officials.[665]

Section 99.32 (Recordkeeping Requirements):

Record of Disclosure to Federal, State and Local Agencies. Educational agencies and institutions must maintain a listing in each student's record of the state and local educational authorities and federal officials and agencies that may make further disclosures of the student's education records without consent. Parents and eligible students are entitled to a copy of the record of further disclosures upon request. 99.32(a)(1); 99.32(a)(4).[666]

Section 99.36 (Health and Safety Emergencies):

The regulations modify the standards to be used in determining whether to release information in connection with an emergency. Educational agencies and institutions may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.[667] In making this determination, the educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the

[665] 34 C.F.R. Section 99.31 (Disclosure).
[666] 34 C.F.R. Section 99.32 (Recordkeeping Requirements).
[667] The U.S. Department of Education and the U.S. Department of Health and Human Services recently issued "Joint Guidance on the Application of FERPA and HIPAA to Student Health Records (November 2008)." In the Guidance, the agencies make clear that the HIPAA Privacy Rule generally does not apply to elementary and secondary schools. Further, student health records are considered "education records," and are therefore exempt from the definition of "protected health information" under HIPAA. Thus, the analysis as to whether such records may be disclosed in an emergency must be conducted under FERPA, not HIPAA.

determination, the Department of Education will not substitute its judgment for that of the educational agency or institution.[668]

The listing of disclosures maintained in the student's record must include a description of the articulable and significant threat, as well as the parties to whom information was disclosed. 99.32(a)(5).[669]

Section 99.37 (Disclosing Directory Information):

Directory Information Opt Outs. An educational agency or institution must continue to honor a parent's or student's decision to opt out of directory information disclosures even after the student leaves the institution. 99.37(b).

Prohibition against Using SSN's to Release or Confirm Directory Information. An educational agency or institution may not use a student's SSN (or other non-directory information) to identify the student when releasing or confirming directory information.[670] This change primarily impacts postsecondary institutions, for example, when a prospective employer submits an inquiry to determine whether a particular individual is a student or graduate of the institution. An educational agency or institution will need to ensure that the student has provided written consent for the disclosure, or must rely solely on a student's name and other properly designated directory information in answering the inquiry. (This may make it more difficult for the employer or other inquirer to ensure that the correct student has been identified because of the known problems in matching records without the use of a universal identifier.) 99.37(d).[671]

P. 2012 Changes to FERPA Regulations

The year 2012 brings changes to the federal regulations implementing FERPA and the California Education Code pertaining to student records.

The Secretary of Education has amended the regulations implementing FERPA, effective January 3, 2012. The regulations make clarifying changes to the provision that allows educational agencies to disclose information from student records to outside organizations conducting studies on behalf of the agency. The regulations also require an educational agency to enter into a written agreement when it designates a representative (other than an employee) to conduct an audit or evaluation of a federal- or state-supported educational program. In addition, the regulations make changes to the provisions authorizing disclosure of "directory information." The following summarizes the major changes to the regulations:

The study's exception[672] allows for the disclosure of personally identifiable information from education records without consent of the student/parent to organizations conducting studies for, or on behalf of, schools, school districts, or postsecondary institutions. Studies can be for the purpose of developing, validating, or administering predictive tests, administering student aid

[668] The regulations no longer specify that the requirements of the health and safety exception be "strictly construed."
[669] 34 C.F.R. Section 99.36 (Health and Safety Emergencies).
[670] Confirmation of information in education records is considered a "disclosure" under FERPA.
[671] 34 C.F.R. Section 99.37 (Disclosing Directory Information).
[672] 34 C.F.R. Section 99.31(a)(6).

programs, or improving instruction. As an example, a state educational agency may disclose personally identifiable information from education records without consent of the student/parent to an organization for the purpose of conducting a study that compares program outcomes across school districts to further assess what programs provide the best instruction and then duplicate those results in other districts.[673]

Even prior to January 3, 2012, the study's exception required the educational agency or institution to enter into an agreement with the organization conducting the study. The Secretary of Education has summarized the mandatory provisions educational agencies must include in their written agreements under the study's exception as follows:

1. Specify the purpose, scope, and duration of the study and the information to be disclosed. Your agreement must specify the purpose of the study, describe its scope and its duration, and identify the information being disclosed.

2. Require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement. Your agreement must specify that the personally identifiable information from education records must only be used for the study identified in the agreement.

3. Require the organization to conduct the study in a manner that does not permit the personal identification of parents and students by anyone other than representatives of the organization with legitimate interests. Your agreement must require the organization to conduct the study so as not to identify students or their parents. This typically means that the organization should allow internal access to personally identifiable information from education records only to individuals with a need to know, and that the organization should take steps to maintain the confidentiality of the personally identifiable information from education records at all stages of the study, including within the final report, by using appropriate disclosure avoidance techniques.

4. Require the organization to destroy all personally identifiable information from education records when the information is no longer needed for the purposes for which the study was conducted, and specify the time period in which the information must be destroyed. Your agreement must require the organization to destroy the personally identifiable information from education records when it is no longer needed for the identified study. You should determine the specific time period for destruction based on the facts and circumstances surrounding the disclosure and study. The parties to

[673] An educational agency or institution is not required to initiate the study or agree with or endorse the conclusions or results of the study.

> the written agreement may agree to amend the agreement to extend the time period if needed, but the agreement must include a time limit.

The new regulations amended Section 99.31(a)(6) to clarify that an organization conducting a study must destroy the personally identifiable information in accordance with the written agreement; it is not sufficient for the organization to return the personally identifiable information to the educational agency in lieu of destroying the information. The regulations also include a list of items that are considered "best practices" for written agreements authorizing work under the studies exception and the audit/evaluation exception discussed. The suggested "best practices" for written agreements are attached hereto.

The audit or evaluation exception[674] allows for the disclosure of personally identifiable information from education records without consent to authorized representatives of the Comptroller General of the U.S., the Attorney General, the Secretary of Education, and state or local educational authorities. Under this exception, personally identifiable information from education records must be used to audit or evaluate a federal- or state-supported education program, or to enforce or comply with federal legal requirements that relate to those education programs. The entity disclosing the personally identifiable information from education records is specifically required to use reasonable methods to ensure to the greatest extent practicable that its designated authorized representative complies with FERPA and its regulations.

As an example, a school district could designate a university as an authorized representative in order to disclose, without consent, personally identifiable information from education records on its former students to the university. The university then may disclose, without consent, transcript data on these former students to the district to permit the district to evaluate how effectively the district prepared its students for success in postsecondary education.

The new regulations state that educational agencies or authorities are responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or authority designated as its authorized representative under the audit/evaluation exception:

1. Uses personally identifiable information only to carry out an audit or evaluation of federal- or state-supported education programs, or for the enforcement of or compliance with federal legal requirements related to these programs;

2. Protects the personally identifiable information from further disclosures or other uses, [except as otherwise authorized by the regulations]; and

3. Destroys the personally identifiable information in accordance with the requirements [of the regulations].[675]

[674] 34 C.F.R. Sections 99.31(A)(3) and 99.35.
[675] 34 C.F.R. Section 99.35(a)(2)(i-iii).

The above is known as the "reasonable methods" requirement and the Secretary of Education has provided a list of "best practices" that support reasonable methods. The list is attached hereto.

The regulations also now require that a state or local educational authority or agency must use a written agreement containing specified provisions to designate any authorized representative, other than an employee, in regards to an audit or evaluation. The Guidance issued by the Secretary of Education summarizes these provisions as follows:

1. Designate the individual or entity as an authorized representative. Your agreement must formally designate the individual or entity as an authorized representative.

2. Specify the personally identifiable information from education records to be disclosed. Your agreement must identify the information being disclosed.

3. Specify that the purpose for which the personally identifiable information from education records is being disclosed to the authorized representative is to carry out an audit or evaluation of federal- or state-supported education programs, or to enforce or to comply with federal legal requirements that relate to those programs. Your agreement must state specifically that the disclosure of the personally identifiable information from education records is in furtherance of an audit, evaluation, or enforcement or compliance activity.

4. Describe the activity with sufficient specificity to make clear that it falls within the audit or evaluation exception. This must include a description of how the personally identifiable information from education records will be used. Do not be vague – the agreement must describe the methodology and why disclosure of personally identifiable information from education records is necessary to accomplish the audit, evaluation, or enforcement or compliance activity.

5. Require the authorized representative to destroy the personally identifiable information from education records when the information is no longer needed for the purpose specified. Your agreement should be clear about how the personally identifiable information from education records will be destroyed.

6. Specify the time period in which the personally identifiable information must be destroyed. Your agreement must provide a time period for destruction. You should determine the specific time period for destruction based on the facts and circumstances surrounding the disclosure and activity. The parties to the written

agreement may agree to amend the agreement to extend the time period if needed, but the agreement must include a time limit.

7. Establish policies and procedures, consistent with FERPA and other federal and state confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in an audit, evaluation, or enforcement or compliance activity. The agreement must establish the policies and procedures, consistent with FEPRA and other federal and state laws, to protect personally identifiable information from education records from further disclosure or unauthorized use.[676]

Again, in addition to the mandatory provisions for written agreements under the study's audit or evaluation exception, the Secretary has suggested the attached list of "best practices."

Schools have always been permitted to disclose information on students if the information has been properly designated as directory information.[677] If a school has a policy of disclosing directory information, it is required to give public notice to parents of the types of information designated as directory information, and of the right to opt out of having their child's information so designated and disclosed. Under the new regulations, schools can now adopt limited directory information policies that allow the disclosure of directory information to be limited to specific parties, for specific purposes, or both.

Under the former regulations, parents were permitted to opt out of having their child's directory information disclosed. This continues to be the case. However, the new regulations provide that parents may not, by opting out of directory information, prevent a school from requiring a student to wear or present a student ID or badge. When a student turns 18 years old or enters college at any age, the rights afforded to parents under FERPA transfer to the student, such as the right to provide consent before information from education records is disclosed. Students who hold their own FERPA rights because they are over 18 or are enrolled in college also have no right – under the new regulations – to refuse to wear or present a student ID or badge if that is a requirement of the local educational agency.

The new regulations also modify the definition of "directory information" to include a "student ID number that is displayed on a student ID or badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user."[678]

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[676] http://www2.ed.gov/policy/gen/guid/fpco/pdf/reasonablemtd_agreement.pdf. Educational agencies with written agreements in place prior to January 3, 2012, the effective date of the regulations, need not comply with these provisions until the written agreement is renewed or amended.

[677] 34 C.F.R. Section 99.37.

[678] 34 C.F.R. Section 99.3. The definition of "directory information" under California law, Education Code section 49061(c), is

Q. Changes to the California Education Code

Assembly Bill 143, effective January 1, 2012, made several changes to Education Code sections 49061 and 49076 regarding pupil records in K-12 education. The definition of "directory information" was modified to no longer include a pupil's place of birth and to include a pupil's e-mail address. Education Code section 49061(c) now provides:

> "'Directory information' means one or more of the following items: pupil's name, address, telephone number, date of birth, e-mail address, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous public or private school attended by the pupil."

Assembly Bill 143 also modifies Education Code section 49076, which requires school districts to allow access to pupil records without written parental consent under certain circumstances. Section 49076(a)(1)(I) now provides access to education records for the counsel of record for a minor in regards to a criminal investigation or probation violation, or in regards to proceedings to declare the person a ward of the court. Probation officers and district attorneys continue to have access for these purposes as well.

Existing law requires the recipient of pupil records to be notified of the prohibition against transmitting the information to others without the written consent of the parent. Assembly Bill 143 modifies Education Code section 49076(b) to require certain officials and authorities receiving pupil records to certify in writing to the school district that the information shall not be disclosed to another party, except as required by law. This requirement applies to law enforcement agencies that receive reports of suspected criminal activity from school administrators pursuant to Education Code section 48902, and individuals who receive pupil records pursuant to Education Code section 49076(a)(1)(I) discussed above. Education Code section 49076(b) now provides:

> "The officials and authorities to whom pupil records are disclosed pursuant to subdivision (f) of Section 48902 and subparagraph (I) of paragraph (1) of subdivision (a) shall certify in writing to the disclosing school district that the information shall not be disclosed to another part, except as provided under the federal Family Educational Rights and Privacy Act of 2001 (20 U.S.C. Sec. 1232g) and state law, without the prior written consent of the parent of the pupil or the person identified as the holder of the pupil's educational rights."

Finally, Assembly Bill 143 clarifies that districts **may** release pupil records to any person or party without written parental consent, if the records have been de-identified, which requires

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more restrictive than the definition under federal law. This definition will be discussed below.

the removal of all personally identifiable information, provided the district has made a reasonable determination that a pupil's identity is not personally identifiable, whether through single or multiple releases, and has taken into account other pertinent reasonably available information.[679]

Assembly Bill 733 amends Education Code section 49076(a)(2), effective January 1, 2013, to state that school districts **may** release information from student records to:

> "(G)(i) A contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant.
>
> (ii) Notwithstanding Section 99.31(a)(1)(i)(B) of Title 34 of the Code of Federal Regulations, a disclosure pursuant to this paragraph shall not be permitted to a volunteer or other party."

This amendment changes the advice we provided in our OPAD 12-55 (enclosed) in regard to outsourcing district e-mail. We had expressed a concern that state law does not permit disclosures of student records to contractors or consultants without parental consent. While Assembly Bill 733 eliminates this cause for concern (effective January 1, 2013), we also expressed a number of other issues districts should consider before outsourcing district e-mail.

Assembly Bill 733 also broadens the "audit" exception, which requires districts to disclose student records to certain governmental agencies. Education Code section 49076(a)(1) is amended to state that "access to those particular records relevant to the legitimate educational interests of the requester shall be permitted to:

> "(C) Authorized representatives of the Comptroller General of the United States, the Secretary of Education, and state and local educational authorities, or the United States Department of Education's Office for Civil Rights, if the information is necessary to audit or evaluate a state or federally supported education program, or in connection with the enforcement of, or compliance with, the federal legal requirements that relate to such a program. Records released pursuant to this section shall comply with the requirements of Section 99.35 of Title 34 of the Code of Federal Regulations."

In addition, Assembly Bill 733 amends Education Code section 49076(a)(1)(H) to state that records related to a parent or guardian's failure to comply with the compulsory education law shall be released to the district attorney's office (this section previously referred to a "prosecuting agency" rather than the "district attorney's office").

[679] Education Code section 49076(c).

R. Confidentiality of Student Information

In Nguon v. Wolf,[680] the United States District Court ruled that the Garden Grove Unified School District did not violate a student's civil rights, right to equal protection, or First Amendment rights to freedom of expression or right to privacy under federal and state law.

The underlying facts were that the student was a sixteen year old junior at Santiago High School. At the beginning of the 2004-2005 academic year, the student entered into a relationship with another female student, and expressed her affection with her girlfriend by holding hands, hugging, and kissing on the school grounds. The student had not revealed her sexual orientation to her parents. The student graduated from Santiago High School in June 2006.[681]

The Principal, Ben Wolf, received a complaint that the student was violating school rules regarding inappropriate public displays of affection. The principal gave the student several warnings. After the sixth incident, the student was suspended for three days. The stated reason for the suspension was defiance.[682]

Later, there was a second suspension and the principal met with the student's mother. The principal discussed the possibility of a transfer to another school with the student's mother. The principal then made arrangements with the principal at Bolsa Grande High School.[683]

The student alleges that she was singled out because she was involved in a homosexual relationship and that heterosexual couples were not treated in the same manner. However, the court ruled that based on the evidence, heterosexual couples were also disciplined in the same manner for showing inappropriate displays of public affection.[684]

The court found that there was no violation of the First Amendment rights of the student, since inappropriate displays of public affection are disruptive to the operation of the school and distract other students from education. The court held that a school need not tolerate student speech that is inconsistent with its basic educational mission.[685] The court held that inappropriate public displays of affection are not protected by the First Amendment, and that such inappropriate public displays of affection are inconsistent with the mission of the school. Therefore, the court held that such conduct may be legitimately regulated by school officials.[686]

With respect to the issue of privacy, the court found that the principal did not expressly reveal the student's sexual orientation to her mother, but indicated that the principal may have told the mother that the student was kissing a girl and that was the reason for the student's suspension. The court found that the student's conduct disrupted school activities or otherwise willfully defied the valid authority of school officials in violation of Education Code section 48900(k). The court also found that, at the time of the student's suspension, a school employee

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[680] 517 F.Supp.2d 1177, 226 Ed.Law Rep. 872 (C.D.Cal. 2007).
[681] Id. at 1179.
[682] Id. at 1181-82.
[683] Id. at 1187.
[684] Id. at 1190-91.
[685] See, Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969); Morse v. Frederick, 127 S.Ct. 2618, 2622 (2007); Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266 (1988).
[686] Id. at 1182-1199.

must make a reasonable effort to contact the pupil's parent, in person or by telephone.[687] The parent or guardian is required to respond without delay to any request for school officials to attend a conference regarding the child's behavior.[688] The conference is part of the due process to which a student is entitled before suspension is imposed.[689] The court noted that the principal was required to provide the parent with an explanation as to why the student was suspended. The court stated:

> "At a minimum, the Court believes that he [the principal] was required to disclose the conduct that constituted the sanctioned defiance; namely, IPDA [Inappropriate Public Displays of Affection]. However, the statute does not describe what must be disclosed and in what detail . . .
>
> "Because the process contemplates more than mere notification, there is a legitimate reason to provide facts which go beyond an abstract description of the conduct warranting the discipline. If a school administrator is prevented from providing a parent with the context of the discipline, it is difficult to see how the school administrator could have a meaningful discussion of the conduct, or the parent could mount a meaningful protest. For example, a parent may well protest vigorously if he or she believes the alleged conduct out of character for the student."[690]

The court went on to find that in balancing the student's privacy rights against the duties of the principal to make disclosures in the context of suspension, the court found that there was a compelling state interest in the disclosure of the objective facts constituting and providing the context for the discipline imposed. Therefore, the court found that the student's privacy rights were not violated.[691]

S. School Counselors and Confidentiality of Student Information

On December 29, 2011, the California Attorney General's office issued an opinion interpreting Education Code section 49602(c) as permitting, but not requiring, a school counselor to disclose personal information (including pregnancy-related information) received from an unemancipated student age twelve or older, to the student's parents or school principal when the counselor has reasonable cause to believe that disclosure was necessary to avoid a clear and present danger to the student's health, safety or welfare.[692]

The Attorney General's opinion is consistent with past legal advice from our office and should not alter the present practices of school districts. However, districts should consult with legal counsel in sensitive cases.

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[687] Education Code section 48911(d).
[688] Education Code section 48911(f).
[689] Goss v. Lopez, 419 U.S. 565, 581, 583 (1975).
[690] Id. at 1194; see, also, Granowitz v. Redlands Unified School District, 105 Cal.App.4th 349, 352-353 (2003).
[691] Id. at 1194-95.
[692] 94 Ops.Atty.Gen. 111 (2011).

The Attorney General's opinion interprets Education Code section 49602. Education Code section 49602 states that any information of a personal nature disclosed by a student twelve years of age or older in the process of receiving counseling from the school counselor is confidential. However, Education Code section 49602(c) creates an exception and authorizes reporting information to the principal or parents of the student when the school counselor has reasonable cause to believe that disclosure is necessary to avoid a clear and present danger to the health, safety, or welfare of the pupil or other persons in the school community, including administrators, teachers, school staff, parents, pupils and other school community members.

The Attorney General stated that because Education Code section 49602(c) does not, by its terms, compel disclosure, it does not form the basis of civil liability against the school counselor or the school district under the doctrine of negligence per se, where the school counselor fails to disclose pregnancy-related personal information to the parents or school principal of an unemancipated student age twelve or older and the minor thereafter suffers harm that could have been avoided by the disclosure of that information. The Attorney General reviewed the language of Section 49602 and concluded that a school counselor is permitted, but not required, to disclose confidential pregnancy-related information received from an unemancipated student age twelve or older, to the minor's parents or principal.

The Attorney General noted that a perceived "danger" to a student's health, safety or welfare should not be interpreted too loosely. The Attorney General noted that an individual's or a community's moral, ethical, or religious values should not be considered in determining whether there is a clear and present danger to the health and safety of the student. The Attorney General stated that Section 49602(c) would not permit a counselor to reveal a student's pregnancy-related personal information based solely on the counselor's personal views on the subject of teen pregnancy, or on the counselor's or community's subjective belief that this is the type of information that every parent should know. The Attorney General further stated that whether pregnancy-related personal information may be properly disclosed under Section 49602(c) would depend on whether the school counselor reasonably believes that disclosing the specific information, to the specific persons listed in the statute, is necessary to avert a perceived clear and present danger. The Attorney General stated that construed in this narrow manner, Section 49602(c) does not, on its face, violate a minor's constitutional right to privacy.

In addition, the Attorney General stated that Section 49602(c) permits a school counselor to reveal confidential information and that permissive action implies permissive inaction. Therefore, the school counselor does not have a mandatory duty to act and civil liability, under the doctrine of negligence per se, would not attach.

T. Pupil's Legal Name

Under California law, a parent may legally register a pupil under a name different from the name on the birth certificate. We also recommend that the school district include a pupil's legal name (i.e., the name on the child's birth certificate) and any other name by which the child may be known on permanent records of the school to maintain complete records.

The common law recognizes the right of a person to change his or her name without the necessity of legal proceedings. The Legislature recently reinforced this right by reenacting Code of Civil Procedure section 1279.5[693] which states, "Nothing in this title shall be construed to abrogate the common law right of any person to change one's name." The statutory proceedings for a name change do not abrogate that right but serve to record publicly the change.[694]

At common law, a minor does not have the right to change his or her name but a parent or guardian can adopt a name change on behalf of a minor. Section 1276 continues the common law rule by the requirement that parents must apply for a name change on a minor's behalf.[695]

There is nothing in the statutes or case law that requires a school district to maintain records reflecting pupils' birth names. Based on that fact and the parent's right to adopt a name change on behalf of a pupil, it appears that a school district could register a student under an adopted name. However, for consistency in the pupil's records, we recommend that the school district include on all permanent records the pupil's legal name and any other name by which the child may be known.

If parents disagree as to the name a minor shall adopt, neither parent has a greater interest in the matter. California has abolished the rule giving the father the primary right to have his child bear his surname and has adopted the "best interest of the child test."[696] If parents disagree as to the name a child shall adopt, the school district should continue registering the student under the name currently on record and direct the parents to seek a court order as to a resolution in the best interest of the child.

U. U.S. Department of Education Guidance

The United States Department of Education published a brochure entitled, "Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools." The brochure notes that school officials are regularly asked to balance the interest of safety and privacy for individual students and that while FERPA generally requires schools to ask for written consent before disclosing a student's personally identifiable information to individuals other than his or her parents, FERPA also allows schools to take key steps to maintain school safety.

In an emergency, FERPA permits school officials to disclose, without consent, education records, including personally identifiable information from those records, to protect the health or safety of students or other individuals. At such times, records and information may be released to appropriate parties, such as law enforcement officials, public health officials, and trained medical personnel.[697] The period of disclosure is usually limited to the length of the emergency and generally does not allow for a blanket release of all personally identifiable information from the student's education records.

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[693] Stats. 1992, ch. 163.
[694] Code of Civil Procedure section 1276.
[695] See, In re Trower (1978) 260 Cal.App.2d 75, overruled on other grounds.
[696] In re Marriage of Schiffman (1980) 28 Cal.3d 640.
[697] See, 34 C.F.R. Sections 99.31(a)(10) and 99.36.

Under FERPA, investigative reports and other records created by school security staff to monitor safety and security in and around schools are not considered education records subject to FERPA. Therefore, schools may disclose information from law enforcement unit records to anyone, including outside law enforcement authorities, without parental consent.[698]

The U.S. Department of Education stated that law enforcement unit officials who are employed by the school district should be designated in the school district's FERPA notification as "school officials" with a "legitimate educational interest." As school officials, law enforcement unit officials may be given access to personally identifiable information from students' education records. The school's law enforcement unit officials must protect the privacy of educational records it receives and may disclose them only in compliance with FERPA. Therefore, law enforcement unit records should be maintained separately from education records.

The U.S. Department of Education also stated that images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under FERPA. As a result, these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate. Schools that do not have a designated law enforcement unit may designate an employee to serve as the "law enforcement unit" in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images.

The U.S. Department of Education indicated that FERPA does not prohibit a school official from disclosing information about a student if the information is obtained through the school official's personal knowledge or observation, and not from the student's education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information, and the teacher may disclose what he or she overheard to appropriate authorities.

V. Videotaping in the Classroom by the Teacher

Education Code section 51512 states that the use of electronic listening or recording devices in the classroom disrupts and impairs the teaching process and is prohibited without the consent of the teacher and the principal of the school. Section 51512 states:

> "The Legislature finds that the use by any person, including a pupil, of any electronic listening or recording device in any classroom of the elementary and secondary schools without the prior consent of the teacher and the principal of the school given to promote an educational purpose disrupts and impairs the teaching process and discipline in the elementary and secondary schools, and such use is prohibited. Any person, other than a pupil, who willfully violates this section shall be guilty of a misdemeanor.

[698] See, 44 C.F.R. Section 99.8.

> "Any pupil violating this section shall be subject to appropriate disciplinary action.
>
> This section shall not be construed as affecting the powers, rights, and liabilities arising from the use of electronic listening or recording devices as provided for by any other provision of law."

The only exception to this prohibition is found in Education Code section 44034. Section 44034 allows a classroom teacher to use an audio recording device to record classroom instruction presentations, in the interest of improving his or her personal teaching techniques, without the approval of the school principal or other school officials. Further, it does not appear that Section 44034 would apply in cases where the teacher is interested in recording activities in the classroom for purposes of disciplining students who may misbehave.

In addition, allowing the teacher to videotape all of the students in the classroom will create potential issues with respect to the confidentiality of student records. For example, if a parent wishes to see the videotape how do we protect the confidentiality of the other students? Potentially, a release from every parent might be required.

In summary, the teacher may not use an electronic listening or recording device in the classroom without the prior consent of the principal of the school. The consent may only be granted if it is given to promote an educational purpose.

W. Outsourcing the Storage of Records

It is becoming more common for districts to store electronic data and records off-site in cloud-based platforms or servers. No longer are all district records stored on site in district files and district servers.

While federal and state law do not prohibit the storage of records, including student records in cloud-based platforms, such storage raises concerns about protecting the privacy of the data on those records. Services like Google Docs, Gmail, Yahoo Mail, and Hotmail, conveniently allow users to access and send email anytime and anywhere through an internet connection.

It should be kept in mind that under federal and state law, districts are responsible for maintaining the privacy of all confidential records, including student records. Districts can be held liable for breaches of privacy. The key to maintaining the privacy of student records and other records is the terms of the contract with the provider. Contract language from providers rarely contains sufficient protections for data that falls under FERPA and "I agree" buttons should not be clicked without careful review. Districts should retain legal counsel to negotiate appropriate agreements with service providers.

When district information is transferred or stored in a cloud, as opposed to an on-site server, it is housed in a system operated by others, usually on shared servers. This means that the district does not have physical control over the data.

FERPA[699] and the Protection of Pupil Rights Amendment (PPRA)[700] apply to all districts that receive federal financial assistance. FERPA prohibits districts from disclosing, except in limited circumstances, personally identifiable information contained in students' educational records without the consent of the parent or adult student. Educational records may include a range of written and electronic files, including email and other communications or documents created by students, teachers, and administrators. Under FERPA, districts must set up reasonable methods to ensure that the service provider accesses only student records in which it has a legitimate educational interest, that the service provider is under the direct control of the district with regard to the use and maintenance of records, and that the provider uses protected information only for the purpose for which the disclosure was made and refrains from disclosure to other parties without authorization.[701]

The National School Boards Association (NSBA) has produced a document entitled, "Data in the Cloud." The Publication recommends the following for districts:

- Identify an individual district-wide chief privacy officer or a group of individuals with district-wide responsibility for privacy.

- Regularly review and update relevant district policies and incident response plans.

- Consistently, clearly, and regularly communicate with students, parents, and the community about privacy rights and district policies and practices with respect to student data privacy. Include in an annual notice to parents and/or students the types of information transferred to cloud service providers.

- Adopt consistent and clear contracting practices that appropriately address student data and discourage acceptance of take it or leave it terms. Contracts with service providers should include terms that enable the district to control student data.

This last recommendation is extremely important. Districts should not sign boilerplate agreements with service providers. Districts should retain legal counsel to negotiate appropriate agreements with service providers that ensure the privacy of the documents and ensure that the service provider will comply with all federal and state laws with respect to the privacy of student records and other district records.

X. Obtaining Information from Students

Federal law states that no student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning the following:

[699] 20 U.S.C. Section 1232g.
[700] 20 U.S.C. Section 1232h.
[701] 34 C.F.R. Section 99.33.

1. Political affiliations or beliefs of the student or the student's parents;

2. Mental or psychological problems of the student or the student's family;

3. Sex behavior or attitudes;

4. Illegal, anti-social, self-incriminating, or demeaning behavior;

5. Critical appraisals of other individuals with whom student has close family relationships;

6. Legally recognized, privileged, or analogous relationships, such as those of lawyers, physicians, and ministers;

7. Religious practices, affiliations, or beliefs of the student or the student's parents; or

8. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).[702]

Federal law goes on to state that local educational agencies must adopt policies enforcing the federal law.[703] Local educational agencies that violate these provisions could lose federal funding.[704]

In addition, state law contains similar provisions. Education Code section 51513 states:

> "No test, questionnaire, survey, or examination containing any questions about the pupil's personal beliefs or practices in sex, family life, morality, and religion, or any questions about the pupil's parents' or guardians' beliefs and practices in sex, family life, morality, and religion, shall be administered to any pupil in kindergarten or grades 1 to 12, inclusive, unless the parent or guardian of the pupil is notified in writing that this test, questionnaire, survey, or examination is to be administered and the parent or guardian of the pupil gives written permission for the pupil to take this test, questionnaire, survey, or examination."

In summary, both federal and state laws protect the personal information of students and their parents. Violations may result in a loss of federal funds or enforcement action by the federal or state government.

[702] 20 U.S.C. Section 1232h(b).
[703] 20 U.S.C. Section 1232h(c).
[704] 34 C.F.R., Part 98.

Y. Posting of Student Grades

We have been asked whether FERPA and state law would prevent teachers from posting student grades, either electronically or on a bulletin board. In our opinion, federal and state law would prohibit posting individual student grades.

FERPA is a federal law passed in 1974. FERPA states that any state or local agency receiving federal funds must keep pupil records confidential and may not release pupil records without parental consent except in limited circumstances.[705] FERPA defines "education records" as records, files, documents and other materials which contain information directly to a student and are maintained by an educational agency or institution. Student grades would fall within the definition of education records.

State law also protects the confidentiality of student records.[706] State law defines a "pupil record" as any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties.[707] State law states that school districts shall not permit access to pupil records to a person without parental consent or under judicial order except in certain specified circumstances. None of those circumstances apply with respect to the posting of student grades or test scores.

In addition, Education Code section 60607 states that with respect to the Standardized Testing and Reporting Program (STAR) that any pupil results shall be private and may not be released to any person other than the pupil's parent or guardian and a teacher, counselor or administrator directly involved with the pupil, without the express written consent of either the parent or guardian of the pupil. Therefore, teachers should not post individual test scores or grades of students where other students and persons entering the classroom may see their scores. Teachers may post data related to class averages and other statistical data, so long as the information does not identify individual students and their grades or test scores.

STUDENT RECORDS AND THE USA PATRIOT ACT

A. Purpose of the Act

The USA PATRIOT Act ("Act"),[708] an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," was enacted by Congress on October 26, 2001, in response to the September 11, 2001, terrorist attacks. The Act was passed 98 to 1 by the Senate, and 357 to 66 in the House of Representatives, with support of members from across the political spectrum. Codified as Public Law 107-56, the Act amends several existing statutes, including the Immigration and Nationality Act,[709] the Illegal Immigration Reform and Immigrant Responsibilities Act of 1996,[710] the International

[705] 20 U.S.C. Section 1232(g).
[706] Education Code section 49060 et seq.
[707] Education Code section 49061(b).
[708] Pub. L. 107–156, Title V, Section 507, Oct. 26, 2001, 107 Stat. 367.
[709] 8 U.S.C. Section 1182.
[710] Pub. L. 104-208.

Emergency Powers Act,[711] the Foreign Intelligence Surveillance Act ("FISA"),[712] and the General Education Provisions Act, also known as the FERPA,[713] among others.

The Act consist of 342 pages outlining new surveillance laws, expanding the definition of terrorism, and reducing judicial review through the sharing of information among governmental agencies, specifically law enforcement and intelligence agencies. The United States Attorney General's Office has commended the Act for clarifying the powers of the various governmental agencies and coordinating between intelligence and law enforcement to protect the Nation's security.

Civil rights advocates, on the other hand, argue that the Act will be abused by the government and blurs the line between terrorism related investigations and criminal investigations. In an effort to prevent this type of abuse, several of the provisions of the Act have been sunsetted and are set to expire in 2005. Nevertheless, opponents of the Act predict that inevitably there will be information sharing between intelligence gathering institutions like the CIA and law enforcement agencies like the FBI which will then trickle down to local police agencies.

The inherent conflict is that the intelligence gathering institutions have more power and discretion in their surveillance operations than law enforcement. Thus, by sharing information, the broad powers trusted with intelligence agencies could be used by law enforcement. Critics of the Act also point out that certain provisions relating to First Amendment Rights have gone too far, especially the possibility that librarians could be required to produce records subpoenaed under the Act.

B. Section 215 Order for Records

One of the most controversial provisions of the Act (Section 215) is the expansion of the electronic surveillance opportunities under the FISA as well as the issuance of an order by the Foreign Intelligence Surveillance Court ("FISC") for the production of "tangible things (including books, records, papers, documents, and other items) for investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution."[714]

Each application under Section 215 of the Act[715] must be made to specially designated courts and must specify the records are sought for an authorized terrorism investigation. The order issued by the court shall not disclose that the order is issued for purposes of a terrorism investigation.[716]

[711] 80 U.S.C. Section 1701 et seq.
[712] 50 U.S.C. Section 1801 et seq.
[713] 20 U.S.C. Section 1232g; 34 C.F.R., Part 99.
[714] 50 U.S.C. Section 1861(a)(2)(A).
[715] 50 U.S.C. Section 1861(b).
[716] 50 U.S.C. Section 1861(c).

Section 215 of the Act prohibits any person from disclosing to any other person (other than those persons necessary to produce the documents) that the FBI has sought or obtained the documents.[717] Any person who, in good faith, has produced a document pursuant to an order under Section 215 shall not be liable to any other person for such production.[718]

The provision of Section 215 has sparked a public debate regarding the scope of authority granted to law enforcement.[719] One commentator has criticized Section 215's non-disclosure requirement as a gag rule that prohibits businesses . . . "from disclosing that it has been the subject of an FBI search and seizure including to the media."[720] The Justice Department, on its webpage defends Section 215 by highlighting Section 215's safeguards:

> "Section 215 permits the government to obtain 'tangible things' from third parties in foreign intelligence investigations. Although the Act does not mention libraries, Section 215 could be applied to library records as business records. Under previous law, government agents had the ability to access business records, including library records, with a grand jury subpoena in criminal cases. Section 215 now allows such requests in foreign intelligence cases. An important protection provides that Section 215 may not be used against U.S. persons (citizens or permanent resident aliens) solely based on activities protected by the First Amendment. In practice, these requests are made only as to specific individuals who are already the target of an investigation. This provision includes a safeguard that provides that government agents must seek a court order for the records, based on a certification from a high-ranking FBI official (Assistant Special Agent in Charge or higher) that the records sought are for 'an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities.' An additional safeguard requires the Department of Justice to report its use of this provision to Congress every six months."[721]

Section 802 of the Act defines "domestic terrorism" as offenses that (1) involve acts dangerous to human life that violate the laws of the United States or any state; and (2) are intended to coerce or intimidate a civilian population, influence government policy by intimidation or coercion or affect the conduct of government by mass destruction, assassination, or kidnapping.[722] This definition is virtually the same as the definition of international terrorism,

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[717] 50 U.S.C. Section 1861(d).
[718] 50 U.S.C. Section 1861(e).
[719] See, "Powers of Patriot Act in Eye of the Beholder." Los Angeles Times (September 2, 2003).
[720] Whitehead, John W. and Aden, Steven H., "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives."
51 Am. U.L. Rev. 1081, 1007 (2002).
[721] Collins, Jeffrey G., "Questions and Answers and the USA Patriot Act" (July 30, 2009), available at http://www.usdoj.gov/usao/mie/ctu/FAQ_Patriot.htm.
[722] 18 U.S.C. Section 2331.

except that domestic terrorism applies to acts that occur within the territorial jurisdiction of the United States.[723] The U.S. Attorney's office has indicated in various publications that this definition would not have a chilling effect on protected speech, such as speaking at a political rally or participating in an anti-war demonstration since these types of activities would not meet the definition of domestic terrorism.

C. Visas of Foreign Students

With respect to immigration matters, following September 11, the Immigration and Naturalization Service ("INS") was dismantled and replaced by the Bureau of Immigration and Customs ("Immigration") enforcement under the Department of Homeland Security.

The Act expands Immigration's authority to monitor the visas of foreign students. While these provisions apply mainly to college students, students attending public schools under certain foreign exchange programs (J visas) may also be covered. Under the expanded program, Immigration may collect the following information:

1. Student's identity.
2. Current U.S. address.
3. Non-immigrant visa classification.
4. Date of visa issuance.
5. Whether the student is satisfying the terms and conditions of the exchange program.[724]

D. Amendment of FERPA

In 1974, Congress enacted FERPA.[725] FERPA states that all educational agencies or institutions which receive federal funds must have a policy in place that allows parents or adult students to inspect and review the student's educational records.[726] Each educational agency or institution must establish appropriate procedures for the granting of a parental request for access to the educational records of their children within a reasonable period of time.[727]

FERPA requires educational institutions receiving federal funds to have a policy that authorizes parents or eligible students to ask the educational agency or institution to amend the record if the parent or child believes that the educational records contain information that is inaccurate, misleading, or in violation of the student's right of privacy.[728] FERPA contains a broad definition of educational records which includes records, files, documents, and other

[723] Ibid.
[724] 8 U.S.C. Section 1372.
[725] 20 U.S.C. Section 1232g.
[726] 20 U.S.C. Section 1232g(a)(1)(A).
[727] Ibid.
[728] 20 U.S.C. Section 1232g(a)(2).

materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution.[729]

FERPA prohibits an educational institution from releasing educational records without a signed and dated written consent from the parent or individual student.[730] An educational agency or institution may disclose personally identifiable information from an educational record of a student without the parent or student's consent, if the disclosure meets one or more of the following conditions:

1. The disclosure is to other school officials who have legitimate educational interest in the information.

2. The disclosure is to another school to which the student seeks or intends to enroll.

3. The disclosure is to authorize federal officials and state and local authorities for audit purposes.

4. The disclosure is in connection with financial aid for which the student has applied.

5. The disclosure is to organizations conducting studies on behalf of the educational agency and is disclosed in a manner that does not permit personal identification of parents and students.

6. The disclosure is to an accrediting organization to carry out their accrediting functions.

7. The disclosure is to comply with a judicial order or lawfully issued subpoena.

8. The disclosure is in connection with a health or safety emergency.

9. The disclosure is directory information.

10. The disclosure is to a victim of a crime of violence or a sex offense.

11. The disclosure is in connection with the disciplinary proceeding at an institution of postsecondary education.[731]

FERPA requires an educational agency or institution to maintain a record of each request for access to any disclosure of personally identifiable information from the educational records of each student.[732]

[729] 20 U.S.C. Section 1232g(a)(4).
[730] 20 U.S.C. Section 1232g(b)(1).
[731] 34 C.F.R. Section 99.31.
[732] 21 U.S.C. Section 1232g(4)(A).

Section 507 of the Patriot Act added 20 U.S.C. section 1232g(j) to FERPA.[733] Section 1232g(j) states that notwithstanding other provisions of FERPA, the Attorney General or any federal officer or employee in a position not lower than an Assistant Attorney General, designated by the Attorney General, may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General, or his designee, to do the following:

1. Collect education records in the possession of the educational agency or institution that are relevant to an authorized terrorism investigation or prosecution as defined by federal law.

2. For official purposes related to an investigation or prosecution of a terrorism offense as defined in federal law to retain disseminate, and use such records consistent with such guidelines as the Attorney General, after consultation with the Secretary of Education, shall issue to protect confidentiality.[734]

The amendments to FERPA state that an application for an ex parte order shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information related to domestic or international terrorism. The court is required to issue an order if the court finds that the application for the order includes the certification required.[735]

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this provision cannot be held liable to any person for the production of records.[736] In addition, the record-keeping provisions of FERPA do not apply to education records subject to a court order under this provision. Therefore, educational institutions are not required to maintain a record of individuals who have requested or obtained access to student records.

Attorneys who advise school districts should review any request school districts receive from the Attorney General or his designee under this provision. The attorney should:

1. Review a copy of any court order issued for compliance with 20 U.S.C. section 1232g(j).

2. Seek clarification of the order if the order is unclear as to the documents requested.

3. Advise the school district that the district is not liable to any person for the production of the documents if the educational agency or institution acted in good faith in complying with the court order.

[733] Pub. L. 107-56, Title V, section 507, October 26, 2001.
[734] 20 U.S.C. Section 1232g(j)(1).
[735] 20 U.S.C. Section 1232g(j)(2).
[736] 20 U.S.C. Section 1232g(j)(3).

4. Advise the educational institution that it is not required to maintain a record of its compliance with the court order.

To date, no provision of the Act has been determined to be unconstitutional by a U.S. court. Whether provisions of the Act will be found to be unconstitutional is impossible to predict. However, it does appear that the major impact of the Act will be felt by non-educational institutions and that there will not be a major impact upon public schools.

TRANSLATION OF DOCUMENTS

Education Code section 48985(a) states:

> "If 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 to 12 inclusive, speak a single primary language other than English, as determined from the census data submitted to the department pursuant to Section 52164 in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in the primary language, and may be responded to either in English or the primary language."

Education Code section 48985(b) requires CDE to monitor adherence to the requirements of Section 48985(a) as part of its regular monitoring and review of public schools and school districts. Section 48985(b) further states that CDE, as part of the Categorical Program Monitoring process, shall determine the types of documents and languages a school district translates to a primary language other than English, the availability of these documents to parents or guardians who speak a primary language other than English, and the gaps in translations of these documents.

The CDE has promulgated regulations implementing Section 48985. Title V, Section 11316 states:

> "All notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parents' or guardians' primary language to the extent required under Education Code section 48985."

On its web page, the CDE published Frequently Asked Questions regarding Education Code section 48985.[737] Question 9 states:

[737] CDE website, http://www.cde.ca.gov, last modified October 19, 2007.

"What notices sent by the PTA, Girl Scouts, Little League or other community organizations, must these notices be translated?

"Community organizations are not bound by EC Section 48985. However, it is important to note that as a supportive or assistive gesture, some schools send notices on behalf of such organizations. It is the CDE's opinion that if the school is sending an organization's notices to parents and guardians, then the notices fall under the requirements set forth in EC Section 48985 (". . . all notices . . . sent . . . by the school or school district . . .")."

In interpreting a statute or set of statutes, the cardinal or fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.[738] In determining the legislative intent, the court will attempt to harmonize statutes relating to the same subject matter and, whenever possible, give effect to each statute as an integral part of a coherent scheme.[739]

CDE on its webpage states that it was not the intent of the Legislature to require community organizations to translate documents that the community organizations draft and send home to parents via the students. The school district is merely assisting community organizations and parents by facilitating the ability of the community organization to send its flyers and information to parents. The Legislature, when it enacted Education Code section 48985, was referring to documents produced and drafted by the school district and not community organizations. The intent was to require translation of district notices, not notices drafted by community organizations.

In Dyna-Med, Inc. v. Fair Employment and Housing Commission,[740] the California Supreme Court stated:

"Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally, and with each other, to the extent possible. . . . Where uncertainty exists consideration should be given to the consequences that will flow from a

[738] See, Select Base Materials, Inc. v. Board of Equalization, 51 Cal.2d 640, 335 P.2d 272 (1959).
[739] See, California State Psychological Association v. County of San Diego, 148 Cal.App.3d 849, 855 (1983).
[740] 43 Cal.3d 1379, 1386-87, 241 Cal.Rptr. 67 (1987).

> particular interpretation. . . . Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. . . ."[741]

In Lungren v. Deukmejian,[742] the California Supreme Court stated:

> "But the 'plain message' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the same subject matter must be harmonized to the extent possible. . . . Literal construction should not prevail if it is contrary to the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. . . . An interpretation that renders related provisions nugatory must be avoided. . . . each sentence must be read not in isolation but in light of the statutory scheme. . . . and if a statute is amenable to two alternative interpretations, the one that leads to more reasonable result will be followed. . . ."[743]

In determining such intent, a court must first look to the words of the statute, taking into account the usual and ordinary meaning of every word, phrase and sentence in the statutory language.[744] The words of the statute must be construed in context, keeping in mind the statutory purpose. A construction making some words surplusage should be avoided.[745]

The CDE has not issued a Legal Advisory from its legal counsel interpreting Education Code section 48985. The CDE has not enacted regulations which define which records must be translated, and thus, has failed to comply with the Administrative Procedures Act (APA).[746]

The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by administrative agencies.[747] A major purpose of the APA is to provide a procedure for persons or entities

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[741] Id. at 1386-87.
[742] 45 Cal.3d 727, 735, 248 Cal.Rptr.115 (1988).
[743] Id. at 735.
[744] Ibid; see, also, Palmer v. GTE California, Inc., 30 Cal.4th 1265, 135 Cal.Rptr.2d 654 (2003).
[745] Dyna-Med, Inc. v. Fair Employment and Housing Commission, 43 Cal.3d 1379, 1386-87, 241 Cal.Rptr. 67 (1987). See, also, Palmer v. GTE California, Inc., 30 Cal.4th 1265, 1271, 135 Cal.Rptr.2d 654 (2003); Microsoft Corp. v. Franchise Tax Board, 39 Cal.4th 750, 758, 47 Cal.Rptr.3d 216 (2006); Los Angeles County Department of Children and Family Services v. Superior Court (Valerie A.), 87 Cal.App.4th 1161, 1165, 105 Cal.Rptr.2d 254 (2001); Gilliland v. Medical Board, 89 Cal.App.4th 208, 212, 106 Cal.Rptr.2d 863 (2001); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553, 578, 71 Cal.Rptr.2d 731 (1998); Select Base Materials v. Board of Equalization, 51 Cal.2d 640, 645 (1959); Stafford v. Realty Bond Service Corp., 39 Cal.2d 797, 805 (1952); People v. Superior Court, 16 Cal.3d 30, 40 (1976); California Schools Employees Association v. Cochella Valley Unified School District, 65 Cal.App.3d 913, 919 (1977); Solberg v. Superior Court, 19 Cal.3d 182, 137 Cal.Rptr. 460 (1977); In Re Waters of Long Valley Creek Stream System; 25 Cal.3d 339, 158 Cal.Rptr. 850 (1979); County of Orange v. Flournoy, 42 Cal.App.3d 908, 117 Cal.Rptr. 224 (1974); Smith v. Rhea, 72 Cal.App.3d 361, 140 Cal.Rptr. 116 (1977); Wallace v. Department of Motor Vehicles, 12 Cal.App.3d 356, 90 Cal.Rptr. 657 (1970); People v. Chambers, 7 Cal.3d 666, 674, 102 Cal.Rptr. 776 (1972); and, Estate of Jacob, 100 Cal.App.2d 452, 458-59 (1950).
[746] Government Code Section11346.
[747] Grier v. Kaiser, 219 Cal.App.3d 422, 431 (1990).

affected by regulation to be heard on the merits in its creation, and to have notice of the law's requirements so that they can conform their conduct accordingly.[748] Therefore, the court generally resolves any doubt as to the applicability of the APA's requirements in favor of the APA.[749]

If a rule constitutes a regulation within the meaning of the APA, it may not be adopted, amended or repealed except in conformity with the procedural requirements of the APA.[750] An agency must give the public notice of its proposed regulatory action, issue a complete text of the regulation with a statement of the reasons for it, give interested parties an opportunity to comment on the proposed regulation, respond in writing to public comments, and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law which reviews the regulation for consistency with the law, clarity and necessity.[751] Any regulation or order of repeal that substantially fails to comply with these requirements may be judicially declared invalid.[752] The procedural requirements of the APA cannot be superseded or modified by any subsequent legislation except to the extent that the legislation does so expressly.[753]

The APA defines "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure."[754] A regulation subject to the APA has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not apply universally so long as it declares how a certain class of cases would be decided. Second, the rule must implement, interpret or make specific the law enforced or administered by the agency or govern the agency's procedure.[755]

The opinion stated on CDE's webpage, "It is the CDE's opinion that if the school is sending an organization's notices to parents and guardians, then the notices fall under the requirements set forth in . . . Section 48985 . . ." appear to be a rule that is intended to be applied generally through a CDE audit, and is clearly intended to implement and interpret Education Code section 48985. Therefore, in our opinion, violates the APA. A requirement that school districts statewide should translate documents from community organizations should be adopted as a regulation as required by state law.

Article XIII B, Section 6, of the California Constitution states that whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse local government agencies for the costs of such program or increased level of service.

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[748] Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal.4th 557, 577 (1996).
[749] United Systems of Arkansas, Inc. v. Stamison, 63 Cal.App.4th 1001, 1010 (1998).
[750] Government Code Section 11346(a).
[751] Government Code Sections 11346.4, 11346.5, 11346.2, 11346.8, 11346.9, 11347.3, 11349.1, 11349.3.
[752] Government Code Section 11350.
[753] Government Code Section 11346(a); Morningstar Company v. State Board of Equalization, 38 Cal.4th 324, 333 (2006).
[754] Government Code Section 11342.600.
[755] Morningstar Company v. State Board of Equalization, 38 Cal.4th 324, 333-334 (2006).

Education Code section 48985 was amended in 2006 to require the CDE to monitor the requirements of Section 48985 through the Categorical Program Monitoring process.[756] As part of that process, CDE is now requiring districts to translate documents drafted by community organizations. In our opinion, the added cost of translating community organization flyers constitutes a higher level of service mandated by the state and the additional costs incurred by the district must be reimbursed by the state.

In summary, in our opinion, the CDE's interpretation of Education Code section 48985, requiring districts to translate documents produced by community organizations, is contrary to the intent of the Legislature when it enacted Section 48985 and amended it in 2006. CDE's opinion seeks to impose a statewide rule or requirement to translate community organization documents without adopting a regulation, and thus, violates the APA, and the additional translation costs are an unfunded state mandate for which the state should provide funding to school districts.

STUDENT BODY ORGANIZATIONS

The Education Code authorizes any group of students to organize a student body association within the public schools, with the approval and subject to the control and regulation of the governing board of the school district. The governing board may authorize any organization composed entirely of pupils attending the schools of the district to conduct activities approved by the governing board, including fundraising activities, so long as the activities are not in conflict with the authority and responsibility of school officials.[757]

The funds of a student body organization must be deposited in a bank, savings and loan association or invested in a manner prescribed by statute subject to the approval of the governing board of the school district.[758] The governing board of the school district must establish procedures for the expenditure of student body organization funds. The procedure must require the approval of at least three persons, including an employee or an official of the school district designated by the governing board, a certificated employee who is the designated advisor of the particular student body organization, and a representative of the particular student body organization.[759] Student body funds in elementary schools (kindergarten through sixth grade) may be used to finance activities for noninstructional purposes or to augment or to enrich the programs provided by the district.[760]

Student body funds may also be used for loans, with or without interest, to any student body organization for a period not to exceed three years; or interest bearing loans for permanent improvements in the school district property to benefit the student body.[761] The governing board of the school district must provide for the supervision of all funds raised by the student body or student body organizations using the name of the school and the cost of supervision is a proper

[756] Stats. 2006, ch. 706.
[757] Education Code sections 48930, 48931, 48932.
[758] Education Code section 48933.
[759] Ibid.
[760] Education Code section 48934.
[761] Education Code section 48936.

charge against the funds of the district.[762] The governing board of the school district may also provide for a continuing audit of student body funds with school district personnel.[763]

In schools or classes for adults, regional occupational centers or programs, or in elementary, continuation or special education schools in which the student body is not organized, the governing board may appoint an employee or official to act as trustee for student body funds and to receive such funds in accordance with procedures established by the governing board.[764] These funds must be deposited in a bank or in a savings and loan association, or both, approved by the governing board and shall be expended subject to the approval of the appointed employee or official and also are subject to such procedures as may be established by the board.[765]

COURSE OF STUDY AND GRADUATION REQUIREMENTS

A. Public Inspection of Course of Study

The governing board of every school district is required to prepare and keep on file for public inspection the course of study prescribed by the schools under its jurisdiction.[766] Each governing board must enforce in the schools the course of study and the use of the textbooks and other instructional materials prescribed and adopted by the proper authority.[767]

At the appropriate elementary and secondary grade levels, the course of study must include instruction in: personal and public safety; accident prevention; emergency first aid; protection and conservation of natural resources; fire prevention; health; and the nature and effects of alcohol, narcotics and restricted dangerous drugs, including their effect on prenatal development. The health instruction may include prenatal care and violence as a public health issue. All pupils must receive AIDS prevention instruction at least once in junior or middle school and once in high school.[768] Instruction in social sciences must include the early history of California and include the role and contributions of both men and women and various racial and ethnic minorities to the economic, political and social development of California and the United States of America.[769] The use of electronic listening or recording devices in any classroom without the prior consent of the teacher and the principal of the school is prohibited.[770]

B. Courses of Study by Grade Level

The course of study for grades 1 through 6 must include English, mathematics, social sciences, science, fine arts, health, physical education, and other studies as may be prescribed by the governing board.[771] The course of study for grades 7 through 12 must include English, social sciences, foreign languages, physical education, science, mathematics, fine arts, applied arts,

[762] Education Code section 48937.
[763] Ibid.
[764] Education Code section 48938.
[765] Ibid.
[766] Education Code section 51040.
[767] Education Code section 51050.
[768] Education Code section 51201.5.
[769] Education Code section 51204.5.
[770] Education Code section 51512.
[771] Education Code section 51210.

vocational and technical education, automobile driver education, and such studies as may be prescribed by the governing board.[772]

The governing board of every school district maintaining a junior or senior high school is required to adopt standards of proficiency and basic skills for pupils attending schools within its school district.[773] Differential standards and assessment procedures may be utilized for special education students.[774] Students who do not meet the standards of proficiency and basic skills prescribed by the governing board of the school district shall not receive a diploma of graduation from high school.[775]

C. Exemption from Course of Study

Whenever any part of the instruction of health, family life education, or sex education conflicts with the religious training and belief of the parent or guardian of any pupil, the pupil, upon written request by the parent or guardian, shall be excused from the part of the training which conflicts with such religious training and beliefs.[776] Students may also be exempted from attending courses in physical education under certain conditions.[777]

The Education Code defines "physical education" as a course of study which all students must participate in unless exempted.[778] Physical education is defined as physical activities that are conducive to health and vigor of body and mind and all pupils, except pupils excused or exempted, shall be required to attend upon the courses of public education for a total period of time of not less than 400 minutes each 10 school days for secondary pupils.[779] The minimum requirement for graduation from high school is two courses in physical education.[780]

The course of study in physical education for grades 9-12 includes instruction in eight areas over the span of the physical education classes offered as part of the school's course of study. Not every class is required to include all eight areas, but all eight areas must be covered over the course of grades 9-12.[781] State regulations outline the criteria upon which each school district shall evaluate their course of study for high school physical education.[782] The course of study provides for instruction in a developmental sequence in each of the following areas:

1. Effects of physical activity upon dynamic health;

2. Mechanics of body movement;

3. Aquatics;

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[772] Education Code section 51220.
[773] Education Code section 51215.
[774] Ibid.
[775] Education Code section 51217.
[776] Education Code section 51240.
[777] Education Code sections 51241, 51242, 51246.
[778] Education Code section 51220(d).
[779] Education Code sections 51222(a), 51223.
[780] Education Code section 51225.3(a).
[781] Education Code sections 33352(b)(7), 51220(d).
[782] 5 California Code of Regulations section 10060.

4. Gymnastics and tumbling;

5. Individual and dual sports;

6. Rhythms and dance;

7. Team sports; and

8. Combatives.

Whether to award physical education credit for courses taken in private schools is left to the local school district. However, the courses should include instruction in the eight areas over the span of the physical education courses offered as part of the school's course of study.[783] Whether to grant credit for participation in Junior Reserve Officer's Training Corps/Cadet Corps or marching band is within the discretion of the school district.[784]

State law authorizes independent study in physical education. Independent study is a voluntary alternative instructional strategy for providing regular education. Students work independently, according to a written agreement and under the general supervision of a credentialed teacher. Attendance in independent study is based on the time value of the student's work product, as determined by the student's supervising teacher. Because independent study is an alternative instructional strategy, students follow the same course of study and meet the same academic standards as classroom-based students. It is not an alternative curriculum. Independent study students must adhere to requirements for the state's physical performance test.[785]

The independent study statutes require that parent and student enter into a contract with the school district.[786] The written agreement must include the maximum length of time that may elapse between the time an independent study assignment is made and the date for which the student must complete the assigned work. The contract must also include the following:

1. The manner, time, frequency and place for submitting a pupil's assignments and for reporting his or her projects.

2. The objectives and methods of study for the pupil's work and the methods utilized to evaluate that work.

3. The specific resources, including materials of personnel that will be made available to the pupil.

4. A statement of the policies regarding the maximum length of time allowed between the assignment and the completion of a pupil's assigned work, and the number of missed assignments allowed prior

[783] Education Code sections 33352(b)(7), 51220(d).
[784] Ibid.
[785] Education Code sections 51222, 51225.3, 51241.
[786] Education Code section 51745.

to an evaluation of whether or not the pupil should be allowed to continue in independent study.

5. The duration of the independent study agreement, including the beginning and ending dates for the pupil's participation in independent study.

6. A statement of the number of course credits to be earned by the pupil upon completion.

7. The inclusion of a statement that independent study is an optional educational alternative in which no pupil may be required to participate.

8. Each written agreement shall be signed, prior to the commencement of independent study by the pupil's parent and shall indicate the certificated employee who has been designated as having responsibility for the general supervision of independent study and all persons who have direct responsibility for providing assistance to the pupil.[787]

Independent study by each student must be coordinated, evaluated, and under the general supervision of a certificated employee of the school district.[788] The school district may include the goals and objectives in the state framework for physical education in the independent study contract for the student. The student would be required to meet the standards and objectives agreed upon by the district and the student.

There are three distinct and separate exemptions from physical education in the Education Code. There is a temporary exemption for students who are ill or injured, or are enrolled for one-half or less of the work normally required for full-time pupils.[789] There is a two-year exemption for students at any time during grades 10-12, if the pupil has met satisfactorily at least five of the six standards of the physical performance test administered in grade 9.[790] There is also a permanent exemption if the pupil complies with any one of the following:

1. Is 16 years of age or older and has been enrolled in the 10th grade for one academic year or longer.

2. Is enrolled as a postgraduate pupil.

3. Is enrolled in a juvenile home, ranch, camp, or forestry camp school where pupils are scheduled for recreation and exercise.[791]

[787] Education Code section 51747.
[788] Education Code section 51747.5.
[789] Education Code section 51241(a).
[790] Education Code sections 51241(b), 60800.
[791] Education Code section 51241(c).

School districts may also exempt any four year or senior high school pupil from attending courses of physical education if the pupil is engaged in a regular school-sponsored interscholastic athletic program.[792] A student may be excused from physical education classes during one of grades 10-12 for not to exceed 24 clock hours in order to participate in automobile driver training.[793] A student enrolled in grades 10, 11, or 12, and who is also attending a regional occupational center or regional occupational program may be excused from attending courses in physical education if attendance in such classes result in hardship because of the travel time involved.[794] Under limited circumstances, a student enrolled in the last semester of grade 12 may be exempted if the student is permitted to attend school less than 240 or 180 minutes per day.[795] While the governing board of a school district may grant exemptions to students from physical education, the exemption must be granted to each individual student and only if that student meets the requirements of the Education Code.[796]

A school district's physical education policy must meet the requirements discussed above. If students do not meet any of the exemptions set forth in the Education Code, the students must comply with the physical education requirements in the Education Code. In our opinion, in order for the student to be granted credit as part of an independent study program, the instruction that the student receives must meet the state standards for physical education and must be supervised by a certificated employee. We would recommend that school districts review their policies to ensure that their policies conform to the Education Code requirements outlined above.

D. Principles of Course of Study

Teachers are also required to try to impress upon the students the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties and dignity of American citizenship and the meaning of equality and human dignity, including the promotion of harmonious relations, kindness toward domestic pets and humane treatment of living creatures, to teach them to avoid idleness, profanity and falsehood and to instruct them in manners and morals and the principles of a free government. Each teacher is encouraged to foster an environment that encourages pupils to realize their full potential and is free from discrimination.[797]

Instruction in a public school and school-sponsored activities may not reflect adversely upon people because of their race, sex, color, creed, handicap, national origin or ancestry.[798] No textbook or other instructional materials shall be adopted by the State Board of Education or any governing board for use in a public school which contain any matter reflecting adversely upon people because of their race, sex, color, creed, handicap, national origin or ancestry.[799] Participation in physical education activities or sports if required of pupils of one sex must be

[792] Education Code section 51242.
[793] Education Code section 51222(a).
[794] Education Code section 52316.
[795] Education Code section 51246.
[796] See, Education Code sections 51222, 51241, 51242, 51246.
[797] Education Code section 44806.
[798] Education Code section 51500.
[799] Education Code section 51501.

available to pupils of each sex.[800] Opportunity for participation in athletics must be provided equally to male and female students.[801]

No governing board of a school district may require students to attend any class in which human reproductive organs and their functions and processes are described, illustrated or discussed.[802] If such classes are offered, the parent or guardian of each pupil must first be notified in writing and provided with the opportunity to request in writing that their child not attend the class. Once the school district has received such a notice, the child may be excused from the class. Parents also have the right to inspect and review the materials to be used in such classes.[803]

E. Adoption of Textbooks and Instructional Materials

The State Board of Education is required to adopt textbooks for use in grades 1 through 8 throughout the state to be furnished without cost as provided by statute.[804] When adopting instructional materials for use in the schools, the governing board must only include such materials which accurately portray the cultural and racial diversity of American society.[805]

Education Code section 60061(a) states that a publisher or manufacturer shall furnish the instructional materials offered by the publisher at a price in California that includes all costs of transportation and does not exceed the lowest price at which the publisher offers those same instructional materials for adoption or sale to any other state. Section 60061(a)(2) provides that the publisher or manufacturer shall automatically reduce the price of those instructional materials to any governing board to the extent that reductions are made in another state. Section 60061(c) states that nothing in Section 60061 shall be construed to restrict the ability of a school district, county office of education, or charter school within California to negotiate the price of standards aligned instructional materials and supplemental instructional materials, in either a printed or digital form, if the negotiated price complies with Section 60061(a).

Education Code section 60063.5 states that instructional materials or supplemental instructional materials that are consistent with the requirements of Section 60119[806] shall be offered by a publisher or manufacturer as unbundled elements to enable digital materials or printed materials to be purchased separately from other components. Section 60063.5(b) states that without violating any copyright law or contract between a school district, any publisher or manufacturer, a school district may use instructional materials in a digital format that were purchased by the school district to create a district-wide online digital database for classroom use consistent with an online security system that is mutually agreed on by the publisher and the school district.

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[800] Education Code section 40.
[801] Education Code sections 41 and 49020 et seq.
[802] Education Code section 51550.
[803] Ibid.
[804] Cal. Const. Article IX, Section 7.5.
[805] Education Code section 60040.
[806] Education Code section 60119 requires public hearings regarding whether each student in the school district has sufficient instructional materials aligned to state standards.

Education Code section 60063(a) states that a publisher or manufacturer that submits a printed instructional material for adoption by the State Board of Education pursuant to Education Code section 60200, or the governing board of a school district pursuant to Section 60400, or for use by the governing board of a school district pursuant to Section 60210, on or after January 1, 2014, shall ensure that the printed instructional material is also available in an equivalent digital format during the entire term of the adoption. Section 60063(b) states that the equivalent digital format of the printed instructional material shall conform to the most current, ratified standards under Section 508 of the Federal Rehabilitation Act of 1973,[807] as amended, and the web content accessibility guidelines adopted by the World Wide Web Consortium for Accessibility.

F. Online Instruction

Assembly Bill 644[808] adds Education Code section 46300.8. Section 46300.8 authorizes on-line instruction for grades 9-12, commencing with the 2014-15 school year under certain limited conditions.

Education Code section 46300.8(a) states that commencing with the 2014-15 school year, attendance of pupils in grades 9 through 12, inclusive, under the immediate supervision and control of a certificated employee of the school district or county office of education who is delivering synchronous, on-line instruction shall be included in computing average daily attendance, provided that all of the following conditions are met:

1. The certificated employee providing the instruction confirms pupil attendance through visual recognition during the class period. A pupil logon, without any other pupil identification, is not sufficient to confirm pupil attendance.

2. The class has regularly scheduled starting and ending times, and the pupil is scheduled to attend the entire class period. Average daily attendance shall be counted only for attendance in classes held at the regularly scheduled times.

3. An individual with exceptional needs, as defined in Section 56026 of the Education Code, may participate in synchronous, on-line instruction only if his or her IEP specifically provides for that participation.

4. If a school district or county office of education elects to offer synchronous, on-line instruction, the school district or county office of education shall not deny enrollment to a pupil based solely on the pupil's lack of access to the computer hardware or software necessary to participate in the synchronous, on-line course. If a pupil chooses to enroll in a synchronous, on-line course and does not have access to the necessary equipment, the school district or

[807] 29 U.S.C. Section 794d.
[808] Stats. 2012, ch. 579.

county office of education shall provide, for each pupil who chooses to enroll in a synchronous, on-line course, access to the computer hardware or software necessary to participate in the synchronous, on-line course.

5. The ratio of average daily attendance for synchronous, on-line pupils who are 18 years of age or younger to school district full-time equivalent certificated employees responsible for the synchronous, on-line instruction, calculated as specified by the State Department of Education, shall not exceed the equivalent ratio of pupils to full-time certificated employees for all other educational programs operated by the school district, unless a higher or lower ratio is negotiated in a collective bargaining agreement.

6. The ratio of average daily attendance for synchronous, on-line pupils who are 18 years of age or younger to the county office of education full-time equivalent certificated employees who provide synchronous, on-line instruction, to be calculated in a manner prescribed by the State Department of Education, shall not exceed the equivalent ratio of pupils to full-time certificated employees for all other educational programs operated by the high school or unified school district with the greatest average daily attendance of pupils in that county, unless a higher or lower ratio is provided for in a collective bargaining agreement. The computation of the ratios shall be performed annually by the reporting agency at the time of, and in connection with, the second principal apportionment report to the Superintendent of Public Instruction.

Education Code section 46300.8(b) states that the Superintendent of Public Instruction shall establish rules and regulations for the purpose of implementing Section 46300.8 which, at a minimum, address all of the following:

1. How school districts and county offices of education include pupil attendance in on-line courses in the calculation of average daily attendance pursuant to Section 46300.

2. How to ensure a pupil meets minimum instructional time requirements.

3. Require statewide testing results for on-line pupils to be reported and assigned to the school in which the pupil is enrolled for regular classroom courses, and to any school district or county office of education within which that school's testing results are aggregated.

4. Require attendance accounted for to be subject to the annual district audit conducted pursuant to Section 41020.

Education Code section 46300.8(c) states that the Superintendent of Public Instruction may provide guidance regarding the ability of a school district or county office of education to provide synchronous, on-line instruction. Section 46300.8(d) states that "synchronous, on-line instruction" shall be defined as a class or course in which the pupil and the certificated employee who is providing instruction are on-line at the same time and use real time, Internet-based, collaborative software that combines audio, video, file sharing, and other forms of interaction. Section 46300.8(e) states that Section 46300.8 shall become inoperative on July 1, 2019 and, as of January 1, 2020, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2020, deletes or extends the dates on which it becomes inoperative and is repealed.

G. Saturday School

Education Code section 37252(a) states that the governing board of a school district maintaining grades 7 through 12, inclusive, shall offer supplemental instructional programs for pupils enrolled in grades 7 through 12 and do not demonstrate sufficient progress toward passing the high school exit exam. Section 37252(b) states that sufficient progress shall be determined on the basis of the results of assessments and the minimum levels of proficiency recommended by the state or, the pupils' grades and other indicators of academic achievement designated by the district.

Education Code section 37252 authorizes school districts to include pupils who do not possess sufficient English language skills to be assessed, to be considered students who do not demonstrate sufficient progress toward passing the high school exit exam. These students may receive supplemental instruction designed to assist students to succeed on the high school exit exam.

Education Code section 37252(e) states that programs to assist students to pass the high school exit exam may be offered during the summer, before school, after school, on Saturday, or during intersession, but shall be in addition to the regular schoolday. Any pupil who is unable to attend a Saturday school program for religious reasons shall be given priority for enrollment in supplemental instruction offered at a time other than Saturday.

Education Code section 37252(f) states that a school district offering supplemental instructional programs shall receive funding pursuant to Education Code section 42239 if provided for in the annual Budget Act. Section 42239 sets forth a formula for funding for supplemental instruction. If the appropriated funding is insufficient to pay all claims made in any fiscal year a process is set forth for prioritizing claims.

Education Code section 37252(g) states that notwithstanding any other provision of law, neither the State Board of Education nor the Superintendent of Public Instruction may waive any provisions of Section 37252. Funds received pursuant to 37252 may be used for special education students in need of intensive instruction and services.

Education Code section 37252.2 authorizes the governing board of each school district to offer programs of direct, systematic, and intensive supplemental instruction to students enrolled in grades 2 to 9, inclusive, who have been recommended for retention or who have been retained.

A school district may require a student who has been retained to participate in supplemental instructional programs. However, school districts must provide a mechanism for a parent or guardian to decline to enroll his or her child in the program. Attendance in supplemental instructional programs is not compulsory. Supplemental educational services may be offered during the summer, before school, after school, on Saturdays, or during intersession. Notwithstanding any other provision of law neither the State Board of Education nor the Superintendent of Public Instruction may waive any provision of Section 37252.2.

Education Code section 37252.8 authorizes the governing board of a school district to offer programs of direct, systematic, and intensive supplemental instruction, during the summer, before school, after school, on Saturdays or during intersession. The student must have been identified as having a deficiency in mathematics, reading, or written expression, based on the results of standardized testing or have been identified as being at risk of retention.

Education Code section 37253 states that the Superintendent of Public Instruction shall adopt rules and regulations necessary to implement supplemental instructional programs. Section 37253(c) sets forth the maximum entitlement of a school district to reimbursement for supplemental instructional programs.

None of the code sections cited above authorize instruction on Sundays. None of the code sections above authorize reimbursement for supplemental instruction for advanced placement students and the statutes cited above specifically prohibit the State Board of Education or the Superintendent of Public Instruction from waiving any of these provisions.

H. Lottery Funds

We have been asked whether Proposition 20 lottery funds may be used to buy iPads and other tablet devices. In our opinion, Proposition 20 lottery funds may be used to buy iPads and other tablet devices if the iPads and other tablet devices are used as a learning resource.

Proposition 20 was passed by the voters in the March 7, 2000 election. The proposition, known as the "Cardenas Textbook Act of 2000," amended Government Code section 8880.4. Section 8880.4 currently provides that fifty percent of any increase in the amount calculated shall be allocated to school districts and community college districts for the purchase of instructional materials on the basis of an equal amount per unit of average daily attendance and through a fair and equitable distribution system across grade levels.[809]

Education Code section 60010(h) defines "instructional materials" as all materials that are designed for use by pupils and their teachers as a learning resource and help pupils to acquire facts, skills or opinions, or to develop cognitive processes. Instructional materials may be printed or nonprinted, and may include textbooks, technology-based materials, other educational materials, and tests.

[809] Government Code section 8880.4(a)(2)(B).

Education Code section 60010(m) states in part:

> "(1) 'Technology-based materials' means basic or supplemental instructional materials that are designed for use by pupils and teachers as learning resources and that require the availability of electronic equipment in order to be used as a learning resource. Technology-based materials include, but are not limited to, software programs, video disks, compact disks, optical disks, video and audiotapes, lesson plans, and databases.
>
> "(2) Technology-based materials do not include the electronic equipment required to make use of those materials, unless that equipment is to be used by pupils and teachers as a learning resource. However, this shall not be construed to authorize a school district to replace computers or related equipment in an existing computer lab or allow a school district to establish a new computer lab." [Emphasis added.]

Based on the language in Section 60010(m)(2), it appears that technology-based materials include the electronic equipment required to make use of those materials, if that equipment is used by pupils and teachers as a learning resource. Therefore, in our opinion, these lottery funds may be used to purchase Apple iPads or other tablet devices if the iPads or other tablet devices are used as a learning resource.[810]

I. Courses Without Educational Content

Education Code section 51228.1(a) states that commencing with the 2016–17 school year, a school district maintaining any of grades 9 to 12, inclusive, shall not assign a pupil enrolled in any of grades 9 to 12, inclusive, in a school in the school district to any course period without educational content for more than one week in any semester, unless all of the following conditions are satisfied:

1. A pupil is assigned to that course only if the pupil and his/her parent(s) consented in writing to the assignment.

2. A school official has determined that the pupil will benefit from being assigned to the course period.

3. The principal or assistant principal of the school has stated in a written document maintained at the school that, for the relevant school year, no pupils are assigned to those classes unless the school has met the conditions specified in paragraphs (1) and (2).

Education Code section 51228.1(b) states that under no circumstances shall a school district assign a pupil enrolled in any of grades 9 to 12, inclusive, in a school in the school

[810] The district may wish to confirm our interpretation with the California Department of Education.

district to a course period without educational content because there are not sufficient curricular course offerings for the pupil to take during the relevant period of the designated schoolday. Education Code section 51228.1(c) defines 'course period without education content" as one course period during which any of the following occurs:

1. The pupil is sent home or released from campus before the conclusion of the designated schoolday.

2. The pupil is assigned to a service, instructional work experience, or to an otherwise named course in which the pupil is assigned to assist a certificated employee, but not expected to complete curricular assignments.

3. The pupil is not assigned to any course for the relevant course period.

Education Code section 51228.1(d) that nothing in section 51228.1 shall be interpreted to limit or otherwise affect the authority of a school district to authorize dual enrollment in community college, to establish and maintain evening high school programs, to offer independent study, to provide courses of work-based learning or work experience education, or to offer any class or course of instruction authorized if the program otherwise meets all of the requirements of law governing that program. Education Code section 51228.1(e) states that section 51228.1 shall not apply to a pupil enrolled in an alternative school, a community day school, a continuation high school, or an opportunity school. Education Code section 51228.1(f) states that the Superintendent of Public Instruction shall develop regulations for adoption by the state board of education to establish procedures for governing section 51228.1, including the form of the written statement required.

Education Code section 51228.2(a) states that commencing with the 2016–17 school year, a school district maintaining any of grades 9 to 12, inclusive, shall not assign a pupil enrolled in any of grades 9 to 12, inclusive, in a school in the school district to a course that the pupil has previously completed and received a grade determined by the school district to be sufficient to satisfy the requirements and prerequisites for admission to the California public institutions of postsecondary education and the minimum requirements for receiving a diploma of graduation from high school, unless either of the following applies:

1. The course has been designed to be taken more than once because pupils are exposed to a new curriculum year to year and are therefore expected to derive educational value from taking the course again.

2. For any course that has not been designed to be taken more than once, all of the following conditions are satisfied: A pupil is assigned to the course only if the pupil's parent(s) has consented in writing to the assignment for the purpose of improving the lower grade, a school official has determined that the pupil will benefit

> from being assigned to the course, and the principal or assistant principal of the school has stated in a written document to be maintained at the school that, for the relevant school year, no pupils are assigned to those classes unless the school has met these conditions.

Education Code section 51228.2(b) states that under no circumstances shall a school district assign a pupil enrolled in any of grades 9 to 12, inclusive, in a school in the school district to a course that the pupil has previously completed and received a grade determined by the school district to be sufficient to satisfy the requirements and prerequisites for admission to the California public institutions of postsecondary education and the minimum requirements for receiving a diploma of graduation from high school because there are not sufficient curricular course offerings for the pupil to take during the relevant period of the designated schoolday. Education Code section 51228.2(c) states that nothing in section 51228.2 shall be interpreted to limit or otherwise affect the authority of a school district to authorize dual enrollment in community college, to establish and maintain evening high school programs, to offer independent study, to provide courses of work-based learning or work experience education, or to offer any class or course of instruction if the program otherwise meets all of the requirements of law governing that program.

Education Code section 51228.2(d) states that section 51228.2 shall not apply to pupils enrolled in an alternative school, a community day school, a continuation high school, or an opportunity school. Education Code section 51228.2(e) states that the Superintendent of Public Instruction shall develop regulations for adoption by the state board of education to establish procedures governing section 51228.2, including the form of the written statement required.

Education Code section 51228.3(a) states that a complaint of noncompliance with the requirements of section 51228.1 or 51228.2 may be filed with the local educational agency under the Uniform Complaint Procedures. Education Code section 51228.3(b) states that a complainant not satisfied with the decision of a local educational agency may appeal the decision to the California Department of Education pursuant to the Uniform Complaint Procedures, and shall receive a decision regarding the appeal within 60 days of the California Department of Education's receipt of the appeal. Education Code section 51228.3(c) states that if a local educational agency finds merit in a complaint, or the Superintendent finds merit in an appeal, the local educational agency shall provide a remedy to the affected pupil.

Education Code section 51228.3(d) states that the Superintendent of Public Instruction shall prepare an annual report detailing actions taken pursuant to section 51228.3. By January 1 of each year, the Superintendent of Public Instruction shall submit the report to the appropriate fiscal and policy committees of the legislature.

Education Code section 51228.3(e) states that the Superintendent of Public Instruction shall have all power and authority necessary to effectuate the requirements of section 51228.3. The Superintendent of Public Instruction shall develop regulations for adoption by the State Board of Education that set forth the procedures governing section 51228.3.

INDEPENDENT STUDY PROGRAMS

A. Alternative Pupil-Teacher Ratios

Education Code section 51745.6 authorizes school districts operating independent study programs to negotiate with the union for a higher or lower grade span ratio for independent study programs in their collective bargaining agreement. The grade spans are defined as K-3 inclusive, 4-6 inclusive, 7-8 inclusive, and 9-12 inclusive. Only those units of average daily attendance for independent study may reflect a pupil teacher ratio that does not exceed the applicable grade span ratios shall be eligible for state apportionments, unless a higher ratio has been negotiated in a collective bargaining agreement. If a school district, charter school, or county office of education has a memorandum of understanding to provide instruction and coordination with the school district, charter school, or county office of education at which a pupil is enrolled, then the applicable grade span ratios that shall apply are the ratios for the local educational agency providing the independent study program to the pupil.

Education Code section 51747 authorizes a school district or county office of education to enter into a written agreement with the student and maintain a signed written agreement on file electronically. Section 51747.5 states that school districts, charter schools, and county offices of education shall not be required to sign and date pupil work products when assessing the time value of pupil work products for apportionment purposes.

B. Independent Study Requirements

Education Code section 51749.5 states that notwithstanding any other law, and **commencing with the 2015-16 school year,** a school district, charter school, or county office of education may, for pupils enrolled in kindergarten and grades 1-12, inclusive, provide independent study courses pursuant to the following conditions:

1. The governing board of a participating school district, charter school, or county office of education adopts policies, at a public meeting, that comply with the requirements of Section 51749.5 and any applicable regulations adopted by the State Board of Education.

2. A signed learning agreement is completed and on file pursuant to Section 51749.6.

3. Courses are taught under the general supervision of certificated employees who hold the appropriate subject matter credential, are highly qualified teachers under the No Child Left Behind Act, and are employed by the school district, charter school, or county office of education at which the pupil is enrolled, or by a school district, charter school, or county office of education that has a memorandum of understanding to provide the instruction in coordination with the school district, charter school, or county office of education at which the pupil is enrolled.

4. Courses are annually certified by resolution of the charter school, county office of education, or school district, to be of the same rigor and educational quality as equivalent classroom-based courses, and shall be aligned to all relevant, local and state content standards. The certification shall, at a minimum, include the duration, number of equivalent daily instructional minutes for each school day that a pupil is enrolled, the number of equivalent total instructional minutes, and the number of course credits for each course. This information shall be consistent with that of equivalent classroom-based courses.

5. Pupils enrolled in courses authorized by Section 51749.5 shall meet the applicable age requirements established pursuant to Sections 46300.1,[811] 46300.4,[812] 47612, and 47612.1.

6. Pupils enrolled in courses authorized by Section 51749.5 shall meet the applicable residency and enrollment requirements established pursuant to Sections 46300.2,[813] 47612, 48204,[814] and 51747.3.[815]

7. Certificated employees and each pupil shall communicate in person, by telephone, or by any other live visual or audio connection no less than twice per calendar month to assess whether each pupil is making satisfactory educational progress. Satisfactory educational progress includes, but is not limited to applicable statewide accountability measures and the completion of assignments, examinations, or other indicators that show that the pupil is working on assignments, learning required concepts, and progressing toward successful completion of the course, as determined by certificated employees providing instruction. If satisfactory educational progress is not being made, certificated employees providing

[811] Education Code section 46300.1 states, "Commencing July 1, 1993, no school district may receive school district apportionments pursuant to Section 42238 for independent study by pupils 21 years of age or older or by pupils 19 years of age or older who have not been continuously enrolled in kindergarten or any of grades 1 to 12, inclusive, since their 18th birthday."

[812] Education Code section 46300.4 states in part, "If a pupil 21 years of age or older, or a pupil 19 years of age or older, has not been continuously enrolled in kindergarten or any of grades 1 to 12, inclusive, since his or her 18th birthday, any attendance credit for coursework he or she is pursuing through independent study shall be eligible for apportionment only if it is one or more of the types of courses set forth in paragraph (1) of subdivision (a) of Section 51225.3 or any course required by the governing board as a prerequisite to receiving a diploma of high school graduation."

[813] Education Code section 46300.2 states, "The State Department of Education shall apportion funds for community school and independent study average daily attendance only for average daily attendance claimed by school districts and county superintendents of schools for pupils who officially reside in the county in which the apportionment claim is reported, or who officially reside in a county immediately adjacent to the county in which the apportionment claim is reported."

[814] Residency under Education Code section 48204 includes students who are placed within the boundaries of the district, a foster child in their school of origin, a pupil with an interdistrict permit, and a pupil who lives with a caregiver.

[815] Education Code section 51747.3(c) excludes apportionments for independent study for students who establish residency based on parental employment pursuant to Education Code section 48204(b).

instruction shall notify the pupil and, if the pupil is less than 18 years of age, the pupil's parent or legal guardian, and conduct an evaluation to determine whether it is in the best interest of the pupil to remain in the course, or whether he or she should be referred to an alternative program, which may include, but is not limited to, a regular school program. A written record of the findings of an evaluation shall be treated as a mandatory interim pupil record, the record shall be maintained for a period of three years from the date of the evaluation and, if the pupil transfers to another California public school, the record shall be forwarded to that school. Written or computer-based evidence of satisfactory educational progress shall be retained for each course and pupil. At a minimum, this evidence shall include a grade book or summary document that, for each course, lists all assignments, examinations, and associated grades.

8. A proctor shall administer examinations.

9. Statewide testing results for pupils enrolled in any course authorized pursuant to Section 51749.5 shall be reported and assigned to the school or charter school at which the pupil is enrolled, and to any school district, charter school, or county office of education within which that school's or charter school's testing results are aggregated. Statewide testing results for pupils enrolled in a course or courses pursuant to Section 51749.5 shall be disaggregated for purposes of comparing the testing results of those pupils to the testing results of pupils enrolled in classroom-based courses.

10. A pupil shall not be required to enroll in courses authorized by Section 51749.5.

11. The pupil-to-certificated employee ratio limitations established pursuant to Section 51745.6 are applicable to courses authorized by Section 51749.5.

12. For each pupil, the combined equivalent daily instruction minutes for enrolled courses authorized by Section 51749.5 and enrolled courses authorized by all other laws and regulations shall meet the minimum instructional day requirements applicable to the local educational agency. Pupils enrolled in courses authorized by Section 51749.5 shall be offered the minimum annual total equivalent instructional minutes pursuant to Sections 46200 to 46208, inclusive, and Section 47612.5.

13. Courses required for high school graduation or admission to the University of California or California State University shall not be offered exclusively through independent study.

14. A pupil participating in independent study shall not be assessed a fee prohibited by Section 49011.

15. A pupil shall not be prohibited from participating in independent study solely on the basis that he or she does not have the materials, equipment, or Internet access that are necessary to participate in the independent study course.

Education Code section 51749.5(c) defines "equivalent total instructional minutes" as the same number of minutes as required for an equivalent classroom-based course. Section 51749.5(d) states that the Superintendent of Public Instruction shall conduct an evaluation of independent study courses offered pursuant to Section 51749.5 and report the findings to the Legislature and the Department of Finance no later than September 1, 2019. The report shall, at a minimum, compare the academic performance of pupils in independent study with demographically similar pupils enrolled in equivalent classroom-based courses.

C. Enrollment Requirements For Independent Study

Education Code section 51749.6(a) states that before enrolling a pupil in a course authorized by Section 51749.5, each school district, charter school, or county office of education shall provide the pupil and, if the pupil is less than 18 years of age, the pupil's parent or legal guardian, with a written learning agreement that includes all of the following:

1. A summary of the policies and procedures adopted by the governing board of the school district, charter school, or county office of education pursuant to Section 51749.5.

2. The duration of the enrolled course or courses, the duration of the learning agreement, and the number of course credits for each enrolled course consistent with certifications adopted by the governing board of the school district, charter school, or county office of education pursuant to Section 51749.5. The duration of a learning agreement shall not exceed a school year or span multiple school years.

3. The learning objectives and expectations for each course, including, but not limited to, a description of how satisfactory educational progress is measured and when a pupil evaluation is required to determine whether the pupil should remain in the course or be referred to an alternative program, which may include, but is not limited to, a regular school program.

4. The specific resources, including materials and personnel, that will be made available to the pupil.

5. A statement that the pupil is not required to enroll in courses authorized pursuant to Section 51749.5.

Education Code section 51749.6(b) states that the learning agreement shall be signed by the pupil and, if the pupil is less than 18 years of age, the pupil's parent or legal guardian, and all certificated employees providing instruction before instruction may commence. The signed learning agreement constitutes permission from a pupil's parent or legal guardian, if the pupil is less than 18 years of age, for the pupil to receive instruction through independent study. A physical or electronic copy of the signed agreement shall be retained by the school district, county office of education, or charter school for at least three years and as appropriate for auditing purposes. For purposes of Section 51749.6, an electronic copy includes a computer or electronic stored image of an original document, including, but not limited to, portable document format, JPEG, or other digital image file type, that may be sent via fax machine, email, or other electronic means.

EVERY STUDENT SUCCEEDS ACT (ESSA)

A. New Accountability Standards

The ESSA returns control over accountability standards to states and local school districts and prohibits the U.S. Department of Education from imposing requirements or influencing state and local academic standards, assessments, reporting and accountability. The ESSA continues to require the testing of students in math, science and reading. The testing results must be disaggregated by race, income, English proficiency and other specific criteria.

The ESSA prohibits the U.S. Department of Education from setting national academic standards or imposing conditions on states and local agencies in exchange for federal grants or for waivers from ESEA requirements. The ESSA requires the U.S. Department of Education to eliminate positions to reflect the elimination of 49 federal education programs.

The ESSA repeals the current national school accountability system and requires each state to establish its own school evaluation system aligned to academic standards developed by the state. States are required to develop and intervene to improve the academic performance of the lowest performing 5% of schools and high schools that fail to graduate one-third or more of their students. Actions must also be taken to assist consistently low performing subgroups of students.

B. State Academic Standards

The ESSA requires states to establish academic standards that apply to all students in the subjects of reading, math and science, and it allows states to develop standards in additional subjects at their discretion. States would not be required to submit their standards to the U.S. Department of Education for review of approval, and the U.S. Department of Education would

be prohibited from exercising any authority, direction or control over state academic standards.

Under the ESSA, state standards must be challenging and include at least three levels of achievement that would apply to all public schools and public school students. The standards must prescribe the same knowledge, skills and level of achievement that is expected of all public school students, and they must be aligned with entrance requirements for credit-bearing course work for higher education and career and technical institutions.

States may adopt alternative academic achievement standards for students with the most significant cognitive disabilities as long as the alternate academic achievement standards are aligned with the state's regular standards, promote access to the general education curriculum, and are consistent with the Individuals with Disabilities Education Act (IDEA). Each state must adopt English language proficiency standards involving speaking, listening, reading and writing that addresses different proficiency levels and aligns with the state's regular academic standards.

C. Testing of Students

The ESSA maintains existing requirements that states regularly test students for academic achievement in math, reading and science. Math and reading assessments must be administered in each of grades 3-8, and at least once in grades 9-12. Science assessments must be administered at least once during grades 3-5, once during grades 6-9, and once during grades 10-12. Local school districts must annually assess the English proficiency of all English learners, although English learners who have been in school in the United States for less than twelve months would be exempt.

The academic assessments used must align with the state's academic standards and must provide coherent and timely information about the student attainment towards those standards, and whether the student is performing at grade level. For elementary schools, the same assessments must be used for all public school students statewide. For high school students, a state may approve the use of locally selected, nationally recognized high school academic assessments.

The results of assessments within a state must be disaggregated by local school district and individual school by race, economically disadvantaged students, children with disabilities, English proficiency standard and status, and gender. Migrant status has been added as a category that must be disaggregated.

The ESSA retains the current cap of 1% of the number of cognitively disabled students who can be assessed under the alternative achievement standards in the state and not be included in the report card measuring a state's academic progress, but it allows individual local school districts to exceed that cap if the district justifies its need to do so. The ESSA sets a target limit on the aggregate amount of time that students may spend taking academic assessments for each grade and allows parents to opt a student out of the required assessments for any reason. The ESSA also allows states to use computer-adaptive tests that enable students to be assessed on content above their grade level.

D. State Accountability Systems

The ESSA requires each state to establish its own statewide accountability system starting with the 2017-18 school year. The state system must be based on the state's adopted academic standards and each state must establish long-term goals that include interim measures of progress towards those goals for all students, as well as separately for certain subgroups of students. The state's long-term goals must include improved academic achievement, improved high school graduation rates, and increases in the percentage of students making progress in English language proficiency.

States are required to assess individual schools on such quantitative measures as graduation rates, performance on state tests and progress on achieving English language proficiency and place less emphasis on subjective measures such as student engagement, educator engagement, student access to and completion of advance coursework, post-secondary readiness, and school climate and safety. States must measure the annual progress of at least 95% of all students, including 95% of all students in subgroups.

States are required to submit their accountability plans to the U.S. Department of Education for approval, although the ESSA explicitly prohibits the U.S. Department of Education from adding or deleting requirements or specific elements to state plans. The U.S. Department of Education is also prohibited from issuing any regulations regarding state development or implementation of accountability systems that would add new requirements or criteria.

E. State Improvement Plans

States are required to add plans to help the lowest performing 5% of all public schools that receive Title I funding. All public high schools that fail to graduate one-third or more of their students in any additional statewide categories that a state deems appropriate. Local school districts are required to develop and implement a support and improvement plan to improve student outcomes at the lowest performing public schools. Such plans must include evidence-based interventions, be based on school level needs assessments, and identify any resource inequities to be addressed through the plan. The plans must be approved by the school, local school district and state educational agency, and they must be monitored and periodically reviewed by the state educational agency.

Schools under such plans would be eligible for comprehensive support and improvement funding to take appropriate actions under the approved plans, for up to four years as determined by the state. If a school has not addressed all its issues within the state-determined time period, a state can take more rigorous action. The ESSA also permits local schools districts to allow the school's students to transfer to another public school, starting with the lowest achieving children from low-income families, unless prohibited by state law.

In schools where any subgroup of students is consistently underperforming, schools must develop and implement their own school level targeted support and improvement plan for those students. Such plans must include evidence-based actions to intervene and identify any resource

inequities that need to be addressed. The plans must be approved and monitored by the local school district. If the plans are unsuccessful after a number of years, additional actions must be taken, including development of a comprehensive support and improvement plan using federal funds.

F. School Report Cards

States must publicly disseminate information regarding the performance of individual local school districts and the state as a whole. The report card must be concise, understandable, and widely accessible to the public. The report card must include information similar to what is now required.

The report card must also report data collected on students who are homeless, in foster care, or who have a parent who is a member of the armed forces on active duty. For all disaggregated subgroups, the report must include the percentage of students assessed and not assessed. The report card must include the number and name of all public schools that have been identified as low performing and are under a comprehensive support and improvement plan, as well as schools with consistently underperforming subgroups of students who are receiving targeted support and improvement. The report card must also publicly present the following:

1. Data regarding measures of school quality.

2. The number and percentage of inexperienced teachers and principals.

3. The per pupil expenditures of federal, state and local funds.

4. The number and percentage of students with the most significant cognitive disabilities who take an alternative assessment by grade and subject.

5. Results on state academic assessments in reading and math in grades 4 and 8 of the National Assessment of Educational Progress (NAEP) compared with the national average.

6. For each high school in the state beginning in 2017, the cohort graduation rate.

7. For each local school district, results on academic assessments compared to the students in the state as a whole.

8. For each school, results on academic assessments compared with the students in the same local educational agency in the state as a whole.

G. U.S. Department of Education Authority

The U.S. Department of Education is prohibited from imposing conditions on states and school districts in exchange for a waiver from the Elementary Secondary Education Act (ESEA) requirements or for federal grants, or from changing state standards or influencing states to enter into partnerships with other states. The ESSA also prohibits the U.S. Department of Education from establishing a national curriculum, supporting a national test for students or requiring particular academic standards, whether directly or indirectly through grants or other means. The ESSA explicitly prohibits the U.S. Department of Education from requiring states to adopt the Common Core State Standards, a set of grade level benchmarks that outline what students should know in both reading and math for kindergarten through high school.

The ESSA requires the U.S. Department of Education to identify the number of full-time equivalent employee positions that are associated with the federal education programs that would be eliminated by the ESSA, and to reduce the department's work force by that number.

H. State Plan Requirements

The ESSA modifies state plan requirements to include:

1. Help for local school districts to support early childhood education.

2. Ensure that low income and minority children are not disproportionately taught by ineffectual, out of field or inexperienced teachers, and publish any criteria used to measure teacher or principal effectiveness.

3. Support local school district efforts to reduce bullying.

4. Help local school districts provide for student transitions between levels of school to reduce the risk of students dropping out.

5. Ensure the educational stability of children in foster care while allowing them to stay in their original school.

6. Support the education stability of homeless children and youth.

7. Eliminate state fiscal and accounting barriers so schools can easily consolidate and use funds from federal, state and local sources.

I. Local Plan Requirements

The ESSA states that local plans must be developed with meaningful consultation with teachers, principals, paraprofessionals, charter school leaders (if applicable), administrators and parents of children in the schools. Local plans must be coordinated with other programs and laws that affect education.

States may approve plans only if they substantially help children served by the local school district. Local plans must ensure that all children receive a high quality education and must close the achievement gap between children meeting the state's academic standards and children who are not.

Local school districts must describe how their local plan will monitor a student's progress in meeting the challenging state academic standards:

1. By implementing a well-rounded program of instruction.

2. Identifying students who may be at risk of academic failure.

3. Providing additional educational assistance to individual students.

4. Implementing strategies to strengthen academic programs and improve school conditions for learning.

The local plan must address disparities that result in low income and minority students being taught by ineffective, inexperienced or out-of-field teachers. The local plan must describe educational services that will be provided for neglected or delinquent children and for homeless children and youth, as well as how it will implement effective parent and family engagement. Local plans must also describe how local school districts will identify and serve gifted and talented students, and assist schools in developing effective school library programs that provide an opportunity to develop digital literacy.

J. Parental Involvement

The ESSA requires that parents be consulted in the development of state and local school district plans. State and local plans must include provisions aimed at informing parents and providing options for parents and students. Local school districts must reserve at least 1% of funds received under Title I funding to assist schools in parental and family engagement.

Local school districts must notify parents of their right to receive information regarding the professional qualifications of the student's classroom teachers, including whether the teacher has met state qualification and licensing criteria, whether the teacher is teaching under a provisional status, and whether the teacher is teaching in his or her field of certification. Local school districts must provide parents with information regarding the student's level of achievement and growth on each of the state academic assessments, and provide timely notice if the student has been taught for four or more consecutive weeks by a teacher who does not meet state certification requirements. If requested, school districts must provide parents information regarding student participation and mandated assessments, and the parent's right to opt the student out of the assessment. School districts must also make publicly available on their web sites information on each required assessment, including subject matter, the purpose of the assessment, source of the requirement, amount of time that students will spend on the assessment, the schedule for the assessment, and the time and format for disseminating the results.

K. English Language Instruction

School districts that receive Title I funds must develop a plan for outreach to parents of English learners. School districts must inform parents regarding how they can be involved in their child's education and assist their children to attain English proficiency, achieve at high levels within a well-rounded education, and meet the challenging state academic standards.

School districts that receive funding under Title I to provide English language instruction must inform parents at least 30 days before the start of the school year if their child may be participating in the program. The school district must explain how and why the student was selected for participation, and describe the exit requirements for the English language instruction program. The information provided must clarify that the parents have the right to refuse participation and opt out of the program at any time.

L. Grants For Direct Student Programs

The ESSA authorizes states to award grants to local school districts for certain direct student services. These direct student services include the following:

1. Enrollment and participation in academic courses not available at the school.

2. Credit recovery and academic acceleration courses that lead to a regular high school diploma.

3. Assisting students in completing post-secondary level instruction and exams for credit at institutions of higher education, including Advanced Placement and International Baccalaureate programs.

4. Personalized learning, including high quality academic tutoring.

5. Transportation of students from the lowest performing 5% of schools where states are seeking to address the school's problems.

School districts that receive grants from the state for this purpose may use up to 1% for outreach and communication to parents about direct student services and up to 2% for administrative costs, with the remainder to be used for direct student services.

M. Certification and the Evaluation of Teachers

The ESSA eliminates the "highly qualified teacher" designation and removes the U.S. Department of Education from the process of evaluating teachers. The ESSA modifies teacher training programs to provide for state and local development of their own individual teacher evaluation programs that may be tied to student achievement and may be used for decisions regarding hiring, dismissal and compensation.

In applying for teacher training grants, states must describe their system of certification and licensing of teachers and principals, how activities they will perform will align with the state's academic standards, and how states will improve student achievement, how states will improve the skills of teachers and principals to identify students with specific learning needs, and the actions the state may take to improve preparation programs and strengthen support for teachers.

The U.S. Department of Education is expressly prohibited from controlling the development, improvement or implementation of any teacher or principal evaluation system, a state or local educational agency's definition of teacher or principal effectiveness, or any teacher or principal standards, certifications or licensing. In their applications for teacher training sub-grants, local school districts must describe the activities they will carry out and how the activities are aligned with the state's academic standards, as well as how they will prioritize funds to low performing schools where comprehensive support and improvement plans are in place or schools where targeted support and improvement plans are in place for underperforming students subgroups.

The ESSA includes provisions to prohibit states and local school districts from assisting any school employee, contractor or agent in obtaining a new job, apart from the routine transmission of personnel files, if the agency knows or has probable cause to believe that the employee engaged in sexual misconduct regarding a student in violation of the law. States must enact laws to implement and enforce this prohibition. The U.S. Department of Education would be prohibited from having any control or direction over the measures adopted.

N. Charter School Grant Program

The ESSA modifies the current charter school grant program with a program awarding grants to states and, through the states, sub-grants to charter school developers to open new charter schools, and expand and replicate high quality charter school models. Under the ESSA, state entities that receive charter school grant funds must use 90% of the funds to provide sub-grants to eligible applicants to open new charter schools, open high quality charter school models, or expand high quality charter schools. At least 7% of the funds must be used for technical assistance to carry out those activities and to work with authorized public chartering agencies to improve authorized quality. Not more than 3% of the funds may be used for administrative costs.

The ESSA charter school grant program gives priority in providing funds to states that:

1. Allow at least one entity that is not a local educational agency to be an authorizing charter agency, or have an appeal process for the denial of a charter school application if only local educational agencies are allowed to be chartering agencies.

2. Ensure equitable financing for charter schools and students.

3. Use charter schools and best practices from charter schools to help improve struggling schools and local educational agencies.

4. Ensure that public chartering agencies implement best practices for charter school authorizing.

5. Provide charter schools with funding for facilities, assistance with facility acquisition, access to public facilities and low or no cost leasing privileges, and right of first refusal to purchase public school buildings.

6. Support charter schools that serve at-risk students through activities such as dropout prevention, dropout recovery, or comprehensive career counseling.

At the end of the third year of the five year grant program, states must report to Congress on the number of students served by the charter school grant program, progress towards priorities, how quality school objectives were met, the number of sub-grants that were awarded, and how the state worked with charter schools to foster community involvement in their schools. States would be allowed to use a weighted lottery to improve admission chances for educationally disadvantaged students, as long as the lottery is not prohibited by state law and does not create schools exclusively to serve a particular subset of students.

O. English Learners

The ESSA provides funding for English learners and redefines the goals of the program. The goals are:

1. To ensure English proficiency and develop high levels of academic achievement in English for English learners.

2. To assist English learners in meeting the same challenging state academic standards as all students.

3. To assist teachers and schools in establishing and sustaining effective language instruction programs to teach English learners.

4. To assist teachers and school leaders in providing effective programs to prepare English learners to enter all English instructional settings.

5. To promote parental and community participation in language instructional programs for parents, families and communities of English learners.

P. Preschool Programs

The ESSA establishes a new preschool development program to be administered by the

U. S. Department of Health and Human Services in conjunction with the U.S. Department of Education. The ESSA authorizes $250 million per year through fiscal year 2020 and is designed to provide better access to early childhood education for low income and disadvantaged children, with the goal of preparing these children to be ready for kindergarten. Under the ESSA, the U.S. Department of Health and Human Services and the U.S. Department of Education will award grants to states on a competitive basis, but will grant priority to states that have never received preschool development grants.

The grant funds are to be used to conduct periodic statewide needs assessments of the availability and quality of existing preschool programs, including programs serving the most vulnerable or underserved populations or children in rural areas. States must develop strategic plans for collaboration, coordination and quality improvement activities among existing state programs, and must ensure parental choice by providing information to parents about the variety of programs available.

COMMON CORE STATE STANDARDS – LEGAL REQUIREMENTS

A. Historical Background

The Common Core State Standards originated with the National Governors Association and the Council of Chief State School Officers. In January 2010, California enacted legislation which established the Academic Content Standards Commission consisting of 12 appointed members to propose recommended academic content standards to the State Board of Education on or before July 15, 2010.[816] In 2010, the Legislature added provisions to the Education Code to provide for the adoption of the Common Core State Standards.[817]

Education Code section 60605.8 requires the Academic Content Standards Commission created by the Legislature to develop academic content standards that are internationally benchmarked and build toward college and career readiness by the time of high school graduation. On or before July 15, 2010, the Commission was required to present its recommendations to the State Board of Education. On or before August 2, 2010, the Education Code required the State Board of Education to either adopt or reject the academic content standards as proposed by the Commission. The State Board of Education adopted the recommendations of the Commission and adopted the Common Core State Standards.[818]

B. LCAP and the Common Core State Standards

The Common Core State Standards are a state mandate and a school district or county office of education cannot refuse to implement Common Core State Standards since it would be a violation of state law. The State of California could withhold all of a school district's state funding or obtain a court order ordering the school district to implement the Common Core State Standards. The Common Core State Standards are a part of the Local Control and Accountability Plan (LCAP) and each school district is required to adopt an LCAP which

[816] See, Education Code sections 60605.7, 60605.8.
[817] Education Code section 60605.8.
[818] Education Code section 60605.8(g).

includes the Common Core State Standards.[819] Education Code section 52060(d) lists eight priorities that must be part of the LCAP and one of the state priorities is implementation of the academic content and performance standards adopted by the State Board of Education (i.e., the Common Core State Standards).

Education Code section 42127 states that for the 2014-2015 fiscal year and each fiscal year thereafter, the governing board of a school district shall not adopt a budget before the governing board of the school district adopts an LCAP or an annual update to the LCAP. Section 42127 further states that the governing board of a school district shall not adopt a budget that does not include the expenditures necessary to implement the LCAP or the annual update to the LCAP, which also includes the Common Core State Standards. In summary, the budget, LCAP and the Common Core State Standards are all intertwined.

Education Code section 42127 further states that the budget for the school district shall not be adopted or approved by the county superintendent of schools before an LCAP or an update to an existing LCAP for the budget year is approved. Therefore, if the school district fails to approve the LCAP with the Common Core State Standards included and its budget, state funding could be withheld and state intervention could ensue.

C. Failure to Approve an LCAP With the Common Core State Standards Included

The county superintendent has fiscal oversight over school districts and now that the LCAP and the adoption of the Common Core State Standards are connected to the budget, failure to approve the LCAP and Common Core State Standards will trigger the budget oversight provisions in state law. If the county superintendent of schools determines that a school district has failed to approve a budget as a result of failing to approve an LCAP or Common Core State Standards, the county superintendent of schools is required to do at least one of the following pursuant to Education Code section 42127.6:

- Assign a fiscal expert to advise the district on its financial problems.
- Conduct a study of the financial and budgetary conditions of the district.
- Direct the school district to submit a financial projection of all fund and cash balances of the district as of June 30, for the current year and subsequent fiscal years.
- Require the district to encumber all contracts and other obligations, to prepare appropriate cash flow analysis and monthly or quarterly budget revisions, and to appropriately record all receivables and payables.

[819] Education Code section 52060.

- Direct the district to submit a proposal for addressing the fiscal condition that resulted in the determination that the district may not be able to meet its financial obligations.

- Withhold compensation of the members of the governing board and the district superintendent for failure to provide requested financial information.

Without the passage of a budget, the district will not be able to meet its financial obligations and therefore the county superintendent, in consultation with the Superintendent of Public Instruction, must, pursuant to Education Code section 42127.6, take at least one of the five actions described below:

- Develop and impose, in consultation with the Superintendent of Public Instruction and the school district governing board, budget revisions that would enable the district to meet its financial obligations in the current fiscal year.

- Stay or rescind any action that is determined to be inconsistent with the school district's ability to meet its obligations for the current or subsequent fiscal year.

- Assist in developing, in consultation with the governing board of the school district, a financial plan that will enable the district to meet its future obligations.

- Assist in developing, in consultation with the governing board of the school district, a budget for the subsequent fiscal year.

- As necessary, appoint a fiscal advisor to perform any and all duties on the county superintendent's behalf.

If these measures fail or if an LCAP (with the Common Core State Standards included) is not approved by the governing board of the school district, a state trustee could be appointed and ultimately the state could take over the school district and implement a budget, an LCAP and Common Core State Standards for the school district.

PUBLIC SCHOOL ACCOUNTABILITY

The Public Schools Accountability Act of 1999 is one of four major pieces of legislation that together make up Governor Davis' public education reform package.[820] The Act adds Sections 52050-52056 to the Education Code, relating to school performance. The Act establishes the Public School Performance Accountability Program, consisting of three component parts: (1) the State Academic Performance Index, to be known as the API; (2) the

[820] Stats.1999, ch. 4 (S.B. X1).

Immediate Intervention/Underperforming Schools Program; and (3) the Governor's High Achieving/Improving Schools Program.

By July 1, 1999, the Superintendent of Public Instruction, with the approval of the State Board of Education, must develop an API to measure the performance of schools, especially the academic performance of students, and demonstrate comparable improvement in academic achievement by all numerically significant ethnic and socioeconomically disadvantaged subgroups within schools. The API will consist of a variety of indicators currently reported to the State Department of Education including, but not limited to, the results of the STAR test, attendance rates for students and certificated school personnel for elementary schools, middle schools, and secondary schools, and the graduation rates for students in secondary schools. At least 60% of the value of the API will be from tests including STAR, the new high school exit examination enacted by Senate Bill X2, and the yet to be developed "matrix" examination. The accountability system for schools with fewer than 100 students and schools under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, and alternative schools, including continuation high schools and independent study schools, will be deferred until July 1, 2000, so that the State Department of Education may develop an alternative approach.[821]

Based on the API, the Superintendent of Public Instruction must develop, and the State Board of Education must adopt, expected annual percentage growth targets for all schools based on their API baseline score as measured in July 1999. The minimum percentage growth rate will be 5% annually, but the State Board of Education may set differential growth targets based on grade level of instruction and may set higher growth targets for the lowest performing schools.

Upon adoption of state performance standards by the State Board of Education, the Superintendent of Public Instruction must recommend, and the State Board of Education must adopt, a statewide API performance target that includes consideration of performance standards and represents the proficiency level required to meet the state performance target. Schools may either meet the state target or meet their own growth targets to be eligible for the Governor's Performance Award Program.

Beginning in June, 2000, the API shall be used for both of the following:

1. Measure the progress of schools selected for participation in the Immediate Intervention/Underperforming Schools Program; and

2. Rank all public schools in the state for the purpose of the High Achieving/Improving Schools Program.

The Immediate Intervention/Underperforming Schools Program will begin by August 15, 1999, when schools that scored below the 50th percentile on the STAR test, both in the Spring of 1998 and 1999, will be invited to participate. By September 1, 1999, the Superintendent of Public Instruction will notify 430 selected participants. Of the 430 schools, there will be no

[821] Education Code section 52052.

more than 301 elementary, 78 middle, and 52 high schools, providing statewide proportionate geographic representation of urban and rural schools.

If fewer than the specified number of schools in any grade level category apply, schools that scored below the 50th percentile in those grade level categories that did not apply for the program will be randomly selected by the Superintendent of Public Instruction, until the number of schools in each grade level category is achieved. In other words, it appears that participation is voluntary unless the 430 figure is not attained, in which case the Superintendent of Public Instruction will mandatorily select schools to make up the difference.

Each school selected on or before September 1, 1999, will be awarded a planning grant of $50,000. By October 1, 1999, each participating school must contract with an external evaluator and appoint a broad-based school site and community team for development of an action plan by the following March 15. The external evaluators will come from a list developed by the Superintendent of Public Instruction and approved by the State Board of Education.

The action plan must include percentage growth targets at least as high as the annual growth targets adopted by the State Board of Education, and must also include an expenditure plan. At a minimum, the action plan must do all of the following:

1. Review and include the school and district conditions identified in the school accountability report card.

2. Identify the current barriers at the school and district toward improvement in student achievement.

3. Identify schoolwide and districtwide strategies to remove these barriers.

4. Review and include school and school district crime statistics.

5. Examine and consider desegregated data regarding student achievement and other indicators to consider whether all groups and types of students make adequate progress toward short-term growth targets and long-term performance goals.

6. Set short-term academic objectives for a two-year period that will allow the school to make adequate progress toward the growth targets established for each participating school for student achievement as measured by specified indicators.

The completed action plan must be submitted to the district governing board for approval. By April 15, the action plan must be submitted to the Superintendent of Public Instruction with a request for funding. By May 15, the Superintendent of Public Instruction must recommend, and the State Board of Education must act, on the local funding requests.

A school whose application is approved on or before June 15, 2000, will receive a grant for each fiscal year that it participates in the program, in an amount up to $200 per student, with a minimum allocation of $50,000 per school site. A participating school or the school district having jurisdiction over that school must match the amount of state funding from any new or existing sources of funding.

At the end of the first year, if the school fails to meet its short-term growth target, the governing board can impose consequences, including reassignment of school personnel, negotiation of site-specific amendments to collective bargaining agreements or other changes deemed appropriate, in order to continue implementing the action plan and to make progress toward meeting the school's growth targets.

At the end of the second year of implementation (2001-2002), a school that meets or exceeds its growth targets will receive a monetary or nonmonetary award under the Governor's Performance Award Program. A school that has not met its performance goals, but demonstrates significant growth, must continue to participate in the program for an additional year and will receive continued funding.

A school that does not meet its performance goals and has failed to show significant growth after two years in the program will be deemed a low-performing school. The Superintendent of Public Instruction will then assume all of the legal rights, duties, and powers of the governing board with respect to that school. The principal of the school will be reassigned, pursuant to a specified procedure, and the Superintendent of Public Instruction must do at least one of the following:

1. Revise attendance options for students to allow them to attend any public school in which space is available.

2. Allow parents to apply directly to the SBE for establishment of a charter school at the existing school site.

3. Assign the management of the school to a college, university, county office of education, or other appropriate educational institution.

4. Reassign other certificated employees of the school.

5. Renegotiate a new collective bargaining agreement at the expiration of the existing agreement.

6. Reorganize the school.

7. Close the school.

The Superintendent of Public Instruction may take other action considered necessary against the district, including appointment of a new superintendent or suspension of the authority of the governing board with respect to the identified school or schools.

Beginning in June 2000, and every June thereafter, the Superintendent of Public Instruction will rank all public schools based on the API. Schools will be ranked in decile categories by grade level of instruction provided and shall include three categories: elementary, middle, and high school. Beginning in June 2001, the rankings will indicate the target annual growth rates of schools, the actual growth rates, and how growth rates compare schools that have similar characteristics. The Superintendent of Public Instruction will annually publish the rankings on the Internet, and each school must report its ranking in the school accountability report card.

The State Board of Education will establish a Governor's Performance Award Program to provide monetary and nonmonetary awards to schools that meet or exceed API performance growth targets. All schools, including schools participating in the Immediate Intervention/Underperforming Schools Program, are eligible to participate in the Governor's Performance Award Program. The monetary awards will be made available on either a per student or per school basis, not to exceed $150 per student. Nonmonetary awards will also be available, including classification as a distinguished school, listing on a public school honor roll, and public commendations by the Governor and the Legislature.

By January 31, 2002, each district with schools participating in the Immediate Intervention/Underperforming Schools Program must submit to the Superintendent of Public Instruction an evaluation of the impact, costs, and benefits of the program as it relates to the district, with an analysis of the reasons why the schools have or have not met growth targets.

By January 15, 2000, the Superintendent of Public Instruction must develop, and the State Board of Education must approve, guidelines for a request for proposals for an independent evaluator. By September 1, 2000, the Superintendent of Public Instruction must contract with an independent evaluator to prepare a comprehensive evaluation of the implementation, impact, cost, and benefits of both the Immediate Intervention/Underperforming Schools Program and the High Achieving/Improving Schools Program.[822]

STUDENT PROMOTION AND RETENTION

On September 22, 1998, Governor Wilson signed legislation relating to student promotion and retention. This legislation took effect January 1, 1999.[823]

Section 1 of the Act states that it is the intent of the Legislature and the Governor that school districts adopt policies that address academic deficiencies of every student. The purpose of the legislation as declared by the Legislature is the development of rigorous academic standards for each grade level.[824]

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[822] Education Code section 52050 et seq.
[823] Stats.1998, ch. 742 (A.B. 1626) adding Education Code sections 48070.5 and 60648.
[824] Ibid.

The legislation requires the governing board of each school district and each county board of education to adopt policies regarding the promotion and retention of students between the following grades:

1. Between second grade and third grade.

2. Between third grade and fourth grade.

3. Between fourth grade and fifth grade.

4. Between the end of intermediate grades and beginning of middle school grades which typically occurs between sixth and seventh grades but may vary depending upon the grade configuration of the school or school district.

5. Between the end of middle school grades and the beginning of high school which typically occurs between eighth and ninth grades but may vary depending upon the grade configuration of the school or school district.[825]

The legislation requires that the policy provides for the identification of students who should be retained and who are at risk of being retained in their current grade level based on the results of the assessments administered pursuant to Education Code section 60640 (i.e., the Standardized Testing and Reporting Program known as the STAR Program), the minimum levels of proficiency recommended by the State Board of Education pursuant to Education Code section 60648, and the student's grades and other indicators of academic achievement designated by the district. The legislation states that the policy shall base the identification of students transitioning from grades two to three and grades three to four primarily on the basis of the student's level of proficiency in reading. The policy shall base the identification of students transitioning from grades four and above to the next grade on the basis of the student's level of proficiency in reading, English, language arts, and mathematics.[826]

The legislation states that a student who is performing below the minimum standard for promotion shall be retained in his or her current grade level unless the student's regular classroom teacher determines in writing that retention is not the appropriate intervention for the student's academic deficiencies. This written determination shall specify the reasons that retention is not appropriate for the student and shall include recommendations for interventions other than retention that, in the opinion of the teacher, are necessary to assist the student to attain acceptable levels of academic achievement. If the teacher's recommendation to promote is contingent upon the student's participation in a summer school or interim session remediation program, the student's academic performance shall be reassessed at the end of the remediation program, and the decision to retain or promote the student shall be reevaluated at that time. The

[825] Education Code section 48070.5(a).
[826] Education Code sections 48070.5(b) and (c).

teacher's evaluation shall be provided to and discussed with the student's parents or guardian and the principal before any final determination of student retention or promotion.[827]

The legislation states that if a student does not have a single regular classroom teacher, the policy adopted by the school district shall specify the teacher or teachers responsible for the promotion or retention decision.[828] It also states that the policy shall provide for parental notification when a student is identified as being at risk of retention. This notice shall be provided as early in the school year as practicable. The policy shall provide a student's parent or guardian the opportunity to consult with the teacher or teachers responsible for the decision to promote or retain the student.[829]

The legislation states that the district policy shall provide a process whereby the decision of the teacher to retain or promote a student may be appealed. If an appeal is made, the burden shall be on the appealing party to show why the decision of the teacher should be overruled. The legislation states that the policy shall provide that pupils who are at risk of being retained in their current grade be identified as early in the school year and as early in their school careers as possible. Section 48070.5(h) states that the policy shall indicate the manner in which opportunities for remedial instruction will be provided to students who are recommended for retention or who are identified as being at risk for retention. Section 48070.5(i) states that the policy shall be adopted at a public meeting of the governing board of the school district.[830]

Section 48070.5(j) states that nothing in Section 48070.5 shall be construed to prohibit the retention of a pupil not included in the grade levels identified in Section 48070.5(a) or for reasons other than those specified in Section 48070.5(b), if such retention is determined to be appropriate for that student. In addition, nothing in 48070.5 shall be construed to prohibit a governing board from adopting promotion and retention policies that exceed the criteria established in the legislation.[831]

The legislation further requires the Superintendent of Public Instruction to recommend, and the State Board of Education to adopt, levels of student performance on achievement tests administered pursuant to Section 60640 (STAR Testing) in reading, English, language arts, and mathematics at each grade level. The performance levels shall identify and establish the level of performance that is deemed to be the minimum level required for satisfactory performance in the next grade. These levels of performance shall only be adopted after the achievement tests have been aligned, pursuant to Section 60643(a)(3), to the content and performance standards adopted by the State Board of Education pursuant to Section 60605(a).[832] The legislation does not address special education students or programs.

[827] Education Code section 48070.5(d)(1).
[828] Education Code section 48070.5(d)(2).
[829] Education Code section 48070.5(e).
[830] Education Code sections 48070.5(f), (g), (h) and (i).
[831] Education Code section 48070.5.
[832] Education Code section 60648.

COLLEGE AND CAREER ACCESS PATHWAYS PARTNERSHIPS – DUAL ENROLLMENT

On October 8, 2015, Governor Brown signed Assembly Bill 288[833] adding Education Code section 76004, effective January 1, 2016.

Section 1 of Assembly Bill 288 states the findings of the Legislature as follows:

1. Research has shown that dual enrollment can be an effective means of improving the educational outcomes for a broad range of students.

2. Dual enrollment has historically targeted high-achieving students. However, increasingly, educators and policymakers are looking toward dual enrollment as a strategy to help students who struggle academically or who are at risk of dropping out.

3. Allowing a greater and more varied segment of high school pupils to take community college courses could provide numerous benefits to both the pupils and the state, such as reducing the number of high school dropouts, increasing the number of community college students who transfer and complete a degree, shortening the time to completion of educational goals, and improving the level of preparation of students to successfully complete for-credit, college-level courses.

4. California should rethink its policies governing dual enrollment, and establish a policy framework under which school districts and community college districts could create dual enrollment partnerships as one strategy to provide critical support for underachieving students, those from groups underrepresented in postsecondary education, those who are seeking advanced studies while in high school, and those seeking a career technical education credential or certificate.

5. Through dual enrollment partnerships, school districts and community college districts could create clear pathways of aligned, sequenced coursework that would allow students to more easily and successfully transition to for-credit, college-level coursework leading to an associate degree, transfer to the University of California or the California State University, or to a program leading to a career technical education credential or certificate.

6. To facilitate the establishment of dual enrollment partnerships, the state should remove fiscal penalties and policy barriers that

[833] Stats. 2015, ch. 618.

discourage dual enrollment opportunities. By reducing some of these restrictions, it will be possible to expand dual enrollment opportunities, thereby saving both students and the state valuable time, money, and scarce educational resources.

Education Code section 76004 states that notwithstanding Education Code section 76001 or any other law:

1. The governing board of a community college district may enter into a College and Career Access Pathways (CCAP) partnership with the governing board of a school district for the purpose of offering or expanding dual enrollment opportunities for students who may not already be college bound or who are underrepresented in higher education, with the goal of developing seamless pathways from high school to community college for career technical education or preparation for transfer, improving high school graduation rates, or helping high school pupils achieve college and career readiness.

2. A participating community college district may enter into a CCAP partnership with a school district partner that is governed by a CCAP partnership agreement approved by the governing boards of both districts. As a condition of, and before adopting, a CCAP partnership agreement, the governing board of each district, at an open public meeting of that board, shall present the dual enrollment partnership agreement as an informational item. The governing board of each district, at a subsequent open public meeting of that board, shall take comments from the public and approve or disapprove the proposed agreement.

3. The CCAP partnership agreement shall outline the terms of the CCAP partnership and shall include, but not necessarily be limited to, the total number of high school students to be served and the total number of full-time equivalent students projected to be claimed by the community college district for those students. The scope, nature, time, location, and listing of community college courses to be offered and criteria to assess the ability of pupils to benefit from those courses. The CCAP partnership agreement shall also establish protocols for information sharing, in compliance with all applicable state and federal privacy laws, joint facilities use, and parental consent for high school pupils to enroll in community college courses.

4. The CCAP partnership agreement shall identify a point of contact for the participating community college district and school district partner.

5. A copy of the CCAP partnership agreement shall be filed with the office of the Chancellor of the California Community Colleges and with the California Department of Education before the start of the CCAP partnership. The chancellor may void any CCAP partnership agreement it determines has not complied with the intent of the requirements of this section.

A community college district participating in a CCAP partnership shall not provide physical education course opportunities to high school or any other course opportunities that do not assist in the attainment of at least one of the goals listed above.[834] A community college district shall not enter into a CCAP partnership with a school district within the service area of another community college district, except where an agreement exists, or is established, between those community college districts authorizing that CCAP partnership.[835]

A high school pupil enrolled in a course offered through a CCAP partnership shall not be assessed any fee that is prohibited by Education Code section 49011.[836] A community college district participating in a CCAP partnership may assign priority for enrollment and course registration to a pupil seeking to enroll in a community college course that is required for the pupil's CCAP partnership program that is equivalent to the priority assigned to a pupil attending a middle college high school as described in Education Code section 11300 and consistent with middle college high school provisions in Section 76001 of the Education Code.[837]

The CCAP partnership agreement shall certify that any community college instructor teaching a course on a high school campus has not been convicted of any sex offense or any controlled substance offense.[838] The CCAP partnership agreement shall certify that any community college instructor teaching a course at the partnering high school campus has not displaced or resulted in the termination of an existing high school teacher teaching the same course on that high school campus.[839] The CCAP partnership agreement shall certify that a qualified high school teacher teaching a course offered for college credit at a high school campus has not displaced or resulted in the termination of an existing community college faculty member teaching the same course at the partnering community college campus.[840]

The CCAP partnership agreement shall include a certification by the participating community college district of all of the following:

1. A community college course offered for college credit at the partnering high school campus does not reduce access to the same course offered at the partnering community college campus.

[834] Education Code § 76004(d).
[835] Education Code § 76004(e).
[836] Education Code § 76004(f).
[837] Education Code § 76004(g).
[838] Education Code § 76004(h).
[839] Education Code § 76004(i).
[840] Education Code § 76004(j).

2. A community college course that is oversubscribed or has a waiting list shall not be offered in the CCAP partnership.

3. Participation in a CCAP partnership is consistent with the core mission of the community colleges pursuant to Education Code section 66010.4, and that pupils participating in a CCAP partnership will not lead to enrollment displacement of otherwise eligible adults in the community college.[841]

The CCAP partnership agreement shall certify that both the school district and community college district partners comply with local collective bargaining agreements and all state and federal reporting requirements regarding the qualifications of the teacher or faculty member teaching a CCAP partnership course offered for high school credit.[842]

The CCAP partnership agreement shall specify both of the following:

1. Which participating district will be the employer of record for purposes of assignment monitoring and reporting to the county office of education.

2. Which participating district will assume reporting responsibilities pursuant to applicable federal teacher quality mandates.[843]

The CCAP partnership agreement shall certify that any remedial course taught by community college faculty at a partnering high school campus shall be offered only to high school students who do not meet their grade level standard in math, English, or both on an interim assessment in grade 10 or 11, as determined by the partnering school district, and shall involve a collaborative effort between high school and community college faculty to deliver an innovative remediation course as an intervention in the student's junior or senior year to ensure the student is prepared for college-level work upon graduation.[844]

A community college district may limit enrollment in a community college course solely to eligible high school students if the course is offered at a high school campus during the regular school day and the community college course is offered pursuant to a CCAP partnership agreement.[845] A community college district may allow a special part-time student participating in a CCAP partnership agreement established pursuant to this article to enroll in up to a maximum of 15 units per term if all of the following circumstances are satisfied:

1. The units constitute no more than four community college courses per term.

[841] Education Code § 76004(k).
[842] Education Code § 76004(l).
[843] Education Code § 76004(m).
[844] Education Code § 76004(n).
[845] Education Code § 76004(o).

2. The units are part of an academic program that is part of a CCAP partnership agreement.

3. The units are part of an academic program that is designed to award students both a high school diploma and an associate degree or a certificate or credential.[846]

The governing board of a community college district participating in a CCAP partnership agreement shall exempt special part-time students from the fee requirements in Sections 76060.5, 76140, 76223, 76300, 76350, and 79121.[847] A district shall not receive a state allowance or apportionment for an instructional activity for which the partnering district has been, or shall be, paid an allowance or apportionment.[848] The attendance of a high school pupil at a community college as a special part-time or full-time student is authorized attendance for which the community college shall be credited or reimbursed provided that no school district has received reimbursement for the same instructional activity.[849]

For each CCAP partnership agreement entered into pursuant to this section, the affected community college district and school district shall report annually to the office of the Chancellor of the California Community Colleges all of the following information:

1. The total number of high school pupils by school site enrolled in each CCAP partnership, aggregated by gender and ethnicity, and reported in compliance with all applicable state and federal privacy laws.

2. The total number of community college courses by course category and type and by school site enrolled in by CCAP partnership participants.

3. The total number and percentage of successful course completions, by course category and type and by school site, of CCAP partnership participants.

The total number of full-time equivalent students generated by CCAP partnership community college district participants.[850]

On or before January 1, 2021, the Chancellor shall prepare a summary report that includes an evaluation of the CCAP partnerships, an assessment of trends in the growth of special admits system-wide and by campus, and, based upon the data collected pursuant to this section, recommendations for program improvements, including, but not necessarily limited to, both of the following:

[846] Education Code § 76004(p).
[847] Education Code § 76004(q).
[848] Education Code § 76004(r).
[849] Education Code § 76004(s).
[850] Education Code § 76004(t)(1).

1. Any recommended changes to the statewide cap on special admit full-time equivalent students to ensure that adults are not being displaced.

2. Any recommendation concerning the need for additional student assistance or academic resources to ensure the overall success of the CCAP partnerships.[851]

The chancellor shall ensure that the number of full-time equivalent students generated by CCAP partnerships is reported pursuant to the reporting requirements in Education Code section 76002.[852]

The annual report shall also be transmitted to the Legislature, the Director of Finance and the State Superintendent of Public Instruction.[853] A community college district that violates this article, including, but not necessarily limited to, any restriction imposed by the Board of Governors shall be subject to the same penalty as may be imposed by Education Code section 78032(d).[854] The statewide number of full-time equivalent students claimed as special admits shall not exceed 10 percent of the total number of full-time equivalent students claimed statewide.[855]

Nothing Education Code section 76004 is intended to affect a dual enrollment partnership agreement existing on the effective date of this section under which an early college high school, a middle college high school, or California Career Pathways Trust existing on the effective date of this section is operated. An early college high school, middle college high school, or College Career Pathways Trust partnership agreement existing on the effective date of this section shall not operate as a CCAP partnership unless it complies with the provisions of Section 76004.[856] Section 76004 shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date.[857]

THE CALIFORNIA HIGH SCHOOL EXIT EXAM

On October 7, 2015, Governor Brown signed Senate Bill 172[858] effective January 1, 2016. Senate Bill 172 amends Education Code section 60640 and adds Education Code sections 60851.5 and 60851.6.

Education Code section 60640(c)(6) states that the State Superintendent of Public Instruction shall convene an advisory panel to provide recommendations to the State

[851] Education Code § 76004(t)(2).
[852] Education Code § 76004(t)(3).
[853] Education Code § 76004(u).
[854] Education Code § 76004(v).
[855] Education Code § 76004(w).
[856] Education Code § 76004(x).
[857] Education Code § 76004(y).
[858] Stats. 2015, ch. 572.

Superintendent of Public Instruction on the continuation of the high school exit exam and on alternative pathways to satisfy the high school graduation requirements.

Education Code section 60851.5, effective January 1, 2016, states that notwithstanding Section 60851, the administration of the high school exit exam, and the requirement that each pupil completing grade 12 successfully pass the high school exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school, shall be suspended for the 2015-16, 2016-17, and 2017-18 school years. Section 60851.6, effective January 1, 2016, states that notwithstanding Section 60851 or any other law, the governing board of a local educational agency shall grant a diploma of graduation from high school to any pupil who completed grade 12 in the 2003-04 school year or a subsequent school year and has met all applicable graduation requirements other than the passage of the high school exit examination. Section 60851.6 applies to school districts, county offices of education and charter schools.

The passage of Senate Bill 172 in addition to the passage of Senate Bill 725 which stated that the high school exit examination shall not be required as a condition of receiving a diploma of graduation or a condition of graduation from high school for a pupil completing grade 12 in 2015 who has met all other high school graduation requirements.[859]

PARENTAL AND TEACHER RIGHTS

The Education Empowerment Act of 1998[860] amended Section 49063 and added Section 49091.10 et seq. to the Education Code. Education Code section 49091.10(a) provides that all primary supplemental instructional materials and assessments, including textbooks, teachers' manuals, films, tapes, and software, must be compiled and stored by the classroom teacher and made available promptly for inspection by a parent or guardian in a reasonable timeframe or in accordance with governing board procedures. Section 49091.10(b) guarantees the right of a parent or guardian to observe instruction and other school activities that involve his or her child. Upon written request by the parent or guardian, school officials must arrange for observation of the requested class or classes or activities. Districts are authorized to adopt procedures to ensure the safety of students and school personnel and to prevent undue interference with instruction or harassment of school personnel.

Education Code section 49091.14 provides that the curriculum, including titles, descriptions, and instructional aims of every course offered by a public school, must be compiled at least once annually in a prospectus. Each school site must make its prospectus available for review upon request. Additionally, Education Code section 49063 has been amended to require that the annual notice of parents' rights must include a notice of "[t]he availability of the prospectus prepared pursuant to Section 49091.14."[861]

Education Code section 49091.12(a) provides that a student may not be compelled to affirm or disavow any particular personally or privately held world view, religious doctrine, or

[859] *See*: Education Code §60851.1; Stats. 2015, ch. 225, effective August 26, 2015.
[860] Stats.1998, ch. 1031 (A.B. 1216).
[861] Ibid.

political opinion. Unfortunately, the legislation fails to provide any definition or guidance as to what a student's "world view" might consist of.[862]

Section 49091.12(c) provides that a student may not be tested for a behavioral, mental, or emotional evaluation without the informed written consent of his or her parent or guardian. The legislation does not define these types of evaluations. The legislation does not appear to be limited to special education assessments, since parental consent is already required before special education eligibility assessments may be conducted.[863]

Education Code section 49091.18 provides that a school may not require a student or a student's family to submit to or participate in any of the following:

1. Any assessment, analysis, evaluation, or monitoring of the quality or character of the pupil's home life.

2. Any form of parental screening or testing.

3. Any nonacademic home-based counseling program.

4. Parent training.

5. Any prescribed family education service plan.[864]

Additional legislation added Section 51101 to the Education Code, guaranteeing a long list of rights to parents/guardians.[865] These rights overlap with, and expand upon, the rights guaranteed by the Educational Empowerment Act. These rights include the following:

1. To observe the classroom or classrooms in which their child is enrolled.

2. To meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

3. To volunteer their time and resources for the improvement of school facilities and school programs, including providing assistance in the classroom with the approval of the teacher.

4. To be notified on a timely basis if their child is absent from school without permission.

[862] Ibid.
[863] Ibid.
[864] Ibid.
[865] Stats.1998, ch. 864 (A.B. 1665).

5. To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

6. To request a particular school for the child, although the district is not required to grant the parents' request.

7. To have a school environment for their child that is safe and supportive of learning.

8. To examine the curriculum materials of the class or classes in which their child is enrolled.

9. To be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

10. To have access to the school records of their child.

11. To receive information concerning the academic performance standards, proficiencies or skills their child is expected to accomplish.

12. To be informed in advance about school rules, attendance policies, dress codes, and procedures for visiting the school.

13. To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

14. To participate as a member of a parent advisory committee, school site, council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations.

15. To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.[866]

Additionally, Section 51101 requires each school district governing board to adopt a policy, developed jointly with parents or guardians, that outlines how parents or guardians, school staff, and students may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each school site. The policy must include at least the following elements:

[866] Ibid.

1. The means by which the school and parents/guardians may help students to achieve academic and other standards of the school.

2. A description of the school's responsibility to provide a high quality curriculum and instructional program.

3. The manner in which the parents/guardians may support the learning environment of their children, including the following:

   A. Monitoring attendance of their children.

   B. Ensuring that homework is completed and turned in on a timely basis.

   C. Participation of the children in extracurricular activities.

   D. Monitoring and regulating the television viewed by their children.

   E. Working with their children at home in learning activities that extend learning in the classroom.

   F. Volunteering in their children's classrooms, or for other activities at the school.

   G. Participating in decisions relating to the education of their own child or the total school program.[867]

BILINGUAL EDUCATION

A. Introduction

The controversy over bilingual education is fueled in part by demographic changes. In 1976, at the time of the passage of the State Bilingual Act, Assembly Bill 507, there were 375,000 LEP (limited English proficient) students in grades K-12 in California but by 1990, there were 742,000 LEP students. In 1993, there were 1,141,826 LEP students enrolled in California schools, 21.9% of the student population in California. By 1996, the number of LEP students increased to 1,323,767 and the CDE estimated there was a shortage of 20,827 bilingual teachers and that California had only 39% of the bilingual teachers it needed.[868]

These demographic changes make it difficult for school districts to find bilingual personnel and bilingual instructional materials to meet the needs of LEP students. In 1995, there was only one certified Spanish bilingual teacher for every 85 Spanish LEP students in California. For Vietnamese LEP students, the ratio is one teacher for every 889 students. The ratio for

[867] Education Code section 51101(6).

[868] California School News, December 29, 1995, Vol. 1, No. 21. "Bilingual and English Development Teachers – Demand, Supply and Shortage," California Department of Education, August, 1996.

Hmong speakers is one to 4,335. For many language groups there is not a single certified bilingual teacher in California.[869]

B. Federal Law

The Fourteenth Amendment of the United States Constitution provides that no state shall "deny any person within its jurisdiction the equal protection of the laws." Lawsuits alleging violation of the Equal Protection Clause of the Fourteenth Amendment have been brought with regard to bilingual education, but the courts have not reached the constitutional argument or have rejected it outright. In Lau v. Nicholas, the United States Supreme Court relied solely on Title VI of the Civil Rights Act of 1964 and did not reach the equal protection argument.[870]

Following Lau, the United State Supreme Court ruled in Washington v. Davis, that a discriminatory purpose, and not simply a disparate impact, must be shown to establish a violation of the Equal Protection Clause.[871] As a result of the heavy burden of demonstrating purposeful discrimination, and in light of the statutory provisions which are available under Title VI and the Equal Opportunities Act, constitutional analysis under the Equal Protection Clause has not been significant in bilingual education cases.

C. Title VI of the 1964 Civil Rights Act

Title VI of the Civil Rights Act of 1964 states:

> "No person in the United States, shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[872]

In Lau v. Nichols, the United States Supreme Court held that the failure of the San Francisco Unified School District to provide English language instruction to students of Chinese ancestry who did not speak English or to provide them with other adequate instructional programs, denied them a meaningful opportunity to participate in the public educational program and thus violated Title VI. The court in Lau concluded:

> "[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."
>
> "Basic English skills are at the very core of what the public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already

[869] See, "Bilingual Education Handbook: Designing Instruction for LEP Students," (California Department of Education 1990).
[870] Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).
[871] Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).
[872] 42 U.S.C. Section 2000d.

> have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful."[873]

The court in Lau did not mandate a particular program or curriculum that the school district must provide to limited English speaking children, rather, the Supreme Court stated:

> "No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak this language is one choice, giving instruction to this group in Chinese is another, there may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify this situation."[874]

The Lau court deferred to the discretion of the school district to design programs to meet the needs of legislation. LEP students, making it clear that while officials must take affirmative steps to assist English learners, the nature of the steps to be taken is a matter of educational policy left to the discretion of educational officials.

Prior to the Lau decision, Congress enacted the Bilingual Education Act of 1968.[875] The Act created a grant in aid program to support research and experimental demonstration projects in the field with respect to bilingual education. Under the Bilingual Education Act, school districts were not required to provide special programs for LEP students or to submit grant applications. However, several states adopted some form of bilingual education legislation.

In May 1970, the Office for Civil Rights (OCR) and the United States Department of Education issued a policy memorandum providing that the failure of federally assisted educational programs to take "affirmative steps" to provide for "effective participation" by national origin minority group children in their programs constituted a violation of Title VI of the Civil Rights Act of 1964.[876]

The memorandum states that compliance reviews in school districts with large Spanish surname student populations revealed a number of common practices which had the effect of denying equality of educational opportunity to Spanish surname students and had the effect of discrimination on the basis of national origin. OCR identified four major areas of concern. The first concern was that students who were unable to speak or understand the written language were being excluded from effective participation in the educational program offered by the school district and that school districts must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. The report also indicated concern with respect to mismanagement of national origin minority students based on English

[873] Id. 414 U.S. at 566, 94 S.Ct. at 788.
[874] Id. 414 U.S. at 568, 94 St.Ct. at 789.
[875] Former 20 U.S.C. Section 880b.
[876] Office for Civil Rights, United States Department of Education, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed.Reg.11595 (May 25, 1970).

language skills, the use of permanent educational tracking to the detriment of those students, and failure to provide effective information to parents of national origin minority students. In effect, OCR was stating that special services for language minority students was a civil right protected by the 1964 Civil Rights Act and that OCR intended to enforce that right nationally in educational programs receiving federal financial assistance.[877]

D. Equal Education Opportunities Act (EEOA)

In response to the Lau decision, Congress enacted the Equal Educational Opportunities Act (EEOA), which states:

> "No state shall deny equal opportunity to an individual on account of . . . race, color, sex or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in the instructional programs."[878]

In enacting EEOA, Congress did not specify particular educational or remedial approaches, but required only that school districts take appropriate action to guarantee equal educational opportunities for language minority students. As interpreted by the courts, the EEOA allows students to choose among competing instructional methodologies to assist language minority students as long as the instructional program is based on sound educational theory, supported by adequate staffing, resources and materials to permit effective implementation and produces the desired results after a reasonable period of time.[879]

In response to the EEOA, the U.S. Department of Health, Education and Welfare issued a report prescribing "remedies" for educational practices deemed unlawful under the Lau decision (the so called "Lau remedies").[880] The "Lau remedies" evolved into unwritten compliance standards until 1980 when OCR issued proposed regulations. The proposed rules would have required bilingual education as the required method of instruction in schools with sufficient numbers of language minority students. However, the proposed regulations were never promulgated and a three part test based on the U.S. Court of Appeals decision in Castaneda v. Pickard was adopted.

E. Federal Case Law After Lau

In Castaneda v. Pickard, the United States Court of Appeals held that the EEOA did not require local educational authorities to adopt any particular type of language remediation program.[881] Rather, the Court of Appeals held that the EEOA required appropriate action rather than bilingual education. The court stated:

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[877] Ibid.
[878] 20 U.S.C. Section 1703(f).
[879] Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
[880] Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols (U.S. Department of Health, Education & Welfare, 1975).
[881] Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

> "Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.
>
> "The court's responsibility . . . is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy."[882]

In Castaneda, the school district operated a bilingual educational program for all students in kindergarten through third grade. The program included an assessment component and instruction in fundamental reading and writing skills in both Spanish and English. The district did not offer a formal program of bilingual education after the third grade. The Court of Appeals in Castaneda questioned the continuing vitality of Title VI and the Lau remedies in view of the Supreme Court's decision in Washington v. Davis and Bakke. The court rejected the plaintiff's Title VI claim and remanded the matter back to the district court to determine whether there was evidence of intentional discrimination.[883]

The court in Castaneda then reviewed the EEOA claim and developed a three part test for determining the appropriateness of the language remediation program:

> "First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based... The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. . . . Finally, . . . [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned."[884]

The Castaneda court rejected plaintiff's argument that the curriculum over emphasized the development of reading and writing skills in English to the detriment of education in mathematics and science. The court stated:

> "[W]e do not think that a school system which provides limited English speaking students with a curriculum, during the

[882] Id. at 1009.
[883] Id. at 1015.
[884] Id. at 1009-1010.

> early part of their school career, which has, as its primary objective, the development of literacy and English, has failed to fulfill its obligations under Section 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period . . . We believe the statute clearly contemplates that provision of a program placing primary emphasis on the development of English language skills would constitute 'appropriate action.'"[885]

The court in Castaneda did find that the school district was deficient in failing to adequately recruit and train teachers to be employed in bilingual classrooms. The Court of Appeals also concluded that the district should implement a Spanish language achievement testing program.

In Keyes v. School District No. 1, the United States District Court reviewed a complaint in intervention filed in a desegregation case on behalf of English learners.[886] The complaint alleged a violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI, and the EEOA. The Court's decision primarily addressed the EEOA claim and applied the three-part test developed in Castaneda.

Applying the first prong of the Castaneda test, the District Court found that the school district had designed the program based on sound educational theory. The school district in Keyes implemented a "transitional bilingual approach" under which the native language is used as a medium of instruction to ensure academic success in content areas such as mathematics and social studies, while students at the same time were acquiring proficiency in the English language. The parties were in agreement that this was a recognized and satisfactory approach to educating English learners.[887]

Under the second prong of the Castaneda test, the court found that the school district had failed to ensure that teachers had necessary bilingual skills. The District Court criticized the school district's practice of allowing tenured, monolingual English teachers to fill vacancies in bilingual classrooms, even though qualified bilingual teachers with less seniority were available for placement. The District Court also made a finding that certain English learners were not receiving content area instruction in their native language, that there was inadequate instruction in English reading and writing skills as opposed to oral skills and that there was an apparent disregard of the special curriculum needs of children who were presumed to be bilingual but whose English language development and comprehension were in fact below the district average or were at an unacceptable proficiency level based on a national standardized test.[888]

In Teresa P. v. Berkeley Unified School District, the United States District Court applied the Castenada standard and found that a school district complied with the EEOA and the Castenada standard even though it did not employ teachers or tutors who spoke the native

[885] Id. at 1011.
[886] Keyes v. School District No. 1, 576 F.Supp. 1503, 15 Ed.Law Rep. 796 (D.Colo. 1983).
[887] Ibid.
[888] Ibid.

language of the students or utilized materials in the student's native language.[889] The court held that the Berkeley Unified School District which used the English as a second language approach was supported by sound educational theory and noted that the EEOA did not require the Berkeley Unified School District to adopt a specific educational theory or implement an ideal academic program.[890] Rather, the court held that the EEOA permits educational officials substantial latitude in formulating programs to meet the needs of language minority students.[891]

> "That Congress utilizes the term 'appropriate action' rather than 'bilingual education' indicates that Congress intended to leave educational authorities substantial latitude in formulating programs to meet their EEOA obligations."[892]

The court found that the district's program was based on a sound educational theory and held that the program was being properly implemented. The court rejected the plaintiff's contention that teachers in the language remediation program must possess specified credentials and noted the difficulty in filling all necessary positions with fully credentialed teachers in the native language of the students. The court also found that the district's assessment procedures showed that the district's English learners were learning at rates equal to or higher than their counterparts in other school districts in California.[893]

The Castenada standard was recognized by OCR in a 1991 senior staff memorandum.[894] The senior staff memorandum stated:

> "Some approaches that fall under this category include transitional bilingual education, bilingual/bicultural education, structured emersion, developmental bilingual education, and English as a second language (ESL). A district that is using any of these approaches has complied with the first requirement of Castenada."[895]

OCR defers to local educational officials regarding the educational approach utilized by school districts and avoids making educational judgments or second guessing decisions made by school district officials, according to a 1990 memorandum. OCR also recognized that a shortage of trained teachers should be taken into consideration and OCR should not place unrealistic expectations on a school district. [896]

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[889] Teresa P. v. Berkeley Unified School District, 724 F.Supp. 698, 57 Ed.Law Rep. 90 (N.D.Cal. 1989).
[890] Id. at 713.
[891] Id. at 712.
[892] Id. at 713.
[893] Id. at 714-716.
[894] See, "Policy Update on School's Obligation Toward National Origin Minority Students With Limited English Proficiency." (OCR, September 27, 1991).
[895] Id. at 3.
[896] OCR Title VI Language Minority Compliance Procedures (April 6, 1990).

F. California Law

In 1976, the California Legislature enacted the Bilingual/Bicultural Education Act.[897] Pursuant to Section 52162, the California State Board of Education promulgated regulations implementing the Act.[898]

The Act "sunsetted" (i.e., repealed as of a certain date) on June 30, 1987, pursuant to Education Code section 62000.2(d), while the funding for the program continued. Education Code section 62002 states in part:

> "If the Legislature does not enact legislation to continue a program listed in this part, the funding of that program shall continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program. . . . The funds shall be used for the intended purposes of the program, but all relevant statutes and regulations adopted thereto regarding the use of the funds shall not be operative, except as specified in Section 62002.5." [Emphasis added]

Despite the language of Section 62002, the CDE established compliance requirements for school districts for the receipt of continued state funding. The Department of Education took the position that former Education Code section 52161 established specified purposes for bilingual education programs.[899]

The Department developed a "Coordinated Compliance Review Manual" to provide assistance to school districts in preparing for a compliance review by the California Department of Education. The manual contains a 12 item test.[900]

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[897] California Education Code section 52160 et seq.

[898] 5 California Code of Regulations section 4300 et seq.

[899] (1) The primary goal of all [bilingual] programs is, as effectively and efficiently as possibly, to develop in each child fluency in English. (2) The program must provide equal opportunity for academic achievement, including, when necessary, academic instruction through the primary language. (3) The program must provide positive reinforcement of the self-image of participating pupils. (4) The program must promote cross-cultural understanding. (5) California school districts are required to offer bilingual learning opportunities to each pupil of limited English-proficiency enrolled in the public schools. (6) California school districts are required to provide adequate supplemental financial support in order to offer such bilingual learning opportunities. (7) Insofar as the individual pupil is concerned, participation in bilingual programs is voluntary on the part of the parent or guardian. (8) School districts must provide for in-service programs to qualify existing and future personnel in the bilingual and cross-cultural skills necessary to serve the pupils of limited English-proficiency of this state.

[900] (1) District has properly identified, assessed and reported all students who have a primary language other than English and who are of limited-English proficiency. (2) Each LEP student receives a program of instruction in English-language development in order to develop proficiency in English as efficiently and effectively as possible. (3) In order to provide equal opportunity for academic achievement and to prevent any substantive academic deficits, each LEP student whose diagnosis makes academic instruction through the primary language necessary, receives such instruction. (4) In order to provide equal opportunity for academic achievement in the district's regular course of study and to prevent any substantive academic deficits, each LEP student whose diagnosis makes it necessary receives specially designed academic instruction in English. (5) Each LEP student receives, as part of the district=s program, instruction that reinforces a positive self-image and promotes cross-cultural understanding. (6) An adequate number of qualified teachers has been assigned to implement the required English-language development instruction for each LEP student. Upon documentation of the local shortage of qualified teachers to perform English/Language development instruction, the district has adopted and is implementing interim measures by which it plans to remedy the shortage. (7) An adequate number of qualified teachers have been assigned to implement academic instruction through the primary language for each LEP student when that has been determined to be necessary. Upon documentation of a local shortage of qualified teachers

The Department's view of the requirements for bilingual education was more restrictive than that of OCR and is different than that of the California Attorney General. In 1988, the California Attorney General opined that the primary goal of the state bilingual education program was two-fold – to effectively and efficiently as possible develop in each child fluency in English and to provide positive reinforcement of the self-image of participating students, promote cross-cultural understanding, and provide equal opportunity for academic achievement.[901] In Teresa P., the federal district court noted that the specific requirements of the state bilingual act had expired and were no longer required.[902] In a series of program advisories, the CDE has pursued a different course and emphasized native language instruction.[903]

In July, 1995, the California State Board of Education issued a new policy statement on educational programs and services for LEP students. The new policy provided school districts with greater flexibility to choose different instructional approaches to providing services to LEP students and shifts compliance away from particular instructional methodology toward achievement in educating English students. The Board policy established five "Principles for Educational Programs and Services for English Learners."[904]

The Board's policy appeared to be a conscious decision to provide more flexibility to local districts in implementing programs for language minority students. The principles established by the Board are similar to the approach taken by the federal courts when evaluating educational services to English learners. The policy appeared to be a clear signal to school districts to provide more flexibility in implementing programs for LEP students.

The new policy allowed school districts to apply to the State Board of Education for waivers of certain "requirements" of the former state law. The CDE has opposed those waivers. However, the State Board of Education has approved waiver requests, including a waiver request for the Orange Unified School District. As a result of the granting of that waiver request, several community groups have filed a lawsuit against the Orange Unified School District and the State Board of Education. That suit, Quiroz v. State Board of Education, is pending.[905]

The lawsuit in Quiroz alleges violation of the EEOA and state law. On August 18, 1997, the Superior Court issued a Temporary Restraining Order requiring the Orange Unified School

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to perform academic instruction through the primary language for each such LEP student, the district has adopted and is implementing measures by which it plans to remedy the shortage. (8) The district provides an adequate in service training program which results in qualifying existing and future personnel in the bilingual and cross-cultural teaching skills necessary to serve each LEP student. (9) There are adequate basic resources for LEP students, and EIA-LEP funds are used only to supplement, not supplant, the district's general funds, as well as any other categorical funds the district receives. (10) All parents of LEP and FEP students have been notified in writing of their child's English and primary-language proficiency assessment results. (11) A procedure exists that ensures that the participation of each student enrolled in the district=s bilingual program is voluntary on the part of the parent or guardians. (12) The district and school sites, as required, have a functioning bilingual advisory committee meeting all legal requirements.

[901] 71 Ops.Cal.Atty.Gen. 9, 12 (1988), n.4.

[902] Teresa P. V. Berkeley Unified School District, 724 F.Supp. 698, 784 (N.D.Cal. 1989).

[903] Program Advisory 87/8-2 (August 26, 1987); Program Advisory 87/8-14 (May 20, 1988).

[904] Maximum local flexibility to determine which instructional programs and methodologies best achieve results. Instructional programs based on sound educational theory, emphasizing that local programs may include primary language instruction, English language development through sheltered content instruction, and/or other sound instructional methodologies. Adequate resources and personnel to implement the local plans and programs. Parent involvement, including consent for placement, and parent materials to help them actively support their children's education.

[905] Quiroz v. State Board of Education, Case No. 97CS01793 (Sac.Co.Sup.Ct.).

District to restore its native language instruction program. While the court found that native language instruction is not required under federal law, the court held that the district's English based program failed to meet the standards of Castaneda v. Pickard, particularly with respect to the training of staff and the purchase of instructional materials.[906] On September 10, 1997, the federal causes of action were removed to federal court and the federal court dissolved the temporary restraining order issued by the state court and denied the motion for preliminary injunction. The district court ruled that the plaintiffs failed to meet the burden of proof for a preliminary injunction failing to show a likelihood of success on the merits or irreparable harm.[907]

The court in Quiroz held that the plaintiff must show either discriminatory intent or discriminatory effect to establish a prima facie case under Title VI of the 1964 Civil Rights Act. The court adopted the three part Castaneda test and held that under the EEOA, appropriate action does not require native language instruction. The court rejected plaintiff's argument that native language instruction is superior to the educational method adopted by the Orange Unified School District and noted, "That argument must be made to the appropriate educational authorities, as this court will not balance such claims."[908]

G. Proposition 227

An initiative affecting bilingual education, Proposition 227, also known as the "Unz Initiative," was approved by the voters on June 2, 1998. On July 15, 1998, the United States District Court refused to block the implementation of Proposition 227. Therefore, Proposition 227 is in effect. The initiative adds Education Code sections 300 through 340. Proposed Section 300 outlines the purpose of the initiative. It states as its purpose that all children in California public schools shall be taught English as rapidly and effectively as possible.[909]

Section 305 states in part, ". . . all children in California public schools shall be taught English by being taught in English." Section 305 requires that all children be placed in English language classrooms except children who are English learners. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period "not normally intended to exceed one year." Once English learners have acquired a good working knowledge of English, they are to be transferred to English language mainstream classrooms. Section 305 authorizes local schools to place in the same classroom English learners of different ages but whose degree of English proficiency is similar and local schools are encouraged to mix together in the same classroom English learners from different native language groups but with the same degree of English fluency.[910]

Section 306 defines an "English learner" as a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work

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[906] Quiroz v. State Board of Education, Case No. 97CS01793 (Sac.Co.Sup.Ct).
[907] Quiroz v. State Board of Education, 1997 WL 661163 (U.S.Dist.Ct., Eastern Dist. of California).
[908] Id. at 12. The court in Quiroz cited Guadalupe Organization, Inc. v. Tempe Elementary School District, 587 F.2d 1022 (9th Cir. 1978). In Guadalupe, the Court of Appeals stated: "The issue is whether 'appropriate action' must include the bilingual-bicultural education appellants seek. We hold that it need not." Id. at 1030.
[909] Education Code section 300 et seq.
[910] Education Code section 305 et seq.

in English. "English language classroom" is defined as a classroom in which the language of instruction used by the teaching personnel is overwhelmingly the English language and in which such teaching personnel possess a good knowledge of the English language. "English language mainstream classroom" is defined as a classroom in which the pupils either are native English language speakers or already have acquired reasonable fluency in English. "Sheltered English immersion" or "structured English immersion" is defined as an English language acquisition process for young children in which nearly all classroom instruction is in English but with a curriculum and presentation designed for children who are learning the language. "Bilingual education/native language instruction" is defined as a language acquisition process for pupils in which much or all instruction, textbooks, and teaching materials are in the child's native language.[911]

Section 310 allows parents to annually request a waiver of the requirements of Section 305 with prior written informed consent. In order to obtain the waiver, parents must personally visit the school to apply for the waiver, be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. If the waiver is granted, the child may be transferred to a bilingual education program. If twenty or more students in a given grade level request a waiver, school districts are required to offer a bilingual education class or allow the students to transfer to a public school which operates a bilingual educational class.[912]

Section 311 further outlines the circumstances under which parents may obtain a waiver under Section 310 which are as follows:

1. For children who already know English as measured by standardized of English vocabulary, comprehension, reading and writing in which a child scores at or above the state average for his or her grade level or at or above the fifth grade average whichever is lower; or

2. For older children where the child is age ten years or older and it is the informed belief of the school principal and educational staff that an alternative course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or

3. For children with special needs where the child has already been placed for a period of not less than thirty days during that school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such physical, emotional, psychological or educational needs that an alternative course of educational study would be better suited to the child's overall educational development. A written description of these special needs must be provided and any such decision is to be made subject to the examination and approval of the district superintendent under guidelines established by and

[911] Education Code section 306.
[912] Education Code section 310.

> subject to the review of the governing board of the school district and State Board of Education. The existence of such special needs shall not compel issuance of a waiver and the parents shall be fully informed of their rights to refuse to agree to a waiver.[913]

In interpreting the "informed consent" provisions of Section 310, the Attorney General[914] stated:

> "We do not believe that a 'full description of the educational materials to be used' may consist of a blank page or that 'the different educational program choices' may consist exclusively of courses taught only in English."[915]

The Attorney General also interpreted the last sentence of Section 310 as follows:

> "[I]f 20 or more pupils of a given grade level receive a waiver, a school must provide such a class; but if less than 20 of a given grade level receive a waiver, the school may either provide such a class or allow the pupils to transfer to another school that provides such a class."[916]

In other words, a district may not satisfy the requirements of Section 310 by simply providing an alternative program at a single district school. Rather, if 20 or more students of a given grade level receive a waiver, an alternative program must be provided at that school.

The Attorney General found support for the opinion in the following: (1) Education Code section 311, setting forth criteria for granting parental waiver requests; (2) ballot materials submitted by proponents of Proposition 227, stating that the Act does not eliminate choice or impose a single approach; and (3) Title 5 California Code of Regulations section 11303(a)(3), stating that parental exception waivers shall be granted unless the school principal and educational staff determine that an alternative program is not better suited for a student's overall educational development. The Attorney General read these provisions as clearly suggesting "that each application for a waiver must be considered on its individual merits."[917]

In summary, the California Attorney General has opined that school districts must offer an alternative program in which students may be transferred to classes where they are taught English and other subjects through bilingual education techniques or other generally recognized educational methodologies, in order to accommodate the children of parents who may request waivers from English-only instruction.[918]

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[913] Education Code section 310.
[914] 83 Ops.Cal.Atty.Gen. 40 (2000).
[915] Id. at 42.
[916] Id. at 43.
[917] Ibid.
[918] Id. at 44.

Section 315 provides $50 million per year to be appropriated from the general fund for the purpose of providing additional funding for free or subsidized programs of adult English language instruction to parents or other members of the community who pledge to provide personal English language tutoring to California school children with limited English proficiency. Section 316 states that programs funded pursuant to Section 315 shall be provided through school or community organizations and administered by the California Department of Education.[919]

Section 320 states that all California school children have the right to be provided with an English language public education. If a California school child has been denied the option of an English language instructional curriculum in public school, Section 320 grants the child's parent or legal guardian the legal standing to sue for enforcement of the provisions of the initiative and, if successful, the right to be awarded normal and customary attorney's fees and actual damages, but not punitive or consequential damages. Any school board member or other elected official or public school teacher or administrator who willfully and repeatedly refuses to implement the terms of the initiative by providing such an English language educational option at an available public school to a California school child may be held personally liable for fees and actual damages by the child's parent or legal guardian.[920]

The provisions of proposed Section 320 imposing personal liability upon teachers and administrators for willfully and repeatedly refusing to implement the terms of the initiative has raised a number of issues. Under Government Code section 825, a school district has a duty to defend a public employee against lawsuits and to pay any judgment or settlement of the lawsuit on behalf of the employee unless it is established that the act or omission occurred outside the scope of his or her employment. Willful conduct may be outside the scope of the employee's employment and districts may not be able to pay such judgments. For example, in Farmers Insurance Group v. County of Santa Clara,[921] the California Supreme Court held that the County of Santa Clara was not required to indemnify a deputy sheriff who sexually harassed another county employee since the deputy's acts were intentional and outside the scope of his employment. Where an employee deviates from his or her employment duties for personal purposes, the employee is acting outside the scope of his or her employment.[922] This same principle might apply where an employee willfully and repeatedly refuses to implement the initiative and teaches a child in their native language rather than primarily in English.

Under proposed Section 330, the initiative would become operative for all school terms which begin more than sixty days following the date on which it becomes effective (i.e., school terms which begin after August 2, 1998). Proposed Section 335 authorizes amendments to the initiative by statute upon approval by the electorate or by a two-thirds vote of each house of the legislature.[923] State regulations clearly require districts to establish procedures for granting parental exception waivers.[924]

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[919] Education Code sections 315, 316.
[920] Education Code section 320.
[921] 11 Cal.4th 992 (1995)
[922] Id. at 1005.
[923] Education Code section 330.
[924] 5 California Code of Regulations section 11303(a).

Section 11303(a) requires districts to inform parents/guardians of the placement of their children in a structured English immersion program and the opportunity to apply for a parental exception waiver. A brief notice to this effect can be provided as part of a district's assessment process for English learners. This notice should be distinguished from the more detailed notice that must be provided to parents who decide to request a parental exception waiver.[925]

If a parent/guardian wishes to request a waiver of English language instruction requirements, the state regulations provide in part: "Parents and guardians must be provided with a full description . . . of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil."[926] If a parent or guardian requests a waiver, both the Education Code and state regulations require that the parent or guardian be provided with a full written description of the educational materials to be used in a school's educational programs.[927]

In Valeria v. Davis,[928] the United States Court of Appeals upheld the constitutionality of Proposition 227. The Court of Appeals held that the provisions of Proposition 227, which replaced bilingual education programs with curricular programs designed to teach students in English, did not violate the Equal Protection Clause of the United States Constitution, and therefore, was constitutional.

The Equal Protection Clause of the Fourteenth Amendment states in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The court cases interpreting the Equal Protection Clause focus on whether the government has classified individuals on the basis of impermissible criteria. Government actions that classify persons by race or that are facially neutral, but motivated by discriminatory racial purpose are subject to strict judicial scrutiny and are many times found to be unconstitutional.[929] Other types of classifications are subject to a "rationally related" legitimate governmental interest test and if the classification is related to a legitimate governmental interest, it will be constitutional.[930]

The plaintiffs in Valeria argued that Proposition 227 involved racial classifications and should be subject to the strict scrutiny analysis. The Court of Appeals ruled that Proposition 227 does not explicitly mention racial minorities, and further stated, ". . . the record is devoid of any evidence that Proposition 227 was crafted from racial animus."[931]

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[925] Ibid.
[926] Ibid.
[927] Education Code section 310; 5 California Code of Regulations section 11303(a)(1).
[928] 307 F.3d 1036 (9th Cir. 2002).
[929] See, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230 (1995).
[930] See, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).
[931] 307 F.3d 1036, 1039 (9th Cir. 2002).

The Court of Appeals held that the purpose of Proposition 227 was to reallocate political authority to the State with respect to an educational issue, not a racial issue, and therefore, was not subject to the strict scrutiny analysis. The Court of Appeals stated:

> "Plaintiffs cite no substantial evidence to establish that Proposition 227 was enacted for a racially discriminatory purpose. . . . Given Proposition 227's facial neutrality, and the lack of evidence that it was motivated by racial considerations, we hold the Proposition 227's reallocation of political authority over bilingual education does not offend the Equal Protection Clause."[932]

H. The Future of Bilingual Education

In Castaneda, the court stated that the courts are not to choose between sound but competing educational theories.[933] The court in Castaneda recognized that an English Immersion and English as a Second Language program are sound educational theories stating, ". . .we do not think that a school system which provides limited English speaking students with a curriculum, during the early part of their school career, which has, as its primary objective, the development of literacy in English, has failed to fulfill its obligation under 1703(f) [the EEOA], even if the result of such a program is an interim sacrifice of learning in other areas during this period . . ."[934] The Castaneda court held that the EEOA authorizes school districts to decide the sequence of addressing the English language development needs of LEP students by first addressing the English language needs and later providing compensatory education to remedy deficiencies in other areas. "Therefore, we must disagree with plaintiff's assertion that a school system which chooses to focus first on English language development and later provide students with an intensive remedial program to help them catch up in other areas of the curriculum has failed to fulfill its statutory obligation under Section 1703(f)."[935]

To the extent that the Quiroz plaintiffs seek to require the school district to adopt a native language instruction program, it appears that plaintiff's position has been rejected by the courts in Castaneda and later cases which have followed Castaneda.[936] Clearly, the weight of judicial authority is to allow state and local officials to choose among the various types of programs for LEP students and not require native language instruction.

In California, the steady increase in the number of LEP students and the ever increasing shortage of bilingual staff have led a number of school districts to seek state waivers to develop programs that emphasize English language development rather than native language instruction. Proposition 227 will mandate statewide that school districts adopt English language development

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[932] Id. at 1042.
[933] Castenada v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981).
[934] Id. at 1011.
[935] Id. at 1011-12.
[936] See, Keyes v. School District No. 1, 576 F.Supp. 1503, 15 Ed.Law Rep 796 (D.Colo. 1983); Teresa P. V. Berkeley Unified School District, 724 F.Supp. 698 (N.D.Cal. 1989); Gomez v. Illinois State Board of Education, 811 F.2d 1030, 37 Ed.Law Rep. 1073 (7th Cir. 1987); Guadalupe Organization, Inc. V. Tempe Elementary School District, 587 F.2d 1022 (9th Cir. 1978); Quiroz v. State Board of Education, 1997 WL 661163 Case No. Civ. S097-1600 WBS1GGH (U.S.Dist.Ct., Eastern Dist. of Calif.).

programs. To the extent that these types of programs have been approved by the courts in Castaneda and later court decisions, it is unlikely that the courts will find the proposed initiative, if passed by the voters, to be a violation of federal law.

PERFORMANCE-ENHANCING SUBSTANCES

Education Code section 49030 prohibits the use of any of the following substances by a student participating in interscholastic high school sports: (1) synephrine; and, (2) a prohibited substance enumerated by the United States Anti-Doping Agency Guide to Prohibited Substances and Prohibited Methods of Doping (USADA Guide). This prohibition goes into effect sixty days after the posting of the USADA Guide on the CDE website. That posting occurred on or about March 24, 2006. The CIF has adopted Rule 524, requiring that "all schools should adopt policies prohibiting the use and abuse of androgenic/anabolic steroids."

Education Code section 49033 provides that the CIF must require school districts, effective July 1, 2006, to prohibit a student from participating in interscholastic high school sports unless the student signs a pledge not to use anabolic steroids or a dietary supplement prohibited by Education Code section 49030, and the parent/guardian signs a notification form regarding those restrictions. CIF Bylaw 524 provides that "[a]ll member schools shall have participating students and their parents/caregiver agree that the athlete will not use steroids without the written prescription of a fully licensed physician . . . to treat a medical condition." Although Bylaw 524 is limited in scope to steroids, the pledge requirement of Section 49033 includes prohibited dietary supplements as well as steroids. In order to comply with Education Code section 49033, districts should expand the pledge requirement to include dietary supplements prohibited by Education Code section 49030.

Education Code section 49031 provides that a school may not accept a sponsorship from a manufacturer or distributor of a prohibited dietary supplement. This prohibition does not apply to either of the following: (1) an affiliate of a manufacturer or distributor of a prohibited dietary supplement, if the affiliate itself does not manufacture or distribute a prohibited dietary supplement; or (2) a manufacturer or distributor of a prohibited dietary supplement, if no more than 50% of its annual gross sales are derived from the manufacture or distribution of dietary supplements. Unless a particular manufacturer or distributor makes a school a sponsorship offer that the school "can't refuse," a school will probably not want to do the research necessary to determine whether one of these exceptions applies.

Education Code section 49031 also prohibits the marketing, sale, or distribution of a prohibited dietary supplement on a school site or at a school-related event. The term "market" is defined as including direct product advertising, provision of educational materials, product promotion by a school district employee or school district volunteer, product placement, clothing or equipment giveaways, and scholarships.

Education Code section 49032 provides that, effective December 31, 2008, each high school sports coach (including "walk-on" coaches) shall have completed a coaching education program developed by his or her school district or the CIF that meets the guidelines set forth in

Education Code section 35179.1. Subdivision (c) of Section 35179.1 provides that this coaching education program shall emphasize the following components:

1. Development of coaching philosophies consistent with school, school district, and school board goals.

2. Sport psychology: emphasizing communication, reinforcement of the efforts of young people, effective delivery of coaching regarding technique and motivation of the pupil athlete.

3. Sport pedagogy: how young athletes learn, and how to teach sport skills.

4. Sport physiology: principles of training, fitness for sport, development of a training program, nutrition for athletes, and the harmful effects associated with the use of steroids and performance-enhancing dietary supplements by adolescents.

5. Sport management: team management, risk management, and working within the context of an entire school program.

6. Training: certification in CPR and first aid.

7. Knowledge of, and adherence to, statewide rules and regulations, as well as school regulations including, but not necessarily limited to, eligibility, gender equity and discrimination.

8. Sound planning and goal setting.

Section 49032 contains one exception, providing that a coach who does not meet the education requirements may be used for no longer than one season of interscholastic competition.

STUDENT ATHLETES AND CONCUSSIONS

Education Code section 49475 states that if a school district elects to offer an athletic program, a school district must meet certain requirements.[937]

First, the school district must ensure that if an athlete is suspected of sustaining a concussion or head injury in an athletic activity, the athlete must be immediately removed from the activity for the remainder of the day. The athlete shall not be permitted to return to the activity until he or she is evaluated by a licensed healthcare provider, trained in the management of concussions, acting within the scope of his or her practice. The athlete shall not be permitted to return to the activity until he or she receives written clearance to return to the activity from that licensed healthcare provider.

[937] Stats. 2011, ch. 456.

Second, on a yearly basis, a concussion and head injury information sheet shall be signed and returned by the athlete and the athlete's parent or guardian before the athlete's initiating practice or competition. Section 49475 does not apply to an athlete engaging in an athletic activity during the regular school day or as part of a physical education course.

Education Code section 35179.1 requires coaches to receive training every two years in a basic understanding of the signs and symptoms of concussions and the appropriate response to concussions.[938] The concussion training may be fulfilled through entities offering free, online, or other types of training courses.

The addition of training in the basic understanding of the signs and symptoms of concussions is added to the requirements of Section 35179.1 which require coaches to be trained in the following:

1. Development of coaching philosophies consistent with school district goals;

2. Sport psychology: emphasizing communication, reinforcement of the efforts of pupils, effective delivery of coaching regarding technique and motivation of the pupil athlete;

3. Sport pedagogy: how pupil athletes learn, and how to teach sport skills;

4. Sport physiology: principles of training, fitness for sport, development of a training program, nutrition for athletes, and the harmful effects associated with the use of steroids and performance enhancing dietary supplements by adolescents;

5. Sport management: team management, risk management and working within the context of an entire school program;

6. Training: certification in CPR and first aid (including concussions);

7. Knowledge of and adherence to statewide rules and regulations, as well as school regulations including, but not necessarily limited to, eligibility, gender equity and discrimination; and

8. Sound planning and goal setting.

[938] Stats. 2012, ch. 173 (AB 1451).

SCHOOL WELLNESS

The federal Child Nutrition and Women, Infants, and Children Reauthorization Act of 2004 requires each district participating in the National School Lunch Program[939] and/or the Child Nutrition Act of 1966[940] to adopt a districtwide school wellness policy by July 1, 2006. Among other things, the wellness policy should include each district's plan for complying with the federal "foods of minimal nutritional value" (FMNV) requirements.

As set forth in Note (a) of 42 U.S.C. Section 1751, the school wellness policy adopted no later than July 1, 2006, must satisfy the following requirements:

> "(1) Includes goals for nutrition education, physical activity, and other school-based activities that are designed to promote student wellness in a manner that the local educational agency determines is appropriate;
>
> "(2) Includes nutrition guidelines selected by the local educational agency for all foods available on each school campus under the local educational agency during the school day with the objectives of promoting student health and reducing childhood obesity;
>
> "(3) Provides an assurance that guidelines for reimbursable school meals shall not be less restrictive than regulations and guidance issued by the Secretary of Agriculture pursuant to subsections (a) and (b) of section 10 of the Child Nutrition Act (42 U.S.C. 1779) and sections 9(f)(1) and 17(a) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(f)(1), 1766(a)), as those regulations and guidance apply to schools;
>
> "(4) Establishes a plan for measuring implementation of the local wellness policy, including designation of 1 or more persons within the local educational agency or at each school, as appropriate, charged with operational responsibility for ensuring that the school meets the local wellness policy; and
>
> "(5) Involves parents, students, representatives of the school food authority, the school board, school administrators, and the public in the development of the school wellness policy."

The school wellness policy must include an assurance that guidelines for reimbursable school meals shall not be less restrictive than regulations and guidance issued by the Secretary of Agriculture, pursuant to specified provisions of federal law. In essence, a

[939] 42 U.S.C. Section 1751 et seq.
[940] 42 U.S.C. Section 1771 et seq., including the School Breakfast Program.

district's school wellness policy must include the district's plan for complying with the USDA's so-called "foods of minimal nutritional value" (FMNV) requirements. These requirements are found in Title 7, Code of Federal Regulations, Part 210, for the National School Lunch Program, and Part 220, for the School Breakfast Program. In general, the regulations prohibit the sale of FMNV during meal periods anywhere reimbursable meals are sold or eaten. To the extent that schools lack a cafeteria or students eat the reimbursable meals anywhere on campus, FMNV may not be sold anywhere on the campus during the meal period.

Appendix B, Parts 210 and 220 list the following categories of FMNV:

1. Soda water.
2. Water ices, not including water ices which contain fruit or fruit juices.
3. Chewing gum.
4. Certain candies:
   (a) Hard candy,
   (b) Jellies and gums,
   (c) Marshmallow candy,
   (d) Fondant (a product consisting of microscopic sugar crystals that are separated by a thin film of sugar),
   (e) Licorice,
   (f) Spun candy, and
   (g) Candy-coated popcorn.

With one exception, California law is already more restrictive than the federal FMNV requirements. Education Code section 49431.5 establishes a phased-in prohibition against the sale of soda drinks in high schools. Commencing July 1, 2007, no less than 50% of all beverages sold from one-half hour before the start of the school day until one-half hour after the end of the school day, must be specified nutritional beverages. Notwithstanding this provision, "soda water" is a FMNV which may not be sold during meal periods in competition with reimbursable meals under the National School Lunch Program and/or the School Breakfast Program.

Education Code section 49431, establishes standards for individual food items sold during morning or afternoon breaks at elementary schools July 1, 2007.

Education Code section 49431, as amended, no longer subjects fruits, nonfried vegetables, and legumes to the so-called "35/10/35" restrictions. 35/10/35 means no more than 35% of the calories can be from fat, no more than 10% can be from saturated fat, and no more than 35% of the total weight can be composed of sugar. Amended Section 49431 requires individually sold dairy or whole grain food items to meet the 35/10/35 restrictions, and prohibits these items from containing more than 175 calories per individual item. As noted, the standards become operational on July 1, 2007.

Education Code Section 49431.2 imposes comparable standards for "snacks" sold in middle, junior high, and high schools. Section 49431.2(a) provides that the snacks must meet all of the following standards:

> "(1) Not more than 35% of its total calories shall be from fat. This paragraph does not apply to the sale of nuts, nut butters, seeds, eggs, cheese packaged for individual sale, fruits, vegetables that have not been deep fried or legumes.
>
> "(2) Not more than 10% of its total calories shall be from saturated fat. This subparagraph does not apply to eggs or cheese packaged for individual sale.
>
> "(3) Not more than 35% of its total weight shall be composed of sugar, including naturally occurring and added sugars. This paragraph does not apply to the sale of fruits or vegetables that have not been deep fried.
>
> "(4) No more than 250 calories for individual food item."

Section 49431.2(b) provides that, commencing July 1, 2007, "entrée" items sold in middle, junior high, or high schools, except foods served as part of a USDA meal program, may contain no more than 400 calories per entrée, and may contain no more than 4 grams of fat per 100 calories contained in each entrée. Senate Bill 12 amends Education Code section 49430, to define "entrée" as a "food that is generally regarded as being the primary food in a meal, and shall include, but not be limited to, sandwiches, burritos, pasta, and pizza."

Education Code section 49431.5 establishes standards for beverages sold at elementary, middle, and junior high schools. Senate Bill 965 slightly modifies the standards. As amended, Section 49431.5(a)(1) provides that, regardless of the time of day, only the following beverages may be sold to a student at an elementary school:

> "(A) Fruit-based drinks that are composed of no less than 50% fruit juice and have no added sweetener.
>
> "(B) Vegetable-based drinks that are composed of no less than 50% vegetable juice and have no added sweetener.
>
> "(C) Drinking water with no added sweetener.
>
> "(D) Two-percent-fat milk, one-percent-fat milk, nonfat milk, soy milk, rice milk, and other similar nondairy milk."

Standards for beverages sold in middle or junior high schools are set forth in amended Section 49431.5(a)(3), and apply from one-half hour before the start of the school day to one-half hour after the end of the school day. Permissible beverages include those listed above, but for middle and junior high schools, the list is expanded to add "[a]n electrolyte

replacement beverage that contains no more than 42 grams of added sweetener per 20-ounce serving."

Education Code section 49431.5 establishes a phased-in prohibition against the sale of soda drinks in high schools. Commencing July 1, 2007, no less than 50% of all beverages sold from one-half hour before the start of the school day until one-half hour after the end of the school day, must be specified permissible beverages. Commencing July 1, 2009, all beverages sold during this time period must be the specified permissible beverages. The list of permissible beverages is the same as the list noted above for middle and junior high schools.

ADMINISTRATION OF MEDICATION TO STUDENTS

A. The Education Code

Education Code section 49400 authorizes the governing board of the school district to employ properly certificated persons to provide for the health and physical development of students. Education Code section 49423 states that any student who is required to take, during the regular school day, medication prescribed by a physician may be assisted by the school nurse or other designated school personnel, if the school district receives a written statement from the physician detailing the method, amount and time schedules by which such medication is to be taken and a written statement from the parent or guardian of the student indicating the desire that the school district assist the student with the medication. Therefore, if a physician prescribes Diastat for a student, trained school personnel are authorized to administer Diastat pursuant to the manufacturer's specifications that Diastat was designed to be administered by nonmedical personnel.[941]

Education Code section 49423.1 states that any pupil who is required to take, during the regular school day, medication prescribed for him or her by a physician or surgeon, may be assisted by the school nurse or other designated school personnel, if the school district receives the appropriate written statements from the physician or surgeon. The written statement from the physician or surgeon should detail the name of the medication, method, amount and time schedules by which the medication is to be taken and a written statement from the parent, foster parent or guardian of the pupil requesting that the school district assist the pupil with the medication. Again, if a physician prescribes Diastat for a student, trained school personnel are authorized to administer Diastat pursuant to the manufacturer's specifications that Diastat was designed to be administered by nonmedical personnel.

B. The Title 5 Regulations

The Title 5 regulations promulgated by the State Board of Education further reinforce the proposition that trained school employees may administer Diastat to students. Section 600 states that any pupil who is required to take, during the regular school day, prescribed medication, may

[941] See, www.diastat.com/2-Administer/. With Diastat . . . someone you trust can take immediate action to stop the seizure fast, anytime, anywhere. Diastat AcuDial is administered by a caregiver . . . who is familiar with you and your seizure patterns . . ."

be assisted by a school nurse or other designated school personnel if both of the following conditions are met:

1. The pupil's authorized healthcare provider executes a written statement specifying, at a minimum, the medication the pupil is to take, the dosage, and the period of time during which the medication is to be taken, as well as otherwise detailing the method, amount and time schedules by which the medication is to be taken; and

2. The pupil's parent or legal guardian provides a written statement initiating a request to have the medication administered to the pupil or to have the pupil otherwise assist in the administration of the medication, in accordance with the authorized healthcare provider's written statement.

Section 601 contains a definition of the term "other designated school personnel." "Other designated school personnel" is defined as any individual employed by the local education agency who has consented to administer the medication to the pupil or otherwise assist the pupil in the administration of medication and may legally administer the medication to the pupil or otherwise assist the pupil in the administration of the medication.

Section 604 authorizes a school nurse or other designated school personnel to assist pupils in the administration of medication as allowed by law. The pupil's parent or legal guardian may administer medication to the pupil or an individual designated to do so by the parent may administer medication to the pupil. The local educational agency may establish rules governing the designation of an individual by a parent or legal guardian in order to ensure that:

1. The individual is clearly identified;

2. The individual is willing to accept the designation;

3. The individual being designated is permitted to be present on the school site;

4. Any limitations on the individual's authority in his or her capacity as designee are clearly established;

5. The individual's services of designee would not be inconsistent or in conflict with his or her employment responsibilities, if the individual being designated is employed by the local educational agency.

In May 2005, the California State Board of Education approved a Program Advisory on medication administration (copy attached hereto). At Page 16 of 32 the Program Advisory indicates that local educational agencies or school districts desiring to administer selected over-the-counter medication in school without a written statement from a student's authorized healthcare provider, but with a written statement solely from the parent or guardian, may do so

only if the school district's physician or other authorized healthcare provider working with the school district authorizes standard protocols and procedures for the administration of selected over-the-counter medications.

These procedures for selected over-the-counter medications in school must be approved by the governing board of the school district. Before administering any selected over-the-counter medication that has not been prescribed by the student's authorized healthcare provider, the parent or guardian must be notified that selected over-the-counter medications may be administered at the written request of the parent or guardian. The Program Advisory also states that all designated school personnel responsible for administering over-the-counter medications in school be trained in compliance with protocols and procedures for safe administration of over-the-counter medications approved by the local governing board of the school district.

In summary, school districts may develop standard protocols and procedures for the administration of selected over-the-counter medications that can be administered solely with a written statement from the parent or guardian.

C. Specialized Physical Health Care Services – Statutory Provisions

Education Code section 49423.5 states that any individual with exceptional needs who requires specialized physical healthcare services during the regular school day may be assisted by qualified designated school personnel trained in the administration of specialized physical healthcare services provided they perform such services under the supervision of a school nurse, public health nurse or licensed physician or surgeon.

Education Code section 49423.5(a) states:

> "(a) Notwithstanding Section 49422, an individual with exceptional needs who requires specialized physical healthcare services, during the regular school day, may be assisted by any of the following individuals:
>
> "(1) Qualified persons who possess an appropriate credential issued pursuant to Section 44267 or 44267.5, or hold a valid certificate of public health nursing issued by the Board of Registered Nursing.
>
> "(2) Qualified designated school personnel trained in the administration of specialized physical healthcare if they perform those services under the supervision, as defined by Section 3051.12 of Title 5 of the California Code of Regulations, of a credentialed school nurse, public health nurse, or licensed physician and surgeon, and the services are determined by the credentialed school nurse or licensed physician and surgeon, in consultation with

the physician treating the pupil, to be all of the following:

"(A) Routine for the pupil.

"(B) Pose little potential harm for the pupil.

"(C) Performed with predictable outcomes, as defined in the IEP of the pupil.

"(D) Do not require a nursing assessment, interpretation, or decision-making by the designated school personnel." [Emphasis added.]

Specialized healthcare or other services that require medically related training must be provided pursuant to the procedures prescribed under Section 49423. These procedures require the school district to obtain both a written statement from the physician detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken, and a written statement from the parent, foster parent or guardian of the pupil indicating the request that the school district assist the pupil in the matters set forth in the statement of the physician.[942] The written statements must be provided at least annually and more frequently if the medication, dosage, frequency of administration, or reason for administration changes.[943]

In American Nurses Association v. Torlakson,[944] the California Supreme Court held that permitting trained unlicensed school personnel to administer prescription medications did not violate the Nursing Practice Act which prohibits the unauthorized practice of nursing. The court held that state law authorizes each student's physician, with parental consent, to decide whether medication may safely and appropriately be administered by unlicensed school personnel. The court further held that state law reflects the practical reality that medication administered outside of hospitals and other clinical settings is many times administered by laypersons.

Education Code section 49423.5(a)(2) specifically authorizes qualified designated school personnel trained in the administration of specialized physical health care to provide catheterization, gastric tube feeding, suctioning and other services when they perform those services under the supervision of a credentialed school nurse, public health nurse or licensed physician, if the services are:

1. Routine for the pupil.

2. Pose little potential harm for the pupil.

3. Performed with predictable outcomes, as defined in the individualized education program of the pupil.

[942] Education Code section 49423(b)(1).
[943] Education Code section 49423(b)(3).
[944] 57 Cal.4th 570, 160 Cal.Rptr.2d 370 (2013).

4. Do not require a nursing assessment, interpretation, or decisionmaking by the designated school personnel.[945]

Section 49423.5 further states, "This section does not affect current state law or regulation regarding medication administration."[946] As discussed above, the California Supreme Court recently ruled that unlicensed school employees may administer medication pursuant to a physician's order.[947]

Therefore, in our opinion, Education Code sections 49423 and 49423.5 authorize qualified designated school personnel trained in the administration of specialized physical health care to provide physical health care services and administer medication by gastric tube feeding or other means to students under the supervision of a school nurse, public health nurse or licensed physician consistent with the holding of the California Supreme Court in American Nurses Association v. Torlakson. In addition, school nurses may lawfully train and supervise school personnel providing specialized physical health care services, including the administration of medication.

D. Antiseizure Medication – Statutory Provisions

Senate Bill 161 (Huff)[948] added Education Code section 49414.7, effective January 1, 2012. Senate Bill 161 authorizes unlicensed school employees to administer Diastat and other antiseizure medication to students who suffer seizures at school.

Education Code section 49414.7(a) states that it is the intent of the Legislature that, whenever possible, an emergency antiseizure medication should be administered by a school nurse or licensed vocational nurse who has been trained in its administration. Section 49414.7(b) states that in the absence of a credentialed school nurse or other licensed nurse on site at the school or charter school, a school district, county office of education, or charter school may elect to participate in a program to allow non-medical employees to volunteer to provide medical assistance to students with epilepsy suffering from seizures upon request by a parent or guardian.

If the school district, county office of education, or charter school elects to participate in this program, the school district, county office of education, or charter school shall provide school employees who volunteer with voluntary emergency medical training that is consistent with the training guidelines established to provide emergency medical assistance to pupils with epilepsy suffering from seizures. A school employee with voluntary emergency medical training shall provide emergency medical assistance, in a manner consistent with the training guidelines approved on the California Department of Education's Internet Website and the performance instructions set forth by the licensed healthcare provider of the pupil. A school employee who does not volunteer or who has not been trained shall not be required to provide emergency medical assistance.

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[945] Education Code section 49423.5(b)(2).
[946] Education Code section 49423.5(q).
[947] American Nurses Association v. Torlakson, 57 Cal.4th 571 (2013).
[948] Stats. 2011, ch. 560.

Section 49414.7(c) states that if a pupil with epilepsy has been prescribed an emergency antiseizure medication by his or her healthcare provider, the pupil's parent or guardian may request the pupil's school to have one or more of its employees receive training in the administration of an emergency antiseizure medication in the event that the pupil suffers a seizure when a nurse is not available. Section 49414.7(d) states that the school or charter school shall notify the parent or guardian that his or her child may qualify for services or accommodations under Section 504 of the Rehabilitation Act or under the IDEA. The school district or charter school shall assist the parent or guardian with the exploration of the option for a Section 504 Plan or IEP and encourage the parent or guardian to adopt that option if it is determined that the child is eligible for a Section 504 Plan or an IEP.

Section 49414.7(e) states that a school or charter school may ask the parent or guardian to sign a notice verifying that the parent or guardian was given information about Section 504 of the Rehabilitation Act or the IDEA and that the parent or guardian understands that it is his or her right to request a Section 504 Plan or an IEP at any time. Section 49414.7(f) states that if a parent or guardian does not choose to have the pupil assessed for a Section 504 Plan or an IEP, the school or charter school may create an individualized health plan, seizure action plan, or other appropriate health plan designed to acknowledge and prepare for the child's health care needs in school. The plan may include the involvement of a trained volunteer school employee or a licensed vocational nurse.

E. Training of Employees – Antiseizure Medication

Section 49414.7(g) states that in training employees, the school district, county office of education, or charter school shall ensure the following:

1. A volunteer received training from a licensed healthcare professional regarding the administration of an emergency antiseizure medication. A staff member who has completed training shall, if he or she has not administered an emergency antiseizure medication within the prior two years and there is a pupil enrolled in the school who may need the administration of antiseizure medication, attend a new training program to retain the ability to administer an emergency antiseizure medication.

2. Any agreement by an employee to administer an emergency antiseizure medication is voluntary, and an employee of the school or charter school, or are an employee of the school district or county office of education, or the charter school administrator, shall not directly or indirectly use or attempt to use his or her authority or influence for the purpose of intimidating, threatening, coercing, or attempting to intimidate, threaten or coerce any staff member who does not choose to volunteer, including but not limited to, direct contact with the employee.

3. Any employee who volunteers may rescind his or her offer to administer an emergency antiseizure medication up to three days after the completion of the training. After that time, a volunteer may rescind his or her offer to administer an emergency antiseizure medication with a two-week notice, or until a new individual health plan or Section 504 plan has been developed for an affected employee, whichever is less.

4. The school or charter school shall distribute an electronic notice no more than twice per school year per child to all staff that states the following information in bold print:

   A. A description of the volunteer request, stating that the request is for volunteers to administer an emergency antiseizure medication to a pupil experiencing a severe epileptic seizure, in the absence of a school nurse, and that this emergency antiseizure medication is an FDA approved, predosed, rectally administered gel that reduces the severity of epileptic seizures.

   B. A description of the training that the volunteer will receive.

   C. A description of the voluntary nature of the volunteer program.

   D. The volunteer rescission timelines.

5. The electronic notice described shall be the only means by which a school or charter school solicits volunteers.

Section 49414.7(h) states that an employee who volunteers shall not be required to administer an emergency antiseizure medication until completion of the training program adopted by the school district, county office of education, or charter school and documentation of completion is recorded in the employee's personnel file. Section 49414.7(i) states that if a school district, county office of education, or charter school elects to participate, the school district, county office of education, or charter school shall ensure that each employee who volunteers will be provided defense and indemnification by the school district, county office of education, or charter school for any and all civil liability, in accordance with, but not limited to, that are provided under the Tort Claims Act.[949] This information shall be reduced to writing, provided to the volunteer, and retained in the volunteer's personnel file.

[949] See, Government Code section 810 et seq.

F. School District Plan – Antiseizure Medication

Section 49414.7(j) states that if there are no volunteers, then the school or charter school shall renotify the pupil's parent or guardian of the option to be assessed for services and accommodations guaranteed under Section 504 and the IDEA. Section 49414.7(k) states that a school district, county office of education, or charter school that elects to participate shall have in place a school district, county office of education, or charter school plan that shall include, but not be limited to, all of the following:

1. Identification of existing licensed staff within the district or region who could be trained in the administration of an emergency antiseizure medication and could be available to respond to an emergency need to administer an emergency antiseizure medication. The school district or charter school shall consult with the county office of education to obtain this information.

2. Identification of pupils who may require the administration of an emergency antiseizure medication.

3. Written authorization from the parent or guardian for a nonmedical school employee to administer an emergency antiseizure medication.

4. The requirement that the parent or guardian notify the school or charter school that the pupil has had an emergency antiseizure medication administered within the past four hours on a school day.

5. Notification of the parent or guardian, by the school or charter school administrator or, if the administrator is not available, by another school staff member, that an emergency antiseizure medication has been administered.

6. A written statement from the pupil's healthcare practitioner that shall include, but not be limited to, all of the following:

    A. The pupil's name.

    B. The name and purpose of the medication.

    C. The prescribed dosage.

    D. Detailed seizure symptoms, including frequency, type, or length of seizures that identify when the administration of an emergency antiseizure medication becomes necessary.

    E. The method of administration.

F. The frequency with which the medication may be administered.

G. The circumstances under which the medication may be administered.

H. Any potential adverse responses by the pupil and recommended mitigation actions, including when to call emergency services.

I. A protocol for observing the pupil after a seizure, including, but not limited to, whether the pupil should rest in the school office, whether the pupil may return to class, and the length of time the pupil should be under direct observation.

J. Following a seizure, the pupil's parent or guardian and the school nurse shall be contacted by the school or charter school administrator or, if the administrator is not available, by another school staff member to continue the observation plan.

G. Compensation of Employees and State Guidelines – Antiseizure Medication

Section 49414.7(l) states that a school district, county office of education, or charter school that elects to allow volunteers to administer an emergency antiseizure medication shall compensate a volunteer, in accordance with that employee volunteer's pay scale when the administration of an emergency antiseizure medication and the subsequent monitoring of a pupil requires a volunteer to work beyond his or her normally scheduled hours. Section 49414.7(m) states the California Department of Education, in consultation with the State Department of Public Health, shall develop guidelines for the training and supervision of school and charter school employees in providing emergency medical assistance to pupils with epilepsy suffering from seizures and shall post this information on the CDE's Internet Web site by July 1, 2012. The guidelines may be developed in cooperation with interested organizations. Upon development of the guidelines, the department shall approve the guidelines for distribution and shall make those guidelines available upon request. The CDE shall include, on its Internet Web site, a clearinghouse for best practices in training non-medical personnel to administer an emergency antiseizure medication to pupils. Training established pursuant to this subdivision shall include, but not be limited to, all of the following:

1. Recognition and treatment of different types of seizures.

2. Administration of an emergency antiseizure medication.

3. Basic emergency follow-up procedures, including but not limited to, a requirement for the school or charter school administrator to call the emergency 911 telephone number and to contact the pupil's parent or guardian. The requirement for the school or charter school or other staff member to call the emergency 911 telephone number shall not require a pupil to be transported to an emergency room.

4. Techniques and procedures to ensure pupil privacy.

H. Retention of Training Materials – Antiseizure Medication

Section 49414.7(m) further states that any written materials used in the training shall be retained by the school or charter school. Training established pursuant to Section 49414.7(m) shall be conducted by one or more of the following:

1. A physician and surgeon.

2. A physician assistant.

3. A credentialed school nurse.

4. A registered nurse.

5. A certificated public health nurse.

Training provided in accordance with the manufacturer's instructions, the pupil's healthcare provider's instructions, and guidelines established pursuant to Section 49414.7 shall be deemed adequate training.

I. Notification of Administration of Medication – Antiseizure Medication

Section 49414.7(n) states that the school or charter school administrator or, another school staff member, shall notify the credentialed school nurse assigned to the school district, county office of education, or charter school if an employee at the school site administers an emergency antiseizure medication pursuant to Section 49414.7. If a credentialed school nurse is not assigned to the school district, county office of education, or charter school, the school or charter school administrator or, if the administrator is not available, another school staff member shall notify the superintendent of the school, or his or her designee, the county superintendent of schools, or his or her designee, or the charter school administrator, or his or her designee as appropriate, if an employee at the school site administers an emergency antiseizure medication. A school or charter school shall retain all records relating to the administration of an emergency antiseizure medication while a pupil is under the supervision of school staff. The pupil's parent or guardian shall provide all materials necessary to administer an emergency antiseizure medication. A school or charter school shall not be responsible for providing any of the necessary materials.

J. Definition of Antiseizure Medication

Section 49414.7(p) defines an "emergency antiseizure medication" as diazepam rectal gel and emergency medications approved by the federal Food and Drug Administration for patients with epilepsy for the management of seizures by persons without medical credentials. "Emergency medical assistance" means the administration of an emergency antiseizure medication to a pupil suffering from an epileptic seizure. Section 49414.7(q) states that section shall remain in effect until January 1, 2017, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2017, deletes or extends that date.

K. Administration of Medication by School Employees – California Supreme Court Decision

In American Nurses Association v. Torlakson,[950] the California Supreme Court unanimously ruled that California law expressly permits trained, unlicensed school personnel to administer prescription medications, such as insulin, in accordance with the written statements of a student's treating physician and parental consent pursuant to Education Code section 49423.

The California Supreme Court held that such practices did not violate the Nursing Practice Act which prohibits the unauthorized practice of nursing. The court held that state law authorizes each student's physician, with parental consent, to decide whether prescription medication, such as insulin, may safely and appropriately be administered by unlicensed school personnel. The court further held that state law reflects the practical reality that most insulin administered outside of hospitals and other clinical settings is administered by laypersons.

The California Supreme Court framed the question before it as whether California law permits unlicensed school personnel to administer medications and held that it was a question of law rather than a question of fact. State law requires that nurses administer all medications, including insulin, in hospitals and other licensed healthcare facilities.[951] Outside of such facilities, the court noted that insulin is normally administered by laypersons according to a physician's directions, most often by the diabetic person themselves or by friends or family members.

The court stated that public school students with diabetes who cannot self-administer insulin are normally entitled to have it administered to them at no cost pursuant to Section 504 of the Rehabilitation Act (Section 504), Title II of the Americans with Disabilities Act (ADA), and the Individuals with Disabilities Education Act (IDEA).[952] Public schools must offer to students covered by these laws a free and appropriate public education that includes related aides and services designed to meet their individual educational needs. Under these laws, diabetic students pay for insulin, supplies and equipment, but not the cost of administering insulin. A school's obligations to a particular diabetic student are normally set forth in a Section 504 plan or an IEP.

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[950] American Nurses Association v. Torlakson, 57 Cal.4th 570, 160 Cal.Rptr.2d 370 (2013).
[951] Business & Professions Code section 2725.3.
[952] See, 29 U.S.C. Section 794 (Section 504); 42 U.S.C. Section 12131 et seq. (Title II of the ADA); 20 U.S.C. Section 1400 et seq. (IDEA).

The court observed that approximately 14,000 school-age children in California suffer from diabetes. Diabetic students who depend on insulin injections typically need them during the school day, both at regularly-scheduled times and unpredictably to correct for fluctuations in blood glucose. The need for insulin can arise anytime and anywhere. The court noted that to serve this and other student health needs, California has about 2,800 school nurses, averaging one for every 2,200 of the state's approximately six million public school students. While five percent of schools have a full-time nurse, 69 percent of schools have only a part-time nurse, and 26 percent have no nurse at all.

The court also observed that some schools allow unlicensed school personnel to administer insulin while others do not. In some cases, nurses have refused to train unlicensed school personnel to administer insulin out of concern for possible disciplinary action by the Board of Registered Nursing. As a result, diabetic students have encountered difficulty in receiving insulin during the school day.

In October 2005, the parents of four diabetic students filed a class action lawsuit in federal court alleging that schools in Fremont Unified School District and the San Ramon Valley Unified School District had failed to meet their obligations to diabetic students under federal law. The California Department of Education (CDE) was also named in the lawsuit. The plaintiffs alleged that the school districts violated Section 504 and the IDEA by refusing to permit unlicensed school personnel to administer insulin when no nurse was available.

In July 2007, the plaintiffs entered into a settlement with the CDE and the State Board of Education. The agreement required the CDE to fulfill its legal obligations to monitor local educational agency's compliance with Section 504 and the IDEA, and to issue a 2007 Legal Advisory. The 2007 Legal Advisory recognized that some students cannot self-administer insulin and that when a school nurse is not available, unlicensed trained school employees who volunteer may be permitted to administer insulin to students.

As a result of the 2007 Legal Advisory, the American Nurses Association and the California Nurses Association filed a lawsuit in state court against CDE seeking to invalidate the 2007 Legal Advisory. The Superior Court and the Court of Appeal ruled in favor of the American Nurses Association. The American Diabetes Association, also a party in the lawsuit, petitioned for review by the California Supreme Court.

To determine whether unlicensed school personnel may administer a prescription medication, such as insulin, the California Supreme Court reviewed the provisions of Education Code section 49423 and its legislative history. Section 49423(a) states:

> "Notwithstanding Section 49422, any pupil who is required to take, during the regular schoolday, medication prescribed for him or her by a physician and surgeon or ordered for him or her by a physician assistant practicing in compliance with Chapter 7.7 (commencing with Section 3500) of Division 2 of the Business and Professions Code, may be assisted by the school nurse or other designated school personnel or may carry and self-administer prescription auto-injectable epinephrine if the school district

> receives the appropriate written statements identified in subdivision (b)." [Emphasis added.]

The California Supreme Court noted that the Legislature's reason for authorizing school personnel to administer medications, according to the original statute's legislative history, was to "avoid requiring children to leave school during the day for necessary medication or compelling their parents to pay extra sums for a school visit by the physician." Originally, Section 49423 did not require implementing regulations and was thus self-executing. However, over time, some schools refused to administer prescribed medications to students, and in 1997, the State Superintendent of Public Instruction sent a letter to school superintendents reminding them that federal law permitted students to receive medication during the school day and that medication could properly be administered by unlicensed personnel who have been appropriately trained by a credentialed school nurse, public health nurse, or a physician.

The court noted that some districts also required parents to sign waivers to sign away their children's right to medical treatment at school as a condition of enrollment or attendance. To address these issues, the Legislature directed CDE to develop and recommend regulations regarding the administration of medication in the public schools pursuant to Section 49423.[953]

In 2003, the State Board of Education adopted Sections 600 through 611 of Title 5 of the California Code of Regulations.[954] These regulations expressly declare that unlicensed school personnel may administer medications. Section 604(b) states, "Other designated school personnel may administer medication to pupils, or otherwise assist pupils in the administration of medication as allowed by law and, if they are licensed healthcare professionals, in keeping with applicable standards of professional practice for their license." Section 601 defines "other designated school personnel" as any individual employed by the local educational agency who has consented to administer the medication to the pupil or otherwise assist the pupil in the administration of medication and may legally administer the medication to the pupil or otherwise assist the pupil in the administration of medication. The court, after reviewing Education Code section 49423 and its implementing regulations, concluded:

> "Thus, Section 49423 and its implementing regulations plainly establish, as the Legislature, the Board, and the Department intended, that unlicensed school personnel may administer prescription medications. The Nurses do not contend the Board's regulations are invalid, but they do offer a variety of arguments for interpreting them other than according to their plain meaning. None is persuasive."

The court went on to reject all of the legal arguments made by the nurses association, indicating that the nurses have misinterpreted Education Code section 49423 and its implementing regulations. The court stated, "The routine administration of insulin outside of hospitals and clinical settings . . . does not require substantial scientific knowledge or technical

[953] See, Education Code section 49423.6(a), added by Stats. 2000, ch. 281, Section 2, p. 2477.
[954] All references in this paragraph are to Title 5 of the California Code of Regulations.

skill and is, in fact, typically accomplished by the patients themselves, including some children, or by friends and family members."

The court noted that the Nursing Practice Act expressly exempts from the definition of the practice of nursing the carrying out of medical orders prescribed by a licensed physician by unlicensed persons.[955] The court stated, "This medical-orders exception, as we shall explain, is broad enough to cover unlicensed school personnel who act as volunteers for specific students, at their parents' request, to carry out physician's medical orders in accordance with Section 49423 and its implementing regulations." The court concluded:

> "For all these reasons, we conclude the medical-orders exception does permit a layperson to carry out a physician's medical orders for a patient, even orders that would otherwise fall within the definition of nursing practice, without thereby violating the rule against unauthorized practice. To fall outside the exception by 'assuming to practice as a nurse' . . . one must go further by holding oneself out, explicitly or implicitly, to be a nurse in fact. This conclusion disposes of the issue, because unlicensed school personnel do not hold themselves out to be nurses simply by volunteering to act on behalf of particular students in accordance with the Education Code and its implementing regulations."[956]

The California Supreme Court noted that between 2001 and 2011, the Legislature imposed additional training and administrative requirements before unlicensed school personnel may administer three specific emergency medications: epinephrine auto-injectors to treat anaphylaxis,[957] glucagon for severe hypoglycemia,[958] and antiseizure medication for epilepsy.[959] Each of these statutes, while expressing the Legislature's preference that registered nurses administer the medications whenever possible, expressly permit trained, unlicensed school personnel to administer the medication when no nurse is available. The court held that having generally authorized unlicensed school personnel to administer medications pursuant to Education Code section 49423, the Legislature nevertheless retained the power to impose additional restrictions on individual drugs when justified.

After rejecting each of the nurses association's arguments, the court concluded:

> "Finding no merit in the arguments to the contrary, we conclude California law does permit trained, unlicensed school personnel to administer prescription medications, including insulin, in accordance with written statements of individual student's treating physician, with parental consent . . . and that <u>persons who</u>

[955] See, Business & Professions Code section 2727(e).
[956] See, Business & Professions Code section 2727(e).
[957] Education Code section 49414.
[958] Education Code section 49414.5.
[959] Education Code section 49414.7.

> act under this authority do not violate the NPA.[960] . . . Because schools may administer prescription medications only in accordance with physician's written statements . . . state law in effect delegates to each student's physician the decision whether insulin may safely and appropriately be administered by unlicensed school personnel or instead whether a particular student's medical needs can be met only by a licensed healthcare provider. State law, however, presents no categorical obstacle to the use of unlicensed personnel for this purpose." [Emphasis added.]

In summary, the California Supreme Court held that California law authorizes unlicensed school personnel to administer insulin and other prescription medications to students in accordance with written statements of the student's treating physician with parental consent. The court further held that the authorization to allow unlicensed school personnel to administer prescription medication does not violate the Nursing Practice Act. Therefore, school nurses may lawfully train unlicensed school personnel to administer medication pursuant to Education Code sections 49423, 49426,[961] and Title 5 of the California Code of Regulations sections 600 through 611.

L. Administration of Antiseizure Medication – Case Law

The California Supreme Court characterized Education Code section 49414.7 relating to the administration of antiseizure medication as a narrow exception to the broad authority of Education Code section 49423 that authorizes school nurses to train unlicensed school personnel to administer prescription medications in accordance with the written statements of a student's treating physician and parents.[962] The court noted that the Legislature has mandated specific training before unlicensed school personnel may administer specially regulated emergency medications to students, including epinephrine auto-injectors for anaphylaxis, glucagon for severe hyperglycemia, and antiseizure medication for epilepsy.[963] These specific provisions add additional training procedures prior to authorizing school nurses to train unlicensed school employees to administer prescription medication to students.

In American Nurses Association v. Torlakson, the California Supreme Court broadly proclaimed that school nurses may train unlicensed school personnel to administer prescription medications in accordance with the written statements of a student's treating physician and parents. The court stated:

> "In fact, California law expressly permits trained, unlicensed school personnel to administer prescription medications

[960] See, Business & Professions Code section 2727(e).
[961] Education Code section 49426 outlines the qualifications and the role of the school nurse. The role of the school nurse is to strengthen and facilitate the educational process by improving and protecting the health status of children. The major focus is the prevention of illness and disability, and the early detection and correction of health problems. The school nurse is uniquely qualified in preventive health, health assessment, and referral procedures. In addition, the school nurse may design and implement health plans to meet individual student health needs, incorporate plans directed by a physician , as well as consult with, train, and serve as a resource to teachers and administrators.
[962] Id. at 582.
[963] See, Education Code sections 49414, 49414.5, 49414.7.

such as insulin in accordance with the written statements of a student's treating physician and parents (Ed. Code section 49423, 49423.6; California Code of Regs., Title V, Section 600, 604, subdivision (b)) and expressly exempts persons who thus carry out physicians' medical orders from laws prohibiting the unauthorized practice of nursing (Business and Professions Code section 2727, subdivision (e)).”[964]

The California Supreme Court went on to analyze the provisions of Education Code section 49423. Section 49423(a) states in part:

> “Notwithstanding Section 49422, any pupil who is required to take, during the regular school day, medication prescribed for him or her by a physician and surgeon or ordered for him or her by a physician assistant . . . may be assisted by the school nurse or other designated school personnel . . . if the school district receives the appropriate written statements identified in subdivision (b).”

Education Code section 49423(b) requires medications to be administered in accordance with medical orders and parental consent. Section 49423(b)(1) states:

> “In order for a pupil to be assisted by a school nurse or other designated school personnel pursuant to subdivision (a), the school district shall obtain both a written statement from the physician and surgeon or physician assistant detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken and a written statement from the parent, foster parent, or guardian of the pupil indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician and surgeon or physician assistant.”

In reviewing the legislative history of Education Code section 49423, the California Supreme Court stated that the Legislature's reason for authorizing school personnel to administer medications was to avoid requiring children to leave school during the day for necessary medication or compelling their parents to pay extra sums for a school visit by a physician.[965] The court noted that the State Superintendent of Public Instruction reminded school districts of their duty to administer medication to students by unlicensed school personnel who have been appropriately trained by a credentialed school nurse due to complaints from parents. The Legislature then provided additional clarity by directing the California Department of Education to develop and adopt regulations regarding the administration of medication.[966] The court noted that the regulations that were adopted expressly declare that unlicensed school personnel may administer medications.[967] The court concluded, “Thus, Section 49423, and its implementing

[964] Id. at 575.
[965] Id. at 580.
[966] Ibid. See, Education Code section 49423.6.
[967] Ibid. See, Title V, Section 604(b),

regulations plainly establish, as the Legislature, the Board and the Department intended, that unlicensed school personnel may administer prescription medications."[968] [Emphasis added]

The California Supreme Court rejected the argument of the American Nurses Association that only licensed healthcare professionals may administer prescription medications in public schools. The court stated, "This does not mean, however, that only licensed healthcare professionals may administer prescription medications in public schools. It means, rather, only that the board's regulations do not authorize unlicensed school personnel to administer such medications in violation of other applicable laws or regulations."[969] The court stated:

> "Also, the Legislature has mandated specific training before unlicensed school personnel may administer three specially regulated emergency medications to students." (See, Section 49414 [epinephrine auto-injectors for anaphylaxis], 49414.5 [glucagon for severe hypoglycemia], and 49414.7 [antiseizure medication for epilepsy].) A school employee without the licensure or training required by statute for such medications would not be 'allowed by law' . . . to administer them and, thus, not permitted to do so solely by force of the Board's regulations. Compliance with those other laws would also be necessary."[970]

Education Code section 49414.7(a) refers to "emergency antiseizure medication." Section 49414.7(p)(1) defines "emergency antiseizure medication" as follows, "An 'emergency antiseizure medication' means diazepam rectal gel and emergency medications approved by the Federal Food and Drug Administration for patients with epilepsy for the management of seizures by persons without medical credentials listed in paragraph (5) of subdivision (m)."

By its very terms, Education Code section 49414.7 only applies to emergency antiseizure medication as applied. When Education Code section 49414.7 does not apply to drugs and medications falling outside of this definition, the California Supreme Court stated:

> "In contrast, no such law prohibits unlicensed persons from administering prescription medications generally, . . . in carrying out the medical orders of licensed physicians."[971]

Therefore, all other antiseizure medications which do not fall within the definition of "emergency antiseizure medications," as defined in Section 49414.7(p)(1), fall within the holding of the California Supreme Court in American Nurses Association v. Torlakson[972] and Education Code section 49423.

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[968] Id. at 581.
[969] Id. at 582.
[970] Id. at 582.
[971] Id. at 582.
[972] 57 Cal.4th 570, 582 (2013).

The California Supreme Court noted that with respect to epinephrine auto-injectors to treat anaphylaxis, glucagon for severe hypoglycemia and antiseizure medication for epilepsy, the Legislature imposed additional training and administrative requirements before unlicensed school personnel may administer these specific emergency medications. The court noted that the Legislature generally authorized unlicensed school personnel to administer medication pursuant to Education Code section 49423 and directed the State Board of Education to adopt implementing regulations pursuant to Section 49423.6, and also retain the power to impose additional restrictions on drugs the Legislature deemed to need special precautions. Absent restrictive legislation or legislation which imposes additional requirements, school nurses may train unlicensed school personnel to administer medications including prescription medications and controlled substances.[973]

The California Supreme Court then rejected all of the other arguments made by the American Nurses Association and concluded:

> "Finding no merit in the arguments to the contrary, we conclude California law does permit trained, unlicensed school personnel to administer prescription medications, including insulin, in accordance with written statements of individual student's treating physicians, with parental consent . . . and that persons who act under this authority do not violate the NPA . . . . Because schools may administer prescription medications only in accordance with physicians' written statements . . . state law in effect delegates to each student's physician the decision whether insulin may safely and appropriately be administered by unlicensed school personnel or instead whether a particular student's medical needs can be met only by a licensed healthcare provider. State law, however, presents no categorical obstacle to the use of unlicensed personnel for this purpose."[974]

The California Supreme Court broadly referred to all prescription medications and indicated that persons who act under the authority of a treating physician who determined that unlicensed school personnel may safely and appropriately administer the prescribed drug may do so under state law.

In summary, the California Supreme Court in American Nurses Association v. Torlakson[975] held that Education Code section 49414.7[976] constitutes a narrow exception to the broad scope of Education Code section 49423, which authorizes school nurses to train unlicensed school personnel to administer prescription medications in accordance with the written statements of a student's treating physician and parents. The narrow exception contained in Section 49414.7 only adds additional training requirements when emergency antiseizure medication (diazepam rectal gel and emergency medications approved by the federal Food and

[973] Id. at 586.
[974] Id. at 591.
[975] 57 Cal.4th 570 (2013).
[976] As well as Education Code section 49414 and 49415.

Drug Administration for patients with epilepsy for the management of seizures). There is no language in the California Supreme Court's decision, Section 49423, or Section 49414.7 that would indicate that school nurses are prohibited from training unlicensed school personnel to administer other antiseizure medications that fall outside the definition of "antiseizure medications" (i.e., diazepam rectal gel and emergency medications approved by the federal Food and Drug Administration) in Section 49414.7. When other antiseizure medications are prescribed by a physician, the provisions of Education Code section 49423 apply and so long as the medication is prescribed by a physician and authorized by the parent, a school nurse may lawfully train unlicensed school employees to administer the prescribed medication.

M. Administration of Controlled Substances

The question has arisen as to whether the California Supreme Court's decision in American Nurses Association v. Torlakson[977] applies to controlled substances. As discussed below, the court's decision applies to controlled substances and school nurses may lawfully train unlicensed school employees to administer to students controlled substances prescribed by a physician.

Health and Safety Code section 11154 prohibits a physician or other licensed health professional from prescribing, administering, or dispensing, or furnishing a controlled substance to any person for which they are not appropriately treating that individual. However, Health and Safety Code section 11210 authorizes a physician to prescribe, furnish, and administer controlled substances to their patients when the patient is suffering from a disease, ailment, injury or infirmities attendant upon old age other than addiction to a controlled substance. Section 11210 authorizes a physician to prescribe, furnish, or administer controlled substances only when in good faith he or she believes the disease, ailment, injury, or infirmity requires treatment.

Therefore, when a physician prescribes a controlled substance appropriately, Education Code section 49423 would apply in school settings. Under Education Code section 49423(b), an unlicensed school employee may administer a prescription drug, including a controlled substance, appropriately prescribed by a physician pursuant to Health and Safety Code section 11210, in accordance with the written statement from the physician detailing the name of the medication, method, amount and time schedules by which the medication is to be taken, and a written statement from the parent indicating the desire that the school district assist the pupil in the administration of the medication. The California Supreme Court recognized this medical orders exception in Education Code section 49423 when it stated, "In contrast, no such law prohibits unlicensed persons from administering prescription medications generally, or insulin in particular, in carrying out the medical orders of licensed physicians."[978] [Emphasis added]

The California Supreme Court noted that the Nursing Practice Act,[979] Business and Professions Code section 2727(e), expressly exempts the performance by any person of such duties as required in carrying out medical orders prescribed by a licensed physician. The court included, "This medical-order's exception, as we shall explain, is broad enough to cover

[977] 57 Cal.4th 570, 160 Cal.Rptr.3d 370 (2013).
[978] Id. at 582.
[979] Business and Professions Code section 2700 et seq.

unlicensed school personnel who act as volunteers for specific students, at their parents' request, to carry out physicians' medical orders in accordance with Section 49423 and its implementing regulations."[980] The court concluded its analysis of the medical orders exception by stating:

> "For all of these reasons, we conclude the medical orders exception does permit a layperson to carry out a physician's medical orders for a patient, even orders that would otherwise fall within the definition of nursing practice, without thereby violating the rule against unauthorized practice. To fall outside the exception by 'assuming to practice as a nurse' . . . one must go further by holding oneself out, explicitly or implicitly, to be a nurse in fact. This conclusion disposes of the issue, because unlicensed school personnel do not hold themselves out to be nurses simply by volunteering to act on behalf of particular students in accordance with the Education Code and its implementing regulations."[981]

The California Supreme Court, in its conclusion, did not state that trained unlicensed school personnel may not administer prescription medications which are also controlled substances. The California Supreme Court broadly referred to all prescription medications and indicated that persons who act under the authority of a treating physician who determined that unlicensed school personnel may safely and appropriately administer the prescribed drug (which may also be a controlled substance) may do so under state law.

N. Epinephrine Auto-Injectors

On September 15, 2014, Governor Brown signed Senate Bill 1266[982] which amended Business and Professions Code section 4119.2 and Education Code section 49414, effective January 1, 2015.

Business and Professions Code section 4119.2, as amended, states that notwithstanding any other provision of law, a pharmacy may furnish epinephrine auto-injectors to a school district, county office of education, or charter school, pursuant to Education Code section 49414 if all of the following conditions are met:

1. The epinephrine auto-injectors are furnished exclusively for use at a school district site, county office of education, or charter school.

2. A physician and surgeon provides a written order that specifies the quantity of the epinephrine auto-injectors to be furnished.

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[980] Id. at 583.
[981] Id. at 585-586. Neither the language of Education Code section 49423 or the Title 5 regulations excludes controlled substances from the authorization granted to unlicensed school employees to administer medications prescribed by a physician.
[982] Stats. 2014, ch. 321.

Business and Professions Code section 4119.2(b) states that records regarding the acquisition and disposition of epinephrine auto-injectors furnished pursuant to Section 4119.2(a) shall be maintained by the school district, county office of education, or charter school for a period of three years from the date the records were created. The school district, county office of education, or charter school shall be responsible for monitoring the supply of epinephrine auto-injectors and ensuring the destruction of expired epinephrine auto-injectors.

Education Code section 49414(a), as amended, states that school districts, county offices of education, and charter schools shall provide emergency epinephrine auto-injectors to school nurses or trained personnel who have volunteered. School nurses or trained personnel may use epinephrine auto-injectors to provide emergency medical aid to persons suffering, or reasonably believed to be suffering, from an anaphylactic reaction.

Education Code Section 49414(b) defines "anaphylaxis" as meaning a potentially life-threatening hypersensitivity to a substance. Symptoms of anaphylaxis may include shortness of breath, wheezing, difficulty breathing, difficulty talking or swallowing, hives, itching, swelling, shock, or asthma. Causes of anaphylaxis may include, but are not limited to, an insect sting, food allergy, drug reaction, and exercise. An authorizing physician and surgeon may include, but is not limited to, a physician and surgeon employed by, or contracting with, a local educational agency, a medical director of the local health department, or a local emergency medical services director. An "epinephrine auto-injector" means a disposable drug delivery system with a spring-activated needle that is designed for emergency administration of epinephrine to provide rapid, convenient first aid for persons suffering a potentially fatal reaction to anaphylaxis. A qualified supervisor of health may include, but is not limited to, a school nurse. A "volunteer" or "trained personnel" is defined as an employee who has volunteered to administer epinephrine auto-injectors to a person if the person is suffering, or reasonably believed to be suffering, from anaphylaxis, has been designated by a school, and has received training.

Section 49414(e) states that every five years, or sooner as deemed necessary by the State Superintendent of Public Instruction, the Superintendent shall review the minimum standards of training for the administration of epinephrine auto-injectors that satisfies statutory requirements. The Superintendent of Public Instruction shall consult with organizations and providers with expertise in administering epinephrine auto-injectors and administering medication in a school environment including, but not limited to, the State Department of Public Health, the Emergency Medical Services Authority, the American Academy of Allergy, Asthma and Immunology, the California School Nurses Organization, the California Medical Association, the American Academy of Pediatrics, Food Allergy Research and Education, the California Society of Allergy, Asthma and Immunology, the American College of Allergy, Asthma and Immunology, the Stanford Allergy Center, and others. Training established pursuant to Section 49414(e) shall include all of the following:

1. Techniques for recognizing symptoms of anaphylaxis.

2. Standards and procedures for the storage, restocking, and emergency use of epinephrine auto-injectors.

3. Emergency follow-up procedures, including calling the emergency 911 telephone number and contacting, if possible, the pupil's parent and physician.

4. Recommendations on the necessity of instruction and certification in cardiopulmonary resuscitation.[983]

5. Instruction on how to determine whether to use an adult epinephrine auto-injector or a junior epinephrine auto-injector, which shall include consideration of a pupil's grade level or age as a guideline of equivalency for the appropriate pupil weight determination.

6. Written materials covering the information required.

The training shall be consistent with the most recent Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Programs published by the federal Centers for Disease Control and Prevention and the most recent guidelines for medication administration issued by the department. A school shall retain for reference the written materials prepared.[984]

Education Code section 49414(f) states that a school district, county office of education, or charter school shall distribute a notice at least once per school year to all staff that contains the following information:

1. A description of the volunteer request stating that the request is for volunteers to be trained to administer an epinephrine auto-injector to a person if the person is suffering, or reasonably believed to be suffering, from anaphylaxis.

2. A description of the training that the volunteer will receive.

Education Code section 49414(g) states that a qualified supervisor of health at a school district, county office of education, or charter school shall obtain from an authorizing physician and surgeon a prescription for each school for epinephrine auto-injectors that, at a minimum, includes, for elementary schools, one regular epinephrine auto-injector and one junior epinephrine auto-injector, and for junior high schools, middle schools, and high schools, if there are no pupils who require a junior epinephrine auto-injector, one regular epinephrine auto-injector. A qualified supervisor of health at a school district, county office of education, or charter school shall be responsible for stocking the epinephrine auto-injector and restocking it if it is used. If a school district, county office of education, or charter school does not have a qualified supervisor of health, an administrator at the school district, county office of education, or charter school shall carry out the duties. A prescription pursuant to Section 49414 may be filled by local or mail order pharmacies or epinephrine auto-injector manufacturers.

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[983] Currently, Education Code section 49414(e)(2)(D) requires instruction and certification in cardiopulmonary resuscitation (CPR). This requirement will end December 31, 2014, and might be reinstated if it is recommended as part of the minimum standards for training.

[984] Education Code section 49414(e)(3),(4).

Education Code section 49414(h) states that a school nurse or, if the school does not have a school nurse or the school nurse is not onsite or available, a volunteer may administer an epinephrine auto-injector to a person exhibiting potentially life-threatening symptoms of anaphylaxis at school or a school activity when a physician is not immediately available. If the epinephrine auto-injector is used it shall be restocked as soon as reasonably possible, but no later than two weeks after it is used. Epinephrine auto-injectors shall be restocked before their expiration date.

Education Code section 49414(i) states a volunteer shall initiate emergency medical services or other appropriate medical follow-up in accordance with the training materials. Section 49414(j) states that a school district, county office of education, or charter school shall ensure that each employee who volunteers under Section 49414 will be provided defense and indemnification by the school district, county office of education, or charter school for any and all civil liability. This information shall be reduced to writing, provided to the volunteer, and retained in the volunteer's personnel file. Section 49414(k) states that a state agency, or a public school may accept gifts, grants, and donations from any source for the support of the public school carrying out the provisions of Section 49414, including, but not limited to, the acceptance of epinephrine auto-injectors from a manufacturer or wholesaler.

Education Code section 49414(g)(4) states that an authorizing physician and surgeon shall not be subject to professional review, be liable in a civil action, or be subject to criminal prosecution for the issuance of a prescription or order pursuant to section 49414 providing emergency Epinephrine auto-injectors, unless the physician and surgeon's issuance of the prescription or order constitutes gross negligence or willful or malicious conduct.

IMMUNIZATIONS FOR COMMUNICABLE DISEASES

On June 30, 2015, Governor Brown signed Senate Bill 277.[985] Senate Bill 277 amends Health and Safety Code section 120325, 120335, 120370, 120375 and adds Health and Safety Code section 120338, effective January 1, 2016.

Health and Safety Code section 120325(c) is amended to limit exemptions from immunizations to medical reasons only. Section 120335(f) is amended to clarify that the immunization requirement does not apply to a pupil in a home-based private school or a pupil who is enrolled in an independent study program and does not receive classroom-based instruction.[986]

Health and Safety Code section 120335(g), as amended, states that a pupil, who prior to January 1, 2016, submitted a letter or affidavit on file at a private or public elementary or secondary school, child day care center, day nursery, nursery school, family day care home, or development center stating beliefs opposed to immunization shall be allowed enrollment to any private or public elementary or secondary school, child day care center, day nursery, nursery school, family day care home, or development center within the state until the pupil enrolls in the

[985] Stats. 2015, ch. 35.
[986] Many school districts and county offices of education offer independent study programs pursuant to Education Code section 51745, et seq.

next grade span. Section 120335(g)(2) defines "grade span" as birth to preschool, kindergarten and grades 1 to 6, inclusive, including transitional kindergarten, and grades 7 through 12 inclusive. Therefore, when a student moves from preschool to kindergarten or from 6th grade to 7th grade, the student will be required to be immunized.

Health and Safety Code section 120335(g)(3) states that on or after July 1, 2016, the governing authority shall not unconditionally admit to any private or public elementary or secondary school, child day care center, day nursery, nursery school, family day care home, or development center for the first time, or admit or advance any pupil to 7th grade level, unless the pupil has been immunized for his or her age as required by this section. These vaccinations include:

1. Diphtheria.
2. Haemophilus influenza type b.
3. Measles.
4. Mumps.
5. Pertussis (whooping cough).
6. Poliomyelitis.
7. Rubella.
8. Tetanus.
9. Hepatitus B.
10. Varicella (chickenpox).
11. Any other disease deemed appropriate by the department, taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United State Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians.

Health and Safety Code section 120335(h) states that Section 120335 does not prohibit a pupil who qualifies for an individualized education program (IEP), pursuant to federal law and Section 56026 of the Education Code, from accessing any special education and related services required by his or her IEP. However, special education students must be immunized unless they have a medical exemption.

Senate Bill 277 repeals Health and Safety Code section 120365 which included an exemption based on personal belief. The repeal of Section 120365 leaves only a medical exemption from immunization.[987]

Health and Safety Code section 120370(a), as amended effective January 1, 2016, provides additional flexibility to a physician to exempt a student from immunization under circumstances, including, but not limited to, family medical history. Section 120370(a) authorizes a parent or guardian to file with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances, including, but not limited to, family medical history, for which this physician does not recommend immunization. The child shall be exempt to the extent indicated by the physician's statement. Section 120370(b) states that if there is good cause to believe that a child has been exposed to a disease listed in Health and Safety Code section 120335(b)[988] and his or her documentary proof of immunization status does not show proof of immunization against that disease, that child may be temporarily excluded from that school or institution until the local health officer is satisfied the child is no longer at risk of developing or transmitting the disease.

In summary, Senate Bill 277 repeals the personal belief exemption from immunization. Only a medical exemption from immunization still remains.

In Phillips v. City of New York,[989] the Second Circuit Court of Appeals upheld a New York State statute regarding student immunizations and exclusion of students from school for lack of vaccination. The New York statute is similar to the California statute.

The Court of Appeals held that the New York statute did not violate substantive due process rights, the free exercise clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Ninth Amendment or other state statutes. The Court of Appeals held that the state regulations permitting school officials to temporarily exclude students who are exempted from vaccination requirements during an outbreak of a vaccine preventable disease is constitutional. The Court of Appeals rejected the appeal of the parents who alleged that the New York statute was unconstitutional.

NEWS MEDIA ON SCHOOL CAMPUSES

On June 10, 1996, the California Attorney General issued an opinion stating that school administrators may require members of the news media to register their presence on campus, comply with other conditions for interviewing students, observing an event or examining the

[987] When Senate Bill 277 takes effect January 1, 2016, state law will not include an exemption from immunization based on religious beliefs.
[988] These diseases include: 1) Diphtheria; 2) Haemophilus influenza type b; 3) Measles; 4) Mumps; 5) Pertussis (whooping cough); 6) Poliomyelitis; 7) Rubella; 8) Tetanus; 9) Hepatitis B; 10) Varicella (chickenpox); and 11) any other disease deemed appropriate by the department, taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United State Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians.
[989] 775F.3d 538 (2nd Cir. (2015).

curriculum being taught, and leave the premises if their presence would interfere with the peaceful conduct of the activities of the school. However, the Attorney General's opinion stated that school administrators may not require written parental permission before allowing members of the news media to interview students.[990]

The Attorney General noted that the First Amendment of the United States Constitution and Article I, Section 2(a) of the California Constitution guarantee the right of free press. In San Jose Mercury News v. Municipal Court,[991] the California Supreme Court held that the public's right to receive and disseminate communications about public affairs implies at least some right to acquire relevant information at the source. With respect to school campuses, the California Legislature enacted Penal Code section 627 through 627.11. Section 627.2 requires outsiders to register with the principal or the principal's designee prior to entering school grounds. Section 627.7 makes it a misdemeanor to fail or refuse to leave the school grounds promptly after the principal or the principal's designee or a school security officer requests the outsider to leave. However, the definition of "outsider" set forth in Penal Code section 627.1 does not include publishers, editors, or reporters connected with the media. Therefore, members of the news media may not be prosecuted for violating Penal Code section 627.7, and refusing to leave a school campus.

The Attorney General stated that school officials may deny access to members of the news media if their presence would interfere with the peaceful conduct of the activities at the school. The Attorney General noted that there is a special relationship between a school district and its students and that a school district is required to take all reasonable steps to protect its students and that school administrators may reasonably regulate access to school grounds and impose conditions so as to preserve the property under their control for the use for which it is lawfully dedicated (i.e., education of students). The Attorney General cited Penal Code section 626.6 and Education Code section 32211(a) as authority or school officials to regulate members of the news media entering upon school campuses.[992]

The Attorney General concluded that school administrators may require members of the news media to follow reasonable conditions while they are on school grounds in order to prevent interference with the orderly educational activities of the school. These conditions may restrict the news media in the same manner as members of the general public and may include such things as requiring registration, being accompanied by a staff member while on school grounds, and denial of permission to enter classes that are in session. Members of the news media, as well as members of the general public, may be asked to leave if it reasonably appears to school officials that such persons are committing acts likely to interfere with the peaceful conduct of the school's education activities.[993]

The Attorney General went on to state that Education Code sections 48907 and 48950 grant greater protection to students than the First Amendment in the area of free speech. The Attorney General stated that requiring parental permission for a student interview would

[990] 79 Ops.Cal.Atty.Gen. 58 (1996).
[991] 30 Cal.3d. 498, 502 (1982).
[992] Id. at 63-64.
[993] Id. at 66.

constitute an impermissible prior restraint and that the intent of Section 48950 was that students would have the same right to exercise their free speech rights on campus as they enjoy off campus. However, the Attorney General noted that a parent may instruct his or her child not to communicate with news media representatives.[994]

INTERNET ACCESS

The issue of providing Internet access to students at school districts raises a number of legal issues. On June 26, 1997, the United States Supreme Court in Reno v. American Civil Liberties Union,[995] held that two provisions of the Communications Decency Act of 1996 (Act) seeking to protect minors from harmful material on the Internet were unconstitutional in violation of the First Amendment.

The court in Reno held that the provision in the Act,[996] criminalizes the knowing transmission of obscene or indecent messages to any recipient under 18 years of age, and Section 223(d), which prohibits the "knowing" sending or displaying to a person under 18, of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," are unconstitutional. The court held that these two provisions in the Act were vague and overbroad and violated the First Amendment. The court held that the Act fails to define indecent, is not limited to commercial transactions, and does not allow parents to consent to their children's use of restricted materials. The court also held that although the government has an interest in protecting children from potentially harmful materials, the Act pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive.[997]

The California Legislature enacted the Children's Internet Protection Act of 1997 which took effect on July 1, 1998. The legislation adds Education Code section 51870.5, which requires school districts that provide students with access to the Internet or an on-line service to adopt a policy that contains or makes reference to harmful matter as defined in Penal Code section 313(a).[998] Penal Code section 313(a) states:

> "(a) 'Harmful matter' means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."[999]

[994] Id. at 66-69.
[995] 117 S.Ct. 2329, (1997).
[996] 47 U.S.C. Section 223(a)(1)(B)(ii).
[997] Stats.1997, ch. ___ (A.B. 132).
[998] Stats.1997, ch. ___ (A.B. 132).
[999] Penal Code section 313(a).

Annual notification of the district's Internet policy as part of the district's annual notification to parents will be required beginning July 1, 1998.[1000]

The court in Reno reviewed the history of the Internet and noted that the Internet is an international network of interconnected computers. It is an outgrowth of what began in 1969 as a military program which was designed to enable computers operated by military defense contractors and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. This project led to the development of a number of civilian networks eventually linked with each other now enabling tens of millions of people to communicate with one another and to access vast amounts of information from around the world.[1001]

The Internet has experienced extraordinary growth in recent years. The number of host computers that store information and relay communications increased from approximately 300 in 1981 to approximately 9,400,000 in 1996. Sixty percent of these computers are in the United States. About 40,000,000 people used the Internet in 1996, a number that is expected to reach 200,000,000 by 1999.[1002] Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize. Presently, common methods of communication are electronic mail (E-mail), newsgroups, chat rooms and the World Wide Web. All of these methods can be used to transmit text, most can transmit sound, pictures and moving video images.[1003]

To navigate the World Wide Web, a user may either type the address of a known web page or enter one or more key words into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular web page may contain the information sought or it may be an avenue to other documents located anywhere on the Internet. Access to most web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the reader's viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publisher's point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers. No single organization controls any membership in the Web, nor is there any centralized point from which individual web sites or services can be blocked from the Web.[1004]

Sexually explicit material on the Internet ranges from modest to hard core. These files are created, named and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. Once a provider posts its content on the Internet, it cannot prevent that content from entering a community.[1005]

[1000] Education Code section 48980.
[1001] See, Reno v. ACLU, 117 S.Ct. 2329 (1997).
[1002] Reno v. ACLU, 117 S.Ct. 2329, 2334 (1997).
[1003] Id. at 2334.
[1004] Id. at 2335-2336.
[1005] Id. at 2336.

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated, inappropriate sites or it may attempt to block messages containing identifiable, objectionable features. Software has been developed which can screen for certain suggestive words or for known sexually explicit sites, but, presently, software cannot screen for sexually explicit images. However, the court found that there was evidence to indicate that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available.[1006]

Providing Internet access for students raises issues of student privacy and even vicarious liability for student or staff conduct on the Internet. Districts should caution students and staff that information is available about their online activities. For example, every time an individual accesses a web site, the computers and networking equipment involved create a trail that downloads and displays the files from the Internet and usually stores a copy of those files on its hard drive. The computer or server that maintains the connection to the Internet also keeps track of which computer has visited which web site. In addition, the computers which are accessed on the World Wide Web generally capture information about the persons who have accessed those sites. It can include information about the type of computer, the Internet connection used, and e-mail addresses. This information is used by advertisers to attract potential customers.

On the Internet, text graphics, video sound and software can be copied. Defamatory, pornographic or harassing documents can be created and distributed quickly and easily. A number of lawsuits have been filed in the private sector by employees who have been harassed over the Internet.

In the employment context, if an employer has the right and ability to supervise the infringing action of an employee and the employer has a direct financial interest in the exploitation of copyrighted materials, the employer may be held vicariously liable for the copyright infringement. This is true even where the employer lacks actual knowledge that the infringement is taking place.[1007]

The standard that applies to students of colleges, universities and public schools has not been established. Students will often download Internet web sites ("off-line browsing") and view the material at a later time. It can be argued that the use of off-line browsing software programs is a fair use under the copyright laws similar to the copying of television programs with a VCR for viewing in the home at a later time.[1008]

Another concern is when students download graphics, sound clips and text from other web sites and "cut and paste" portions of an Internet page into their own works. It could be argued that such use is a copyright infringement and students should be discouraged from copying copyrighted materials and using the material in their schoolwork.

[1006] Ibid.
[1007] See, Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 489 (1984).
[1008] See, Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

Many schools allow students to have an e-mail address and monitor the mail students send and receive. School districts should obtain permission from the student and the student's parents to monitor electronic mail. The Electronic Communications Privacy Act[1009] makes it a criminal offense to intercept e-mail while it is in transit. The Act provides that it is not unlawful to intercept electronic communication so long as at least one party to the communication has given his or her consent to the interception. Therefore, it is essential that school districts obtain the consent of the student and their parents.

FERPA[1010] requires districts to have a policy which grants parents the right to inspect and review the educational records of their children. FERPA requires that districts establish procedures to provide parents access to records within 45 days of a request for access. Educational records are defined as those records, files, documents and other materials which contain information directly related to a student and which are maintained by an educational agency or institution. The regulations implement the Act and make clear that this definition includes data stored by electronic means.

FERPA also requires that schools obtain a parent's written consent before disclosing personally identifiable information about the student. Most school computers that provide Internet access automatically store information about the student which might fall within the definition of educational data about students. To the extent this information identifies a particular student's use of the school's Internet connection it could fall within the definition of personally identifiable information.[1011]

In addition, school districts should carefully monitor the type of student information that is made available on school web sites. Names and photographs of students should not be placed in a web page without parental permission. Also, school districts should be aware of where this information is stored so that parents can be given access to the information.

Following the decision in Reno, Congress amended the federal statute to make the use of filtering software a condition of the receipt of federal funding.[1012] Congress was concerned about preventing children's access to hard core pornography on the Internet and, therefore, required public libraries to utilize filtering software to prevent such harm to minors.

The American Libraries Association brought suit to block enforcement of the Act, alleging that the Act was unconstitutional because it induces public libraries to violate their patron's First Amendment rights, and it requires libraries to relinquish their First Amendment rights as a condition on the receipt of federal funds and is, therefore, impermissible under the doctrine of unconstitutional conditions. In arguing that the Act induces public libraries to violate the First Amendment, the plaintiffs contended that, given the limits of the filtering technology, the Act's condition effectively requires libraries to impose content-based restrictions on their patrons' access to constitutionally protected materials. The plaintiffs argued that these

[1009] 18 U.S.C. Sections 2510-2520.
[1010] 20 U.S.C. Section 1232(g).
[1011] Ibid.
[1012] Children's Internet Protection Act (CIPA), Public Law No. 106-554, 20 U.S.C. Section 9134(f) and 47 U.S.C. Section 254(h)(6).

restrictions were not narrowly tailored to further a compelling state interest and no less restrictive alternatives would further that interest.

A three judge court was convened pursuant to the Act to try the issues. An eight-day trial was conducted, which focused mainly on the capacity of currently available filtering software to appropriately filter out objectionable materials. The three judge panel concluded that the plaintiffs demonstrated that thousands of pages of materials containing protected speech was wrongly blocked by the four leading filtering programs. The court found that one failure of critical importance is that the filtering systems are able to search text only and not images and, as a result, visual depictions that are obscene are not blocked, as required by the Act. The three member panel concluded that the Act violated the First Amendment rights of patrons of the public library and was thus invalid.[1013]

In United States v. American Library Association,[1014] the United States Supreme Court upheld the provisions of the Children's Internet Protection Act (CIPA).[1015] The court held that Congress may require public libraries that receive federal funds to provide Internet access to install software that blocks images that constitute obscenity or child pornography and to prevent minors from obtaining access to materials that are harmful to them.

While the case did not involve community colleges or school districts, the decision will indirectly impact community colleges and school districts since CIPA contains similar provisions for community college districts and school districts that receive federal funds to provide Internet access.

The United States Supreme Court held that the federal statute did not violate the First Amendment rights of public libraries and that public libraries were not open forums that would require public libraries to provide unrestricted Internet Access to patrons. The court noted that the federal statute permitted libraries to disable the filter to enable access to bona fide research and other materials by adults, and adults could simply request that the filter be disabled. The court noted that Congress had wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. The court stated:

> "As Congress recognized, 'the Internet is simply another method for making information available in a school or library.' It is no more than a technological extension of the bookstack."[1016]

The court noted that most libraries already exclude pornography from their print collections because they deem it to be inappropriate for inclusion. The court stated that pornography on the Internet should not be treated any differently. The court concluded by stating:

[1013] American Library Association, Inc. v. United States, 201 F.Supp.2d 401 (E.D. Pa. 2002).
[1014] 539 U.S. 194, 123 S.Ct. 2297 (2003).
[1015] 47 U.S.C. Section 254.
[1016] Id. at 207.

> "Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose a unconstitutional condition on public libraries."

Based on the court's reasoning in American Libraries Association, the court would, most likely, uphold similar provisions applying to school districts, school district libraries, and community college libraries.

The courts have also upheld provisions in federal law, such as the Child Pornography Prevention Act of 1996,[1017] which prohibit the transmission of child pornography over the Internet. In Ashcroft v. American Civil Liberties Union,[1018] the United States Supreme Court held that provisions of the federal statute referring to contemporary community standards were constitutional. The court held that the federal statute was not unconstitutionally vague and gave sufficient guidance to a person of reasonable intelligence as to what it prohibits. In another U.S. Supreme Court case, Ashcroft v. The Free Speech Coalition,[1019] the court held that the statute's ban on virtual child pornography was unconstitutional.

Based on these court decisions, there are several ways to monitor access to the Internet by both students and staff. Such monitoring can be achieved by observation of supervisors and teachers or through software programs that restrict access to web sites with objectionable material.

Perhaps the simplest way to control access to the Internet by students is to ensure that students are only allowed access to the Internet under a teacher's supervision. However, constant monitoring by teachers is not always feasible. Information and improper material can be accessed by a student in a short period of time.

Another method to monitor access is to keep track of the web sites that have been downloaded by students. By tracking this information, school districts can determine whether students are accessing inappropriate web sites. Notification to parents and students that such monitoring will occur should be done prior to any type of monitoring.

Districts may wish to use software programs to monitor or restrict access to web sites containing objectionable material. Some of the programs allow access only to predetermined web sites. Other software specifies sites or particular content that are off limits.

Districts should adopt acceptable use policies which spell out the purposes for which students may use the school's Internet connection. The policy should indicate that students should only access appropriate web sites and students may be disciplined for accessing pornographic or indecent material. A sample policy is attached as Appendix I.

[1017] 18 U.S.C. Section 2256.
[1018] 535 U.S. 564, 122 S.Ct. 1700 (2002).
[1019] 535 U.S. 234, 122 S.Ct. 1389 (2002).

STUDENT BODY ELECTIONS

The United States Supreme Court has held that students do not shed their constitutional rights to freedom of speech or expression at the school house gate.[1020] The United States Supreme Court has also held that the United States Constitution does not compel teachers, parents and elected school officials to surrender control of the American public school system to public school students.[1021] The Supreme Court further held that the rights of public school students are not automatically co-extensive with the rights of adults in other settings. The Court stated that school district need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress that speech outside of the school house.[1022] Limitations on speech that would be unconstitutional outside the school house are not necessarily unconstitutional within it.[1023] Therefore, the courts must analyze the First Amendment violations alleged by students in light of the special characteristics of the school environment.[1024]

When the student speech at issue occurs in the context of a school sponsored activity, the authority of the school district to exercise control over the content of the speech is at its greatest.[1025] The reason being is that educators have a legitimate interest in assuring that participants in a school sponsored activity learn whatever lessons the activity is designed to teach, and as long as the actions of the educators are reasonably related to legitimate pedagogical concerns, educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored expressive activities.[1026]

The appellate courts have applied these concepts to school sponsored activities such as student elections.[1027] In student elections, school officials generally schedule the assembly to be held during school hours and on school property. The school district determines the eligibility of prospective speakers and they review the speeches in advance, many times correcting inappropriate grammar and attempting to weed out inappropriate content.[1028] In the context of school elections, the Sixth Circuit Court of Appeals indicated that legitimate pedagogical concerns may include the following:

> "The art of stating one's views without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum, and we are not prepared to say that the lesson Unicoi High tried to teach Dean Poling and his captive audience was illegitimate. Neither can we say that the method by which the school sought to

[1020] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 736 (1969).
[1021] Bethel School District Number 403 v. Fraser, 478 U.S. 675, 686, 106 S.Ct. 3159, 3166 (1986).
[1022] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562 (1988).
[1023] Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989).
[1024] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562 (1988).
[1025] Id. at 276.
[1026] Id. at 571.
[1027] Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989); Henerey v. City of St. Charles, 200 F.3d 1128 (8th Cir. 1999). See, also, Phillips v. Oxford Separate Municipal School District, 314 F.Supp. 2d 643 (N.D. Miss. 2003).
[1028] Id. at 762.

> drive the lesson home was so extreme as to violate the constitution."[1029]

The Sixth Circuit Court of Appeals in Poling v. Murphy went on to state the participation in student body elections is a privilege similar to participating in interscholastic athletics.[1030] The Court of Appeals upheld the process by which Dean Poling was disqualified from participating in the student body election which consisted of meeting with the school principal, an activities advisor, then the principal, and then the district superintendent. The district superintendent offered to allow the parents to meet with the school board, but the parents decided to file a lawsuit rather than address the school board. The court stated, "Surely the due process clause would have required nothing more than this even if a deprivation of some constitutionally protected liberty or property interest had been established."[1031]

In Henerey v. City of St. Charles,[1032] the Court of Appeals upheld the disqualification of a candidate for student body president following the student's unauthorized distribution of condoms during his campaign. The court in Henerey held that the student body elections were a school sponsored event supervised by a school administrator. The election rules required approval from the principal or assistant principal before handing out campaign materials. The student in Henerey failed to comply with this rule and was disqualified for this reason.

The Eighth Circuit Court of Appeals rejected the student's argument that the rule is unconstitutional. The court held that the rules further legitimate interests of public schools including an interest in assuring that the school hours and school property are devoted primarily to education as embodied in the district's prescribed curriculum and the interest of preserving calm at school, as well as respect for authority and traditional values, be they social, moral or political.[1033] The court noted that schools must teach by example the shared values of a civilized society and these shared values include discipline, courtesy and respect for authority. The court held that a school must retain the authority to refuse to sponsor student speech that is inconsistent with the shared values of a civilized social order or to associate the school with any position other than neutrality in matters of political controversy.[1034]

The court held that civility and compliance with school rules are legitimate pedagogical concerns, as well as an interest in maintaining decorum and preventing the creation of an environment in which learning might be impeded.[1035] The court concluded by upholding the right of the school district to disqualify Henerey from participating in the student body election.

In California, the California courts have also held that extracurricular activities are a privilege, not a right.[1036] In addition, Education Code section 48950 refers to discipline, not

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[1029] Id. at 763.
[1030] Id. at 764.
[1031] Id. at 764.
[1032] 200 F.3d 1128 (8th Cir. 1999).
[1033] Id. at 1134-35.
[1034] Id. at 1135.
[1035] Id. at 1135-36.
[1036] Steffes v. California Interscholastic Federation, 176 Cal.App.3d 739, 746-48 (1986); Ryan v. California Interscholastic Federation, 94 Cal.App.4th 1048, 1059-76 (2001).

disqualification from extracurricular activities which are a privilege, not a right.[1037] Therefore, in our opinion, Education Code section 48950 does not apply to disqualification from holding a student body office.

SCHOOL COUNSELORS

On October 6, 2015, Governor Brown signed Senate Bill 451[1038] effective January 1, 2016.

Senate Bill 451 amends Education Code section 49600 related to educational counseling by school counselors. Section 49600(a), as amended effective January 1, 2016 will state that the governing board of the school district may provide a comprehensive educational counseling program for all pupils enrolled in the school district. It is the intent of the Legislature that a school district that provides educational counseling to its pupils, implement a structured and coherent counseling program. Section 49600(b) defines "educational counseling" as specialized services provided by a school counselor possessing a valid credential with a specialization in pupil personnel services who is assigned specific times to directly counsel pupils.

Education Code section 49600(c) states that it is the intent of the Legislature that school counselors do all of the following:

1. Engage with, advocate for, and provide support for all pupils with respect to learning and achievement.

2. Plan, implement and evaluate programs to promote the academic, career, personal, and social development of all students, including pupils from low income families, foster youth, homeless youth, undocumented youth, and pupils at all levels of academic, social and emotional abilities.

3. Use multiple sources of information to monitor and improve pupil behavior and achievement.

4. Collaborate and coordinate with school and community resources.

5. Promote and maintain a safe learning environment for all pupils by providing restorative justice practices, positive behavior interventions and support services.

6. Intervene to ameliorate school related problems, including issues related to chronic absences.

[1037] Education Code section 48950(a) states, "A school district operating one or more high schools, a charter school, or a private secondary school shall not make or enforce a rule subjecting a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."

[1038] Stats. 2015, ch. 539.

7. Use research based strategies to reduce stigma, conflict, and pupil to pupil mistreatment and bullying.

8. Improve school climate and pupil well-being.

9. Enhance pupil's social and emotional competence, character, health, civic engagement, cultural literacy, and commitment to lifelong learning and the pursuit of high quality educational programs.

10. Provide counseling interventions and support services for pupils classified as English learners, eligible for free or reduced priced meals, for foster youth, including enhancing equity and access to the education system and community services.

11. Engage in continued development as a professional school counselor.

Education Code section 49600(d) states that educational counseling shall include academic counseling, in which pupils receive counseling in the following areas:

1. Development and implementation, with parental involvement, of the pupil's immediate and long range education plans.

2. Optimizing progress toward achievement and proficiency standards.

3. Completion of the required curriculum in accordance with the pupil's needs, abilities, interests and aptitudes.

4. Academic planning for access and success in higher education programs, including advisement on courses needed for admission to public colleges and universities, standardized admission tests, and financial aid.

5. Career and vocational counseling, in which pupils are assisted in planning for the future, becoming aware of personal preferences and interests that influence educational and occupational exploration career choice and career success, developing realistic perceptions of work, the changing work environment and the effect of work on our lifestyle, understanding the relationship between academic achievement and career and success, and the importance of maximizing career options, understanding the value of participating in career technical education and work based learning activities and programs, and understanding the need to develop essential employable skills and work habits and understanding the variety of four year colleges and universities, and community college

vocational and technical preparation programs, as well as admission criteria and enrollment procedures.

Education Code section 49600(e) states that educational counseling may include counseling in any of the following:

1. Individualized review of the academic and department records of the pupil.

2. Individualized review of the pupil's career goals, and the available academic and career technical education opportunities and community and workplace experiences available to the pupil that may support the pursuit of those goals.

3. Opportunity for a counselor to meet with each pupil and the parent or legal guardian of the pupil to discuss the records of the pupil, his or her educational options, the coursework and academic progress needed for satisfactory completion of middle or high school, passage of the high school exit examination or its successor, education opportunities at community colleges, eligibility for admission to a four year institution of post-secondary education and the availability of career technical education.

4. Identifying pupils who are at risk of not graduating with the rest of their class, are not earning credits at a rate that will enable them to pass the high school exit examination, or its successor, or do not have sufficient training to allow them to fully engage in their chosen career.

5. In schools that enroll pupils in grades 10 and 12, developing a list of coursework and experience necessary to assist each pupil in his or her grade who has not passed one or both parts of the high school exit examination, or its successor, or has not satisfied, or is not on track to satisfy, the curricular requirements for admission to the University of California and the California State University, and to successfully transition to postsecondary education or employment.

6. Developing a list of coursework and experience necessary to assist each pupil in middle school to successfully transition to high school and meet all graduation requirements, including passing the high school exit examination, or its successor.

7. In schools that enroll pupils in grades 6 to 12, inclusive, developing a list of coursework and experience necessary to assist each pupil to begin to satisfy the curricular requirements for admission to the University of California and the California State University.

8. Providing a copy of the lists developed to a pupil and his or her parent or legal guardian, ensuring that the list of coursework and experience is part of the pupil's cumulative record.

9. Informing each pupil who has failed to pass one or both parts of the high school exit examination, or its successor, of the option of intensive instruction and services.

10. Developing a list of coursework and experience for a pupil enrolled in grade 12, including options for continuing his or her education if he or she fails to meet graduation requirements.

11. Providing a copy of the list of coursework and experiences developed to the pupil and his or her parent or legal guardian, ensuring that the list of coursework and experience is part of the cumulative records of a pupil.

12. Offering and scheduling an individual conference with each pupil in grades 10 and 12 who has failed to pass one or both parts of the high school exit examination, or its successor, or has not satisfied, or is not on track to satisfy, the curricular requirements for admission to the University of California and the California State University and to successfully transition to postsecondary education or employment.

13. Personal and social counseling, in which pupils receive counseling pertaining to interpersonal relationships for the purpose of promoting the development of their academic abilities, careers and vocations, and personal and social skills.

Education Code section 49600(f) states that counselors should participate in professional development related to career and vocational counseling shall include strategies for counseling pupils pursuing postsecondary education, career technical education, multiple pathways, college, and global career opportunities. Section 49600(g) states that nothing in Section 49600 shall be construed as prohibiting persons participating in an organized advisory program approved by the governing board of a school district, and supervised by a school district counselor, from advising pupils pursuant to the organized advisory program.

In summary, the Legislature has made numerous changes to the role of school counselors.

APPENDIX I

February 2012

Sample Board Policy: Student Use of Technology

Computers and other electronic resources are important tools for students to use in school and in other parts of a student life. Students are expected to be good citizens in all of their communications. It is expected that students will use these resources in a responsible manner to protect their safety and the safety of others, as well as to protect the electronic resources themselves.

Definitions

- "Technology" includes computers, tablets, the Internet, telephones, cellular telephones, personal digital assistants, pagers, MP3 players, such as iPod's, USB drives, wireless access points (routers), or any wireless communication device.

- "District Technology" is that which is owned or provided by the district.

- "Personal Technology" is non-district Technology.

Use of District Technology

The district provides Technology for a limited educational purpose. This means students may use these resources for classroom activities and other school-related work. Students may not use District Technology for commercial purposes; students may not offer, provide, or purchase products or services using District Technology. Students may use District Technology only for class assignments or for personal research on subjects similar to what they might study in a class or in the school library. Use for entertainment purposes or personal communication, such as personal blogging, instant messaging, on-line shopping or gaming is not allowed.

Use of Personal Technology

Use of Personal Technology may violate this Policy if the district reasonably believes the conduct or speech will cause actual, material disruption of school activities. This Policy and accompanying Administrative Regulation will provide students with guidance in order to avoid such disruption.

Privilege, Not a Right

Use of District Technology is a privilege, not a right. The district may place reasonable restrictions on the material that students access through the system, and may revoke students' access to District Technology if they violate the law, district policies or regulations.

Consequences for Violation

Violations of the law or this policy may be reported to law enforcement agencies. In addition, violations of the law or this policy may result in discipline, up to and including suspension and expulsion.

No Expectation of Privacy

Students should not expect privacy in the contents of their personal files on the District's Internet system or other District Technology. All student use of District Technology will be supervised and monitored. The district's monitoring of student Internet usage can reveal all activities students engage in using the District's Internet system.

■ Maintenance and monitoring of the District's Internet system or other Technology may lead to discovery that a student has violated this Policy, or the law. An individual search will be conducted if there is reasonable suspicion that a student has violated this Policy, the district's student discipline policy, or the law.

■ Parents have the right to request to see the contents of student computer files at any time.

Acceptable Use Agreement

Before students are authorized to use District Technology and/or bring personal mobile devices to school or school activities, they and their parent/guardian are required to sign and return the Acceptable Use Agreement. Parents must agree not to hold the district or its personnel responsible for the failure of any technology protection measures, violations of copyright restrictions, or user mistakes or negligence. Parents also will acknowledge they may be held liable for damages caused by their child's intentional misuse of District or Personal Technology.

Responsibility for Damages

Parents can be held financially responsible for any harm that results from a student's intentional misuse of District or Personal Technology.

Filtering

In compliance with the Children's Internet Protection Act, 47 U.S.C. 254, the Superintendent or designee shall ensure that all district computers with Internet access have a technology protection measure that blocks or filters Internet access to visual depictions that are obscene, child pornography, or harmful to minors and that the operation of such measures is enforced.

Instruction

The district shall provide age-appropriate instruction regarding safe and appropriate behavior on social networking sites, chat rooms, and other Internet services. Such instruction shall include, but not be limited to, the dangers of posting personal information online, misrepresentation by online predators, how to report inappropriate or offensive content or threats, behaviors that constitute cyberbullying and responding to cyberbullying.

Access to Social Media Sites

The district permits/does not permit students to access social media sites, such as Facebook and Myspace, at school. [districts should select one of the above options]

References to Related Policies

- District Technology Plan
- Student Conduct/Discipline
- Cyberbullying
- Cell Phones
- Academic Honesty
- Use of Copyrighted Materials

Sample Administrative Regulation: Student Use of Technology

Definitions

- "Technology" includes computers, tablets, the Internet, telephones, cellular telephones, personal digital assistants, pagers, MP3 players, such as iPod's, USB drives, wireless access points (routers), or any wireless communication device.

- "District Technology" is that which is owned or provided by the district.

- "Personal Technology" is non-District Technology.

Access to On-line Materials

Students shall not use District Technology to access the following:

- Material that is obscene or depicts sex or nudity
- Material that depicts violence or death or promotes weapons
- Material that is designated as "adults only"
- Material that promotes the use of alcohol, tobacco or illegal drugs
- Material that promotes school cheating
- Material that advocates participation in hate groups or other potentially dangerous groups

Inadvertent Access

If students mistakenly access inappropriate information, they should immediately report this access to a teacher or school administrator. This may help protect students against a claim that they have intentionally violated this policy.

Reports to School Officials

Students should promptly disclose to a teacher or school staff any message or other materials they receive that are inappropriate or make them feel uncomfortable. Students should not delete this information unless instructed to do so by a staff member.

Personal Information

It is important for students to protect their personal contact information, which includes their full name, together with other information that would allow an individual to locate the student, including their family name, home address or location, school address or location, work address or location, or phone number.

- Using District Technology, students shall not:
    - Disclose their personal contact information
    - Disclose other people's personal contact information*****

***** Students are encouraged to follow these rules in their use of their Personal Technology as well. If student use of Personal Technology causes disruption to the school community, the student may be disciplined.

Unauthorized Access/Hacking
Students shall not gain or attempt to gain unauthorized access to District Technology, or that of another individual. This includes going beyond the student's authorized access, attempting to log in through another person's account, and accessing another person's files.

Attempts to Damage Resources
Students shall not deliberately attempt to disrupt District Technology, or that of another individual. Examples include attempts to destroy or alter data, or spread computer viruses.

Unlawful Activities
Students shall not use District Technology to engage in any unlawful act, including but not limited to, arranging for a drug sale or the purchase of alcohol; engaging in criminal gang activity; threatening the safety of any person; stealing; or cheating.*****

***** Students are encouraged to follow these rules in their use of their Personal Technology as well. If student use of Personal Technology causes disruption to the school community, the student may be disciplined.

Inappropriate Language
Students shall not use obscene, profane, lewd, vulgar or threatening language using District Technology. Such use of Personal Technology may violate this Policy if the district reasonably believes the conduct or speech will cause actual, material disruption of school activities.

Sexual Harassment
Students shall not use District Technology to engage in sexual harassment. (See Educ. Code 212.5). Such use of Personal Technology may violate this Policy if the district reasonably believes the conduct or speech will cause actual, material disruption of school activities.

Hate Violence
Students shall not use District Technology to engage in hate violence. (See Educ. Code 233.) Such use of Personal Technology may violate this Policy if the district reasonably believes the conduct or speech will cause actual, material disruption of school activities.

Harassment, Threats and Intimidation
Students shall not use District or Personal Technology to engage in 'harassment, threats, or intimidation' directed against district personnel or students. The phrase 'harassment, threats, or intimidation' is defined in Education Code section 48900.4.

Cyberbullying
Students shall not engage in cyberbullying, which is bullying by means of an electronic act. Cyberbullying using District Technology is prohibited, as is Cyberbullying using Personal Technology when the district reasonably believes the conduct or speech will cause actual, material disruption of school activities. The term 'Cyberbullying' will not be interpreted in a way that would infringe upon a student's right to engage in legally protected speech or conduct. All students or others who experience, witness or become aware of cyberbullying shall immediately report it to a teacher or district administrator.

"Bullying" means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Education Code section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

(a) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.

(b) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.

(c) Causing a reasonable pupil to experience substantial interference with his or her academic performance.

(d) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

While not an exhaustive list, examples of cyberbullying might include:

- threats to harm another person
- written assaults, such as teasing or name-calling
- social isolation or manipulation
- posting harassing messages, direct threats, social cruelty or other harmful texts, sounds or images on the Internet, including social networking sites
- posting or sharing false or defamatory information about another person
- posting or sharing information about another person that is private
- pretending to be another person on a social networking site or other electronic communication in order to damage that person's reputation or friendships
- posting or sharing photographs of other people without their permission
- breaking into another person's account
- spreading hurtful or demeaning materials created by another person(e.g., forwarding offensive e-mails or text messages)
- retaliating against someone for complaining that they have been bullied

"Electronic act" means the transmission of a communication, including, but not limited to, a message, text, sound, or image, or a post on a social network Internet Web site, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer or pager.

"Reasonable pupil" means a pupil, including, but not limited to, an exceptional needs pupil, who exercises average care, skill, and judgment in conduct for a person of his or her age, or for a person of his or her age with his or her exceptional needs.

The district prohibits all bullying, including but not limited to, discrimination, harassment, intimidation and bullying based on the actual or perceived characteristics set forth in Penal Code section 422.55 and Education Code section 220, and disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics. In addition, the district prohibits retaliation against complainants.

Obscene Photographs

Students may not send, share, view or possess pictures, text messages, e-mails or other material of an obscene nature in electronic or any other form on Personal Technology at school or school-related activities, or using District Technology.

Mobile Devices

A. Personal Mobile Devices

The use of personal mobile devices, such as laptops, cellular phones, tablets, pagers, or other electronic signaling devices, by students on campus is subject to all applicable district policies and regulations concerning technology use, as well as the following rules and understandings:

- Permission to have a mobile device at school is contingent on parent/guardian permission in the form of a signed copy of the District's Technology Use policy and administrative regulation, except as required by Education Code section 48901.5(b).
- The district accepts no financial responsibility for damage, loss or theft. The student should keep the device in a locker when not in use. Devices should not be left unattended.
- All costs for data plans and fees associated with mobile devices are the responsibility of the student. The district does not require the use of personal mobile devices and does not rely on personal devices in its instructional program or extracurricular activities.
- Mobile devices with Internet access capabilities will access the Internet only through the school's filtered network while on school property.
- Use during class time must be authorized by the teacher.
- Photographs and audio or video recordings may be taken/made only with the express permission of all individuals being photographed or recorded. Recordings made in a classroom require the advance permission of the teacher and the school principal.
- Students may not take, possess or share obscene photographs or videos.
- Students may not photograph, videotape or otherwise record teacher-prepared materials, such as tests.
- The district will monitor all Internet or intranet access.

- If the district has reasonable cause the student has violated the law or district policy, the device may be searched by authorized personnel and/or law enforcement may be contacted.

B. District-Owned Mobile Devices

When a student is using a district-owned mobile device, all of the above rules pertaining to personal mobile devices apply as well as the following:

- The device may be used only for school-related purposes.
- Users may not download applications ("apps") to the device without permission from the teacher or other district employee.
- Users must follow all "apps" use agreements.
- The student and parent/guardian will be responsible for the replacement cost if the device is lost or is damaged because of intentional misuse.

Academic Dishonesty

Electronic resources can make academic dishonesty easier and more tempting for students. Students are reminded that academic dishonesty includes the following:

A. Cheating

1. Copying work from others.
2. Communicating exam answers with other students during an examination.
3. Offering another person's work as one's own.
4. Sharing answers for a take-home examination or assignment unless specifically authorized by the instructor.
5. Tampering with an examination after it has been corrected, then returning it for more credit.
6. Using unauthorized materials, prepared answers, written notes or concealed information during an examination.
7. Allowing others to do the research and writing of an assigned paper (including use of the services of a commercial term-paper company).

B. Dishonest Conduct

1. Stealing or attempting to steal an examination or answer key from the instructor.
2. Changing or attempting to change academic records without proper sanction.
3. Allowing another student to copy off of one's own work during a test.

C. Plagiarism

Plagiarism is intellectual theft. It means use of the intellectual creations of another without proper attribution. Plagiarism may take two main forms, which are clearly related:

1. To steal or pass off as one's own the ideas or words, images, or other creative works of another.
2. To use a creative production without crediting the source.

***** Credit must be given for every direct quotation, for paraphrasing or summarizing a work (in whole, or in part, in one's own words), and for information which is not common knowledge.

D. Collusion

Any student who knowingly or intentionally helps another student perform any of the above acts of cheating or plagiarism is subject to discipline for academic dishonesty.

Copyrights

Students may not inappropriately reproduce or share a work that is protected by copyright. Students may not quote extensively from any source without proper attribution and permission.

Students may not make or share copies of copyrighted software, songs or albums, digital images, movies or other artistic works unless explicitly permitted by fair use provisions of copyright law. Unlawful peer-to-peer network file sharing may be a criminal offense.

System Security

Students are responsible for their individual district account and should take all reasonable precautions to prevent others from being able to use their account. Under no conditions should students provide their password to another person. Students shall immediately notify a teacher or administrator if they identify a possible security problem.

Resource Limits

Students shall not download large files without permission of a teacher or administrator. Students shall not misuse district or school distribution lists or discussion groups by sending irrelevant messages.

Violations of this Policy

The district will cooperate fully with local, state, or federal officials in any investigation related to any unlawful activities. In the event that there is a claim that a student has violated the law, this Policy, or the district's discipline policy, the student's access to District Technology may be terminated, permission to bring personal mobile devices to school or school activities may be revoked, and/or the student may be disciplined under the discipline policy.

APPENDIX II

QUESTIONS AND ANSWERS REGARDING INTERDISTRICT ATTENDANCE

I. Interdistrict Permits and Residency Based on Parental Employment (the "Allen Bill")

1. What is the impact of the recent amendments to Education Code section 46600 on interdistrict attendance?

Assembly Bill 2444[1039] amended Section 46600 to state that once a pupil in Kindergarten or any grades 1-12 inclusive is enrolled in a school pursuant to the interdistrict attendance provisions, the pupil shall not have to reapply for an interdistrict transfer and the governing board of the school district of enrollment shall allow the pupil to continue to attend the school in which he or she is enrolled.[1040] The recent amendments also created an exception to this general rule stating that an interdistrict attendance agreement between two or more districts may contain standards for reapplication agreed to by the district of residence and the district of attendance which may stipulate terms and conditions under which an interdistrict attendance shall be permitted or denied; the agreement may contain standards for reapplication agreed to by the district of residence and the district of attendance that require students to reapply annually, and may stipulate terms and conditions under which the interdistrict permit may be revoked. However, a school district of residence or a school district of enrollment is prohibited from rescinding existing transfer permits for pupils entering grades 11 or 12 in the subsequent school year.[1041]

Therefore, school districts may enter into agreements that require annual renewals of interdistrict permits for K-9 students and allow revocation of interdistrict permits for K-9 students for poor behavior or poor attendance.

2. May school districts revoke the interdistrict permits of students in grades 10, 11 and 12 due to poor attendance or poor behavior?

No. Education Code section 46600(a)(4) would prohibit a school district from rescinding existing transfer permits for poor attendance or poor behavior. However, districts may suspend or expel tenth, eleventh and twelfth grade students on interdistrict transfer permits under Education Code section 48900 in the same manner as students who reside in the school district.

[1039] Stats. 2010, ch. 263 (A.B. 2444).
[1040] Education Code section 46600(a)(1).
[1041] Since 10th grade students will be entering 11th grade in the subsequent school year, the language would apply to 10th grade students as well.

3. What options are there when a district of residence is not willing to agree to a separate agreement that provides for annual renewals of an interdistrict agreement?

In such cases, when the district of residence is not willing to enter into a separate agreement to provide for annual renewals of interdistrict agreements, the provisions of Section 46600 would apply. Under the provisions of Education Code section 46600(a)(1), in the absence of an agreement requiring annual renewals, once a pupil is enrolled in a school, the pupil is not required to reapply for an interdistrict transfer.

4. If the district of enrollment accepts a student without an agreement with the district of residence for an annual renewal, what would happen if the student moves from the attendance area of the original district of residence?

In the absence of an agreement between the district of residence and the district of enrollment requiring annual renewals of an interdistrict attendance agreement, once the district of enrollment accepts the student, the provisions of Section 46600(a)(1) apply and the pupil is not required to reapply for an interdistrict transfer. Therefore, the pupil's subsequent move from the original district of residence would have no effect on the original granting of the interdistrict permit. The pupil would not have to apply for a new permit, the original interdistrict attendance agreement would remain in effect and the student would be able to continue to attend the school in the district of enrollment.

5. Does a tenth, eleventh or twelfth grade student who moves outside the attendance boundaries of the school district of residence, but granted the original interdistrict permit, still have the right to stay in the school to which they transferred?

Yes. Section 46600(a)(4) states that a school district of residence or a school district of enrollment shall not rescind existing transfer permits for pupils entering grades eleven or twelve in the subsequent school year. Therefore, once an interdistrict permit has been granted for these students, the students have the right to stay in the school to which they have enrolled.

6. If a student received an interdistrict permit two or more years ago, but remained at the district of enrollment without an interdistrict permit for the 2010-2011 school year, is the student required to reapply for an interdistrict permit for the 2011-2012 school year or is the student, under the provisions of Education Code section 46600 able to stay in the district of enrollment?

If the parent of the student has not been advised that the student must renew their interdistrict permit each year and that the school district of enrollment reserves the right to not renew the interdistrict permit each year, the student may be able to remain at the school of enrollment under Education Code section 46600. We would recommend that school districts in this situation review the documentation and consult with legal counsel before taking any action.

7. Are students who have been determined to have been bullied by other students in the district of residence entitled to be given priority for interdistrict attendance?

Yes. Effective July 1, 2012, Education Code section 46600(b) gives students who have been determined to be bullied by personnel of either the district of residence or the district of proposed enrollment priority for interdistrict attendance. The statute does not define the level of evidence or proof needed to determine whether bullying has occurred and leaves the determination of bullying to the discretion of the school district.

8. Do the provisions of Section 46600 (interdistrict permits) and Section 48204 (the Allen Bill) overlap?

Yes. While Section 48204 (discussed below) focuses solely on parental employment, Section 46600 authorizes two school districts to enter into an interdistrict attendance agreement for a broad range of reasons including parental employment. In essence, districts **may** authorize interdistrict attendance under Section 46600 for such reasons as transportation, health and safety of the student, child care needs, class offerings not available in the district of residence, and for other reasons as the district deems appropriate.

9. When two school districts enter into an interdistrict attendance agreement, are they required to consider the child care needs of the pupil?

Districts are no longer required to give consideration to the child care needs of the pupil, but may do so in considering the request. With the repeal of Education Code section 46601.5, it is now permissive rather than mandatory.

10. May districts grant interdistrict permits for one year?

Yes. If districts enter into interdistrict agreements pursuant to Section 46600 which contain standards for reapplication which require the applicant (grades K-9) to apply for an interdistrict permit each year.

11. May districts revoke interdistrict permits for poor behavior or poor attendance?

Yes. If the interdistrict agreement between the districts stipulates that an interdistrict permit may be revoked for poor behavior or poor attendance for students in grades K-9.

12. If the parent of a special education student waives their child's right to services in order for the receiving district with impacted programs to accept the interdistrict transfer, does the receiving district or district of enrollment have to accept the transfer if they would otherwise do so?

The school district should consult with legal counsel before taking any action.

II. Interdistrict Permits and Residency Based on Parental Employment (the "Allen Bill")

13. Does the reenactment of Education Code section 48204 (the "Allen Bill") make any substantive changes with respect to residency based on a parent's employment?

Senate Bill 170 (Stats. 2007, ch. 33) made several substantive changes in Education Code section 48204. Senate Bill 170 added the word "physically" to Section 48204(b) to state that the parent or legal guardian of the pupil is physically employed within the boundaries of the school district. Section 48204 also applies to all K-12 students. Senate Bill 170 extends the operation of Section 48204 until June 30, 2012.

14. Does Section 48204 as amended apply only to elementary school students?

No. Section 48204 as amended refers to pupils. Therefore, it would apply to all pupils enrolled in grades K-12.

15. Are school districts required to admit pupils whose parents are employed within the boundaries of the school district?

No. Section 48204(b) now states that a school district may deem a pupil as having complied with the residency requirements for school attendance in the school district if one or both parents or legal guardians of the pupil are employed within the boundaries of the school district. Therefore, it is permissive. However, Section 48204(b)(1) states that even though districts are not required to admit students on the basis of employment, districts may not discriminate on the basis of race, ethnicity, sex, parental income, scholastic achievement, or any other arbitrary consideration. Therefore, districts should adopt consistent policies and criteria for the admission of students whose parents are employed within the boundaries of the school district.

16. Are school districts required to communicate in writing to parents the specific reasons for not admitting a student?

No. Section 48204(b)(4) no longer requires a school district to communicate in writing to the parents the reason for not admitting a student. Section 48204(b)(4) now states that districts are encouraged to communicate in writing to parents. Therefore, it is now permissive, rather than a mandatory requirement.

17. Are there numerical limits on the number of students that may transfer under Section 48204?

Yes. A sending district may object to further transfer of students if more than one percent of the average daily attendance of the district or 75 pupils, whichever amount is greater, attempt to transfer when the district has an average daily attendance of 2501 or more. The numerical limit of 75 pupils or 1% of the average daily attendance of the district, whichever is

greater, is calculated based on the net transfer of students out of the school district. The net number is calculated as the difference between the number of students exiting the district and the number of students entering the district in a fiscal year. If a school district has more than a net number of 75 students or 1% of its average daily attendance of students transferring out of the district, then the district may deny the request to attend other school districts.

18. Once a pupil is granted a transfer under Section 48204 based on parental employment, must the student reapply each year?

No. Once the district grants residency based on Section 48204, the student does not have to reapply in the next school year to attend a school within that district, and the district is required to allow the pupil to attend the school through the 12th grade if the parent or guardian so chooses and if one or both of the pupil's parents or guardians continues to be employed by an employer situated within the attendance boundaries of the district. If the parent's employment within the attendance boundaries of the school district ceases, the pupil's right to continue to attend a school in that district through the 12th grade ceases.

19. If a school district grants student residency in the district pursuant to parent employment or an interdistrict permit, does the student have a right to attend a particular school in that district?

No. The pupil has the right to attend a school within that district, but not a particular school.

20. Should the district's policy regarding interdistrict attendance and attendance by parental employment be the same for regular education and special education students?

Yes. District should adopt the same policies and practices for regular education and special education students even though Education Code section 48204(b)(3) states that a school district may prohibit the transfer of a pupil if the district determines that the additional cost of educating the pupil would exceed the amount of additional state aid received as a result of a transfer. The United States Department of Education, Office for Civil Rights, has concluded in a number of cases involving California school districts that federal law, Section 504 of the Rehabilitation Act, prohibits school districts from discriminating against disabled students. OCR concluded that districts must treat disabled students and non-disabled students in the same manner and the same criteria (e.g., space available, programs available and not impacted, etc.) should be utilized. Therefore, if a special education student needs a particular education program and that program is filled to capacity, the school district may deny the student admission in the same manner as when a school district's regular education program is filled to capacity and a regular education student is denied admission

III. School Districts of Choice

21. Are school districts required to adopt resolutions to become school districts of choice?

No. It is permissive as to whether a school district wishes to adopt a resolution to become a school district of choice.

22. What is a school district of choice?

Education Code section 48300 defines school district of choice as a school district for which a resolution is in effect as set forth in Education Code section 48301. Under Education Code section 48301, the governing board of a school district may adopt a resolution electing to accept interdistrict transfer students and determine the number of transfers it is willing to accept. If the school district adopts such a resolution, the pupils must be admitted through a random, unbiased process that prohibits an evaluation of whether or not the students should be enrolled based upon their academic or athletic performance. Any student accepted for transfer under the resolution shall be deemed to have fulfilled the residence requirements of Education Code section 48204, which means that the student will not have to renew their request for an interdistrict transfer each year.

23. Are there limits on the number of transfers if a school district adopts a resolution to become a school district of choice?

Section 48301(a), as amended effective January 1, 2010, states that if the number of transfer applications exceeds the number of transfers the governing board of the school district elects to accept under its resolution, approval for transfer shall be determined by a random drawing held in public at a regularly scheduled meeting of the governing board of the school district.

Under Section 48301(b), either the student's school district of residence or the school district of choice may prohibit the transfer of the student under the school district's resolution, or limit the number of students so transferred if the governing board of the district determines that the transfer would negatively impact any of the following:

1. The court-ordered desegregation plan of the district;

2. The voluntary desegregation plan of the district;

3. The racial and ethnic balance of the district.

Under Section 48301(c), the school district of residence may not adopt policies that in any way block or discourage students from applying for transfer to another district. Section 48301(d), as amended effective January 1, 2010, states that communications to parents by districts electing to enroll students under the choice options provided shall be factually accurate

and not target individual parents or guardians or residential neighborhoods on the basis of the child's actual or perceived academic or athletic performance or any other personal characteristic.

24. May a school district of choice prohibit the transfer of special education students and English language learners if the governing board of the school district determines that the additional cost of educating a student would exceed the amount of additional state aid received as a result of the transfer?

Section 48303 states that school districts of choice may not prohibit a transfer of the student based upon a determination by the governing board of that school district that the additional cost of educating the student would exceed the amount of additional state aid received as a result of the transfer. A school district may reject the transfer of a student if the transfer of that student would require the district to create a new program to serve that student, except that a school district of choice shall not reject the transfer of a special needs student, including an individual with exceptional needs and an English learner.[1042] Section 48303(b) states:

> "This section is intended to ensure that special education, bilingual, English learner, or other special needs pupils are not discriminated against by the school district of choice because of the costs associated with educating those pupils. Pupils with special needs may take full advantage of the choice options available under this section."[1043]

An application of any student for transfer may not be approved if the transfer would require the displacement, from a school or program conducted within any attendance area of the school district of choice, of any other student who resides within that attendance area or is currently enrolled in that school.[1044]

School districts of choice may employ existing entrance criteria for specialized schools or programs if the criteria are uniformly applied to all applicants.[1045] A school district of choice shall give priority for attendance to siblings of children already in attendance in the district.[1046] A school district of choice may give priority for attendance to children of military personnel.[1047]

25. May a school district of residence limit the number of pupils transferring out each year?

A school district of residence with an average daily attendance greater than 50,000 may limit the number of pupils transferring out each year to one percent of its current year estimated average daily attendance.[1048] A school district of residence with an average daily attendance of less than 50,000 may limit the number of students transferring out to three percent of its current

[1042] Education Code section 48303(a).
[1043] Education Code section 48303(b).
[1044] Education Code section 48304.
[1045] Education Code section 48305.
[1046] Education Code section 48306(a).
[1047] Education Code section 48306(b).
[1048] Education Code section 48307(a).

year an estimated average daily attendance and may limit the maximum number of students transferring out for the duration of the program authorized by the school of choice article to ten percent of the average daily attendance for that period.[1049]

A school district of residence that has a negative status on the most recent budget certification completed by the county superintendent of schools in any fiscal year, may limit the number of students who transfer out of the district in a fiscal year.[1050] Notwithstanding any prior or existing certification of a school district of residence, only if the county superintendent of schools determines that the district would not meet the standards in criteria for fiscal stability specified in Education Code section 42131 for the subsequent fiscal year exclusively due to the impact of additional pupil transfers pursuant to the school of choice article in that year, the district may limit the number of additional pupils who transfer in the upcoming school year pursuant to this article, up to the number that the county superintendent identifies beyond which number of additional transfers would result in a qualified or negative certification in that year exclusively as a result of additional transfers.[1051]

If a school district of residence limits the number of students who transfer out of the district, students who have already been enrolled or notified of eligibility for enrollment, including through the random, public selection process prior to the action of the district to limit transfers, shall be permitted to attend the school district of choice.[1052] Notwithstanding any other provision of the schools of choice article, a pupil attending a school district of choice or a student who received a notice of eligibility to enroll in a school district of choice, including a student selected by means of a random selection process conducted on or before June 30, 2009, shall be permitted to attend the school district of choice.[1053]

26. What are the timelines for transfers in school districts of choice?

An application requesting a transfer pursuant to these schools of choice provisions shall be submitted by the parent or guardian of a student to the school district of choice that has elected to accept transfer students prior to January 1 of the school year preceding the school year for which the student is requesting to be transferred. This application deadline may be waived upon agreement of the school district of residence of the student and the school district of choice.[1054] The application deadline does not apply to an application requesting a transfer if the parent or guardian of the pupil, with whom the pupil resides, is enlisted in the military and is relocated by the military within 90 days prior to submitting the application.[1055] The application may be submitted on the form provided by the State Department of Education and may request enrollment of the student in a specific school or program of the school district.[1056]

[1049] Education Code section 48307(b).
[1050] Education Code section 48307(c).
[1051] Education Code section 48307(b).
[1052] Education Code section 48307(e).
[1053] Education Code section 48307(f).
[1054] Education Code section 48308(a)(1).
[1055] Education Code section 48308(a)(2).
[1056] Education Code section 48308(b).

Not later than 90 days after the receipt by a school district of an application for transfer, the school district may notify the parent or guardian in writing whether the application has been provisionally accepted or rejected or the placement of the student on a waiting list. Final acceptance or rejection shall be made by May 15 preceding the school year for which the student is requesting to be transferred.[1057]

27. If a school district decides to be a school district of choice, what are the accounting requirements?

Each school district electing to accept transfer students as a school district of choice shall keep an accounting of all requests made for alternative attendance and records of all dispositions of those requests that shall include, but are not limited to, all of the following:

1. The number of requests granted, denied, or withdrawn. In the case of denied requests, the records shall indicate the reasons for the denials.

2. The number of students transferred out of the district.

3. The number of students transferred into the district.

4. The race, ethnicity, gender, self-reported socioeconomic status and the school district of residence of each of the students that have transferred in and out.

5. The number of students who have transferred in and who have transferred out who are classified as English learners or special education students.[1058]

The information contained shall be reported to the governing board of the school district at a regularly scheduled meeting of the governing board. No later than May 15 of each year, the school district shall report the information regarding the district's status as a school district of choice in the upcoming school year to each school district that is geographically adjacent to the district electing to accept transfer pupils, the county office of education in which the district is located, the Superintendent of Public Instruction, and the Department of Finance. The Department of Finance shall make the information reported to it available upon request to the Legislative Analyst.[1059] The Legislative Analyst shall annually report the above information to the Governor and to the appropriate fiscal and policy committee of the Legislature.[1060]

The Legislative Analyst shall conduct a comprehensive evaluation of the interdistrict transfer program and make recommendations regarding the extension of the program by

[1057] Education Code section 48308(c)(1).
[1058] Education Code section 48313(a). The provisions relating to race, ethnicity, gender, self-reported socioeconomic status, school district of residence, English learners and special education students take effect January 1, 2010.
[1059] Education Code section 48313(b).
[1060] Education Code section 48313(c).

November 1, 2014.[1061] The school district of choice provisions become inoperative on July 1, 2016 and as of January 1, 2017 are repealed unless a later enacted statute, which becomes effective on or before January 1, 2017 deletes or extends the dates on which it becomes inoperative and is repealed.[1062]

IV. Open Enrollment Act

28. What is the Open Enrollment Act?

On January 7, 2010, Governor Schwarzenegger signed Senate Bill 4 5x (Romero) (the Open Enrollment Act).[1063] This legislation takes effect 90 days from the end of the Legislature's fifth special session or April 12, 2010. This legislation will apply, in most cases, to "low achieving schools" identified by the State Superintendent of Public Instruction and schools where parents have filed a petition to restructure a school that fails to make adequate yearly progress under the No Child Left Behind Act (NCLB) and has an Academic Performance Index (API) score of less than 800.

29. What is the purpose of the Open Enrollment Act?

The legislation adds Article 10, commencing with Education Code section 48350, and is entitled the Open Enrollment Act. Section 48351 states that the purpose of the legislation is to improve pupil achievement, in accordance with the regulations and guidelines for the federal Race to the Top Fund authorized under the federal American Recovery and Reinvestment Act of 2009[1064] and to enhance parental choice in education by providing additional options to pupils enrolled in low achieving public schools throughout the State without regard to the residence of their parents.

30. How are "low achieving schools" and "school district of enrollment" defined in the Open Enrollment Act?

Section 48352 defines a "low achieving school" as any school identified by the State Superintendent of Public Instruction under the following criteria:

1. Excluding court, community, or community day schools, the Superintendent of Public Instruction shall annually create a list of 1,000 schools ranked by increasing API with the same ratio of elementary, middle and high schools as existed in decile 1 in the 2008-2009 school year.

2. In constructing the list of 1,000 schools each year, the Superintendent shall ensure that no local educational agency shall have more than ten percent of the schools on

[1061] Education Code section 48316.
[1062] Education Code section 48315.
[1063] Stats. 2010, ch. 3.
[1064] Public Law 111-5.

the list, and court, community, or community day schools and charter schools shall not be included on the list.

"School district of enrollment" is defined as the school district other than the school district in which the parent of the pupil resides, but which the parent of the pupil intends to enroll the pupil.[1065] "School district of residence" is defined as the school district in which the parent of the pupil resides.[1066]

Section 48353 states that the State Board of Education shall adopt emergency regulations to implement this legislation.

31. What are the timelines under the Open Enrollment Act?

Section 48354(a) states that the parent of a pupil enrolled in a low-achieving school may submit an application for the pupil to attend a school in a school district of enrollment. Section 48354(b)(1) states that consistent with the requirements of the No Child Left Behind Act,[1067] on or before the first day of the school year, or, if later, on the date the notice of program improvement, corrective action or restructuring status is required to be provided under federal law, the district of residence shall provide the parents and guardians of all pupils enrolled in a school determined to be on the list of 1,000 schools created by the Superintendent of Public Instruction, with notice of the option to transfer to another public school served by the school district of residence or another school district.[1068]

An application requesting a transfer shall be submitted by the parent of the pupil to the school district of enrollment prior to January 1 of the school year preceding the school year for which the pupil is requesting to transfer. The school district of enrollment may waive the deadline. The application deadline does not apply if the parent is enlisted in the military and was relocated by the military within 90 days prior to submitting the application.[1069]

32. May a parent request a transfer to a specific school or program?

Yes. The application may request enrollment of the pupil in a specific school or program within the school district of enrollment. A pupil may enroll in a school in the school district of enrollment in the school year immediately following the approval of his or her application. In order to provide priority enrollment opportunities for pupils residing in a school district, a school district of enrollment shall establish a period of time for resident pupil enrollment prior to accepting transfer applications pursuant to this legislation.[1070]

[1065] Education Code section 48352(c).
[1066] Education Code section 48352(d).
[1067] 20 U.S.C. Section 6301 et seq.
[1068] Education Code section 48354(a) and (b)(1).
[1069] Education Code section 48354(b).
[1070] Education Code section 48354(b).

33. Are there limits on transfers under the Open Enrollment Act?

Education Code section 48355 states that the school district of residence or the school district of enrollment to which a pupil has applied to attend may prohibit the transfer of the pupil or limit the number of pupils who transfer if the governing board of the district determines that the transfer will negatively impact a court-ordered or voluntary desegregation plan of the district or the ratio in ethnic balance of the district, provided that any policy adopted is consistent with federal and state law. A school district shall not adopt any other policies that in any way prevent or discourage pupils from applying for transfer to a school district of enrollment. Communications to parents or guardians by districts regarding the open enrollment options provided by this legislation shall be factually accurate and not target individual parents or guardians or residential neighborhoods on the basis of a child's actual or perceived academic or athletic performance or any other personal characteristic.

34. May a school district adopt specific written standards for applications for transfers?

Yes. Education Code section 48356 states that a school district of enrollment may adopt specific written standards for acceptance and rejection of applications pursuant to this legislation. The standards may include consideration of the capacity of a program, class, grade level, school building or adverse financial impact. The standards shall not include consideration of a pupil's previous academic achievement, physical condition, proficiency in the English language, family income or any individual characteristics set forth in Education Code section 200.[1071]

Section 48356(b) states that in considering an application pursuant to this article, a nonresident school district may apply its usual requirements for admission to a magnet school or a program designed to serve gifted and talented pupils. Section 48356(c) states that subject to the rules and standards that apply to pupils who reside in the school district of enrollment, a resident pupil who is enrolled in one of the district's schools pursuant to this article, shall not be required to submit an application in order to remain enrolled.

Section 48356(d) states that a school district of enrollment shall ensure that pupils enrolled pursuant to standards adopted pursuant to this Section, are enrolled in a school with a higher academic performance index than the school in which the pupil was previously enrolled, and are selected through a random, unbiased process that prohibits an evaluation of whether or not the pupil should be enrolled based on his or her individual academic or athletic performance. Pupils applying for a transfer pursuant to this article shall be assigned priority for approval as follows:

1. First priority for the siblings of children who already attend the desired school.

[1071] Education Code section 200 states: "It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor."

2. Second priority for pupils transferring from a program improvement school ranked in decile 1 on the Academic Performance Index.

3. If the number of pupils who request a particular school exceeds the number of spaces available at that school, a lottery shall be conducted in group priority order to select pupils at random until all the available spaces are filled.

Section 48356(e) states that the initial application of a pupil for transfer to a school within a district of enrollment shall not be approved if the transfer would require the displacement from the desired school of any pupil who resides within the attendance area of that school or is currently enrolled in that school. Section 48356(f) states that a pupil approved for a transfer to a school district of enrollment pursuant to this article shall be deemed to have fulfilled the requirements of Section 48204 (residency requirements for school attendance in a school district).

35. May the school district of enrollment incorporate their Open Enrollment Act transfers within the timelines for their other interdistrict transfers which may be a few weeks prior to the start of school?

Yes. The Open Enrollment Act sets a timeline of January 1 of the prior year. However, the school district of enrollment may waive the deadline to coordinate the timelines with the timelines for other interdistrict transfers. There is no restriction on setting the timeline near the start of school. However, if a court finds that the timeline is impractical or a hardship to parents, a court might invalidate a late timeline.[1072]

36. If additional late enrollment of students who reside in the district pushes the school total beyond capacity, may the district decline the transfer at the last minute?

We would recommend that districts avoid this dilemma by estimating the number of late transfers based on past history and define "capacity" by including the number of estimated late transfers into the school. Once a transfer is granted, the courts may not allow school districts to revoke the approval. Another alternative would be to establish a waiting list and allow students to transfer during the year if there is capacity in the school.

37. Are there any transportation requirements under the Open Enrollment Act?

No. The Open Enrollment Act does not require school districts to transport students. The parents are responsible for transporting their children to school.

[1072] Education Code section 48354(b).

38. If special education programs are beyond capacity, do school districts have to accept transfer students?

No. The school district may refuse to accept students when their special education programs are beyond capacity. Districts should develop standards for determining when their special education programs are beyond capacity so that districts can support any refusals to accept transfer students.

39. Can parents choose specific schools under the Open Enrollment Act?

Parents may request specific schools or programs, but the school district may offer other schools or programs. The Open Enrollment Act is unclear as to whether school districts may refuse to place students in the programs requested for any reason.

40. May school districts of enrollment place students who request transfers in a program improvement (PI) school?

The Open Enrollment Act does not specifically prohibit placing a transfer student in a program improvement school but the intent of the legislation appears to allow students to transfer into non-program improvement schools. Therefore, we would recommend allowing students to transfer into non-PI schools if there is space available before offering non-PI schools unless the parent requests the PI school.

41. Is a transfer under the Open Enrollment Act for one year?

No. Section 48356 (c) states that a resident pupil who is enrolled in one of the district's schools pursuant to this law shall not be required to submit an application in order to remain enrolled. The district of enrollment **may** allow the pupil to matriculate to a middle or high school without having to reapply.[1073]

42. What if the school in the school district of residence is not on the underperforming list the next year, does that affect the transfer?

No. Section 4702(b) of Title 5 of the California Code of Regulations states that a pupil who transfers to a school pursuant to the Open Enrollment Act shall not be required to reapply for enrollment in that school, regardless of whether the pupil's school of residence remains on the list of 1,000 Open Enrollment schools.

43. Can the district move the student to a different school in the district if the school becomes overcrowded the next year?

The district would need to treat the student the same as any resident student. Education Code section 48356(e) states that the **initial** application for a pupil to transfer to a school shall not be approved if the transfer would require the displacement from the desired school of any

[1073] 5 C.C.R. Section 4702(c).

other pupil who resides within the attendance area of that school or is currently enrolled in that school. However, as stated above, once the Open Enrollment Act transfer is approved by the school of enrollment, the student does not have to reapply to that school.

44. Do school districts have to accept students from other counties?

Yes. The Open Enrollment Act applies to the entire state and does not limit interdistrict transfers to the same county.

45. If a parent disagrees with the school district of enrollment's denial of their request, can the parents appeal to the county board of education or file a uniform complaint under the uniform complaint procedures?

The Open Enrollment Act does not authorize an appeal to the county board of education. If the parent feels that they have been discriminated against, the parent may file a uniform complaint under the Uniform Complaint Procedures.

46. Do school districts have to keep any documentation under the Open Enrollment Act?

Section 48359 encourages, but does not require, school districts to keep an accounting of all requests made for alternative attendance. We would recommend the districts document the number of requests granted, denied, or withdrawn, and the reasons for denial. Districts should also keep records of the number of pupils who transfer out of the district and into the district. Districts should also document the race, ethnicity, gender and other characteristics of each of the students, including English learners and special education students, and the school district of residence of each of the pupils who have transferred in or out of the district.

47. What notices must be sent to parents?

Section 48357 states that within 60 days of receiving an application pursuant to Section 48354, a school district of enrollment shall notify the applicant parent and the school district of residence in writing whether the application has been accepted or rejected. If an application is rejected, the school district of enrollment shall state in the notification the reasons for the rejection.

48. Must the school district of enrollment accept credits toward graduation that were awarded to the pupil by another school district?

Yes. Section 48358 states that a school district of enrollment that enrolls a pupil pursuant to this article shall accept credits toward graduation that were awarded to the pupil by another school district and shall graduate the pupil if the pupil meets the graduation requirements of the school district of enrollment.

49. What are the accounting requirements?

Section 48359 states that each school district is encouraged to keep an accounting of all requests made for alternative attendance pursuant to this article, and records of all dispositions of those requests may include, but are not limited to, all of the following:

1. The number of requests granted, denied or withdrawn. In the case of denied requests, the records may indicate the reasons for the denials.

2. The number of pupils who transfer out of the district.

3. The number of pupils who transferred into the district.

4. The race, ethnicity, gender, self-reported socioeconomic status, and the school district of residence of each of the pupils who have transferred in or out of the district.

5. The number of pupils who have transferred in or out of the district who are classified as English learners or identified as individuals with exceptional needs (special education).

The information may be reported to the governing board of the school district at a regularly scheduled meeting of the board.

50. Does the Open Enrollment Act apply to basic aid districts?

Yes. Section 48359.5 states that for a school district of enrollment that is a basic aid district, the apportionment of state funds for any average daily attendance credited shall be 70% of the district revenue limit that would have been apportioned to the school district of residence. Apportionment of these funds shall begin in the second consecutive year of enrollment, and continue annually until the pupil graduates from, or is no longer enrolled in, the school district of enrollment. A basic aid district is defined as a school district that does not receive an apportionment of state funds pursuant to Education Code section 42238(h) for any fiscal year.

51. Does a basic aid district have to accept transfers even if they have a policy of not accepting interdistrict transfers?

Yes. Under Education Code section 48359.5, a basic aid district would have to accept students who wish to transfer into the district.

Education Code section 48356(a) states that a school district with enrollment may adopt specific written standards for acceptance and rejection of applications. The standards may include consideration of the capacity of the program, class, grade level, school building, or adverse financial impact. However, the standards shall not include consideration of a pupil's previous academic achievement, physical condition, proficiency in the English language, family

income, or any of the other individual characteristics set forth in Section 200 of the Education Code (e.g., race, ethnicity, sex, religion.). If the number of pupils who request a particular school exceeds the number of spaces available at that school, a lottery must be conducted in group priority order, with first priority for siblings of children who already attend the desired school, and second priority for pupils transferring from a program improvement school ranked in decile 1 on the Academic Performance Index, and third priority to select pupils at random until all of the available spaces are filled.

52. Is the Superintendent of Public Instruction required to do an independent evaluation of the Open Enrollment program?

Education Code section 48360 states that the Superintendent of Public Instruction shall contract for an independent evaluation of the open enrollment program using federal funds. The evaluation shall, at a minimum, consider all of the following:

1. The levels of, and changes in, academic achievement of pupils in school districts of residence and school districts of enrollment for pupils who do and do not elect to enroll in a school district of enrollment.

2. Fiscal and programmatic effects on school districts of residence and school districts of enrollment.

3. Numbers and demographic and socioeconomic characteristics of pupils who do and do not elect to enroll in a school district of enrollment.

The Superintendent of Public Instruction shall provide a final evaluation report to the Legislature, Governor and the State Board of Education on or before October 1, 2014.

53. Will the State Board of Education be adopting regulations to clarify the requirements of the Open Enrollment Act?

The State Board of Education has adopted regulations pursuant to the Open Enrollment Act, 5 C.C.R. Section 4700 et seq.

APPENDIX III

QUESTIONS AND ANSWERS REGARDING PUPIL RECORDS

Below is a summary of the questions we have received in a question and answer format:

1. May either parent have copies of the child's school records?

Yes. Pursuant to Family Code section 3025 and Education Code sections 49061 and 49069, both parents have the right to copies of pupil records. Family Code section 3025 provides access to school records to noncustodial parents. Unless a court order prohibits or limits access, even a parent without physical or legal custody can access pupil records under Family Code section 3025.

2. Is a school district required to notify a parent when the other parent has requested access to pupil records?

No. In our opinion, the school district is not obligated to routinely notify a parent that the other parent is seeking access to a pupil's records. Both parents have the right to access the student records pursuant to Family Code section 3025 and Education Code sections 49061 and 49069.

3. What should the school do if an attorney calls on behalf of a parent and requests school records?

Pursuant to Education Code section 49075, the parent or guardian must provide written consent to release records to the attorney by specifying the records to be released and identifying the attorney by name. Once this written consent is obtained, the records may be released to the attorney.

4. How should the school verify that a person claiming to be a child's parent is, in fact, the child's parent?

We would recommend that school staff require a picture ID from the individual and a birth certificate of the child verifying the name of the parent. If the birth certificate does not include the parent's name, the parent may provide the school with a copy of a custody order or paternity order that identifies the parent as the parent of the child in question. The school may also wish to consult the emergency card and other enrollment information in the possession of the school. The school may wish to call the parent that the school is familiar with or other persons listed on the emergency card for verification.

5. Do schools have to maintain suspected child abuse reports as pupil records?

No. Suspected child abuse reports are not pupil records and are confidential pursuant to Penal Code section 11164 and following. Mandated reporters should maintain their copy of a suspected child abuse report in a confidential file separate from other documents, including pupil records. Penal Code section 11166 allows districts to establish internal reporting procedures to facilitate notification of supervisors and administrators of reports that are made.

6. Do school districts have to maintain pupil records of a student who transfers to a new school district or matriculates to a new district?

Yes. Pursuant to Title 5 of the California Code of Regulations section 438, the original school district must maintain a copy of the mandatory permanent pupil record.[1074] Section 438 states as follows:

(a) When a pupil transfers to another school district or to a private school, a copy of the pupil's Mandatory Permanent Pupil Record shall be transferred upon request from the other district or private school. The original or a copy must also be retained permanently by the sending district. If the transfer is to another California public school, the pupil's entire Mandatory Interim Pupil Record shall be forwarded. If the transfer is out of state or to a private school, the Mandatory Interim Pupil Record may be forwarded. Permitted pupil records may be forwarded. All pupil records shall be updated prior to such transfer.

(b) If the pupil is a within-California transfer, the receiving school shall notify parents of the record transfer. If the student transfers out of state, the sending district may notify the parents of the rights accorded them. The notification shall include a statement of the parent's right to review, challenge, and receive a copy of the pupil record, if desired.

[1074] 5 C.C.R. Section 432(b)(1) defines "Mandatory Permanent Pupil Records" as "those records which the schools have been directed to compile by California statute authorization or authorized administrative directive. Each school district shall maintain indefinitely all mandatory permanent pupil records or an exact copy thereof for every pupil who was enrolled in a school program within said district. The mandatory permanent pupil record or a copy thereof shall be forwarded by the sending district upon request of the public or private school in which the student has enrolled or intends to enroll. Such records shall include the following:
(A) Legal name of pupil.
(B) Date of birth.
(C) Method of verification of birth date.
(D) Sex of pupil.
(E) Place of birth.
(F) Name and address of parent of minor pupil.
1. Address of minor pupil if different than the above.
2. An annual verification of the name and address of the parent and the residence of the pupil.
(G) Entering and leaving date of each school year and for any summer session or other extra session.
(H) Subjects taken during each year, half-year, summer session, or quarter.
(I) If marks or credit are given, the mark or number of credits toward graduation allows for work taken.
(J) Verification of or exemption from required immunizations.
(K) Date of high school graduation or equivalent.

(c) Pupil records shall not be withheld from the requesting district because of any charges or fees owed by the pupil or his parent. This provision applies to pupils in grades K-12 in both public and private schools.

7. How long must a school district maintain pupil records?

Title 5 of the California Code of Regulations section 437, provides guidance for pupil records retention and destruction. Records classified as Mandatory Permanent shall be preserved in perpetuity by all California schools. Unless forwarded to another district, mandatory interim pupil records may be determined to be disposable when the student leaves the district or when their usefulness ceases. Destruction shall be in accordance with Title 5 of the California Code of Regulations section 16027, during the third school year following such classification, and district policies/procedures. Permitted pupil records may be destroyed when their usefulness ceases. They may be destroyed after six months following the pupil's completion of or withdrawal from the educational program consistent with district policies/procedures. The method of destruction shall assure that records are not available to possible public inspection in the process of destruction.

8. Can permanent records be maintained electronically?

Yes. Mandatory Permanent Records may be maintained electronically if the records are photographed, microphotographed, or otherwise reproduced on film. Under Title 5 of the California Code of Regulations section 16022, after reproduction on film, the original record, unless classified as Class 2-Optional, may be classified as Class 3-Disposable and may then be destroyed if the following conditions have been met:

(1) The reproduction was accurate in detail and on film of a type approved for permanent, photographic records by the United States Bureau of Standards.

(2) The superintendent has attached to or incorporated in the microfilm copy his signed and dated certification of compliance with the provisions of Evidence Code section 1531.[1075]

(3) The microfilm copy was placed in a conveniently accessible file, and provision was made for preserving permanently, examining and using same.

9. How is "after usefulness ceases" defined for purposes of destruction of records?

Title 5 of the California Code of Regulations section 16020, states that "after usefulness ceases" means after the student graduates, or when a student transfers out or leaves school, as the

[1075] Evidence Code section 1531 states: "For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be."

date the student leaves. Districts may choose by policy or practice to maintain records for a longer period of time. For example, some districts may extend the time frame to include the two-year statute of limitations period for special education cases. Title 5 of the California Code of Regulations section 437, states that for mandatory interim pupil records, the records may be classified as disposable when the student leaves the district or when their usefulness ceases. Destruction shall be during the third school year following such classification. Permitted pupil records may be destroyed when their usefulness ceases. They may be destroyed after six months following the pupil's completion of or withdrawal from the educational program.

10. What records are included in directory information and who can receive directory information?

Under Education Code section 49061(c), "directory information" means one or more of the following items: pupil's name, address, telephone number, date of birth, email address, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous public or private school attended by the pupil. Districts must provide annual notification to parents/legal guardians of the district's directory information policy, including which items are included as directory information and which individuals/entities are authorized recipients, in accordance with Education Code sections 49063 and 49073.

11. Can districts post classroom assignment lists on bulletin boards for students to see?

If the classroom assignment list includes personally identifiable pupil record information, districts would need parent/legal guardian consent to post this information on a publicly displayed bulletin board. Although a pupil's name can be part of directory information, if the parent/legal guardian has not opted out of disclosure, the designation of classroom assignments are not a directory information category and would require parent/legal guardian consent prior to disclosure.[1076]

12. If law enforcement is called regarding a student in special education, do schools provide the officer with a copy of the student's IEP?

Under Education Code section 48902(e), the principal or principal's designee reporting a criminal act committed by a student in special education shall ensure copies of special education and discipline records, to the extent necessary and permissible under FERPA, are provided to the responding law enforcement official. If an IEP is provided, it should be a signed copy of the IEP (not printed out from a database) to ensure accuracy and currency. Please note that this provision does not apply to Section 504 Plans, which should not be released to law enforcement without written authorization from the parent/legal guardian.

[1076] Education Code section 49061(c).

13. Are personal notes pupil records?

No. Education Code section 49061(b) specifically states that a pupil record does not include informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. A "substitute" means a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position. As long as the personal notes have not been shared with another school employee (other than a substitute), they are not pupil records.

14. Are counselor notes pupil records?

Under Education Code section 49602, information of a personal nature disclosed by a pupil 12 years of age or older, or by that pupil's parent or guardian, in the process of receiving counseling from a school counselor is confidential. The information shall not be part of the pupil record without the written consent of the person who disclosed the confidential information.

15. Can a district charge for copies of pupil records?[1077]

Yes. Education Code section 49065 allows schools to charge a reasonable fee, not to exceed the actual costs of copying, for pupil records. Section 49065 states that no charge should be made for up to two transcripts of former pupils' records or up to two verifications of former pupils' records. In addition, federal FERPA regulations and Education Code section 56504 prohibit charging of a fee where the fee would effectively prevent parents and students from exercising their right to inspect and review records or receive copies. Any copying fee should be consistent with district policies/procedures and specified in the district's annual notice pursuant to Education Code section 49063(h).

16. Are emails pupil records?

No, unless the emails are printed out and placed in the student's folder or file. In 2009, a court determined that emails that identified a specific pupil and were sent between school employees did not constitute pupil records unless the emails were "maintained" by the school or district, which would require placing them in the student's file (S.A. v. Tulare County Office of Education and California Department of Education (E.D. Cal., Sept. 24, 2009/Oct. 6, 2009, No. CV F 08-1215) 2009 WL 3126322/2009 WL 3296653). However, school employees still need to exercise caution and judgment in using email to communicate about students.

17. Must school districts notify teachers of students who have engaged in misconduct?

Yes. Under Education Code section 49079, teachers must be notified of students in their classes who have engaged in any of the acts in 48900 (except (h)), possessed or used tobacco

[1077] 34 C.F.R. Section 99.11.

products), 48900.2, 48900.3, 48900.4 or 48900.7 for the past three years. Some student information systems have a confidential system for notifying teachers.

18. What is the timeframe for school-to-school transfers of pupil records?

Under Education Code section 49068, when a student transfers in-state between public or private schools, the public or private school must transfer the student's records no later than 10 schooldays following the date the request is received from the school where the student intends to enroll. Title 5 of the California Code of Regulations section 438, requires that the mandatory permanent record be transferred. In addition, if the transfer is to another California public school, the pupil's entire Mandatory Interim Pupil Record shall be forwarded. If the transfer is out of state or to a private school, the Mandatory Interim Pupil Record may be forwarded. Permitted pupil records may be forwarded. All pupil records must be updated prior to transferring. The originating school district must maintain the original records and send a copy or maintain a copy and send originals in accordance with the regulatory timeframes for records retention.

19. Must a district expunge an expulsion record if a parent requests expungement?

No. Education Code section 48917(e) permits a governing board to expunge the record of an expulsion, but expunging the expulsion record is not mandated. Districts can explain to parents the district expungement policy, pursuant to Education Code section 49063(e). School officials can also share with parents that discipline records are classified as Permitted Pupil Records and are not required to be maintained permanently. Schools may also inform parents they may include a written statement or response concerning the student discipline for the student's file, under Education Code section 49072. At the secondary level, parents may request expungement because the Common Application for colleges and universities contains the following question:

Disciplinary History

Have you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from the institution. ___ Yes ___ No

Have you ever been adjudicated guilty or convicted of a misdemeanor, felony, or other crime? ___ Yes ___ No

[Note that you are not required to answer "yes" to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise ordered by a court to be kept confidential.]

If you answered "yes" to either or both questions, please attach a separate sheet of paper that gives the approximate date of each incident, explains the circumstances, and reflects on what you learned from the experience.

Note: Applicants are expected to immediately notify the institutions to which they are applying should there be any changes to the information requested in this application, including disciplinary history.

However, parents should note that the Common Application question would require the same response whether the record is expunged or not.

20. Must a district expunge a suspension record if a parent requests expungement?

No. Unlike expulsions, there is not a specific Education Code provision authorizing expungement of student suspensions. Instead, schools may remind parents that suspensions fall under the classification of Permitted Pupil Records, which may be destroyed six months following the pupil's completion of or withdrawal from the educational program.[1078] Secondary schools may receive requests for expunging suspension records from parents in response to the Common Application (see number 20, above). Schools may inform parents they may include a written statement or response concerning the student discipline for the student's file, under Education Code section 49072. Parents may also choose to challenge the content of the pupil record, but Education Code section 49070 limits the grounds for the challenge to the following: inaccurate, unsubstantiated personal conclusion or inference, conclusion or inference outside of the observer's area of competence, not based on the personal observation of a named person with the time and place of the observation noted; misleading; in violation of the privacy or other rights of the pupil.

21. If the district wants to enter into an agreement with a vendor and pupil record information will be shared, what is required in the agreement?

FERPA allows for districts to share pupil record information for specific purposes with third party vendors. The U.S. Department of Education's Family Policy Compliance Office, which interprets and enforces FERPA, issued guidance for what provisions should be included in these types of agreements, including the need for network security standards, specified length of use, and method of destruction of records.

You may access the FPCO guidance at:

http://www2.ed.gov/policy/gen/guid/fpco/pdf/reasonablemtd_agreement.pdf

[1078] 5 C.C.R. Sections 430(d), 437(d).

APPENDIX IV

MODEL RESPONSE TO PARENT REQUEST TO OPT OUT OF INSTRUCTIONAL ACTIVITIES

[To Be Typed on OCDE Letterhead]

Date

Parent/Guardian Name
Address
City, State, Zip

Dear Parent / Guardian:

We are in receipt of your request to opt out of a number of assessments and activities. Please be assured that the Orange County Department of Education (OCDE) will comply with all federal and state laws that apply to the rights that you have noted.

With regard to your requests involving data collection, please take note that OCDE will continue to follow federal and state law, which does require reporting of specified student data to federal and state agencies. Regarding your request to opt out of Common Core State Standards, by law the California Legislature and the State Board of Education have the authority to adopt state curriculum standards and school districts and county offices of education are required to comply by teaching to the State-adopted curriculum content standards.

[Optional: For your information, the annual notice that OCDE sends to parents each year (copy attached) contains additional information about parent/legal guardian rights to inspect instructional materials, opt out of coursework as provided under the law, and opt out of federally funded research.] Thank you for sharing your concerns. If you have any questions or would like additional information, please feel free to contact _____ at _____.

Sincerely,

_____
Title