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Student Fees Settlement: Status Update

Mark R. Bresee, Esq.

The implementation of the settlement of the ACLU's student fee lawsuit against the State of California is in full swing. The settlement agreement has four basic components: 1) issuance of a Guidance Letter from the State; 2) legislation and regulations to clarify permissible and impermissible fees; 3) mechanisms for enforcement of the "free school guarantee" by students and parents; and 4) annual audit requirements and sanctions for multiple audit exceptions. A brief update on the status of each of these aspects of the settlement is provided below. The parties are appearing in court later this month to present an amended settlement agreement that addresses the changes that have occurred.

1) **Guidance Letter**

The settlement dictated that within two weeks of execution the State will send a pre-approved letter to all K-12 administrators describing existing law regarding fees, asking local agencies to review policies and practices to ensure compliance, reinforcing the principle that "schools may solicit and accept donations from parents or the broader community, so long as the fundraising program is voluntary and contributing is not a requirement for participation in an educational activity," and providing resources.

Status: This has been implemented.

2) **Legislation and Regulations to Clarify Permissible and Impermissible Fees**

As with the *Williams* and *Valenzuela* lawsuits, the core aspect of the settlement is to be implemented through the enactment of legislation and regulations, and incorporating enforcement and remedies for violations into the uniform complaint procedure. The agreement proposed to add section 49010 to the Education Code, explicitly to be "declarative of existing law," describing the generally-accepted rules related to student fees first articulated in *Hartzell v. Connell*. The settlement also proposed a regulation within the Standards and Procedures for Audits of California K-12 Local Education Agencies containing a commonly circulated list of twenty legally permissible fees, deposits, charges or levies issued to students.

Status: The work has begun on legislative and regulatory implementation. AB 165 (Lara) was introduced on January 20, 2011, and it was referred to the Assembly Education Committee on February 3, 2011. Efforts are underway to get a committee hearing date scheduled.

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Although worded differently than the proposed legislative language in the settlement agreement, AB 165 includes proposed Education Code provisions to incorporate the general rules enunciated in *Hartzell* and its progeny into the Code. One notable, clarifying difference, though, is that AB 165 would add Education Code section 49011(a) to state that “a school district, school, or other entity working under the supervision of, or in coordination with, a district or school shall not impose a pupil fee for participation in educational activities.” (Emphasis added) Both “pupil fee” and “educational activity” are defined in the legislation, consistent with existing law. The language about other entities working under district supervision or coordination was not in the settlement. This does not change the law, in my opinion, but it does clarify that foundations and booster clubs collecting fees on behalf of a program or activity is the same as a district employee collecting the fees directly, and that all must comply with the “free school guarantee.”

3) Uniform Complaint Procedure Enforcement by Students and Parents

The proposed legislation in the settlement would add “fees, deposits, or other charges related to participation in a curricular or extracurricular activity” as a basis for a uniform complaint under Education Code section 35186, and adds the fee prohibition to the required classroom notice. Uniform complaints can be filed anonymously under existing law.

Status: AB 165 incorporates the student fee prohibition into the uniform complaint process, and the classroom notice requirement, as specified in the settlement. However, there is a significant difference in the language related to remedies for violations revealed through uniform complaints. Instead of using the settlement language requiring the district or school to “fully reimburse the pupil with interest” when a violation is found through the uniform complaint process, AB 165 states that the district or school must “fully reimburse all affected pupils, parents or guardians with interest” as a remedy for violations. This resolves a logical inconsistency in the proposed language in the settlement agreement when the complaint is anonymous, i.e. how do you reimburse a pupil who files anonymously? To some degree this amendment is therefore not surprising. But, it raises the stakes by encouraging anonymous complaints on behalf of the entire class of parents and families who paid an impermissible fee, charge or deposit.

4) Audit Requirements

The settlement agreement added “compliance with . . . the ‘free school guarantee’ in Section 5 Article IX of the California Constitution” to the annual audit of district funds, commenced this review starting with the current school year, and charged county superintendents with the responsibility of reviewing audit exceptions related to fees. The settlement proposed significant sanctions associated with these annual audits. If a prior year audit exception was not corrected, or there were any fee exceptions for two years in a row, the State Controller would be required to “withhold one percent of the amount authorized to be used for administrative costs [General Administration function codes 7000-7999] from the next principal apportionment to the local

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educational agency, until such time as the agency reimburses all illegally-collected fees, with applicable interest."

Status: I am informed by counsel for the students in the litigation that the State Controller and Department of Finance have both convinced the parties that the annual audits cannot include fee reviews in the manner called for in the settlement agreement. So, what is developing is a process where each year the superintendent of each district will have to certify that no unlawful fees are being charged in the district. For the 2010-11 school year the only requirement and review will be determining whether the certification is signed and submitted, and starting with the 2011-12 school year the annual review will look at uniform complaints/lawsuits as a means of validating the accuracy of the certification.