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ACLU Files Lawsuit Challenging Fees Charged by School Districts: Guidance for Charter Schools regarding Authorized Fees

Given the budget shortfalls facing many local education agencies, the temptation is great to recover the costs of instruction and other school-related activities by charging fees to students. According to a lawsuit recently filed by the American Civil Liberties Union of Southern California (ACLU/SC), that practice has become common and violates the “free school guarantee” of Article IX, section 5 of the California Constitution and the State Board of Education’s Title 5 regulations. (5 Cal. Code of Regs. §350.)

The lawsuit, filed in Los Angeles Superior Court, follows an investigation by the ACLU/SC that uncovered a widespread practice among school districts of forcing students to purchase textbooks, workbooks, and assigned novels to matriculate in academic courses. School districts also charged students to take Advanced Placement examinations, even though completing these examinations is a course requirement and affects students’ grades.

This is not the first time that student fees have been challenged in this state. In *Hartzell v. Connell* (1984) 35 Cal.3d 899, the state Supreme Court held that a school district was prohibited by both the constitutional “free school” provision and the state regulations from charging fees for either curricular or “extracurricular” activities. The decision expressly rejected the view that only credit-bearing courses were required to be free. Instead, the Court took the broader view that, if an activity or experience was “an integral fundamental part of elementary or secondary education” or a “necessary element of a school activity” designed to help the student become a member of the community, then the activity or experience must be free. (*Id.* at p. 905.) The court struck down school district fees of \$25 per athletic team and \$25 for each performing arts activity such as choir or cheerleading. The California Attorney General has also opined that the free school guarantee “extends to fees designed to cover a school district’s costs of performing a statutorily mandated administrative function, including the processing of interdistrict attendance applications.” (87 Ops. Atty. Gen. 132, 134 (2004).)

The free school guarantee does not apply to “purely recreational” activities such as weekend dances or attending athletic events as a spectator. (*Hartzell v. Connell, supra*, at 911.) The “essential” elements of public education also do not include bus transportation from home to school because transportation is not an educational activity. (*Arcadia Unified School Dist. v. California Dept. of Educ.* (1992) 2 Cal.4th 251, 264-265.) The same is true for nutrition or health services which, though necessary to a student’s ability to learn, are not educational. A district is also authorized by various statutes to charge fees for particular activities such as out of state field trips or school sponsored summer camp. (Educ. Code §§33530 and 33535.)

Further, although textbooks and instructional materials are educational, the free school guarantee may only require a school district to provide for *basic* instructional opportunities. That is, no case or statute prohibits a charge if a student is going to keep a book or chooses to participate in an activity that requires special or unusually costly materials. It should be noted,

however, that whether an enhanced educational opportunity is outside the free school guarantee could depend on whether a student's participation is truly voluntary. (81 Ops. Atty. Gen. 153, 155 (1998) [questioning the voluntariness of contributions by parent booster clubs].)

Since the "free school" provision is in the California constitution, charter schools are not exempt from this rule under Education Code §47610. Therefore, while the outcome of this new litigation is not yet certain, MYM encourages charter schools to consult with legal counsel before implementing any policy or practice related to student fees.

If you should have any questions regarding this update, please contact Michael Hersher (mhersher@mymlaw.com) at the Law Offices of Middleton, Young & Minney, LLP at (916) 646-1400. Or find us on the web at: www.mymcharterlaw.com

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