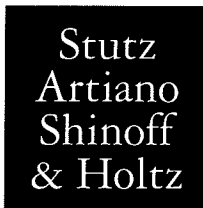


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VIA FACSIMILE AND U.S. MAIL

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Board of Trustees and Superintendent
Del Mar Union School District
225 Ninth Street
Del Mar, CA 92104-2716

**Re: Funding of Teaching Positions with Donated Funds as Related to
Proposed Resolutions from February 28, 2007 Board Meeting**

Dear Members of the Board and Superintendent:

ISSUE

As a result of discussions at the February 28, 2007 Board Meeting continued to the March 7, 2007 Board Meeting certain issues arose concerning the funding of the Enrichment Program teachers. The District has funded the Enrichment Program and the Del Mar School's Education Foundation (DMSEF) has historically contributed significant resources to the District's general fund, which has allowed the District to offer a program that may have exceeded the District's resources. In other words, without the generous donations from the DMSEF, it would be difficult for the District to offer the current Enrichment Program. This opinion letter provides background information concerning teacher employment issues for discussions concerning the future direction of the Board and DMSEF with respect to the Enrichment Program.

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DISCUSSION

Teacher's¹ have significant and numerous employment rights under the Education Code. These rights relate to credentialing; probationary and permanent teachers; contracting for temporary teachers (including categorically funded positions), and re-employment rights. Collective bargaining laws also affect the employment relationship

FACTUAL BACKGROUND

The District has funded Enrichment Program teachers who teach art, music, science, technology (and in some schools PE) during the regular school day. These Enrichment Program teachers provide release time for a prep period for regular classroom, special education and Enrichment Program teachers under the collective bargaining agreement. For fiscal year 2006-07 the District has budgeted the entire cost for the Enrichment Program teachers. However, as in years past, the DMSEF is projected to donate over \$600,000 to the District general fund in order to offset some of the costs of the Enrichment Program teachers. The Board has been advised that it should discontinue its current practice of close cooperation with the DMSEF when annually soliciting per pupil donations as a goal at each school in conjunction with the DMSEF.

LEGAL ANALYSIS

1. **Credentials:** In order for the District to collect average daily attendance (ADA) a class must be taught by a properly credentialed employee (Education Code² section 46300). Credentials are issued by the Commission on Teacher Credentialing generally based upon completion of college subject matter majors and minors, passing the California Basic Educational Skills Test (CBEST) and completion of a student teaching experience. Generally, in order to earn a credential, a teacher must have received a BA, and completed a fifth postgraduate year of teacher preparation, commonly referred to as the "credential year."

There are different types of credentials depending upon an individual's college education, and completion of the credential year. For purposes of this discussion, it is not necessary to analyze the numerous credential situations that may occur depending upon education, transferring from out of state, major and minor degrees and teacher interns. The type of credential a teacher holds

¹This analysis focuses on teachers, but all certificated employees, counselors, nurses, librarians and administrators, etc. are also certificated employees, and the same statutes apply to them. Education Code section 44001.

²All references are to the Education Code unless noted otherwise.

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becomes significant when determining teacher seniority, types of employment contracts issued, and rights of re-employment.

2. **Probationary and Permanent Teachers**

a. **Probationary Employee:** Section 44915. A probationary teacher is a certificated employee within the first two years of employment within the same school district in a position. The years of service need not be continuous, i.e., employee works one year, takes a year leave and then returns. In the event the years of service are not continuous, the second school year of employment (after one or more years interruption) becomes the second probationary year.

b. **Permanent Employee:** Section 44929.21. A certificated employee upon commencing work in the third year of employment within the same school district acquires permanency or tenure. The school district must give written notice of lay off or non reelection to a certificated employee before March 15 of the employee's second complete consecutive school year within the school district or the employee will be automatically reelected (employed) and gain permanent status in the third year.

c. **Status of Enrichment Program Teachers:** The Enrichment Program teachers are either probationary or permanent. They have not been employed as temporary employees in temporary positions and cannot be classified as temporary employees once they have earned probationary or permanent status.

3. **Temporary Teachers:** The code authorizes the employment of teachers in "temporary" positions. (This discussion does not include the day to day substitute.) Also, if a temporary employee teachers 75 percent of a school year in a single position, and there is a vacancy the succeeding school year for which the employee is credentialed and qualified to teach, the temporary employee has priority rights to that teaching position over new applicants (Sections 44917, 44918). That second year of employment is deemed the second year of probationary status. The Code is explicit in the manner that these temporary contract documents can be offered; and if there is an error in not completing the initial employment contract exactly, the district may be obligated to employ the teacher as a probationary teacher the next year. This can occur even if the district has no need or funding for the position. *Kavanaugh v. West Sonoma County Union High School District* (2003), 29 Cal.4th 911, 129 Cal.Rptr.2d 811.

There is substantial litigation concerning the rights of temporary employees. These cases usually occur when there is a lay off because teachers are asserting their rights to continue their employment. Cases have addressed the very specific terms of the temporary contract: when it was signed; whether or not the position was truly categorically funded; whether or not the position was

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truly temporary in nature; and whether or not any other employee had priority rights to re-employment, etc. In general courts have interpreted the statutes in the employee's favor and specifically prohibit an employee from waiving statutory rights of employment. There are several limited categories of temporary teachers.

a. **Categorically funded:** Section 44909 applies when a District receives categorical funds, or restricted funds, that can only be used for a limited purpose. Positions funded by the categorical funds are deemed to be temporary; when the funds end, the temporary teacher's employment ends. Therefore, the employees employed for those positions must be issued temporary contracts. There has been a commonly accepted practice whereby senior teachers may be placed in the categorically funded program and then the senior teacher's position is backfilled by the temporary employee. However, an Appellate Court has recently held that the categorically funded position may only be filled by a temporary teacher and not a backfilled by the temporary teacher.³

b. **Temporary Replacement:** Section 44920 applies when an employee is hired for a complete school year, but not less than one semester, subject to certain exceptions, to replace a regular certificated employee who has been granted leave for a semester or a year, or is experiencing a long term illness.

4. **Rights to Continuing Employment:** Teachers in regular positions (permanent and probationary) are deemed employed for the following school year automatically unless the Board passes particular resolutions and notifies teachers in writing by March 15 of the preceding school year that they will not be re-employed (Sections 44949 and 44955).

The resolution the Board adopts states that the District is eliminating or reducing a "particular kind of service" for the ensuing school year. (Boards can reduce staff because of declining enrollment, but the process is rarely used because of the difficulty in meeting the mathematical formula.) In actuality services or programs must usually be reduced when there are fewer students and less ADA generated income. The lay-off resolution lists the specific services that are being reduced or eliminated. Then the District, using its certificated seniority list, determines by seniority and credentials held, the individuals who will receive lay-off notices. These notices must be provided by March 15 or the teacher is deemed re-employed. After receiving the notice, the teachers have a right to request a hearing which must be completed by May 7. Then the Board must receive the hearing decision and provide the teachers a second notice by May 15 or they will be re-employed

³*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006), __ Cal. Rptr. 3rd __, WL 3734564 (Cal. App. 5 Dist.). The school district and the union have appealed the *Bakersfield* decision by filing Petitions for the California Supreme Court to Review that decision. Therefore, the *Bakersfield* decision is not to be followed because it is not yet final.

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the ensuing year. Lay-off procedures are detailed and specific. If the District does not follow them exactly, the District will be required to re-employ the teachers whether the District has sufficient funds or not.

In an elementary district such as Del Mar, most teachers have multiple subject credentials, which authorize them to teach all elementary school subjects. However, some teachers may have single subject credentials in a particular subject matter, such as art, music, PE or technology. Teachers holding those credentials are only authorized to teach in the specific subject matter area. For purposes of this discussion, we will assume that there is a single subject credential in vocational education. If the Board determined to eliminate or reduce vocational education offerings, then the least senior teacher, who is credentialed to only teach vocational education will be laid off. This may occur even if the vocational education teacher has greater seniority than a multiple subjects credentialed teacher.

5. **Fiscal Information Used in Order to Issue March 15 Notices:** In order for a board to reduce or eliminate particular kinds of services and issue lay-off notices prior to March 15, the board has to rely on the financial data as it exists in late February for the ensuing school year. The Governor presents a proposed state budget approximately January 15 for the ensuing fiscal year. School districts also analyze their projected enrollments in approximately January or February for the ensuing school year. The Governor's budget usually provides a per-pupil funding amount as calculated by the revenue limit amount per student with a projected Cost of Living Adjustment (COLA). Basic aid district revenue is calculated based on district property assessed valuation and ADA, among other factors. The Governor's budget may also have proposed reductions of existing programs or recommendations for augmenting or adding new programs. The budget is proposed until the Legislature revises and adopts it for the fiscal year commencing July 1. On May 15 the Governor issues his revised budget as the state's income and expense figures become more certain. Unfortunately the March 15 and May 15 lay-off deadlines, when the boards must adopt resolutions to reduce or eliminate services and send the lay-off notices, are well before the actual state budget adoption. Those notices are then based on the early projected financial data known in February.

In that the District did not reduce or eliminate any services and send lay-off notices this year, for the 2007-08 school the District is committed to re-employing all the probationary and permanent certificated staff it currently employs, including the Enrichment Program teachers. If the District has a projected shortfall for 2007-08, it will need to make up the shortfall by reducing other costs than certificated employees costs or by reducing the ending balance.

6. **Collective Bargaining:** Under Government Code section 3540, *et. seq.*, teachers have collective bargaining rights concerning their terms and conditions of employment. Such terms include the work day schedule including prep time periods. These rights are contained in the collective bargaining agreement.

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CONCLUSION

Due to the provisions regarding credentials; probationary and permanent teachers; temporary teachers and the exact contract requirements; re-employment rights, and collective bargaining agreements, it is problematic to depend on "soft" or donated funds in order to fund certificated positions. Also because of the time line for developing a district budget and March 15 deadline for noticing employees who may be laid off, reliance on donations or "soft" money poses some risks for the district.

We look forward to discussing these issues at the Board meeting of March 7, 2007.

Yours very truly,

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation


Christina L. Dyer

CLD:p