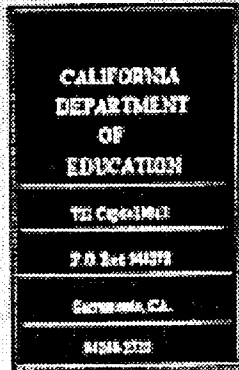




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State Superintendent of Public Instruction



FISCAL MANAGEMENT ADVISORY 97-02

October 30, 1997

TO: County and District Superintendents

FROM: 
Patrick Keegan, Deputy Superintendent
Finance, Technology, and Information Services

SUBJECT: Fees, Deposits, and Other Charges

School district administrators frequently ask the Department to provide additional guidance on the matter of fees. This Advisory which supersedes Fiscal Management Advisory 87-03 is provided for that purpose, and reflects the most recent legislation and California Supreme Court interpretations. The following narrative contains a number of conclusions based on legal references. Most of these references are to a particular case or opinion. Those conclusions without attribution represent the opinions of the Department's Legal Office.

TUITION, FEES, DEPOSITS, AND OTHER CHARGES IN CALIFORNIA PUBLIC SCHOOLS, K-12 AND ADULT SCHOOLS

I. A Free Public School System

"A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law."¹

With this language the State Board of Education made clear that fees are not to be imposed except where specifically authorized by law. This administrative regulation, or "law" of the State Board was promulgated based on the authority of Article IX, Section 5 of the California Constitution. Article IX, Section 5 provides for a free school system:

"The Legislature shall provide for a system of common schools by 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 a school has been established."

The State Supreme Court in 1874 held that this provision entitled students to be educated at public expense.²

The Attorney General has, in several opinions,³ consistently ruled that school districts do not have authority to levy fees for any elective or compulsory class. Further, districts may not require security deposits for locks, lockers, books, class apparatus, musical instruments, uniforms, or other equipment.

The administrative regulation noted above prohibited fees except those "...specifically authorized by law." Certain fees have been authorized by law since the rule was promulgated.

The 1984 California Supreme Court decision, Hartzell v. Connell,⁴ raises serious questions about the imposition of a non-statutory fee for extracurricular activities. The lead opinion acknowledges that fees may be charged for "recreational" activities but not for "educational" activities. Extracurricular activities are described in the opinion as an integral component of public education; they are a part of the educational program according to this decision.

The court held that the "...imposition of fees for educational activities offered by public high school districts violates the free school guarantee. The constitutional defect in such fees can neither be corrected by providing waivers to indigent students nor justified by pleading financial hardship."

¹Title 5 California Code of Regulations, Section 350

²Wade v. Flood, 48 Cal. 36, 51 (1874)

³Ops. Cal. Atty. Gen. No. N5-4114, 1942

⁴35 Cal. 3d 899 (1984)

II. Fees Authorized by Law

The Education Code specifically authorizes certain fees. Except for home to school transportation fees discussed later, none of those Code sections have been challenged and the Hartzell v. Connell decision did not directly rule on their legality. Therefore, districts may continue to levy fees as authorized in the following Education Code sections:

- A. Fees that a district may collect for furnishing materials to a pupil for items the pupil has fabricated from such materials for his or her own use. Such fees may not exceed cost. (Education Code section 39526)**
- B. Fees that a district may charge pupils for transportation to and from school under limited circumstances. (Education Code sections 38028, 39807.5 and 39837)**
- C. Charges for food served to pupils. (Education Code sections 39870-39874, 39876)**
- D. Charges to the parent or guardian of any pupil who loses a book, defaces books or other school property. Liability limits for lost items or damage are adjusted annually by the State Superintendent of Public Instruction pursuant to statute. (Education Code section 48904)**
- E. Charges for field trips or excursions, principally for transportation. The authority to charge a fee for field trips or excursions is not directly stated in the Education Code. Rather, it provides that "No pupil shall be prevented from making the field trip or excursion because of lack of sufficient funds." (Education Code section 35330)**
- F. Districts must make medical, hospital, or accident insurance available to pupils who may be injured while participating in field trips. The cost of the insurance may be paid by the pupil or his parents. (Education Code section 35331)**
- G. Governing boards may expend from the general fund of the district any money which is budgeted for community services to establish and maintain community service classes. They may charge student fees not to exceed the cost of maintaining such classes. (Education Code section 51815)**
- H. A governing board may charge a tuition fee to adults for any class except classes in English and citizenship for foreigners, classes in elementary subjects, and classes for which high school credit is granted when taken by a person not holding a high school diploma. (Education Code section 52612)**

- I.** Districts must provide, and each member of an athletic team must have, accidental death, injury and medical insurance coverage. The cost of such insurance may be paid by the pupil unless the pupil is unable to pay for such insurance. (Education Code sections 32220-32224)
- J.** A school district may require a deposit from a borrower of school band instruments, music, uniforms, and other regalia for use on an excursion to a foreign country. (Education Code section 40015)
- K.** Pupils whose parents are actual and legal residents of an adjacent foreign country or an adjacent state shall be charged a tuition fee. (Education Code sections 48050 and 48052)
- L.** The regulations of the governing board may provide for the sale of materials purchased from the incidental expense account to pupils in classes for adults, for use in connection with such classes. The proceeds of all such sales shall be deposited in that account (Education Code section 52615). A high school district board may charge for textbooks used in classes for adults or impose a refundable deposit on loaned books. (Education Code section 60410)
- M.** The governing board of a school district may sell class material to persons enrolled in classes for adults. This may include materials necessary for the making of articles by students enrolled in adult education. The materials shall be sold at not less than the cost to the district; any article made shall be the property of the person who made it. (Education Code section 39527)
- N.** 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 non-payment of the fee. (Education Code section 35335)
- O.** Families utilizing child care and development services shall be charged a fee by the school district, but no fees shall be assessed against families whose children are enrolled in the state preschool program, or for such services provided to severely handicapped children (Education Code sections 8263(e)(f) and 8250(d)). Standards for fees appear in Education Code section 8265. The school district may also impose a fee for a program of supervision of children before and after school. (Education Code section 8487 and 8488)
- P.** School districts may offer a fingerprint program for children in kindergarten or newly enrolled children and shall assess a fee to the parent or guardian who chooses to participate. (Education Code section 32390)

III. District Obligation to Provide Without Charge.

The opinions of the Attorney General mentioned earlier indicate that charges may not be levied for the following:

- A. A deposit in the nature of a guarantee that the district would be reimbursed for loss to the district on account of breakage, damage to, or loss of school property.
- B. An admission charge to an exhibit, fair, theater or similar activity for instruction or extracurricular purposes when a visit to such places is part of the district's educational program.
- C. A tuition fee or charge as a condition to enrollment in any class or course of instruction, including a fee for attendance in a summer or vacation school, a registration fee, a fee for a catalog of courses, a fee for an examination in a subject, a late registration or program change fee, a fee for the issuance of a diploma or certificate, or a charge for lodging.
- D. Membership fees in a student body or any student organization as a condition for enrollment or participation in athletic or other curricular or extracurricular activities sponsored by the school.
- E. Education Code section 48053 prohibits charging an apprentice, or his or her parents or guardian, for admission or attendance in any class.
- F. Textbooks and workbooks must be furnished without charge by elementary and high school districts except for classes for adults. A charge may not be made for their use (Education Code sections 60070 and 60410).

Education Code section 40011 provides:

"Writing and drawing paper, pens, inks, blackboard erasers, crayons, lead pencils, and other necessary supplies for the use of the schools, shall be furnished under direction of the governing board of the school district."

The Attorney General has issued an opinion interpreting this language. He was asked specifically whether a student could be required to furnish any or all of the following:

- A. Art material for art classes and mechanical drawing sets
- B. Cloth to be used in dressmaking classes and wood for carpentry classes
- C. Gym suits and shoes for physical education classes

- D. Bluebooks in which to write a final examination
- E. Paper on which to write a theme or report when such theme or report is a required assignment.

The Attorney General concluded that all the above-mentioned materials were "necessary supplies" and as such had to be furnished by the school district. He reasoned that the articles listed in A, B, C, and D, "appear to be supplies that must be available to students in order to participate in regular classroom work in the particular subjects involved." As to E, the Attorney General stated that "paper to be used on which to write a theme or report must also be furnished when required as a part of the classroom activity."⁵

The Attorney General limited his discussion to the questions specifically asked and did not state what materials a district is not obligated to furnish. However:

"[s]upplies,....must be furnished free of cost to students when the supplies are what might be termed 'school supplies' and are necessary in order for the students to pursue a course of study."

The Attorney General's use of the term "school supplies" is meant to exclude from the district's obligation those items or materials which, although necessary for class participation, are essential regardless of whether or not a person is a student. For example, a school district would not be obligated to furnish corrective lenses, clothes, and so forth. Such items are needed whether or not one is a student.

Specifically with respect to gym clothes, Education Code section 49066(b) states that: "No grade of a pupil participating in a physical education class, however, may be adversely affected due to the fact that the pupil does not wear standardized physical education apparel where the failure to wear such apparel arises from circumstances beyond the control of the pupil," such as, for example, lack of funds.

It should be determined whether a fee for a particular item is specifically authorized by statute. If not, it should be determined whether a particular item is required by law to be furnished free or whether it comes under the category of "necessary supplies." If it does, then the district must furnish the item without charge.

It is the position of the Department that a school district may require its students to purchase their own gym clothes of a district specified design and color so long as the design and color are of a type sold for general wear outside of school. Once the required gym uniforms become specialized in terms of included logos, school name or other characteristics not found on clothing for general use outside of school, they are school supplies and the district must provide those uniforms free of charge.

It is the opinion of the Department's legal office that a school district may not charge a fee or require students to purchase necessary materials even if the

⁵Ops. Cal Atty. Gen. No. NS-4414, 1942

district maintains a special fund to assist students with financial need or waives such fee or charge for students with financial need. The fee or charge still remains a condition for all other students not so assisted. The court in Hartzell v. Connell, discussed below, held that a fee-waiver policy for needy students does not save the fee.

IV. Extracurricular Activities

On April 20, 1984, the California Supreme Court decided, in Hartzell v. Connell 35 Cal. 3d 899, that a public school district may not charge fees for educational programs simply because they are denominated "extracurricular." As expressed by the lead opinion, the court concluded that "the imposition of fees as a precondition for participation in non-statutory educational programs offered by public high schools on a noncredit basis violates the free schools guarantee of the California Constitution and the prohibition against school fees contained in Title 5, Section 350 of the California Administrative Code." (now California Code of Regulations).

Some significant observations by the various justices and ramifications of the decision are as follows:

- A. The lead opinion was written by Chief Justice Bird with Justices Broussard and Reynoso concurring specifically. The approach taken to the issue by the Chief Justice holds that the free school guarantee extends to all activities which constitute an integral, fundamental part of elementary and secondary education or which amount to necessary elements of any school's activity. The opinion concludes that extracurricular activities constitute an integral component of public education.
- B. The lead opinion holds that fee based extracurricular activities are also illegal under Title 5 California Code of Regulations 350 (5 CCR 350) which prohibits the imposition of "...any fee, deposit, or other charge not specifically authorized by law."
- C. Apart from the fee issue, this particular holding has wide reaching significance. Along with constitutional provisions and statutes, any regulation adopted by the State Board of Education or Superintendent of Public Instruction is a "law." Education Code section 35160, the so-called "permissive code" authority allows school districts to carry on any activity or act in any manner "...which is not in conflict with or inconsistent with, or preempted by, any law..."
- D. As noted above, several provisions of the Education Code permit school districts to impose charges or fees, e.g.: Section 35330 (field trips and excursions), Section 48909 (charge for lost textbook), Section 35335 (school camps), Sections 32220-32224 (requires members of athletic teams to purchase death, accident and hospital insurance), Section 40015 (deposit for use of a school musical instrument), Section 39804 (pupil transportation), and so forth. In

his separate opinion, in which he concurs in the judgment, Justice Kaus raised the question whether, under the decision, any of the statutory fees and charges (Paragraph II, supra) would be unconstitutional. Because none of the statutory fees were in issue, the court made no ruling in that respect. The Hartzell decision is binding precedent for invalidation of any non-statutory fees of the type examined by that court. Except for home to school transportation fees (Section 39807.5), the constitutionality of the statutory fees and charges is yet to be judicially decided.

- E. In a footnote the lead opinion states that the: "[e]ducational activities are to be distinguished from activities which are purely recreational in character. Examples of the latter might include attending weekend dances or athletic events." This statement may cause future litigation on the issue of whether the challenged fee based activity is educational or recreational. The issue is complicated by the fact that while citing an athletic event as possibly being recreational, the court invalidated a fee based athletic activity because it was held to be educational. This could be reconciled by interpreting the footnote as allowing a fee if the participation is solely as a spectator.
- F. The defendants argued that their fee-waiver policy for needy students satisfies the requirements of the free school requirement. They suggested that the right to be educated at public expense amounts merely to a right not to be financially prevented from enjoying educational opportunities. The court answered that such an argument plainly contradicts the plain free school language of the Constitution.

V. Home to School Transportation Fees

Education Code section 39807.5 allows school districts to charge parents a fee for home to school transportation provided to their children by the district. On a constitutional challenge the California Supreme Court in Arcadia School District v. State Department of Education,⁶ upheld the transportation fee statute. According to the court, permitting school districts to charge parents and guardians for the transportation of students to and from school does not violate the California Constitution free school guarantee. Unlike the extracurricular activities held to be free in Hartzell v. Connell (supra), transportation is neither an educational activity nor an essential part of school activity. Home to school transportation is not included within the free school guarantee.

⁶² Cal.4th 251 (1992)

VI. Tuition for Summer School

No statute specifically authorizes tuition for summer school. Therefore, tuition or any fee or charge is prohibited under Section 350 of Title 5 California Code of Regulations (*supra* at page 1), which according to the court in Hartzell v. Connell (*supra*), is a law within the meaning of the so-called permissive provisions of Education Code section 35160.

VII. Community Service Classes

The governing board of a school district is authorized to maintain community service classes and to charge fees to cover the costs of maintaining such classes (Education Code sections 51810 and 51815). These classes may be convened at any time during the school year as may be determined by the governing board (Education Code section 51812).

Community service classes are not intended to teach required courses that students in grades K-12 must complete as part of their instructional programs. Community service classes usually include classes in music, drama, art, handicraft, science, literature, nature study, nature contacting, aquatic sports, athletics, and other such classes of general interest to the community (See Education Code, section 51810). These classes are primarily intended for adults and are open only to those minors whom the governing board believes will profit from such classes (Education Code, section 51811). It is the Department's position, therefore, that community service classes may not be used as summer schools for K-12 students, except for the incidental attendance of students with special interest in the subjects being taught.

VIII. Summer Schools Conducted Under Contract by Private Parties

The provisions of law relating to contracts whereby private parties conduct a portion of the educational program are not entirely clear. Neither the California Constitution nor the Education Code specifically prohibits contracts for educational services. Education Code section 35160 authorizes districts to engage in any activity not prohibited by law.

Section 6, Article IX, of the California Constitution prohibits a school district from transferring, directly or indirectly, any part of the public school system, or the placing of any part of the public school system under the jurisdiction of any authority other than a public school authority. This constitutional provision was explained in CTA v. Fullerton.⁷ That case involved a school district which let a contract for a private vendor to conduct its driver training program. The court held that the district had not transferred a part of the school system, but only a part of the curriculum. The court's reasoning is that the curriculum is only a function of the system and not a part of the system. This reasoning would seem also to validate contracting for a summer school program. However, in discussing this constitutional prohibition, the court stated that the Constitution would be violated if the control and management of the driver training program were to be transferred to a private authority. This would be true because the various

⁷82 Cal.App.3d 249, 1978

administrative units authorized to maintain and administer the curriculum with the public school system constitute, along with the curriculum, a part of the system. Thus, contracting for a summer school program would be valid under Article IX, Section 6 only if the school district maintains exclusive control and management of the educational program.

The requirement for the maintenance of control and management, however, places the contracting district in a legally impossible position when tuition fees are charged. If the contractor providing the program charges tuition the district might thereby be in violation of the prohibition against tuition charges.

IX. Leasing School Buildings for Educational Use.

The Education Code provides authority for school districts to lease, or allow the use of, unneeded school buildings and classroom space, or to enter into joint occupancy or joint use agreements with private entities including private schools. (Education Code sections 39360, 39379, 39380, 39381, 39440, 39444, 39470, and 40040, et seq.)

When authorizing school buildings to be used by another entity for a summer school program, however, the district should consider the following:

- A. When leasing to a sectarian organization, the district must avoid violating the religious establishment prohibition of the First Amendment to the United States Constitution. According to the California Attorney General, a school district cannot lease or loan vacant classrooms to a sectarian institution for religious purposes while public school is concurrently in session.⁸
- B. The use granted under the Civic Center Act must not result in a monopoly for the benefit of any person or organization. (Education Code section 40041 et seq.) (Effective 1/1/98 renumbered to 38130)

X. Charter Schools.

Education Code section 47605(d) prohibits a charter school from charging tuition, but does not mention fees or other charges. Should it be argued that a certain educationally based fee or other charge is not in the nature of a tuition, the charter school would, nevertheless, be prohibited from assessing them. Although a charter school is exempt from the laws governing school districts (Education Code section 47610), the California Constitution, which is the highest law of the state, cannot be rendered inapplicable by the Legislature. Therefore, any tuition, fee or other charge relating to the charter school's educational program is prohibited by the free school guarantee of the California Constitution Article IX, Section 5, as interpreted in Hartzell v. Connell, supra.

⁸60 Ops. Cal. Atty. Gen. 269