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LEGAL UPDATE

May 10, 2004

To: Superintendents, Member School Districts (K-12)

From: Nancy L. Klein, Associate General Counsel

**Subject: Reauthorization of Interdistrict Transfer and Attendance Statutes
Memo No. 5-2004**

Recently the Governor signed AB 97 reauthorizing “District of Choice” as an interdistrict transfer option. AB 97 also made operative SB 140, which reauthorized interdistrict attendance based on child care needs (Ed. Code sec. 46601.5 and parent or guardian employment (Ed. Code sec. 48204(b).) Statutory provisions pertaining to students residing with care giving adults and homeless students are also summarized below.

1. **Child Care Needs.** (Ed. Code secs. 46600 et seq.) With the permission of their district of residence and the receiving district, students may transfer to another school district. A district may establish lawful, non-discriminatory criteria for the acceptance or denial of an interdistrict transfer request. If a request is denied, the parent or guardian may appeal the denial to the county board of education.

When considering an interdistrict transfer request, a school district is “*encouraged* to give consideration to the child care needs”¹ of students and “*encouraged* to allow [students] to remain continuously enrolled ...if the parent so chooses.”² (Ed. Code Sec. 46601.5(b).) A high school district whose feeder elementary school has entered into an interdistrict

¹ Section 46601.5, subdivision (a), formerly provided that a district “*shall*...give consideration to the child care needs of the pupil.”

² The former statute provided that a district “*shall allow*” a student to remain continuously enrolled.

attendance agreement based on child care needs is similarly “encouraged” to allow students to attend school through 12th grade.³ (Ed. Code Sec. 46601.5(c).)

Once admitted based on child care needs, K-6 students “may not be require[d]...to reapply...unless [they] cease to receive child care in the district...”⁴ (Ed. Code sec. 46601.5(b).) In contrast students granted interdistrict transfers on other bases (e.g., to allow a student to participate in a special program) must reapply each year unless the sending and receiving districts specifically agree otherwise.

For students admitted or seeking admission based on child care needs the right to enroll or remain enrolled may be denied or discontinued where 1) the net transfer out of students would exceed specified statutory limits, 2) the transfer would negatively impact court-ordered or voluntary desegregation plans, or 3) additional costs would exceed state aid received as a result of the transfer. (Ed. Code sec. 48204(b)(1)-(6) and 46601.5(b) and (c).)(See Costs vs. Programmatic Availability, below.)

2. **Parent/Guardian Employment within District.** (Ed. Code sec. 48204(b)) Parents and guardians may request to transfer their elementary school-aged students to the school district in which their place of employment is located. School districts are not required to admit students based on a parent/ guardian’s employment within district boundaries but may not deny a request for discriminatory or arbitrary reasons. Once admitted, the receiving district “*may deem* a [student] as having complied with the residency requirements for school attendance...”⁵ (Ed. Code sec. 48204(b).)

The Education Code does not define the term “employment,” but the California Department of Education in an Advisory Opinion dated June 19, 1989, concluded that the term is intended to apply to “actual employment which requires substantial periodic presence in the receiving school district during the school year.”

Once admitted, students are not required to reapply in subsequent years and are entitled to continue to attend school in the district through 12th grade if the parent/guardian continues to be employed within district boundaries. (Ed. Code sec. 48204(b)(7).)⁶

Employment-based transfers may be denied or discontinued where 1) the net transfer out of students would exceed specified statutory limits, 2) the transfer would negatively impact court-ordered or voluntary desegregation plans, or 3) additional costs would exceed state aid received as a result of the transfer. (Ed. Code sec. 48204(b)(1)-(6).) (See Costs vs. Programmatic Availability, below.)

³ The former statute provided that a district “*shall allow*” a student to attend through 12th grade.

⁴ The express requirement that students continue to receive child care services within the district to be eligible for attendance is new.

⁵ The previous version of this statute, which was codified at Education Code section 48204(f), provided that students admitted based parent/guardian employment within the district “shall be deemed to have complied with the residency requirement.”

⁶ The previous version of this statute, sometimes referred to as the “Allen Bill,” did not expressly condition the right to attend in future years on the parent/guardian’s continuing employment within district boundaries.

3. **District of Choice.** (Ed. Code secs. 48300 et seq.) By resolution a school district may elect to accept up to a specified number of students from other districts. The students must be “selected through a random, unbiased process...,” except that siblings of students already enrolled are entitled to priority. (Ed. Code secs. 48301(a) and 48306.) Once accepted, the students’ right to attend in subsequent years “will be renewed automatically for each year unless the school district of choice though the adoption of a resolution withdraws from participation. ...” (Ed. Code sec. 48209.9(d).) In such event high school students admitted to a district of choice “may continue in attendance until they graduate.” (Ed. Code sec. 48209.9(d).)

Either the district of choice or the district of residence may prohibit or limit the number of transfers if the governing board determines that the transfer would “negatively impact” the district’s court-ordered or voluntary desegregation plan or the racial and ethnic balance of the district. (Ed. Code sec. 48301(b).)

A district may deny a transfer “if [it] would require the district to create a new program to serve [the student].” (Ed. Code sec. 48303(a).)(See Costs vs. Programmatic Availability below.)

A district must deny a transfer if it “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 the that attendance area or is currently enrolled in that school. (Ed. Code sec. 48304.)

4. **Care giving Adult.** (Ed. Code sec. 48204(d)) Students who live in a care giving adult’s home located within a school district’s boundaries are entitled to attend school in that district. The execution of an affidavit under penalty of perjury is a sufficient basis for determining that a student lives in the caregiver’s home, unless the district “determines from actual facts that the [student] is not living in the caregiver’s home.”

School district approval or consent is not required for a student to attend a district school based on a care giving adult’s affidavit.

5. **Homeless Children.** (42 U.S.C. 11432(g).) Homeless⁷ students are entitled to continue to attend their “school of origin”⁸ (a) for the duration of homelessness, if a student becomes homeless between academic years or during an academic year, or (b) for the

⁷ “Homeless” students mean individuals who lack a fixed, regular and adequate night time residence and includes children who are sharing housing of other persons due to loss of housing, economic hardship or other reason; are living in motels, hotels, trailer parks or camp grounds due to lack of alternative adequate accommodation; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement; children whose primary night time residence is a public or private place not designed for or ordinarily used as a regular sleeping accommodation (e.g., cars, parks, abandoned buildings, bus or train stations; and migratory children). (42 U.S.C. 11434(a).)

⁸ The school the student attended when permanently housed or the school in which the student was last enrolled.

remainder of the academic year, if a student becomes permanently housed during the academic year. Homeless children also are entitled to attend school in the district where they are personally present with the intent to remain but not necessarily the intent to remain permanently.

School district prior approval or consent is not required for a student to attend a district school based on homeless status.

Establishing School Capacity

For purposes of transfers or attendance based on 1 or 2, above, the governing board may establish a definition of capacity that differs from limits established for class size reduction, collective bargaining agreement, programmatic and other lawful purposes. For example, for transfer purposes a governing board may adopt a policy establishing a capacity of 18 students per class in grades K-3 to ensure that sufficient space will be available for students who physically reside within the district. The capacity established by policy may operate to deny a special needs student's transfer request provided the district similarly applies the policy to non-special needs students.

Programmatic Capacity

By local policy a school district may deny transfers based on 1 or 2, above, if it will cause the district to exceed the maximum student-to-staff ratios (e.g. RSP or speech and language therapist caseloads), or other program limits as established by statute, policy or local agreement.

The Right to Attend a School in the District

Interdistrict transfers or attendance based on 1, 2, or 3, above, establishes a student's right to attend one of the district's schools, not a particular school. By policy a district may assign such students to any district school where grade/class or school capacity permits and may transfer such students to a different school to accommodate students who later move into the attendance area of an impacted school.

Students residing with a care giving adult should be assigned to the school in the attendance area where the care giving adult lives.

Homeless students are entitled to attend their "school of origin" or in the district where they are personally present and intend to remain.

Preferences

In connection with intradistrict ("open enrollment") requests made pursuant to Education Code section 35160.5 districts are authorized to give preference to siblings already in attendance at a school and to a student whose parent or guardian is assigned to a school as his/her primary place of employment. (Ed Code Sec. 35160.5(3)(D).) By local policy districts may institute similar preferences when considering interdistrict transfer requests and parent/guardian employment-based requests.

Costs vs. Program Availability

When considering whether to approve a transfer request based on 1 or 2, above, a school district may consider whether it has the programs and services required to serve that student. If, as a result of a transfer, the district would have to create a new program or obtain/offer new services not currently provided in the district, the district may deny the transfer request. Any policy calling for denial of transfers for programmatic/service reasons must be narrowly drawn and applied in the same manner to all students – regular and special needs alike.

It is critical that districts distinguish between a programmatic/service-based policy and a cost-based policy, the latter of which provides for denial of transfers on the ground that the cost of educating the student exceeds the amount of additional state funding the district would receive as a result of the transfer. Although not facially discriminatory, a cost-based policy would have a disproportionately higher impact on special needs students and is unlikely to withstand judicial scrutiny. As a result, we do not recommend the adoption of cost-based policies.

Please call for assistance if you have any questions or desire assistance in reviewing or revising district policies and procedures.

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