



association of california  
school administrators

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## **ACSA SUPERINTENDENCY COUNCIL**

Wednesday, January 29th | 8:00am-10:30am

(Note: this is not a reimbursable meeting)

(Breakfast available from 7:30-8:00am)

**AGAVE ROOM, CONFERENCE CENTER SECTION OF THE HYATT HOTEL, INDIAN WELLS**

**KATIE MCNAMARA, COUNCIL PRESIDENT**

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### **AGENDA**

#### **1.0 WELCOME/CALL TO ORDER**

#### **2.0 DISCUSSION ITEMS**

- 2.1 Identification of Pressing Issues | *Katie McNamara*
- 2.2 State Budget Update and Analysis | *ACSA Governmental Relations Staff*
- 2.3 Potential Elimination of SAT/ACT in College Admissions | *Edgar Zazueta, Sr. Director, Governmental Relations*
- 2.4 Learning Lab | *Morgan Polikoff – USC Rossier School of Education*
- 2.5 Negotiations Support Tool Kit | *Wes Smith, ACSA Executive Director*

#### **3.0 REPORTS/UPDATES**

- 3.1 2020 Legislative Outlook | *Edgar Zazueta*

#### **4.0 FUTURE AGENDA ITEMS**

#### **5.0 ADJOURNMENT**

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#### **FUTURE MEETING DATES:**

**\*March 18, 2020** ACSA (Sacramento Office), 10:00 a.m.-2:00 p.m.

**\*April 22, 2020** ACSA (Sacramento Office), 10:00 a.m.-2:00 p.m.

**\*Reimbursable meetings**

January 27, 2020

The Honorable \_\_\_\_\_

Member of the \_\_\_\_\_

State Capitol, Room \_\_\_\_\_

Sacramento, CA 95814

Subject: AB 5-Urgent Need to Amend AB 5

Dear \_\_\_\_\_:

On behalf of the , I am writing to express the urgent need to amend AB 5, passed by the Legislature, signed by the Governor and became law on January 1, 2020.

When the Legislature enacted AB 5 it sought to put a halt to the exploitation and misclassification of workers as independent contractors which caused these workers to lose significant workplace protections. AB 5 did not expressly state whether AB 5 was meant to apply to public employees but at least one state agency has stated on its website that AB 5 does apply to public employees.<sup>1</sup> The uncertainty as to whether AB 5 applies to public employees will lead to costly and unnecessary litigation that will divert valuable taxpayer funds from the classroom and harm public education. At a minimum, the Legislature should clarify whether AB 5 applies to public employees.

In deciding whether AB 5 should apply to public employees, the Legislature should keep in mind the main goal of AB 5 was to prevent the misclassification of workers as independent contractors, therefore, the Legislature should consider the laws and regulations that are already in place to protect public employees and the unique mission and role of public education. The public sector and school districts, in particular, are highly regulated entities with numerous provisions in the Education Code and Government Code which regulate their employment practices.

The Educational Employment Relations Act (EERA) that is found in the Government Code, for example, established a system of collective bargaining that has been in place for more than 40 years. Pursuant to the EERA, most school districts have entered into collective bargaining agreements with certificated and classified employees that contain limits and procedures for contracting out work to independent contractors. The purpose of the collective bargaining provisions is to protect the jobs of school district employees and avoid the misclassification of workers as independent contractors by school districts.

In addition to the protections in collective bargaining agreements, school district employees are protected by provisions in the Education Code that place limits on contracting with independent contractors. Education Code section 45103.1 requires an extensive cost savings analysis to be completed before a school district can contract with an independent contractor to perform services.

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<sup>1</sup> The Labor and Workforce Development Agency, on its website at [www.labor.ca.gov/employmentstatus/faq](http://www.labor.ca.gov/employmentstatus/faq), has posted Frequently Asked Questions on AB 5. The answer to Question 13 states that AB 5 applies to public agencies.

In short, the Legislature has already enacted protections for school district employees in the form of collective bargaining, provisions in the Education Code limiting the ability of school districts to contract out services, and protections for the discipline and dismissal of school district employees, including tenure and evidentiary hearings for dismissal for cause.

The restrictive ABC test in AB 5 will hamper the ability of school districts to hire educational consultants as independent contractors to provide in-service training to teachers. These educational experts typically provide one or two day trainings on curriculum and effective teaching and classroom management techniques that are invaluable to teachers and instructional aides seeking to raise the academic achievement of students. Furthermore, school districts would be unable to contract with tutors who work directly with students in the K-12 setting. And, our retirees working under their STRS/PERS limitations would be required to be re-classified as employees posing a significant on STRS/PERS.

AB 5 would hamper the ability of school districts to hire psychologists, speech therapists, physical therapists, occupations therapists, and other professionals to provide federally required educational services to special education students when school district employees are not available or when special expertise is needed. AB 5 would hamper the ability of school districts to combat the rise in student suicides by restricting the ability to contract with mental health consultants to train school district employees in identifying students at risk for suicide. Independent consultants are needed by school districts to provide these services and to handle temporary spikes in demand for these services.

For these reasons, ACSA urges you to support amendments to AB 5 that will exempt school districts from the restrictive requirements of AB 5 and instead return our employment protections outlined in the Education and Government Codes and Borello. This will allow school districts to fulfill their mission of educating our youth and raising academic achievement.

Sincerely,

## Draft AB 5 Talking Points

- The ***Dynamex*** court case addressed the mis-assignment of independent contractors in private sector employment. AB 5 was introduced to codify this court decision. The CA Employment Development Department states on its website that AB 5 applies to public agencies.
- CA school districts are already highly regulated with numerous employee protections found in both the Education and Government Codes. (California's Educational Employment Relations Act, EERA, was passed in 1976.)
- In 1992, the CA Legislature added Education Code Section 45103.1 to limit the ability of school districts to contract with independent contractors for services.
- Because school districts engage in collective bargaining with our employees, we are required to negotiate the particulars around contracting out to ensure our employees are not displaced.
- School districts will be forced to violate federally required special education services for students who qualify for special education OR be in violation of AB 5.
- Due to the current labor shortage, school districts must contract out for services to be in compliance with a student's IEP. This can include services by speech language pathologists, physical therapists, nurses, psychologists, counselors, mental health professionals, occupational therapists, and more, who want to remain independent contractors.
- AB 5 impacts the ability for school districts to hire mental health experts and suicide prevention specialists as independent contractors to come into schools to train school personnel or to work with individual students.
- AB 5 impacts the ability for school districts to hire educational experts to provide professional development to teachers in teaching methodology, classroom management, literacy coaches, technology, etc. since they won't meet the ABC test. The Education Code already limits the ability of school districts to hire temporary employees to conduct one or two day workshops only.
- AB 5 has a direct impact on the academic achievement of our students by eliminating the ability to provide experts to provide services to teachers, classified employees and students, without becoming employees even though their services are needed only intermittently.
- School districts aggressively recruit potential employees particularly in shortage areas. School districts are often unable to compete financially with other businesses, agencies, or with the flexibility of being an independent contractor. It is not unusual for a school district to post jobs for months for nurses, speech language pathologists, bus drivers and more without anyone applying.
- CA School districts are not only experiencing a teacher shortage but also a classified employee shortage.

- School districts will be unable to provide translators or interpretation services to parents and students unless these individuals become employees of the district. Their services are provided on an as-needed basis.
- School districts are facing the financial increase of business-to-business services since the additional costs for employment are being passed through to school districts.
- Legislature continues to add services for students to be provided with yet AB 5 will prohibit our ability to provide those services. (Examples: mental health, threat assessment, bullying, suicide prevention.)
- AB 5 is not in the best interest of students, the primary focus of our work. It will result in a decrease in student outcomes as districts will face a lack of services, tutoring, employee training, mental health interventions, compliance with special education mandates, and so much more.

Provide number of employees you currently employ, number of vacancies and in what subjects/jobs, and if relevant, how long some of the openings have been posted.

## **PREPARING FOR THE IMPACT OF AB 218**

AB 218 (Gonzalez) was signed by the Governor and became law on January 1, 2020. The bill extends the statute of limitations to bring a civil action against an employer, including school districts, where there has been a claim against an employee of that district for alleged child sexual abuse. ACSA has compiled some helpful tips on best practices and resources to help prepare you for the expected increase in sexual assault claims.

### **Things to know about AB 218:**

- Statute of limitations for childhood sexual assault and molestation is extended by 22 years from the date an individual attains the age of majority (40 years old) or within five years an individual discovers that their current psychological injury or illness was caused by a sexual assault occurring before the age of majority.
- Claims, including retroactive claims, can be filed starting January 1, 2020. There is a three-year retroactive window opened that permits old claims to be revived including claims that would otherwise be barred because of applicable statute of limitations for which no monetary damages were collected.
- AB 2218 claims targets will be public entities, including Local Educational Entities, LEAs.
- Older claims will likely be more difficult and expensive to defend since records or witnesses may not be found.
- Because there may be a lack of documentation from many years prior, the process could be exploited and fraudulent claims be filed. The public may opine that your district has harbored sexual predators when in fact you are forced to settle a claim without evidence available to disprove it.
- LEAs need to be aware and prepared for claims that pre-date the existence of your risk pool.
- Treble damages can be imposed if any effort to conceal can be proven. These damages may not be covered by a pool, excess pool or reinsurance and are ultimately the responsibility of the public entity to pay.
- AB 218 sets a lower standard to establish employer liability. Prior to AB 218, a victim could bring a civil suit a person or entity after the plaintiff attains the age of majority if they allege that the employer had some reason to know of “unlawful sexual conduct” by their employee, volunteer, representative or agent **AND** the employer failed to take action to prevent the abuse. AB 218 changed the **AND** to

an OR which eliminates the requirement that the employer have knowledge thereby creating a standard similar to strict liability, regardless of knowledge of or reasonable steps taken to safeguard students.

### **Consider the following:**

- Review your policies, procedures, practices and training materials relating to hiring and student/child supervision.
- Update training on early identification or possible grooming activities physical boundary violations in order to prevent abuse, mandated reporting, response procedures.
- Develop a communication plan with students and families (who is responsible for and content of the communication).
- Adopt and enforce a zero-tolerance policy for student sexual harassment/assault/abuse.
- Tighten site access (i.e. control of all visitors, tradespersons, vendors, volunteers, walk-on coaches, etc.).
- Elevating the Profession Through Educator Ethics is a micro-credential based on the Model Code of Ethics for Educators, MCEE. It was developed by the National Education Association in partnership with Digital Promise and was created by educators for educators. The program is free and is another opportunity to show your district is doing everything possible to prevent student assault.
- Identify potential victims from old cases such as those that were rejected due being time-barred.
- Identify if previous insurance companies are still in business. If so, be aware that the “year of claim” may not have coverage to current levels.
- Inform your various membership association of the impact of AB 218 on your LEA. (loss of insurance coverage, insurance cost increases, number of claims and outcomes, etc.).

Please note, this is not an exhaustive list nor is it to be construed as legal advice. Please contact your legal counsel should you have questions.