

Trygstad, Schwab & Trygstad

A LAW CORPORATION

TO: CTA Members
FROM: Richard J. Schwab, Lawrence B. Trygstad and Shanon D. Trygstad, Law Offices of Trygstad, Schwab & Trygstad
RE: **WHAT MEMBERS NEED TO KNOW ABOUT THEIR RIGHTS AND RESPONSIBILITIES [REVISED EDITION 2006]**

The purpose of this handout is to heighten awareness and understanding of what members need to know. It serves as a practical aid for often asked questions about child abuse, harassment, STRS and other subjects. This handout provides an overview of the laws, practices and procedures in order to keep our membership current with the frequent changes in the statutes, case law and administrative regulations. It is our hope that you will find this handout helpful in serving your school.¹

I.

WHAT TO DO WHEN A MEMBER IS ACCUSED OF CHILD ABUSE

First and foremost, the members, if accused of abuse, should immediately contact our office. We are now dealing with possible criminal charges as well as professional disciplinary action (dismissal and/or credential revocation) and civil lawsuits for damages. Moreover, they should not discuss the charges with any law enforcement officer without first obtaining legal assistance, and never consent to a polygraph (lie detector) examination. There are basically two reasons for this advice. The consequences of making an inadvertent, albeit innocent, statement could lead to criminal charges, loss of employment, and revocation of the teaching credential. Second, our members are professionals and should be treated with dignity. The mere fact that a student makes an allegation is no reason for the member to have to automatically allow law enforcement to pry into his or her private affairs, force them to take a polygraph, and prove their innocence. Often times a reasonable reply to the charges through the assistance of counsel can diffuse a potentially dangerous threat of criminal prosecution and loss of career. Early intervention is the key to a good result.

A member threatened by child abuse allegations should be aware of the following:

1. Under Education Codes Sections 44807, 49001, and Penal Code Section 11165.4, a teacher is not subject to criminal prosecution for exercising the type of control over a student that a parent would have under similar circumstances.
2. If a student who is making the charge was about to be disciplined for inappropriate conduct, make sure that the paper work for discipline against the student is

¹Members and their families are also entitled to a 30 minute consultation on any non-employment questions such as: defense of criminal charges, personal injuries, (car accidents, trip and fall, premises liability, assault and battery, medical malpractice, insurance bad faith, defamation and product liability), family law (dissolution of marriage, paternity, child custody), wills, estate planning, probate, real estate, contracts and defense of law suits

completed.

3. Never be alone with a student in a classroom. Always make sure others are present.
4. Avoid using any physical force on a student unless it is necessary for the protection of the student or others who may be affected. Also reasonable restraint may be used to quell a disturbance, confiscate dangerous objects, or to prevent serious injury.
5. If students seek help for personal problems, refer them to a counselor. If that is not possible, listen to the problem, but immediately report it to the school psychologist, etc.
6. Do not meet with the child and attempt to get a retraction of the charges. This can be interpreted as consciousness of guilt. Never refer to students by informal or pet names such as Darling, sweetheart, cutie, etc.

II.

WHAT ARE THE RIGHTS OF MEMBERS IF THEY ARE THREATENED OR HARASSED BY STUDENTS OR THE PUBLIC?

Often times teachers and/or support service staff are victimized by their students or outside agitators. When, and if this occurs, there are viable Code sections that can be relied upon to assure the protection of our membership. They are as follows:²

1. Education Section 44810 - Any person over sixteen who is not a pupil who interferes with school activities is guilty of a misdemeanor. In 1999, the legislature amended this law to mandate jail time for multiple offenders.
2. Education Code Section 44811 - Parents, guardians or other persons whose conduct materially disrupts class work or extracurricular teaching activities is guilty of a misdemeanor. In 1999 the legislature amended this law to mandate jail time for multiple offenders.
3. Penal Code Section 626.2 - Any student returning to campus without authorization after suspension or expulsion may be guilty of a misdemeanor.
4. Penal Code Section 626.6 - Persons not a student, officer or employee who interfere with peaceful conduct of campus activities who, after being asked to leave, refuse or reenter the campus are guilty of a misdemeanor.
5. Penal Code Section 627.2 - Any outsider who enters or remains on school grounds during school hours without registering with the principal is guilty of a misdemeanor.
6. Penal Code Section 626.8 and Education Code Section 32211 - Any person who comes on to school premises without lawful business or who interferes in school activities or fails to leave the premises is guilty of a misdemeanor.

²Many of the protections offered to teachers have been laws and causes handled by your union.

7. Penal Code Section 653(g) - Any person who loiters about a school campus after being asked to leave is guilty of a misdemeanor.
8. Education Code Section 32210- Any person who willfully disturbs any public school is guilty of a misdemeanor.
9. Penal Code Section 415.5 - Any person, except a registered student, who fights, disturbs or uses offensive language is guilty of a misdemeanor.
10. Penal Code Section 626.10 - Any person who brings or possesses a lethal weapon on a school campus is guilty of a misdemeanor.
11. Penal Code Sections 240, 241.2, 242, and 243.2 - Any person who commits an assault and/or battery against another is guilty of a misdemeanor.
12. Education Code Section 48905 - Any certificated employee whose person or property is injured or damaged by the willful misconduct of a pupil while on campus or during a school activity can request the school district to pursue legal action on a pupil who caused injury or damage.
13. Education Code Section 48900 and 48910 - Expulsion or suspension of students who among other grounds attempt or cause physical injury, damage to property or are habitually disruptive.
14. Education Section 48904 - Parent liability up to the amount of \$7,500 for the willful and intentional injury by a minor pupil on school campus to any pupil or school employee.
15. Education Code Section 51512 - Prohibition against secret surveillance or recordings in the classroom without consent.
16. Education Code Section 49079 - Right to know about dangerous students enrolled in your class.
17. Civil Code Section 1714.1 parent or guardian liability up to \$25,000.00 for willful misconduct of a minor.

As can be seen from the above, there are many protections for teachers and service support staff. However, the problem of obtaining the cooperation of the school administration and police departments to seriously enforce these laws can present an impediment. Thus, members may want to seek their own civil harassment restraining order. Members are encouraged to contact this office for advice and guidance.

III.

MEMBER'S CHILD ABUSE REPORTING REQUIREMENTS

The primary legal obligation set forth in Penal Code Section 11165, et seq., is a REPORTING duty. Teachers and other designated school personnel must:

1. report by telephone or writing immediately to child protective agency any known or suspected incidents of child abuse and submit a written report within 36 hours of receiving the information on the incident [Pen. Code ' 11166(a)]; and

2. if first employed after January 1, 1985, sign a form acknowledging the reporting requirements of Penal Code Section 11166 and that she/he will comply [Pen. Code ' 11165.5].

The reporting duty is a serious obligation. A teacher who fails to report a known or suspected incident of abuse of a child under the age of 18 will be subject to criminal penalties [Pen. Code ' 11172(d)]. "Child abuse" includes physical injury, pain or neglect, sexual assault, and emotional abuse or neglect.

It is important to realize that the reporting responsibility is an individual duty. No one, including other school personnel, may impede or prohibit an individual from performing the legal obligation to report [Pen. Code ' 11166(0)]. A teacher is not liable for reporting [Pen. Code ' 11172].

It should be emphasized if a principal, central office administrator, or any other person attempts to stop a teacher from reporting as required by law, this should be reported immediately to the district attorney or other appropriate law enforcement official [Pen. Code ' 11166(f)].

IV.

DISABILITY RIGHTS UNDER STRS

What Members Need to Know About Their Rights With Regard to Disability Benefits Under STRS

Many teachers are unaware of the benefits available to them under the State Teachers Retirement System if they become disabled. Unlike workers' compensation, a disability need not be work-related in order to qualify for disability benefits under the State Teachers Retirement System. A teacher, for example, who fell at home and, as a result became disabled, would be eligible. The law provides that disability benefits are available to qualified members of STRS who have a medically determinable physical or mental impairment which prevents them from performing their usual duties and prevents them from performing duties of a comparable level for which they may become qualified in a reasonable period of time through a program of education, training and experience. This medically determinable physical or mental impairment must be expected to last continuously for at least twelve months.

In order to be eligible for a disability allowance a teacher must have five or more years of credited service with the STRS, unless during the course and scope of their employment they were the object of an act of violence. All teachers hired after October 15, 1992, are automatically enrolled in Plan "B". A few years ago, teachers were given their choice of selecting either Coverage A which is entitled "Disability Allowance Program" or Coverage B which is entitled "Disability Retirement Program." Set forth below is a brief description of each program. Members who qualify under the Collective Bargaining Agreement are entitled to receive District Health Benefits for the rest of their lives.

Coverage A Disability Allowance Program

1. *Death payment \$5,000.*
2. *Members receive 50% of their final compensation; unless over age 45 with less than 10 years of service credit, then they receive 5% of their final compensation for each year of service credit.*

3. *Must be below age 60 to apply.*
4. *Additional 10% of final compensation increment for eligible children. Payable to age 18 or 22, if a full time student.*
5. *The allowance, including the children's portion, is reduced by benefits paid or payable for the same impairment by other public systems, such as Social Security and Workers Compensation.*
6. *No joint and survivor option available while on a Disability allowance.*
7. *Upon conversion to Service Retirement at age 60, member receives lesser of the Service Retirement or Disability allowance payment.*
8. *Those whose earnings while on disability allowance exceed 66 2/3% of indexed final compensation over a continuous six-month period are removed from the allowance role.*

Coverage B
Disability Retirement Program

1. *Retired death payment \$5, 000.*
2. *Members receive 50% of their final compensation.*
3. *No age restriction for application.*
4. *Additional 10% of final compensation increment for eligible children, payable to age 21 (no full-time student requirement),*
5. *The member's portion of the allowance is reduced by benefits paid or payable for the same impairment by Workers Compensation only.*
6. *Joint and survivor option available. This reduces the monthly allowance, but would provide a lifetime monthly allowance to the option beneficiary upon the member's death.*
7. *No conversion at age 60, payable for duration of disability.*
8. *No limit on earnings for those enrolled in an approved STRS rehabilitation plan. If not in a rehabilitation plan, a set amount currently approximately \$16,950.00 per year. If that amount is exceeded, excess earnings are recovered by the STRS.*

It has been our experience that many members who apply for disability allowance often fail to understand the intricate procedures required and fail to present the best evidence of their disability at the time they apply. If unsatisfactory evidence is presented, the STRS will deny the application for disability allowance. Upon this denial the teacher has a right to an administrative hearing before an administrative law judge who then renders a proposed decision to the Teachers' Retirement Board. This decision may be accepted or rejected by the Retirement Board. Accordingly, it is in the disabled teacher's interest to present the strongest possible case at the outset, since an administrative hearing is both stressful and costly.

Accordingly, any member considering applying for a disability allowance should consult with our office before making an application.

RIGHTS OF MEMBERS WITH DISABILITIES

The federal American's With Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA) are the principal statutes that prohibit discrimination against individuals with disabilities. Generally speaking, a disability is:

- i. A physical or mental impairment that substantially limits one or more of an individual's major life activities;
- ii. A record of such an impairment; or
- iii. Being regarded as having such an impairment.

In the past several years, members have been placed on mandatory leave and forced to use their sick leave or be on unpaid leave. If wrongfully placed on leave or wrongfully denied their right to return from a disability leave because of disability discrimination, FEHA permits members to recover back pay, reinstatement of sick leave and other damages. Members have also been denied reasonable accommodation for their disability. Any member who is directed to meet with a school district physician in connection with a disability, should contact the union or this office for a consultation.

Problems have also arisen when members signed general releases for all of their medical records. Such a broad release may be an invasion of the member's privacy rights.

For example, if the medical issue involved is a physical problem, the District is not entitled to obtain records from a psychiatrist, psychologist or other therapists.

Members who have been discriminated against under the ADA and FEHA may recover back salary, benefits, general damages, as well as a return to their position.

VI.

PERMANENT TEACHER DISMISSAL CASES

Any tenured member who receives a Notice of Dismissal from the school district should immediately contact their association. Once a notice is given, a hearing must be demanded within thirty (30) days. Thereafter, a hearing is held before a Commission on Professional Competence. As a member, legal services are provided. Often times, early intervention can resolve a problem without the necessity of going through the administrative hearing. (See Education Codes ' 44932 - 44944) When there is a pattern of problems which indicates that a dismissal may be forthcoming it is essential to begin preparation by maintaining anecdotal notes, photographs of room environment (is the room inviting) and obtaining names, addresses and telephone numbers of potential witnesses. Also, where appropriate, to enroll and participate in relevant counseling or other treatment or assistance.

Also in a major Court of Appeal published decision (**ASHFORD** opinion) recently handled by this office it is now the law that a member cannot be subject to repeated hearings if the school district fails to prove its case of dismissal.

VII.

TEACHER CREDENTIAL CASES

When a member is charged with certain crimes, is suspended for more than ten (10) days, or resigns with dismissal charges pending, a report is automatically made to the Commission on Teacher Credentialing. In addition, school district officials often notify the Commission on Teacher Credentialing of any alleged conduct by a member which would affect a member's fitness to retain his or her credential. Even conduct outside of the school setting can be a source for a credential review and disciplinary action. Accordingly, any member who receives a letter from the Commission on Teacher Credentialing concerning any criminal charges, criminal convictions, or allegations made by other school personnel or members of the public, should immediately contact our office. Members who qualify are provided services to defend against these charges.

VIII.

PROFESSIONAL INSURANCE COVERAGE

Members who are arrested or charged with crimes, should also immediately contact our office or their association for advice since every criminal case is a potential credential and/or dismissal case. Moreover, if the charge involves child abuse or other conduct with a student, there is a potential civil law suit against the member. Members have a \$1,000,000.00 liability policy to provide for their defense of civil suits arising out of educational employment activities. In addition, members can be reimbursed up to \$35,000.00 for attorney fees if charged with an employment related criminal proceeding. The only exception is that any criminal matter involving school personnel (colleagues, administrators, classified) is not covered under the policy.

IX.

MEMBER'S AWARENESS OF SEXUAL HARASSMENT

Sexual harassment is unwelcome sexual advances, requests for sexual favor, and other verbal or physical contact of a sexual nature.

There are two (2) types of sexual harassment recognized both under federal and California Law:

- (a). Quid Pro Quo
- (b). Hostile work environment

All members especially need to be made aware of their obligation to supervise and take appropriate action to control any form of sexual harassment in the classroom.

In order for a member to avoid being accused of sexual harassment, it is best to limit or eliminate physical contact with students (unless absolutely necessary); maintain space or distance when dealing with students, and use good judgment when conversing with students, especially when sensitive topics arise.

When and if a member is accused or wishes to complain about sexual harassment by administrators or other school employees, the School District provides an administrative review procedure. Any member victimized by sexual harassment should immediately contact our office for a consultation. There are time limits for filing complaints that must be followed.

X.

WHEN MEMBERS ARE SUFFERING FROM MENTAL DISABILITY/POSSIBLE STRS DISABILITY

Should any member be requested or directed to meet with a school district physician, they should be advised to contact the union for a consultation.

No member should meet with a school district physician or sign any general releases without obtaining advice about their rights.

Under California law, Education Code Section 44942 provides a specific procedure the District must follow if a teacher claims he / she has a mental disability. A member with a mental disability can qualify for STRS Disability Benefits. ADA and FEHA may provide additional rights and protections.

XI.

PRIVACY ISSUES REGARDING COMPUTERS AND PRIVATE CONDUCT

With the growth of technology at the school, in classrooms and in the home the use and misuse of computer hardware, software, the Internet and E-Mail has been a recent fertile source of criminal and professional prosecution. Please always remember there is no privacy on the computer. Whenever an E-Mail is sent or an individual is on-line both the employer and law enforcement may be monitoring. Thus never E-Mail or visit a site that you would not want to become public. Additionally, computer software which is pirated or not properly obtained can subject you, and the School District to criminal prosecution along with civil penalties (money damages). It is best to observe the following rules

Never visit Internet sites which contain pornography. There are State and Federal laws which prohibit and make crimes for viewing said sites. Often times these sites are monitored by law enforcement.

Never use School computers, at any time, for personal use or to visit adult sites. This includes E-Mails or using the computer for non-pedagogical purposes. There is a growing number of cases involving teachers using school computers or lap tops for personal use.

Never use software that is not properly licensed. If you observe that a school computer is using "pirated" software then immediately report it to an administrator or other District Official both orally and in writing.

Never E-Mail your students for personal reasons. The E-Mail to students should always be for school related purposes. This has also been a major source of criminal investigations and discipline.

The advancements in technology have been amazing. However with this growth, there is a measurable loss of privacy. Even in your home or at school during after hours, if you are using pirated software or visiting sites that are deemed pornographic you may be subject to criminal and professional sanctions. **Remember: Use the computer responsibly; "Big Brother" or your school district could be watching.**

Along with responsibility in the classroom all members should be mindful that even private family matters can be the basis for disciplinary action including loss of job and credential. Under Education Code Sections 44424 and 44425 if a certificated employee is charged and convicted of certain misdemeanor or felony offenses it could result in an automatic loss of both. For example a plea to certain types of nuisance crimes could ban you from teaching. (for example P. C. ' ' 647 (a), 314, 647.6) Also certain felonies relating to theft, assault or lewd acts may have permanent adverse consequences. This includes domestic violence, shoplifting, fighting etc. As a

professional all of your conduct in the classroom, at school or in your private life can endanger your career in teaching.

XII

WHAT TO DO IF THE DISTRICT DOES NOT TIMELY PAY YOUR SALARY INCREASE

The enactment of Education Code sections 45048 and 45049 now mandate that when a member who has filed proper documentation for a salary increase is not paid within three (3) pay periods or three (3) months, he/she is entitled to daily interest calculated from the date the increase was owed. Additionally, these enactments have been the underpinnings for possible legal action if the school district does not make your salary needs a priority. This is one of many successful legislative accomplishments by your union.

XIII

MEMBERS RIGHTS TO LEAVES OF ABSENCE AND TO RETURN FROM LEAVES OF ABSENCE

Every credentialed employee has 10 full days and either 90 days at one half pay (or in other Districts 90 differential days) for illness or injury. (Education Codes ' 44977 and ' 44978). Once an employee has exhausted full and differential illness days, a permanent employee is placed on an unpaid re-employment list for 39 months and a probationary employee for 24 months. If the employee does not return to active employment within 39 months, he or she is automatically separated from the School District without a due process hearing (Education Code ' 44978.1). Contact the Union if the District refuses to permit a return from a leave of absence.

Eligible employees may have rights to 12 weeks of unpaid job protected leave for specified family and medical reasons. Under the Federal Family and Medical Leave Act (FMLA) and California Family Right Act (CFRA) during the leave salary is not paid. However, the employee is entitled to health coverage.

Employees covered by State Disability Insurance (SDI) may receive up to 6 weeks of wages when taking time off. Most public educations do not pay into SDI. However, some employees may have made contributions to SDI before becoming an educator.

Employees may also have leave rights when injured at work. This would be handled by your Union=s Workers Compensation Attorney.

XIV

WHISTLE BLOWING

Public school employees who report improper government activity, @ viz. a violation of a state or federal law or regulation including such things as: corruption, theft, fraud, coercion, misuse of government property or willful omission to perform duty and are subjected to reprisal, personnel or disciplinary action or offer of benefit can file a complaint with the local law enforcement agency and then sue for damages.

CONCLUSION

All members at some time in their career may need assistance. Accordingly, there may be many questions to which you will need to respond. When in doubt, contact your union.

We hope that this handout is helpful. Our best to you for a successful and meaningful

school year.

Your Attorneys
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