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## LEGAL UPDATE

July 29, 2009

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

**From: Janna L. Lambert, Senior Associate General Counsel**

**Subject: Preliminary Injunction Challenges Sexual Harassment Policy  
Memo No. 21-2009**

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School districts are required by federal and state law to prevent sexual harassment as well as other forms of harassment in their programs and activities. "Sexual harassment" is defined as unwelcome conduct of a sexual nature under several conditions, including the following condition: "The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment." (Education Code, section 212.5(c).) School districts often use this same or similar language in their sexual harassment prevention policies. However, tension can arise between the obligation to prevent sexual harassment and the effect of sexual harassment prevention policies on free speech rights.

On July 10, 2009 the United States District Court for the Central District of California issued a preliminary injunction that prohibits the Los Angeles Community College District (LACCD) from enforcing its sexual harassment policy.<sup>1</sup> The case involves a student's claims that the policy violates his free speech rights. The part of the policy that the *Lopez* Court found most troubling involved the above-underscored language which is taken directly from Education Code, section 212.5(c).

The *Lopez* Court determined that this language is unconstitutionally vague, overbroad, and could improperly prohibit free speech. Although the July 10, 2009 order affects only the LACCD, it also raises concerns for both school and college districts which are required by the Education Code to use a definition that might subject their sexual harassment prevention policies to a constitutional challenge.

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<sup>1</sup> *Jonathon Lopez, et al v. Kelly G. Candaele, et al.*

The primary bases for the *Lopez* Court's concerns about the policy language were two-fold. First, the Court criticized a limitation on speech that "has the purpose" of causing a negative effect, "regardless of whether the speech actually has any effect."

Second, the Court considered the words "hostile" and "offensive" to be subjective such that "the Policy is so subjective and broad that it applies to protected speech." In particular, LACCD's policy did not contain both a subjective and an objective requirement for determining whether conduct created a hostile environment. Conduct must be both subjectively and objectively offensive in order to constitute illegal sexual harassment. The U.S. Department of Education, Office for Civil Rights (OCR) has verified its position that "the objective severity of harassment should be judged from the perspective of a reasonable person in the [victim's] position, considering 'all the circumstances.'"

The *Lopez* Court looked more favorably on a District statement that verified that discussion of "sexual ideas, taboos, behavior or language" in the context of academic freedom and class-related speech did not constitute sexual harassment. However, the Court found that this limitation on sexual harassment did not address similar "discussions in any public and common areas at LACCD."

The *Lopez* Court also noted that LACCD was unable to suggest alternative language that would cure the problems. Accordingly, the Court barred LACCD from enforcing or publicizing the Policy while the case proceeds.

It is important to recognize that the *Lopez* Court's preliminary injunction applies only to LACCD. Furthermore, the issuance of a preliminary injunction does not mean that the Court will ultimately determine the LACCD policy is unconstitutional. However, a preliminary injunction can only be issued if a court determines that a plaintiff can establish that "(1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm absent an injunction, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest." The *Lopez* Court found that these elements were present, suggesting that a final determination may include a finding of unconstitutionality.

We recommend the following actions for our member districts:

- Until there is a determination that the language of Education Code, section 212.5(c) is unconstitutional, districts should not remove such language if it is part of an existing policy. The cited language is established by state law governing school and college districts. The language also reflects federal regulations that implement Title VII, and Title VII applies to all districts as employers.
- Districts should ensure that their policies/practices require both a subject assessment and an objective assessment of whether challenged conduct creates a hostile environment or substantially interferes with an individual's work.
- Districts should consider specifically stating that their policies are not intended to intrude on free speech rights. Such a statement might include something similar to the following cautionary language used by the OCR: "Federal civil rights laws are intended to protect

students from discrimination, not to regulate the content of speech. OCR [The District] is sensitive to First Amendment concerns that may arise in the course of addressing sexual harassment complaints and takes special care to avoid actions that would impair the First Amendment rights of an institution's [its] students and employees.”

We will provide additional information on this issue as it becomes available. In the meantime, please contact any of our attorneys if you have questions regarding this matter.