TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79–520
of	:	August 14, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Edmund E. White Deputy Attorney General	:	

SUBJECT: AVERAGE DAILY ATTENDANCE—Education Code section 42239, which authorizes a school district to increase its revenue limit for a loss in average daily attendance, does not apply to a loss in average daily attendance occurring as a result of a school district unification.

The Honorable Iver E. Skjeie, County Counsel of Monterey County, has requested an opinion on a question that we have rephrased as follows:

Upon unification of a component elementary district of a union high school district where the unified district contracts to have its high school pupils attend the union district's high schools until its own high school building is completed, does the union high school district's loss of average daily attendance for purposes of Education Code section 42239 occur at the time the unification takes effect or does it occur at the time that the unified district's high school pupils cease attending the union high school district's schools upon termination of the contract?

CONCLUSION

Education Code section 42239, which authorizes a school district to increase its revenue limit for a loss in average daily attendance, does not apply to a loss in average daily attendance occurring as a result of a school district unification. Where it does apply, Education Code section 42239 takes effect in the budget year in which it is anticipated that there is a qualifying decrease in the average daily attendance figures that are reported to the State Department of Education as part of a district's second principal apportionment attendance report for that budget year.

ANALYSIS

Education Code[1] section 42239 operates to cushion the financial burden imposed upon school districts when they suffer a qualifying "loss in average daily attendance" by allowing a school district to count a percentage of its anticipated "lost" units of average daily attendance (hereinafter "ADA") for the purpose of determining its revenue limit during the budget year in which the loss occurred.

The question is posed in the context of the following submitted facts:

> "The North Monterey County Union School District was unified effective July 1, 1976, after approval of the electorate in that district on May 27, 1975. Prior to unification, that district was a component elementary district of the Salinas Union High School District (hereafter Salinas). Salinas educated 9th through 12th grade pupils from the North Monterey County District (hereafter North Monterey). The simple, practical effect of unification of the latter district was that North Monterey increased its educational programs from K-1 through K-8 to K-1 through K-12—in other words, it added a high school program. Since, however, North Monterey had no facilities for a high school, the pupils who would otherwise attend such high school continued to be educated by Salinas under a contract provision for actual costs of such education authorized for this purpose by section 46303. No facilities were transferred to North Monterey as a result of the reorganization, since the three high schools of Salinas are physically located within the boundaries of that district and were not affected by the reorganization.
>
> "North Monterey commenced construction of its own high school in 1976: During construction, North Monterey pupils continued to attend

[1] All unidentified section references are to the Education Code.

Salinas high schools. Construction was completed, and pupils in grades 9 through 11 transferred to the new high school at the beginning of the 1978–79 school year. Grade 12 pupils have continued to attend their respective high schools in Salinas.

"It should be noted that North Monterey pupils attending Salinas high schools have always been commingled with other students in the classrooms of each high school. That is to say, pupils were not segregated into one high school or in identifiable classes within a high school. Eighth grade graduates from the respective elementary schools in North Monterey were assigned to one of the three high schools and were mixed in each classroom with students from other component elementary districts. This is mentioned to establish that no facilities or identifiable programs were transferred to North Monterey.

"During the 1976–77 and 1977–78 school years, pupils in all four high school grades continued to attend Salinas high schools.

'By reason of the unification of North Monterey, Salinas consequently suffered a "loss" of approximately 1200 ADA beginning in 1976–77 and continuing to September, 1978. The loss, however, was a "technical" one, inasmuch as the students continued to attend Salinas high schools and Salinas was compensated for the actual costs of their attendance under section 46304."

Section 42239 provides in part that:

"A district may add . . . for purposes of increasing the district's revenue limit for the budget year a portion of its loss in average daily attendance when it is anticipated that the estimated second principal apportionment units of average daily attendance . . . will be less than those of the preceding year . . . ."

Section 42239 then provides in subdivision (b) that if the reduction in average daily attendance is less than one percent of the preceding year, no adjustment is allowed. If the reduction is greater than one percent, then the estimated average daily attendance of the budget year may be increased by 75 percent of that difference in the first succeeding[2] year

[2] Section 42239 actually uses the term "preceding" in this context rather than "succeeding." This is clearly an error of draftmanship that must be disregarded otherwise the statute cannot be made to operate under any circumstance.

and by 50 percent of that difference in the second succeeding year. Section 42239 further provides that "the amount calculated in subdivision (b) times the revenue limit per unit of average daily attendance shall be considered an addition to the district revenue limit, *but shall not be used to compute state apportionments.*" (Emphasis added.)

The primary issue is to determine the meaning of the phrase "loss in average daily attendance" as that phrase is used in section 42239, since the statute provides: that a district may add "a portion of its loss in average daily attendance when it is anticipated that the estimated second principal apportionment units of average daily attendance . . . will be less than those [units] of the preceding year."

The question presented assumes that section 42239 applies to a loss of ADA resulting from a unification. We must determine whether that assumption is justified. The primary and controlling consideration in the construction of a statute is the determination of and the giving effect to the legislative intent behind the statute. (*Great Lakes Properties, Inc. v. City of El Segundo* (1977)19 Cal. 3d 152, 163; *Select Base Materials v. Board of Equal.* (1959) 51 Cal. 2d 640, 645.) Further, the various parts of a statute or other statutes relating to the same subject must be construed together and harmonized by considering the statutory framework as a whole. (*Moyer v. Workmen's Comp. Appeals Board* (1973) 10 Cal. 3d 222, 230; *Steilberg v. Lackner* (1977) 69 Cal. App. 3d 780, 785.)

Section 42239 was enacted in 1973 (Stats. 1973, ch. 208, § 39.3, pp. 559–560). As enacted, section 42239 was never intended to relate to the amount of state school funds received by a school district since the Legislature expressly provided that its provisions "shall not be used to compute state apportionments." Section 42239 was expressly limited in its application to the computation of the maximum general purpose tax rate pursuant to which school districts obtained local funds. (See § 42238.) With the subsequent passage in 1978 of Proposition 13 (Cal. Const., art. XIIIA.) the state elected to provide additional state funds to replace those local funds lost to school districts because of the effect of Proposition 13. That subsequent event, however, does not change the legislative purpose intended to be effectuated by the provisions of section 42239. This factor has significance because of the context in which the question is presented. Thus, one must determine whether at the time section 42239 was enacted the Legislature intended that school districts obtain additional local taxes by permitting them to increase their maximum general purpose tax rate upon a school district "unification" or similar school district reorganization.

We have been advised by the Chief of the Division of Financial Services, Department of Education, that he is aware of no instance prior to the enactment of Proposition 13 in which section 42239 was interpreted as applying to losses of ADA occurring as a result of school district reorganization changes. The issue only arose because currently the revenue limit adjustments under section 42239 for loss of ADA are paid with

state funds rather than with local taxes. Further, the Legislature has increased the revenue limits since the 1976–77 budget year and changed the adjustment formula. Consequently, a qualifying loss of ADA for the 1978–79 budget year will produce a greater amount of additional revenue pursuant to section 42239 than a loss of ADA for the 1976–77 budget year.

As we shall demonstrate, there are several factors that persuasively indicate that section 42239 is limited in application to those decreases in ADA that are caused by unexpected declines in pupil enrollment. The legislative purpose that is reflected in section 42239 is to provide school districts with a portion of the revenue that they would have received, had there been no decline in attendance, in order that they may pay certain costs that they are committed to pay during the succeeding two years despite the loss of pupil attendance. Further, we will demonstrate that the only rationale that has been advanced as supporting a contrary conclusion is based upon an erroneous reading of a subsequently enacted statute.

The first factor that we consider critical to resolution of the issue of legislative intent is a State Department of Education bulletin to all County Superintendents of Schools, dated July 27, 1976, which states in part that:

> "[T]his law [section 42239, then numbered section 20905.5] is in reference to declining enrollment and not in reference to changes in ADA because of class-size penalties, summer school programs, interdistrict attendance agreements or discontinuing programs that produce ADA *District reorganization changes are not considered declining enrollment."* (Emphasis added.)

Thus, in 1976, the Department of Education, which provides guidance statewide as to the proper implementation of statutes affecting public education, advised all county superintendents that the type of loss of ADA that qualifies pursuant to section 42239 is "declining enrollment" and that changes in ADA resulting from school district reorganizations are not considered to be declining enrollment.

Subsequent to the receipt by all county superintendents of this interpretation by the State Department of Education, the Legislature enacted a new statute containing unmistakably clear language establishing that the Department of Education's interpretation of section 42239 is correct. We think that it is a fair inference that if the interpretation by the Department of Education was deemed incorrect by the various county superintendents, they would have advised the Legislature which would have inserted in the new statute language appropriate to any contrary interpretation since it is the county superintendent of schools who must compute the maximum general purpose tax rate for each elementary,

high and unified school district in his county. (§ 42238.)

The new statute is section 42239.5[3] (Stats. 1977, ch. 259) which reads as follows:

> (a) Whenever a school district has received school facilities and a portion of an elementary attendance area from another school district by virtue of that partial attendance area deannexing itself from one school district to join another, the school district gaining the partial attendance area shall be allowed to include the average daily attendance transferring in its base year for purposes of determining the extent of declining enrollment, if any, in the budget year, for purposes of the computations provided pursuant to Section 42239.
>
> (b) Whenever a school district has transferred school facilities and a portion of an elementary attendance area to another school district by virtue of that partial attendance area deannexing itself from one school district to join another, the school district losing the partial attendance area shall exclude the average daily attendance transferred from its base year for purposes of determining the extent of declining enrollment, if any, in the budget year, for purposes of the computations provided pursuant to Section 42239."

Section 42239.5 (Stats. 1977, ch. 259) prescribes which of two school districts, where a partial attendance area deannexes itself, shall include, and which shall exclude, in its base year the average daily attendance transferring between such districts "for purposes of determining the *extent of declining enrollment, if any, in the budget year, for purposes of the computations* provided pursuant to Section 42239." Note that section 42239.5 (Stats. 1977, ch. 259) does not operate to allow transferring ADA, per se, to be considered as a "loss of average daily attendance" for purposes of section 42239. The effect of section 42239.5 (Stats. 1977, ch. 259) is to allow the school district gaining the deannexing "partial" attendance area to take into consideration any declining enrollment with respect to that partial attendance area in its *own* budget for a given school year.[4] The statute

[3] There are two distinctly different sections of the Education Code enacted in 1977, each numbered section 42239.5. We shall distinguish them by reference to their chapter number.

[4] Although it is not of critical import to our analysis, we assume that the legislative purpose in enacting section 42239.5 (Stats. 1977, ch. 259) was to allow for the fact that the school district receiving the deannexing partial attendance area may have allowed in its budget sufficient funds to educate the number of pupils expected to be enrolled from that area. Thus, if a "decline" in attendance occurred with respect to that partial attendance area, it would be the school district now responsible for educating such pupils that would need the benefit of section 42239 to compensate

excludes that portion of a declining enrollment related to the "partial" attendance area from the budget process of the school district losing the territory. In that context, the statute does not consider the *absolute change* in ADA as constituting a "loss" in enrollment. It only allows the *decline* in enrollment, *if any*, occurring with respect to a "deannexing" partial attendance area to be considered by the "acquiring" school district when it determines its revenue limit for a particular budget year. Thus, the language of this section does not establish a type of 'loss of attendance" that may be considered when applying section 42239. It simply establishes which school district, under the circumstances described, may consider the declining enrollment, if any, with respect to the area affected by the deannexation. Thus, the critical phrase that is contained in section 42239.5 (Stats. 1977, ch. 259) describes the *purposes* of section 42239 as being a determination of the extent of *declining enrollment*, if any, for purposes of the computations contained in section 42239.

Thus, the language of section 42239.5 (Stats. 1977, ch. 259) provides: language selected by the Legislature that indicates that the type of loss of attendance that qualifies pursuant to section 42239 is a declining attendance. The Department of Education had advised all county superintendents of schools the year previous to the enactment of section 42239.5 that the concept of declining attendance excluded changes in attendance occurring as a result of school district reorganizations.

However, the legal office of the Department of Education, by memorandum dated April 3, 1979, opined to the Chief, Division of Financial Services, Department of Education, that section 42239 applied to a loss of average daily attendance caused by a school district unification. The analysis of the department's legal office was stated as follows:

> "The general proposition in Section 42239 is that a school may add to its revenue limit computation 'a portion of its loss in average daily attendance.' There is no question but that if, through a district reorganization, a shift in student population to the newly organized district causes a net reduction in student enrollment, the result is a corresponding loss in ADA Section 42239 speaks in terms of resulting loss, not causes of loss. Nowhere in that section are causes mentioned, much less district reorganization as a cause. However, with respect to results, Section 42239 does exclude loss of ADA in adult school and summer school. Furthermore, two other sections of the Education Code provide specific exceptions. Effective April 29, 1977, Section 42239.5 excludes from a determination of loss allowed in Section 42239 any loss of ADA caused by reclassifying high school ADA to adult ADA In another Section 42239.5, effective July 8, 1977, it is provided that

for the decrease in revenue that would occur the following year.

> loss of ADA caused by deannexation of a partial attendance area from one school district to another shall be excluded from an ADA, loss determination under Section 42239. Thus, it is clear that, in specifying the types of ADA loss that shall be excluded from a determination under Section 42239, ADA losses of any other type, or from whatever other cause, are included, including a loss caused by a unification election." (Emphasis added.)

This analysis does not support the conclusion that section 42239 applies to unifications. First, as we have stated previously, section 42239.5 does not provide that a loss of ADA caused by the deannexation of a partial attendance area shall be excluded from an ADA loss determination under section 42239, as stated in the memorandum. On the contrary, section 42239.5 applies only to decreasing ADA, if any, occurring with respect to the partial attendance area that deannexed itself. Section 42239 specifies which school district affected by the deannexation shall receive "credit" for the decline in ADA, for the purposes of section 42239. Thus section 42239.5 does not "exclude" anything from the operation of section 42239.

Secondly, even disregarding this erroneous reading of the import of section 42239.5, we cannot agree with the rationale, expressed in the memorandum, that because some types of loss of ADA are excluded from the operation of section 42239 then "losses of any other type, or from whatever other cause, are included, including a loss caused by a unification election." (*Op. cit*., Legal Office memorandum dated April 3, 1979.)

Although not expressly stated, this argument is based upon a maxim of jurisprudence used by this office and the courts to interpret statutes, to wit: "expressio unius est exclusio alterius," e.g., the enumeration of items within a statute implies the exclusion of other items within the enumerated class. In applying this principle of statutory construction, the *first* issue would be: does section 42239 *include* losses of attendance occurring as a result of a reorganization *except* such decreases as are expressly *excluded* or does section 42239 *exclude* losses of attendance occurring as a result of a reorganization except those decreases expressly *included*. Secondly, after making this determination, one must examine critically the exclusions so as to *classify* them for the purpose of determining whether all items or only other *similar* items are to be included or excluded. (See 62 Ops. Cal. Atty. Gen. 126, 129 (1979).)

In other words, a statute may exclude from, or include within, its operation many different classifications. Within one such classification it may specify specific exclusions. On the other hand, the Legislature may intend to exclude from the operation of a statute an entirely different classification except to the extent that it may *affirmatively* authorize an exception. For example: "all declining attendance may be considered as a loss of attendance except for declining attendance at summer schools" compared with "no transfer

between schools of units of average daily attendance shall be considered as a loss of attendance except as to a partial attendance area that deannexes itself." Further, several statutes, relating to one general subject matter, may contain both types of exclusions, e.g., as to one classification it may include "all but X" and as to another classification, it may include "none but Y." The rule of construction, "expressio unius est exclusin alterius" may be utilized to give effect to the perceived legislative intent. If, however, these distinctions are not observed, the application of such a rule of construction may frustrate the legislative intent rather than effectuate it.

There are four exceptions to section 42239's provisions that indicate the type of "loss of attendance" that is covered by section 42239. Within section 42239 itself, the Legislature has excluded any loss of attendance occurring in classes for adults (denominated "defined adults") and during summer school. Further, section 42239.5 (Stats. 1977, ch. 36) excludes from the "loss of attendance" concept "any gain or loss of average daily attendance, which is due to reclassifying high school average daily attendance to adult average daily attendance pursuant to Chapter 323 of the Statutes of 1976. . . ." Section 42239.5 (Stats. 1977, ch. 36) further excludes 'any gain or loss of average daily attendance . . . which is due to attendance in regional occupational centers or programs pursuant to Sections 52321 and 52324. These four exceptions clearly distinguish between *types* of educational programs *within* a school district. Thus, the proper interpretation is that all similar items within that classification, not expressly excluded, must be deemed included within section 42239. Note that all items within this classification that are specifically excluded pertain to programs that would have a potential for a *declining* attendance. None of these exclusions not any provision of any statute expressly includes or excludes a type of "loss of attendance" similar to a transfer of attendance of pupils between school districts. Even assuming but not conceding that section 42239.5 (Stats. 1977, ch. 259) constituted an "exception," the *only* supportable conclusion in that event would be that all changes of ADA occurring as a result of reorganizations are excluded *except* the one type of "transfer of attendance" purportedly authorized to be included by section 42239.5 (Stats. 1977, ch. 259). Thus, even under that analysis, loss of ADA resulting from unifications are excluded.

Thus, we conclude that section 42239 is limited in application to a "loss of average daily attendance" that constitutes a "declining" type of loss. The word "declining" in this context suggests a gradual change, typically resulting from demographic changes, rather than an abrupt change as demonstrated by a change of attendance of 1,200 pupils caused by a unification.

We interpret the phrase "declining enrollment" as both describing and as limiting the type of loss of attendance to which the language of section 42239 pertains. In that context we note that the date of the second principal apportionment attendance report is "on or before April 15" of each school year, a date occurring very late in the school year.

A school district ordinarily will have unavoidable expenses in maintaining its educational program during the next school year that do not take into account the loss of revenue consequent to a declining enrollment. The financial cushioning effect of section 42239 is intended to provide funds for the next two school years to cover such costs and expenses. In effect, a school district is permitted to consider "as present and enrolled" pupils who are not in fact present because the school district is deemed not to have had adequate time to adjust its level of expenditures for educational services for such pupils to reflect the decline in enrollment.

We conclude that section 42239 does not apply to a situation such as a unification where, typically, the decision to unify has gone before the voters, where public hearings have been held and where the respective boards have agreed to the unification of the component elementary district. The number of pupils affected, the time-span within which each district may plan effectively, based upon its precise knowledge of the effect of the unification, is an integral part of such a change in pupil attendance.

Therefore, it is concluded that section 42239, which authorizes a school district to increase its revenue limit for a loss in average daily attendance, does not apply to a loss in average daily attendance occurring as a result of a school district unification.

The remaining issue to be resolved concerns a determination of the "year" in which section 42239 applies, assuming that section 42239 is applicable to a given situation. The language of section 42239 itself provides a clear answer to that question.

Section 42239 speaks in terms of a "budget year" in which the "estimated second principal apportionment units of average daily attendance" will be less than those units of the preceding year, thereby triggering an adjustment of total pupil average daily attendance on a fictional basis for the next two successive years. The "time" of the second principal apportionment refers to the antecedent phrase: "budget year." Therefore, it is the anticipated loss of ADA in that budget year, as measured in that budget year and compared to the previous year, that may be taken into consideration. Necessarily, the "average daily attendance" that is applicable is that which is *reported* in that budget year to the State Department of Education for purposes of the apportionment of the state school funds. Thus, any change in enrollment with respect to pupils who are not reported as part of the school district's legal average daily attendance may not be considered in determining whether there has been the requisite qualifying "loss of attendance" for purposes of section 42239. Note, for instance, that section 46304, applying to certain types of reorganizations, transfers as a matter of law the average daily attendance of the pupils affected by the reorganization to the unifying school district on the effective date of the reorganization, irrespective of which school district continues to provide the educational program to such students. We repeat, however, that a change in ADA between school districts occurring as

a result of a unification is not a "loss of average daily attendance" within the meaning of section 42239.

Therefore, it is concluded that section 42239 takes effect in the budget year in which it is anticipated that there is a qualifying decrease in the average daily attendance figures that are reported to the State Department of Education as part of the school district's second principal apportionment attendance report for that budget year.

*****