

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the Agreement) is entered into as of August 17, 2017, by and between Evergreen Elementary School District, sued as Evergreen (District), and Petitioners Cal200 and Marc Babin (Petitioners) (collectively, the Parties).

WHEREAS, Petitioners have filed a writ action against the District, among others, entitled *Cal 200, et al. v. Apple Valley Unified School District, et al.*, CPF-15-514477 (San Francisco County Superior Court) (the Action), alleging that the District has failed to provide the number of minutes of physical education instruction set forth in California Education Code section 51210; and

WHEREAS, the District denies it has failed to comply with the provisions of the California Education Code; and

WHEREAS, the Parties desire to enter into this Agreement to avoid further controversy and expense;

NOW THEREFORE, the Parties do hereby covenant, promise, and agree as follows:

1. Cal200. As used in this Agreement, Cal200 shall mean petitioner Cal200, an unincorporated association, acting by, through, or on behalf of its agents, members, employees, attorneys, representatives, assigns, predecessors or successors in interest, and any and every other person or entity acting by, through, on behalf of, or in concert or combination with any of them.

2. Marc Babin. As used in this Agreement, Marc Babin shall mean petitioner Marc Babin, a California citizen, individually and as an officer, agent and/or member of Cal200.

3. District. As used in this Agreement, District shall refer to Evergreen Elementary School District, a political subdivision of the State of California. Nothing in this Agreement shall be deemed or construed to apply to any charter school.

4. Term. This Agreement shall become effective as to the District on October 1, 2017, and shall remain in effect for a period of two years. Within ten (10) days of the Effective Date of this Agreement, Petitioners shall dismiss all claims and actions against the District with prejudice and District shall withdraw all discovery served on Petitioners in the Action. Pursuant to Code of Civil Procedure section 664.6, the Parties stipulate and agree that, without any finding or admission of liability, the Court shall retain jurisdiction over this matter during the period in which it is in effect.

5. Future Changes to Education Code. In the event of a change to the obligations imposed by Education Code section 51210, District shall be entitled to move the Court for relief from the requirements of this Agreement.

6. Reporting of Physical Education Minutes. Commencing October 1, 2017, District shall report physical education minutes (Report) in the following manner: No later than the day following the day physical education is provided, it shall be electronically reported on the PowerSchool platform, where it shall be visible to parents and to Petitioners.

7. Comprehensive Physical Education Program. In lieu of the requirements of Paragraph 6, District may implement and provide a Comprehensive Physical

Education Program. Implementation and maintenance of a Comprehensive Physical Education Program shall constitute full compliance with the reporting requirements of this Agreement.

- a. A Comprehensive Physical Education Program shall mean the provision of not less than 200 minutes of instruction in physical education every ten (10) school days by a certificated staff member holding a current credential in physical education.
- b. District may, in its sole discretion, implement a Comprehensive Physical Education Program for some, but not all, grades 1 through 6 and/or some, but not all, school sites. This includes the discretion to implement a Comprehensive Physical Education program for some, but not all, grades 1 through 6 within a particular school site. However, all self-contained classrooms of a single grade level at a single school site will be similarly included or excluded from the Comprehensive Physical Education Program. For self-contained classrooms that are not part of a Comprehensive Physical Education Program, the reporting requirements described in Paragraph 6 shall apply.

8. Annual Notice and Complaint Form. Commencing with the 2017-2018 school year, District shall provide annual notice of the requirements of Education Code section 51210(a)(7) to all parents and guardians of all students in grades 1 through 6, inclusive. The notice shall inform parents and guardians that if they have questions regarding physical education minutes, they should first contact their child's teacher or

principal. The notice shall also provide information regarding the Uniform Complaint Procedure described in Education Code section 51210(b).

9. No Admission of Liability. It is understood and agreed by the Parties that this Agreement is a compromise of disputed and contested claims and that it shall not be argued, asserted, claimed, considered or construed as an admission of liability or wrongdoing by District.

10. Exclusions. The Parties agree that the requirements in Paragraphs 6 and 7 do not apply to:

- a. Any student in grade 6 at an intermediate or middle school who is not in a single, full-day, self-contained classroom but, rather, is in rotating classrooms including a class period specifically devoted to physical education.
- b. Any student in special day classes whose IEP specifies what physical education (if any) shall be given to the student.
- c. Any instruction or school day outside of the regular academic year, including summer session and extended school year.

11. Release of All Claims. In consideration of the mutual promises and agreements set forth herein, Petitioners do hereby release and discharge District and each of its agents, employees, attorneys, officers, board of trustees members, representatives, administrators, affiliates and assigns, and any and every other person or entity acting by, through, on behalf of, or in concert or combination with any of them (collectively, the Releasees), from any and all actions, suits, proceedings, claims, complaints, rights, demands, obligations, debts, liabilities, and any and every cause of action of any type or

nature whatsoever, whether in law or equity, known or unknown, fixed or contingent, arising from or relating to any matter, conduct, transaction, or activity whatsoever from the beginning of time through the duration of this Agreement. Notwithstanding any other provision of this Agreement, Petitioners may make any request for public records and retain all rights they have under the California Public Records Act.

12. Covenant Not to Sue. Petitioners hereby covenant and agree that, except to enforce this Agreement or to the extent Petitioners are required by law to do so, during the term of this Agreement, they will not file or cause to be filed, and will not aid, cooperate or assist, directly or indirectly, with any state or federal court, administrative, arbitral, or other agency proceeding, or in any other action, suit, claim, complaint or proceeding of any kind, nature or description whatsoever against the Releasees arising from or relating to any matter released or compromised pursuant to this Agreement. In the event that Petitioners shall file, or cause to be filed, aid, cooperate or assist in any action, suit, claim, complaint or proceeding in violation of this Covenant Not to Sue, they hereby state and agree that: (a) this Agreement shall constitute a complete and total defense to any such action, suit, claim, complaint or proceeding, and that (b) they shall indemnify, save, keep and hold the Releasees harmless for any and all loss, damages, costs or expenses incurred in connection with that action, suit, claim, complaint or proceeding, including without limitation reasonable attorneys' fees and expenses.

13. Release of Unknown Claims. Petitioners understand and agree that the nature, extent and result of the claims they are releasing may not now be known or anticipated and declare that they nevertheless desire to settle, compromise, and release in full all of the rights and claims described by this Agreement. In entering this Agreement,

Petitioners expressly waive the benefits of and release any rights they would otherwise have under California Civil Code section 1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

14. Entire Agreement. This Agreement constitutes the entire understanding and Agreement between the Parties. All understandings, agreements, statements, and representations, express or implied, oral or written, between the Parties are contained and merged herein. No other agreements, covenants, statements or representations, express or implied, oral or written, have been made by or between the parties to the Agreement concerning the subject matter hereof. This is an integrated agreement. It may not be altered, modified, or otherwise changed in any respect except in a writing signed by each party.

15. Understanding the Agreement. This Agreement is freely and voluntarily entered into with the independent advice of each party's counsel. The Parties represent and agree that they have read and discussed this Agreement with their respective counsel, that they fully understand its terms, ramifications, and effects and that they accept the same.

16. Board of Trustees Approval. The Parties understand and agree that this Agreement is subject to review and approval by District's Board of Trustees, and that District shall have no obligation hereunder unless and until such approval is granted. District will present this Agreement to its Board of Trustees for approval not later than August 17, 2017. Likewise, Petitioners shall have no obligation hereunder to District unless or until the District's Board of Trustees grants approval of the Agreement. In the

event that the District's Board of Trustees does not approve this Agreement on or before August 17, 2017, District shall be returned to the status quo existing on August 14, 2017.

17. Payment to Petitioners' Counsel. District agrees to issue payment to Petitioners' undersigned counsel of record for attorney fees in the total sum of Thirty Thousand Dollars (\$30,000) (the Payment). The Parties state and agree that the Payment shall represent and fix the District's total obligation to Petitioners in this Action for any sums whatsoever, however characterized, including without limitation attorneys' fees, Petitioners' costs and expenses, and that Petitioners and Petitioners' counsel each independently accept such Payment and shall make no other or further claim or demand upon District including without limitation any claim or demand under Code of Civil Procedure section 1021.5. Petitioners and Petitioners' counsel agree that the Payment shall represent and fix the total liability of District for any loss, damage, cost or expense, however described, including attorneys' fees and expenses, in connection with this Action or the claims upon which it is based, whether incurred by Petitioners or Petitioners' counsel before this Agreement or during the effective period of this Agreement, except to enforce this Agreement. Except as otherwise provided in this paragraph, each party shall bear its own attorneys' fees and costs and no party shall be deemed to be the prevailing party. Further, District agrees that it shall not be entitled to make any claim against Petitioners or Petitioners' counsel through the Effective Date of this Agreement, and all such claims or potential claims, known or unknown, are released.

18. Headings. The captions and headings contained herein are intended for convenience of reference only and shall not alter or affect the meaning or interpretation of this Agreement or the rights or obligations of the Parties.

19. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. Photocopies, facsimiles, and signatures transmitted electronically shall be as valid and binding as an original.

20. Construction and Governing Law. This Agreement is entered into and its construction and performance governed by the laws of the State of California, without regard to principles of conflict of laws. This Agreement shall be deemed to have been drafted by all Parties hereto, with advice of independent counsel, and no rule of construction shall be applied against any party as the drafter.

21. Severable Agreement. In the event any term or provision of this Agreement shall be held invalid or unenforceable by any court, that term or provision shall be omitted herefrom, but the remaining provisions of this Agreement shall remain in full force and effect.

22. No Waiver. Delay by any party in enforcing its rights under this Agreement shall not be construed as a waiver, in full or in part, by that party of any rights under this Agreement. No breach of any provision of this Agreement can be waived by any party unless such waiver is set forth in writing and signed by each party hereto. Waiver of any breach shall not be deemed to constitute a waiver of any other breach of the same or other provision of this Agreement.

23. Enforcement. This Agreement is specifically enforceable. Any party to this Agreement may enforce it upon a material breach of another party, including a material breach of the obligation to comply with the requirements of Education Code section 51210(a)(7), but only after providing thirty (30) school days' written notice (Written Notice). Such Written Notice may allege a pattern of violations. In the event

that Petitioners seek enforcement of this Agreement, the court has discretion to award or not award reasonable attorneys' fees to Petitioners. District may request the court to determine that District acted in good faith. If the court finds that District acted in good faith, the court may not award attorneys' fees to Petitioners against District. In determining whether District acted in good faith, the court shall give consideration to District's efforts to cure the alleged noncompliance, among any other evidence of good faith.

The Parties shall execute all documents necessary or appropriate to effectuate the terms of this Agreement.

IN WITNESS WHEREOF, the Parties and their respective counsel have hereunto set their hands, on the dates indicated below:

APPROVED:

Marc Babin
Marc Babin, Petitioner

Dated: 9/11/17

Cal200
Marc Babin
By: Marc Babin
Its: President

Dated: 9/11/17

EVERGREEN ELEMENTARY SCHOOL DISTRICT

Sylvia Alvarez
By:
Its: Board of Trustees

Dated: Aug 21, 2017

EVERGREEN ELEMENTARY SCHOOL DISTRICT

Kathy Gomez
By: Kathy Gomez
Its: SUPERINTENDENT

Dated: 8/21/17

APPROVED AS TO FORM:

DRISCOLL & OMENS
Donald Driscoll
DONALD P. DRISCOLL
Attorneys for Petitioners Marc Babin and
Cal200

Dated: 9/11/17

APPROVED AS TO FORM:

Dannis Woliver Kelley
W Tunick
By: William Tunick
Attorneys for Respondent Evergreen Elementary School District

Dated: 8/28/17