Winter 2009

The California School Board Association's
Education Legal Alliance

Alliance REPORT

This Alliance Report highlights the newest cases. For information on other cases, please contact us.

We fight better when we stand together

The Education Legal Alliance of the California School Boards Association initiates and supports litigation on behalf of public schools. This consortium of school districts, county offices of education (COEs) and regional occupational centers/programs voluntarily joins together to impact education issues and case law.

Formed in 1992 to challenge the constitutionality of property tax collection fees imposed on all school districts and COEs, the Alliance continues to be successful in pursuing and defending the broad spectrum of statewide public education interests in the courts and before state agencies.

Process for submission of cases to the Alliance: *When a district/county office is involved in an issue of statewide significance, requests for assistance may be submitted to the Alliance. An Attorney Advisory Committee, consisting of experts in the field of education law, reviews the case and makes a recommendation to the Alliance Steering Committee. The Steering Committee, consisting of board members, superintendents and representatives of education groups, makes the final determination as to whether the Alliance should become involved in the case.*

IMPORTANT ISSUES

The following section provides an overview of important issues that the Alliance has been working on, such as a legal issue before a state agency, an issue in the trial court the Alliance is tracking, or an issue on which the Alliance is initiating legal action:

Algebra I Mandate

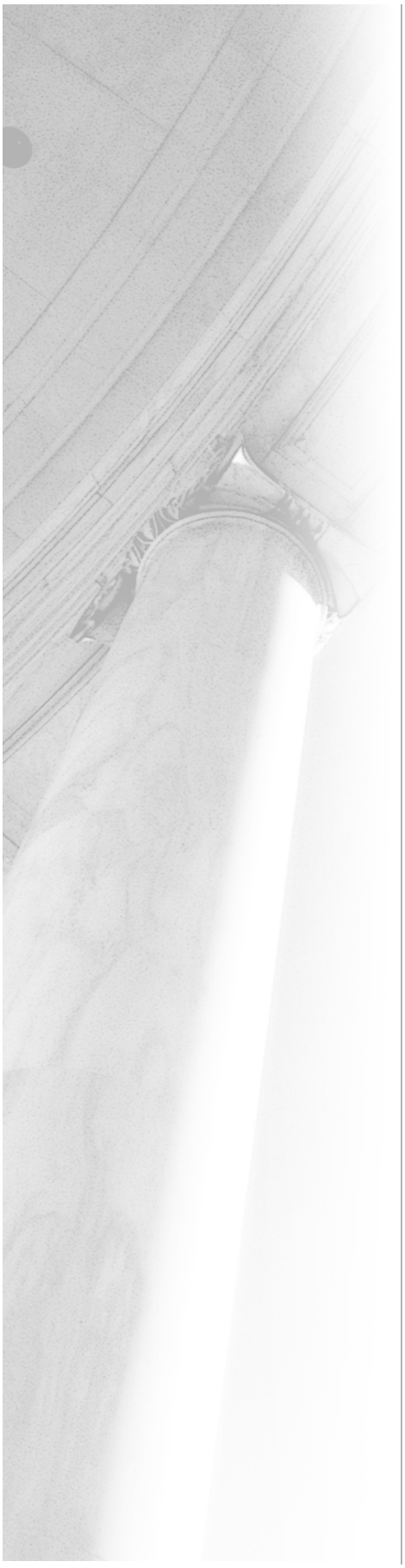
CSBA/ELA, ACSA v. State Board of Education/Sacramento County Superior Court

Issue:

Did the State Board of Education's July 9 action to designate Algebra I as the Grade 8 assessment violate the Bagley-Keene Open Meeting Act and exceed the SBE's authority?

Background:

In the fall of 2007, the U.S. Department of Education found California's assessment system to be out of compliance with the NCLB because two assessments are available for grade 8 level students: 1) Algebra I for students enrolled in Algebra I; and 2) Grade 8 general math assessment for students not enrolled in Algebra I. Because the general math assessment was based entirely on grade 6 and 7 academic content standards it was determined by USDOE not to be at "grade level," as required by NCLB. At its July meeting, the SBE voted to direct the California Department of Education to enter into a compliance



agreement with USDOE to transition into implementing the Algebra I assessment for all 8th graders over a three-year period.

Alliance Activities:

CSBA and ACSA filed litigation in early September to invalidate the SBE's July action on the grounds that the action exceed the SBE's authority and violated the state's open meeting act. Superintendent of Public Instruction Jack O'Connell and the California Teachers Association joined in the litigation.

In a major victory, the Sacramento County Superior Court on December 19 granted the Alliance's request for a preliminary injunction by ruling that CSBA was likely to prevail at trial on both claims. The judge's order prevents the SBE from implementing its July 9 action, including finalizing a timeline waiver or compliance agreement with the USDOE until after a trial is held or a settlement is reached. At its January 8, 2009 meeting, the SBE authorized appeal of that portion of the court's decision finding the SBE lacked authority to revise the 8th grade math content standard.

Why this issue is important:

The SBE's decision is a significant change in statewide policy and results in a new mandate on districts without any funds allocated to support the new mandate. While CSBA believes that it may be worthwhile to discuss at the statewide level when students should take Algebra I, CSBA disagrees with the process used by the SBE to make the decision and the fact that the decision was made without any discussion as to the resources necessary to implement the new mandate. Nor was there any discussion as to other implementation issues, such as changes to laws regarding teacher preparation, instructional materials and professional development.

Proposition 39 Charter School Facilities Regulations

CSBA/ELA et al v. State Board of Education/Sacramento County Superior Court

Issue:

Has the SBE exceeded its authority in developing revised regulations regarding Proposition 39 facility requests by charter schools?

Background:

Since the passage of Proposition 39, there have been four court decisions relating to charter school facilities issues. In 2007, the CDE proposed revisions to the existing SBE regulations to incorporate the court decisions and to reconsider proposed regulations that would create a dispute resolution procedure. The regulations were ultimately adopted by the SBE and the Alliance then filed litigation challenging several provisions.

Alliance Activities:

On November 24, 2008, the judge issued a ruling that invalidated several significant provisions of the new regulations, but rejected other issues raised by CSBA. In an important victory, the court rejected provisions related to conversion charter schools. The rejected provision would have prevented districts from moving a conversion charter school from a school site without obtaining both a revision to the charter and a waiver from the SBE. However, the court upheld problematic regulations related to furnishings and equipment and grade level comparisons. As a result of the court's decision, those

sections of the regulations that were upheld are effective for facility requests made in 2008-09 by charter schools for facilities in 2009-10. The Alliance is still reviewing whether to appeal the judge's decision.

Why this issue is important:

Many of the revisions are detrimental to school districts. For example, the statutory requirement to furnish and equip facilities "for the charter school's average daily classroom attendance by in-district students" is expanded to include providing front office equipment and additional, though undefined, support furnishings and equipment ("student services that directly support classroom instruction").

Mandated Cost Lawsuit

CSBA/ELA, et al. v. State of California, Commission on State Mandates/California Court of Appeal

Issue:

Is a statute constitutional that prohibits mandate reimbursement to a local agency for the costs of performing duties "necessary to implement" or "reasonably within the scope of" a mandate expressly specified in a ballot measure approved by the voters?

Background:

The basis of the lawsuit is the approval of AB 138 (Chapter 72, Statutes of 2005) by the Legislature, a statute enacted as part of the state's concentrated strategy to terminate its constitutional obligation to reimburse local governments for costs associated with providing mandated services. AB 138 expanded an existing statute exempting the state from having to reimburse school districts for costs of mandates expressly specified in a voter-approved ballot measure to include costs of mandates "necessary to implement" or "reasonably within scope of" an expressly specified voter-approved mandate.

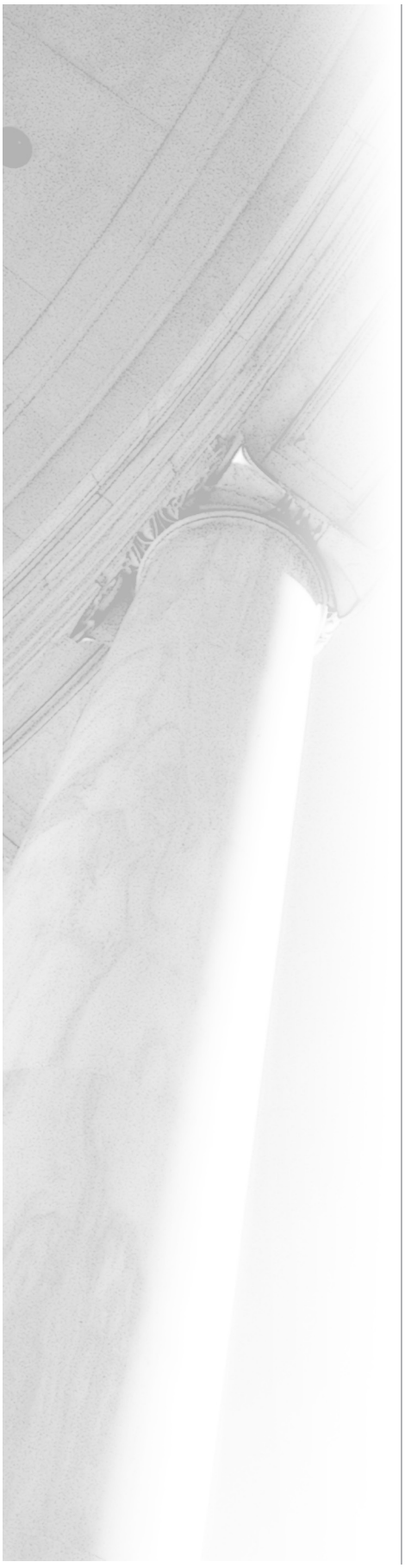
For many years, the Commission on State Mandates had determined that three state-mandated programs were reimbursable mandates: the School Accountability Report Card, the Mandate Reimbursement Process, and certain Brown Act requirements. AB 138 "compelled" the COSM to change its prior determinations by requiring the COSM to either vacate or reconsider its decisions because the mandates were either "necessary to implement" or "reasonably within the scope of" an expressly specified voter-approved mandate. The SARC, MRP, and Brown Act were previously approved reimbursable mandates and, although not expressly included in a voter-approved ballot measure, have "roots" in voter-approved ballot measures.

Alliance Activities:

In 2007, the Alliance initiated a lawsuit against the state and the COSM and the Alliance won in the trial court but the state and COSM appealed. The Alliance also filed a cross-appeal. Based on arguments raised by the COSM in the first lawsuit, the Alliance has filed another lawsuit against the COSM concerning the SARC mandate. Oral argument was held in December and a decision is expected by the end of February 2009.

Why this case is important:

The Legislature does not have the authority "to write its own ticket" to avoid paying for the mandates it imposes. AB 138, determined unconstitutional by the trial court, was part of that effort to avoid payment.



Mandate Deferral Lawsuit

CSBA/ELA, et al. v. State of California, et al./San Diego County Superior Court

Issue:

Does the state have the authority to simply appropriate $1,000 for each K-12 mandate and defer payment of the balance to another fiscal year?

Background:

The state constitution requires that whenever the state mandates a new program or higher level of service on any local government (including school districts), it must reimburse the local government for the costs incurred unless funding for the mandate is completely deleted or the mandate is suspended. However, beginning in the 2002-03 fiscal year, the state has deferred payment on the 38 K-12 reimbursable state mandated programs by approving only $1,000 per mandate, even though the costs of these mandates, and the claims submitted, far exceed that amount. This budget-balancing technique is used by the Legislature and governor in an attempt to satisfy the State's Proposition 98 guarantee and to deny districts the ability to avoid performing the mandated program or service.

The 2006-07 state budget appropriated $900 million to fund payment of the accumulated debt and added some funding for 2006-07 mandates. However, this appropriation failed to pay off the past debt and was inadequate to cover the state's 2006-07 obligation. Although the cost of the K-12 mandates for 2007-08 is estimated at $160 million, the 2007-08 state budget appropriates only $38,000, or $1,000 per mandate. The carry-over "credit card debt" from prior years is approximately $415 million.

Alliance Activities:

The Alliance filed a lawsuit challenging the state's authority to defer mandate payments and seeks to compel the State to fully reimburse districts and county offices of education for all new programs or higher levels of service.

In another major victory for the Alliance, the Superior Court ruled on December 4, 2008 that the California Constitution requires the state to budget full reimbursement of local governments for the cost of state-imposed mandates. The judge's ruling prohibits this deferral practice in the future. In response to this court decision, the governor proposes to suspend all education mandates in 2009-10 except inter-district transfers and California High School Exit Examination. The state has indicated it will appeal the court's decision.

Why this case is important:

School districts and COEs are being forced to bear the costs of new programs and higher levels of service mandated by the state until some future time when the state chooses to appropriate funding. Forcing the state to follow the statutory requirement to either fully budget the mandates, and then to delete the funding or suspend the mandates, gives districts the ability to avoid having to perform the mandated programs or services that the state is not paying for.

Mandated Cost Claim Audits by the State Controller's Office

Clovis USD, et al. v. Controller/Sacramento County Superior Court

Issue:

Has the State Controller's Office imposed unreasonable documentation requirements in audits of mandated cost claims, thus thwarting districts from receiving reimbursement for state-mandated costs?

Background:

Since 2002, the SCO has audited reimbursable mandate claims filed by local educational agencies. A number of problems have arisen with the auditing procedures relied upon by the SCO, which have resulted in a total denial or substantial reduction of many claims. Most typically, the problem is a result of the SCO's demand for contemporaneous supporting data for staff time. The lawsuit filed against the SCO, led by Clovis USD, is focused on SCO procedures in the following mandated programs: collective bargaining, school district of choice, intra-district attendance, notification of truancy, emergency procedures, earthquake procedures and disaster program and graduation requirements.

Alliance Activities:

The Alliance is providing financial assistance to districts who filed suit in the trial court against the SCO. The trial court held that the SCO's requirement of contemporaneous documents of employees' salaries is reasonable and otherwise allowable, except when applied to the collective bargaining and intradistrict attendance programs, where the requirement constitutes an impermissible underground regulation. Thus, a substantial, but only partial, victory has been gained for school districts.

On January 2, 2009, the court confirmed and clarified its ruling. This clarification assures school districts involved in the litigation that $1.5 million worth of adverse findings from SCO audits has been voided and there is a potential that another $2.4 million in SCO audits will be voided. By expanding the court's ruling to other districts there is potential for another $4 million of SCO audits to be voided.

Why this case is important:

The new documentation requirements are not consistent with applicable government accounting standards and are part of the state's continuing strategy to reduce the state's liability for mandated costs.

Behavioral Intervention Plans

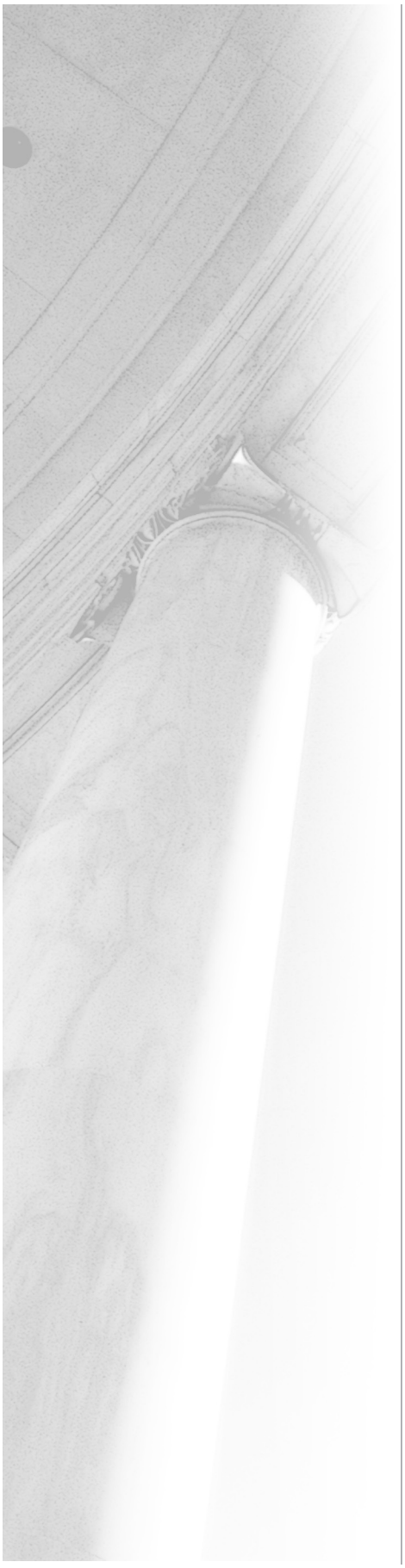
COSM/Sacramento Superior Court

Issue:

Do state requirements for behavioral intervention plans, specified in the Education Code and Title 5 regulations, require LEAs to perform activities not required under federal law and thus constitute a state-mandated program subject to reimbursement?

Background:

In 1990, legislation was enacted requiring the SBE to adopt regulations concerning behavioral intervention plans for pupils who exhibit serious behavior problems that



interfere with their education. In 1994, a test claim was filed with the COSM claiming the BIP requirements imposed a reimbursable state-mandated program upon LEAs. In 2000, the COSM adopted a decision agreeing that the regulations imposed a reimbursable state mandate, but the COSM decision has not been implemented pending conclusion of what became stalled negotiations to settle the exact amount owed by the State. In 2003, the Department of Finance filed litigation challenging the COSM's decision. Negotiations resumed in late 2007.

Alliance Activities:

In yet another major victory, the Alliance negotiated a settlement in this dispute, which has been ongoing for over 14 years. Starting in 2009-10, LEAs will see increased AB 602 funding (the special education funding mechanism) in the amount of $65 million. Commencing in 2010-11, that amount will be subject to cost-of-living adjustments. In addition, in settlement of the BIP costs going back to 1993-94, school districts will receive $510 million, payable in $85 million annual installments over six years starting in 2011-12 and ending in 2016-17. All payments will be into school districts' general funds based on 2007-08 P2 ADA. Also, in 2009-10 an additional $7.5 million will be paid to COEs and SELPAs.

The Alliance is now responsible for coordinating the receipt of documents approving the settlement by LEAs. Settlement approval documents were mailed to all LEAs at the end of December. In order to trigger the obligation by the Legislature to enact the funding, at least 85 percent of all school districts, COEs and Special Education Local Plan Areas, constituting 92 percent of statewide ADA, must approve and sign the waiver and return it to CSBA by February 27, 2009 (100 percent approval is anticipated).

Why this issue is important:

The state requirements for BIPs are detailed and costly, and it is important to LEAs that this mandate be reimbursed because they are required to implement an increasing number of BIPs.

NEW ALLIANCE CASES

The following section discusses cases in which the CSBA Executive Committee or the ELA Steering Committee has approved involvement of the Alliance.

CEQA Statute of Limitations

Committee for Green Foothills v. County of Santa Clara et al., Leland Stanford Junior University, et al. Real Parties in Interest/California Supreme Court

Issue:

Does an agency's properly filed and posted notice of determination (NOD) trigger the 30-day statute of limitations for California Environmental Quality Act challenges, or may a court disregard the NOD and apply a longer limitations period if the plaintiff might be able to allege that the agency did not comply with CEQA when it approved the project?

Alliance Activities:

The Alliance filed an amicus brief in support of the County of Santa Clara and Stanford University.

Background:

This case concerns a resolution and NOD approving a project for trail easements between the County of Santa Clara and Stanford. Prior to the resolution and project approval, an Environmental Impact Report was completed that evaluated the environmental effects of planned campus development and identified mitigation measures for those impacts. The NOD stated that an EIR was prepared, that findings were made under CEQA, that mitigation measures were made a condition of approval and that the project would not have a significant effect on the environment.

The statute of limitations in CEQA, which sets deadlines for an individual or group to challenge an agency's actions, varies depending on if the agency has filed an NOD and the particular findings made by the agency. In this case, the challenge was filed 161 days after the county filed and posted its NOD for the approval. The trial court held that the action was time-barred since the statute of limitations had passed, but the appellate court reversed. The Court of Appeal held that the trial court should look behind the NOD to see if the agency followed CEQA's procedural and substantive requirements to determine what environmental effects were implicated by its approval. Thus, courts must first look at the merits of the agency's decision to see if the action is time-barred.

Why this case is important:

LEAs must comply with CEQA. Enforcement of the abbreviated deadlines for filing CEQA challenges is important in order to allow projects to move forward and construction and funding commitments to be made. Delays in construction or a nullification of a previous approval would subject LEAs to substantially increased costs. Needed facilities would not be available to students in a timely fashion, thereby negatively affecting students' education.

Certificated Layoff "Skipping"

Hildebrandt v. St. Helena USD/California Court of Appeal

Issue:

In a certificated lay-off may a district "skip" a junior full-time employee and layoff two more senior part-time employees qualified to perform the particular kind of service being reduced?

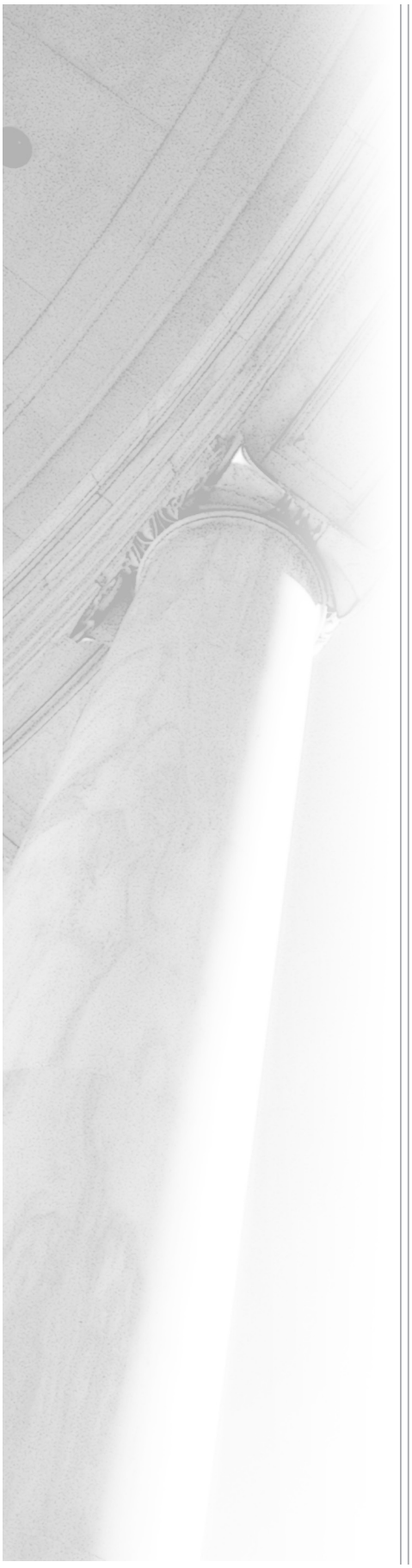
Alliance Activities:

The Alliance filed an amicus brief in support of the district.

Background:

In March 2007, the district initiated layoff proceedings, in part, to reduce psychologist services by 1.0 FTE. Three psychologists constituting 2.0 FTE positions received notice of layoff. The district decided to retain the full-time employee, even though she had a lower seniority date. At the hearing, the Administrative Law Judge agreed that the district could "skip" and retain the more junior employee, even though her seniority date was later, and layoff the two part-time positions instead. The part-time employees sued to gain entitlement to the 1.0 FTE position.

The district argued that it was in the governing board's discretion to decide to retain the full-time position and the board was not required to break up the full-time position in order to accommodate the two part-time psychologists. According to CTA, the Education Code only allows "skipping" when the district can demonstrate a specific need for the



employee to provide the retained service or when the employee has "special training and experience." The trial court agreed with the district and the part-time psychologists appealed.

Why this case is important:

Previously, courts have held that part-time employees do not have rights to a full-time position on rehire after a layoff. It is now important to establish this rule for the initial layoff so that districts do not need to break-up a full-time position. It is important that districts retain the ability to maintain full-time teaching or service positions and not be forced into a job sharing or dual teaching assignment.

RULINGS/SETTLEMENTS IN ACTIVE ALLIANCE CASES

Since the last issue of the Alliance Report, there has been a court ruling in the following case in which the Alliance has filed a lawsuit or an amicus brief:

Dismissal of Employee for Failure to Assist in Internal Investigation

Spielbauer v. County of Santa Clara, et al./California Supreme Court

Issue:

May a public employee be terminated for refusing to answer questions regarding the performance of public duties after having been forewarned that refusal to answer his employer's questions would constitute insubordination leading to termination and assured that his statements could not be used against him in criminal proceedings?

Alliance Activities:

The Alliance filed an amicus brief, in conjunction with the California League of Cities and the California State Association of Counties, focused on the rights of public employers to discipline employees who refuse answer questions in an internal investigation.

Case Status:

A public defender committed misconduct by making material misrepresentations to a judge in a criminal case in an "unmistakable attempt to affirmatively mislead the court." Following revelation of the misconduct, the public defender's office commenced an internal investigation. When interviewed, the public defender declined to answer questions relying on the advice of counsel and his right against self-incrimination under the constitution. He was terminated for insubordination, gross misconduct and violation of a public defender's office ethical rules. The Court of Appeal held that a governmental employer cannot compel employees to answer incriminating questions unless it has first obtained for that employee a formal grant of immunity from the state.

The appellate court's decision came as a surprise to attorneys representing public employers who had long-believed that a previous decision allowed an employer to discipline an employee for failure to answer questions, as long as the employee received the appropriate admonition and warnings (i.e., right to remain silent, silence could be deemed insubordination, statement could not be used against him in any subsequent criminal proceeding).

The Supreme Court agreed that the appellate court's decision was incorrect and reversed the judgment. According to the Supreme Court, a public employee may be compelled, by threat of job discipline, to answer questions about his/her job performance as long as that employee is not required, on pain of dismissal, to waive the constitutional protection against criminal use of those answers. In this case, the public defender was told that the statements could not be used against him in a criminal trial, thus no grant of immunity was required before requiring him to answer questions related to the noncriminal employment investigation.

Why this case is important:

This Supreme Court decision reaffirms long-standing practice and maintains an employer's right to discipline a public employee.

Distribution of Educational Revenue Augmentation Funds

Los Angeles Unified School District v. Auditor/Controller, County of Los Angeles/Los Angeles County Superior Court

Issue:

Should Educational Revenue Augmentation Fund funds be considered property tax revenues received for purposes of determining the pro rata distribution of property tax from redevelopment projects?

Alliance Activities:

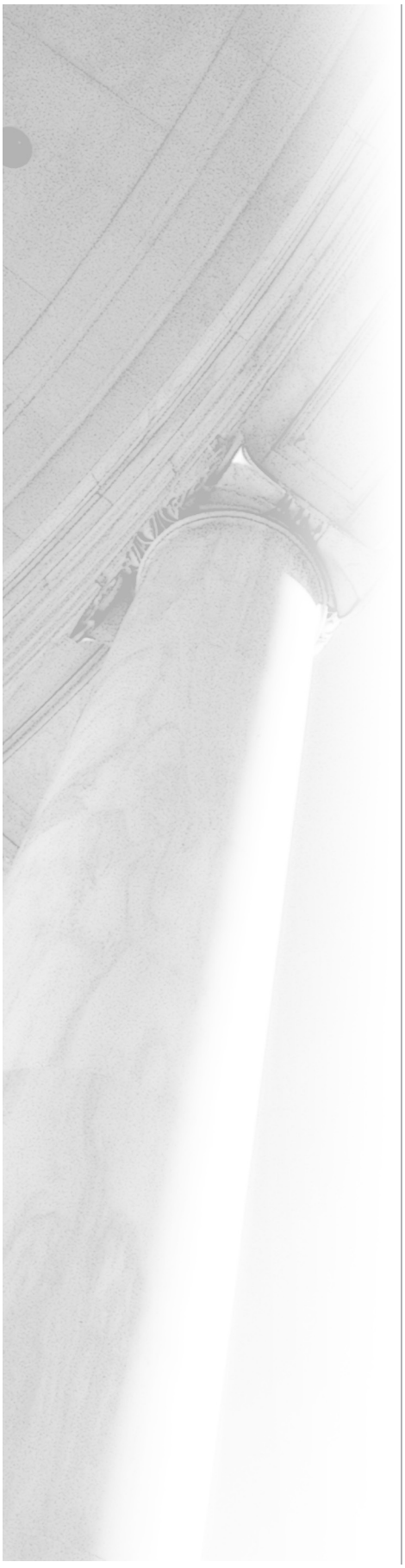
The Alliance filed an amicus brief in support of LAUSD in its lawsuit filed against LA County's Auditor/Controller challenging calculations of the amount due to the district from redevelopment agencies that do not consider ERAF funds as "taxes received" by the district. The Alliance has also been exploring ways to take this issue statewide in order to benefit all school districts.

Case Status:

ERAF funds increase the share of local property taxes paid to schools, in turn decreasing the amount of required State payments under Proposition 98. Subsequent legislation was enacted to reduce the adverse impact of Redevelopment Agency projects on the property tax revenue of the schools and other local governmental entities entitled to property taxes. When a redevelopment project occurs, the property comes off the general tax roll and the RDA then receives the taxes subsequently assessed. A portion of the property tax revenue received by the RDA is redirected to the "affected taxing entities." This money is to be split among the affected taxing entities in "proportion to the percentage share of property taxes each affected taxing entity ... receives."

The lack of explicit direction as to the treatment of ERAF payments has led to a split in the method of calculating payments by county auditors and controllers. Some counties include ERAF payments to school districts in determining the districts' percentage of property taxes received for purposes of calculating RDA tax increment entitlement. Other counties exclude ERAF payments in calculating districts' percentage share of property taxes received. These counties treat the ERAF payments as belonging to non-school entities.

On December 11, 2008 the trial court ruled against LAUSD finding that the Community Redevelopment Law and the ERAF statutes "are separate statutory schemes that were not intended to be read together. Conflating the statutes as LAUSD requests would result in



LAUSD obtaining a financial windfall to the detriment of non-school entities. LAUSD has filed an appeal and has requested an expedited review schedule by the court.

Why this case is important:

Approximately 56 percent of the RDA pass-through payments to schools can be used for facilities and are exempt from the revenue limit. Therefore it is important to maximize pass-through payments from RDAs by having ERAF funds included as "taxes received" by school districts. According to LAUSD's calculation, schools in Los Angeles County, and elsewhere, are receiving approximately 18 percent less redevelopment tax increment than they are entitled to. Depending on the rate at which property appreciates and the number and extent of redevelopment projects, it is believed LAUSD will be underpaid by as much as $2.4 billion over the next 45 years (anticipated life of an RDA project). Other affected school districts will be disadvantaged proportionately.

OTHER ACTIVE CASES

A court decision is pending in the following cases in which the Alliance has filed or will file an amicus brief:

Dismissal of Employee Resulting from No Contest Plea

Cahoon v. Governing Board of Ventura Unified School District/California Court of Appeal

Issue:

Can a district dismiss a classified employee for his plea of no contest to a drug offense specified in the Education Code as a mandatory leave offense?

Baseline for Assessing Environmental Impacts

Communities for a Better Environment v. South Coast Air Quality Management District/ California Supreme Court

Issue:

What is the "baseline" for assessing the impacts of modifications to existing facilities for purposes of environmental review under the California Environmental Quality Act?

Teacher Failure to Obtain Required English Learner Certification

Ripon USD v. Comm. on Professional Competence, Theresa Messick, RPI/California Court of Appeal

Issue:

May a school district terminate a Life Single Subject Teaching Credential (music) teacher who refuses to obtain EL certification as required in the collective bargaining agreement?

Use of District Mailboxes for Campaign Purposes

San Leandro Teachers Association, CTA/NEA; California Teachers Association v. San Leandro Unified School District/California Supreme Court

Issue:

Does the Education Code require that a district prohibit the local teachers association and others from using school mailboxes to distribute political material?

Attorneys' Fees in Settlement of a Special Education Lawsuit

M.D. and S.D v. OAH and Saddleback Valley USD/U.S. 9th Circuit Court of Appeal

Issue:

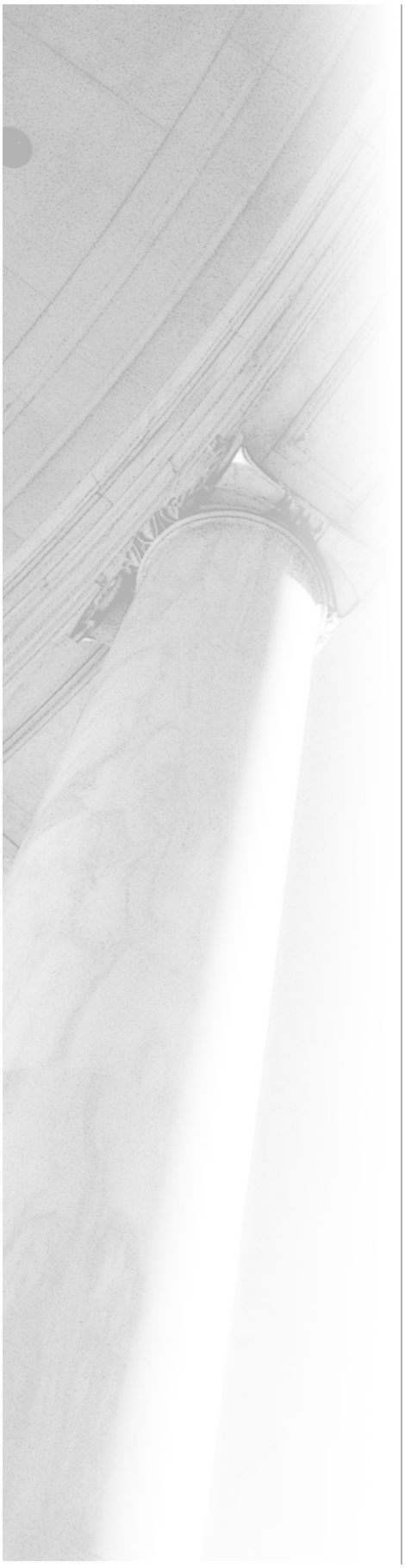
Are attorneys' fees available to a parent who accepts a school district's written offer of settlement 10 days prior to the start of a due process hearing under the Individuals with Disabilities Education Act?

Right of Student to Attend a Protest During the School Day

Corales et al. v Bennett, Kinley, et al. (Ontario-Montclair School District)/U.S. 9th Circuit Court of Appeal

Issue:

Is a middle school student's act of leaving school without permission or supervision of parents or school authorities to attend a protest during the school day expressive conduct protected by First Amendment free speech rights?



Education Legal Alliance

2009 Steering Committee

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Scott P. Plotkin
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Peter Birdsall
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Atkinson, Andelson, Loya, Ruud & Romo

** As a result of an agreement with ACSA, the Alliance has a non-voting position on ACSA's Education Legal Support Fund board and ACSA likewise has a similar non-voting position on the Alliance Steering Committee.*

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