Fall/Winter 2009

The California School Board Association's
Education Legal Alliance

Alliance REPORT

IMPORTANT ISSUES

NEW ALLIANCE CASES

RULINGS/SETTLEMENTS IN ACTIVE ALLIANCE CASES

OTHER ACTIVE CASES

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:

Proposition 98 Maintenance Factor

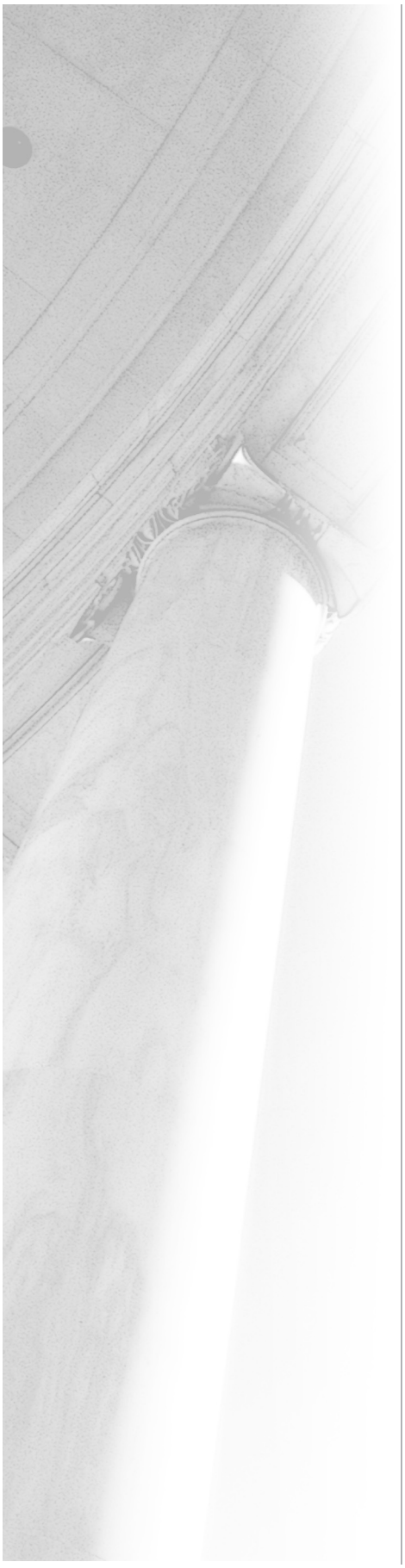
Melinda Dart, CFT, SEIU Local 99, et al. v. Schwarzenegger, et al./San Francisco County Superior Court

Issue:

Under the 2008-09 and 2009-10 (unrevised) budget scenarios, was the state's reduction of school funding permanent or was the state required to create a "maintenance factor" to restore funding in the future, as provided for in Proposition 98?

Background:

On February 20, 2009, the governor signed a revised 2008-09 state budget cutting $7.4 billion from the amount originally budgeted and state officials announced that these cuts would become permanent unless Proposition 1B was approved by the voters in the May 2009 special election. The measure failed. Severe cuts to education funding were also made in the 2009-10 state budget and billions more in reductions were proposed. The governor asserted that these cuts were permanent; however CSBA, and other parties, disagreed and asserted



the state was obligated to restore the cuts to K-14 education funding as soon as the state is financially able to do so under the "maintenance factor" provisions of Proposition 98.

Alliance Activities:

On June 4, 2009, CSBA and the Alliance joined in litigation filed by the California Federation of Teachers and SEIU to ensure that an estimated $10 billion in school funding cuts was restored to K-14 public education funding under the "maintenance factor" for 2008-09 and that, in future years, including 2009-10, restoration occurs whenever falling revenues lead to significant reductions in education funding.

In the fall, the lawsuit was dismissed since its objective, establishment of a maintenance factor, has been satisfied with the enactment of the revised 2009-10 budget in July. In the revised budget, the Legislature, for the first time by statute, established which Proposition 98 test applies in a fiscal year (Test 3 for 2008-09) and set the amount of the maintenance factor to be restored ($11.2 billion for 2009-10). Consistent with the terms of Proposition 98, the maintenance factor will be restored over several years when state general fund revenue growth resumes.

Why this issue is important:

The state must follow the law (Propositions 98) and enact the intent of the voters that California invest in the education of its children.

Algebra I Mandate

CSBA/ELA, ACSA v. State Board of Education/California Court of Appeal

Issue:

Did the State Board of Education's July, 2008 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 No Child Left Behind Act 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. In July 2008, 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 the Association of California School Administrators filed litigation to invalidate the SBE's July action. Superintendent of Public Instruction Jack O'Connell and the California Teachers Association joined in the action.

In a major victory for the Alliance, in December, 2008 the Sacramento County Superior Court granted the Alliance's request for a preliminary injunction ruling that CSBA was likely to prevail at trial on both its claims. The judge's order prevents the SBE from implementing its July action, including finalizing a timeline waiver or compliance agreement with the USDOE, until after a trial is held or a settlement is reached. The SBE appealed the trial court's decision on the issue of the SBE's authority to amend the standards. Briefing has been completed and a court decision should be received by mid-2010.

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 SBE's agenda did not provide an opportunity for the public to express its views. In addition, the SBE's 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. SBE et al./California Court of Appeal

Issue:

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

Background:

In 2007, the CDE proposed revisions to the existing SBE regulations to incorporate four court cases decisions governing Proposition 39 charter school facilities requests. The regulations were ultimately approved by the SBE and the Alliance filed litigation challenging several provisions.

Alliance Activities:

Last November, a 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 California Charter Schools Association filed an appeal of the trial court's ruling regarding conversion charters. As a result, the Alliance countered with an appeal as to the portion of the trial court's ruling adverse to district interests.

The case is currently pending in the appellate court and briefing is underway. A decision expected by mid-2010.

Why this issue is important:

Many of these proposed revisions are detrimental to districts and regulate issues that should be within district discretion. With the SBE exceeding its authority, this has now become a battle over maintaining maximum district discretion when dealing with requests for facilities pursuant to Proposition 39.

Mandate Deferral Lawsuit

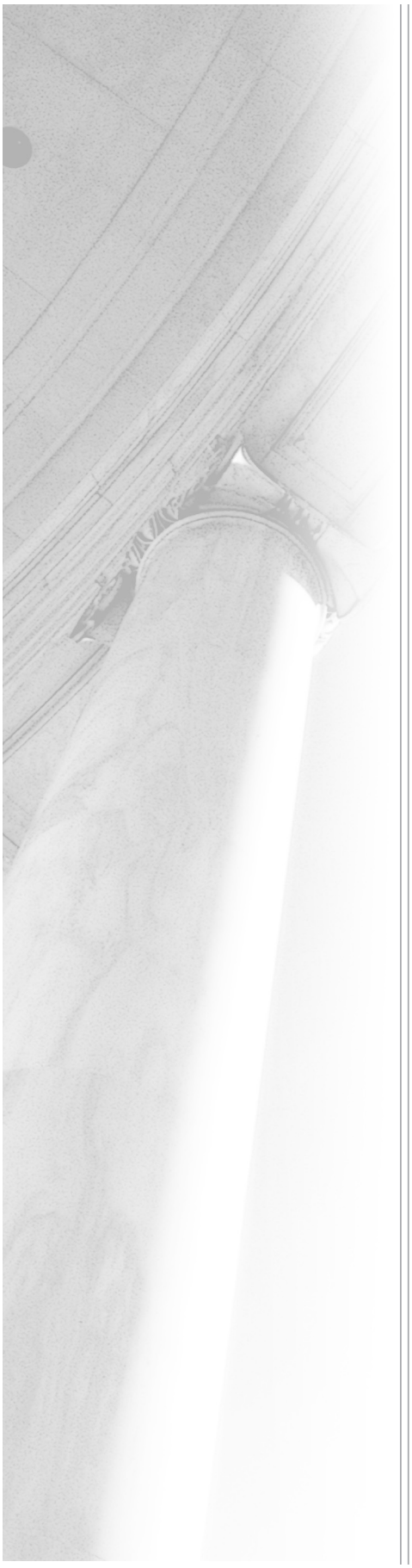
CSBA/ELA, et al. v. State of California, et al./California Court of Appeal

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, it must reimburse the local government for the costs incurred unless funding for the mandates 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 obligations. Although the cost of the K-12 mandates for 2007-08 was estimated at $160 million, the 2007-08 state budget appropriated only $38,000, or $1,000 per mandate. The estimated annual cost has now increased and the K-12 carry-over "credit card debt" from prior years is expected to exceed $1 billion by the end of 2009-10.

Alliance Activities:

The Alliance filed a lawsuit challenging the state's authority to defer mandate payments and to compel the state to fully reimburse districts and COEs for all new programs or higher levels of service. The Superior Court ruled that the California Constitution requires the state to budget full reimbursement of local governments (including school districts) for the cost of state-imposed mandates. The judge's ruling prohibits this deferral practice in the future. The state has appealed the trial court's ruling, thus that court's decision has been stayed (held in abeyance) pending the outcome of the appeal.

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 or suspend the mandates gives districts the ability to avoid having to perform the mandated programs or services.

Mandated Cost Claim Audits by the State Controller's Office

Clovis USD, et al. v. Controller/California Court of Appeal

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 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, which resulted in $1.5 million in SCO audit penalties being declared void and unenforceable. In other challenged audits (School District of Choice, Emergency Procedures, Earthquake Procedures and Disaster and Notification of Truancy Programs) now pending before the Commission on State Mandates, the aggrieved districts may rely upon the court's ruling barring contemporaneous documentation unless specifically provided for in the parameters and guidelines for those mandates. Thus, there is a potential that another $6.4 million in audit penalties ultimately being voided.

The SCO and the school districts have each appealed the portions of the trial court's ruling adverse to their interests.

Alliance Activities:

In the trial court, the Alliance provided financial assistance to the districts that filed suit against the SCO to help offset their trial court legal expenses. In the appellate court, the Alliance will file an amicus brief in support of the districts.

Why this case is important:

The 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/Legislature

Issue:

Do state requirements for behavioral intervention plans, specified in the Education Code and Title 5 regulations, require local education agencies 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 behavioral intervention plan 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, but that case been held in abeyance.

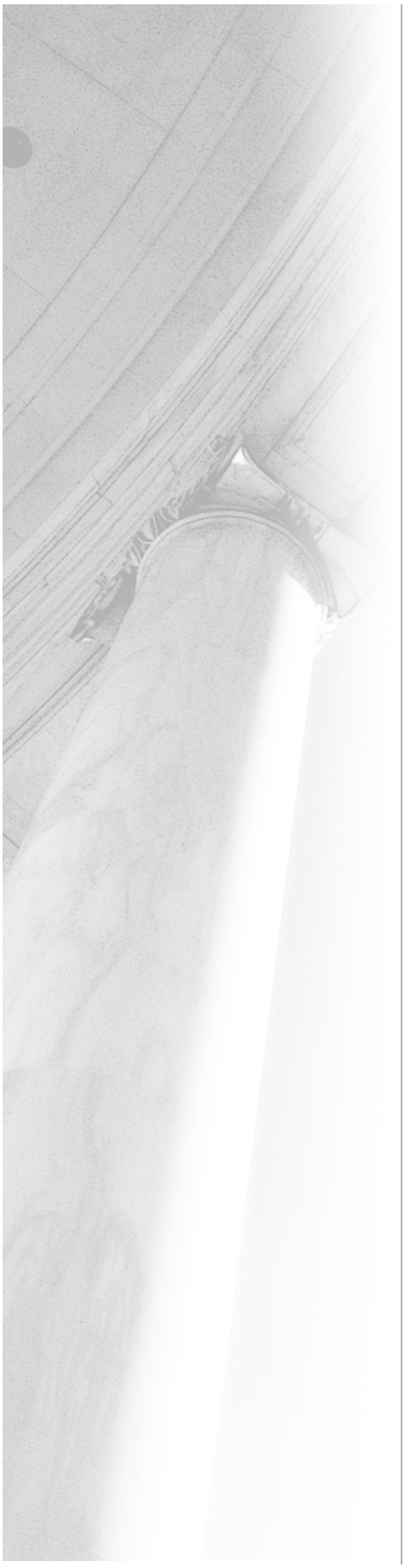
Alliance Activities:

The parties agreed to a settlement in December, 2008. Starting in 2009-10, LEAs would have seen increased AB 602 funding (the special education funding mechanism) in the amount of $65 million. In addition, in settlement of the BIP costs going back to 1993-94, school districts would have received $510 million, payable in $85 million annual installments over six years starting in 2011-12 and ending in 2016-17. All payments would have been into school districts' general funds based on 2007-08 P2 ADA. Also, in 2009-10 an additional $7.5 million would have been paid to COEs and special education local plan areas.

The obligation for the Legislature to enact the funding specified in the settlement agreement was triggered when the Alliance collected the requisite amount of legal waivers from school districts, COEs and SELPAs. Although LEAs overwhelming supported the Alliance-negotiated settlement, the 2009-10 state budget problems made legislative enactment of the settlement impossible. However, with the support of the DOF the Alliance is working to include the settlement, with the amount increased to account for another year of delay, into the 2010-11 state budget.

Why this issue is important:

State requirements for BIPs are detailed and costly. LEAs are being required to implement an increasing number of BIPs and it is important that this mandate be reimbursed.



NEW ALLIANCE CASES

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

Split Roll Parcel Tax

Beery/Borikas v. Alameda Unified School District/Alameda County Superior Court

Issue:

Does a parcel tax which charges different rates for residential and commercial parcels violate the requirement that the tax be "uniform?"

What this case is about:

The court has consolidated two separate cases that were filed challenging the legality of Alameda USD's parcel tax, which was passed by 66.9 percent of Alameda's voters in June 2008. The four-year tax charged residential properties and commercial/industrial property different amounts and set a floor and cap on the amount charged to commercial/industrial properties.

The Government Code allows districts to impose qualified special taxes that apply "uniformly" to all taxpayers or all real property within the school district. The plaintiffs allege that because the commercial/industrial property owners pay a different rate than residential property owners, and commercial/industrial owners are subject to a different rate even among themselves because of the floor and cap, the "uniformity" requirement has been violated. The district argues that "uniformity" means only that the tax is uniform to all persons and properties within the same classification.

The plaintiffs also allege that the district's parcel tax is unconstitutional because it is not a "special tax." The text of Alameda's measure stated it would be used to "offset severe budget cuts to Alameda schools, minimize school closures, and protect the quality of education, student safety, class sizes, excellent teachers and staff and to restore prioritized cuts to music, athletics, advanced placement courses and other programs." Plaintiffs argue that this language is "vague" and "aspirational" as opposed to saying exactly how the funds will be spent.

The parties are currently in settlement negotiations and the trial has been put on hold.

Role of the Alliance:

The Alliance will file an amicus brief in support of the district if the case reaches the court of appeal. The Alliance's brief will focus on the definition of uniformity and may also discuss requirements related to specificity of the ballot language.

Why this case is important:

These cases could make it much more difficult for districts pass parcel taxes in the future and greatly reduce districts' flexibility. The elimination of the "split roll" option would also make it more difficult for districts to structure a local tax for the particular circumstances in the district. Due to the ever-changing budget situation, it would be difficult for a ballot measure to outline exactly how the funds will be spent with specificity.

Use of Public Funds for Campaign Communications

CSBA et al v. Fair Political Practices Commission/Sacramento County Superior Court

Issue:

Has the Fair Political Practices Commission exceeded its statutory authority by adopting regulations regarding the use of public funds for communications about ballot measures?

What this case is about:

The FPPC adopted regulations in August interpreting a California Supreme Court case in which the court examined the use of public funds in elections involving ballot measures. Consistent with current understanding of the statutes, the court ruled that expenditures for "informational" communications were allowed but that public agencies were prohibited from using public funds for "campaign materials" that urge voters how to vote.

The FPPC regulations attempted to build upon the court decision by defining campaign material as material that "expressly advocates" the passage or defeat of a measure or "unambiguously urges" a particular result. A public agency "unambiguously urges" a particular result if the material is clearly campaign material or "when considering the style, tenor, or timing" the material can be characterized as campaign material or is not a fair presentation of facts serving an informational purpose. If the material is determined to be campaign in nature, then, according to the FPPC regulations, the public entity has made an "independent expenditure" and the public entity has become a committee subject to reporting requirements and regulation by the FPPC.

More problematic however is how these regulations conflict with the Education Code. Under these regulations, districts may be required to register as an independent expenditure committee with the FPPC any time they are distributing information on ballot measures, even if that information does not expressly advocate for or against the measure. Because the Education Code prohibits schools districts from using public funds for campaign purposes, the implication of registering as a committee with the FPPC is that the district is engaging in actions that are illegal under the Education Code.

Role of the Alliance:

In light of recently-enacted legislation, CSBA will request that the FPPC reconsider the regulations. If the FPPC declines this request, CSBA will join with the California League of Cities and the California State Association of Counties in filing a legal challenge.

Why this case is important:

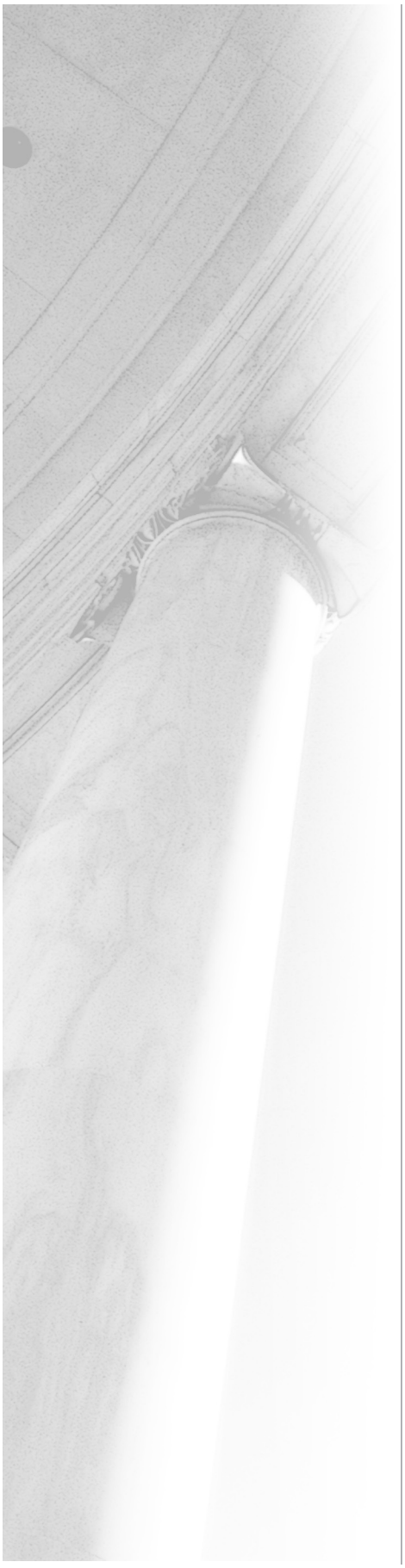
The FPPC is exceeding its statutory authority by adopting a standard beyond the court's intent and thus allowing the FPPC to become an arbiter of whether there has been misuse of public funds in the preparation/distribution of informational communications.

Bargaining of the Decision to Layoff Employees

International Association of Firefighters, Local 188 v. PERB (City of Richmond, RPI)/ California Supreme Court

Issue:

Is the decision to layoff employees a mandatory subject of collective bargaining under the Meyers-Milias-Brown Act?



What this case is about:

In 2003-04, the city was facing a fiscal crisis which ultimately resulted in the layoff of 18 firefighters, "rolling closures" at designated fire stations, and the shifting of staffing levels of fire suppression units. The firefighters filed an unfair practice charge arguing that the city was required to meet and confer over the decision to lay off employees when the decision affected the workload and safety of the remaining employees. A Public Employment Relations Board panel upheld the dismissal by stating that the decision to lay-off employees was not within the scope of the bargaining, but that the effects of a layoff decision, such as workload and safety concerns, were negotiable.

The Appellate Court agreed with PERB that workload and safety issues that result from the decision to lay off firefighters is subject to negotiation, but that the layoff decision itself is not subject to negotiation. Thus, collective bargaining rights attach only after the workforce is reduced and apply to the "remaining employees" whose workload and safety must be considered.

Role of the Alliance:

The Alliance will file an amicus brief in support of the city. The brief will be filed jointly with the Inland Personnel Council, a consortium of 55 school districts and COEs from Riverside and San Bernardino counties, and will be focused on reaffirming the premise that only the effect of the layoff is subject to negotiation.

Why this case is important:

This case is of statewide significance in that a negative decision under the MMBA could ultimately limit a school district's ability to reduce services and cut budgets under the Education Employment Relations Act. Given the state's fiscal condition, any limitation of a district's ability to lay off employees could be devastating to district budgets.

RULINGS/SETTLEMENTS IN ACTIVE ALLIANCE CASES

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

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 music teacher with a Life Single Subject Teaching Credential who refuses to obtain English Learner certification as required in the collective bargaining agreement?

Alliance Activities:

The Alliance filed an amicus brief in the appellate court in support of the district and provided financial support for the district's trial court action.

Case Status:

The CDE conducted an audit and found Ripon USD out of compliance because EL students were assigned to classes taught by teachers who lacked EL certification. In response, the district

developed a plan that included an agreement with the teachers' union that all certificated staff would obtain the certification or either resign or be terminated. The district agreed to pay for the training if the teacher obtained it through the COE and provided an additional stipend. Messick, a music teacher with a lifetime credential and the only music teacher in the district, refused to obtain the training. The district eventually began termination proceedings against her for unprofessional conduct and refusal to obey district rules. The Administrative Law Judge found that the district did not have the authority to terminate her, the trial court disagreed, and Messick filed this appeal.

Although Messick's attorneys argued that the state laws regarding certification did not require teachers who received a credential prior to 2003 to obtain EL certification, the district and Alliance pointed out that the Education Code does require districts to provide EL students with equal opportunities and that all teachers teaching EL students be certified to do so. Districts are also subject to monitoring and penalties if they assign an EL student to a teacher who is not certified. If an EL student registered for a music class, the district would be placed in an impossible situation—it could either deny the student the opportunity to take the class or risk sanctions for assigning the student to a teacher without certification.

The court agreed and held that the district's termination was lawful. The court also agreed with the district's argument that the EL requirement did not affect the validity of Messick's credential. According to the court, the credential authorizes her to teach music, but it does not guarantee her employment or tenure, nor does it preempt the district from imposing conditions on her employment to teach music.

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?

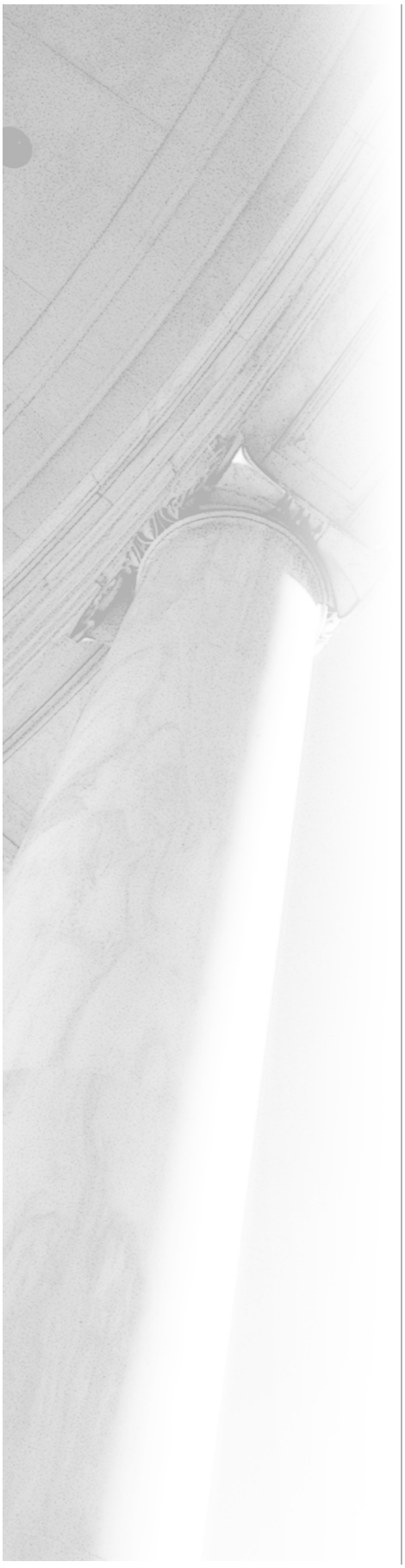
Alliance Activities:

The Alliance filed an amicus brief in support of the district in the appellate and supreme courts.

Case Status:

The San Leandro Teachers Association regularly used district mailboxes to communicate with its members. However, in this case the union used the mailboxes to distribute a newsletter that endorsed a slate of school board candidates in an upcoming election. The district advised SLTA that the Education Code prohibited use of the mailboxes for political purposes. The union filed an unsuccessful unfair labor practice charge and, pursing a separate tactic, also sued. The case advanced on to the appellate court, which ruled in favor of the district, and the state Supreme Court agreed to review the case.

The Supreme Court agreed with the district and Alliance's position that allowing the union to use the mailboxes to endorse candidates unfairly benefits the candidates they endorse because no other candidates or organizations have similar access to the boxes. The court held that the union's special access to an internal channel of district communication is the type of abuse that the Education Code was designed to guard against—the use of taxpayer dollars for political advantage. Furthermore, the district's ban was an authorized and reasonable regulation of a union's right to communicate with its members.



OTHER ACTIVE CASES

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

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?

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 CEQA?

Liability for Cost Overruns in Facility Contracts

Los Angeles USD v. Great American Insurance Co. et al./California Supreme Court

Issue:

Must a school district pay a contractor for cost overruns beyond an agreed-upon contract price when there is no evidence the district had any intent to defraud?

Education Legal Alliance

2009 Steering Committee

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CSBA President-elect, Santa Rosa City Schools

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CSBA Executive Director

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Executive Director of Advocacy & Association Services, School Innovations & Advocacy

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Brian Heryford
Delegate, Region 10, Clovis USD

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Kelli Moors
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ACSA Liaison, Management Services Executive

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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.*

Education Legal Alliance

CSBA

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