Spring 2011

The California School Boards Association's
Education Legal Alliance

# Alliance REPORT



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

## SUPPORT THE EDUCATION LEGAL ALLIANCE

When the Alliance enters a case, everyone wins. Join the Alliance or renew your membership today so we can continue to make the most of your investment—taking on issues that impact all of California's students and schools. Your membership makes a difference.

*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

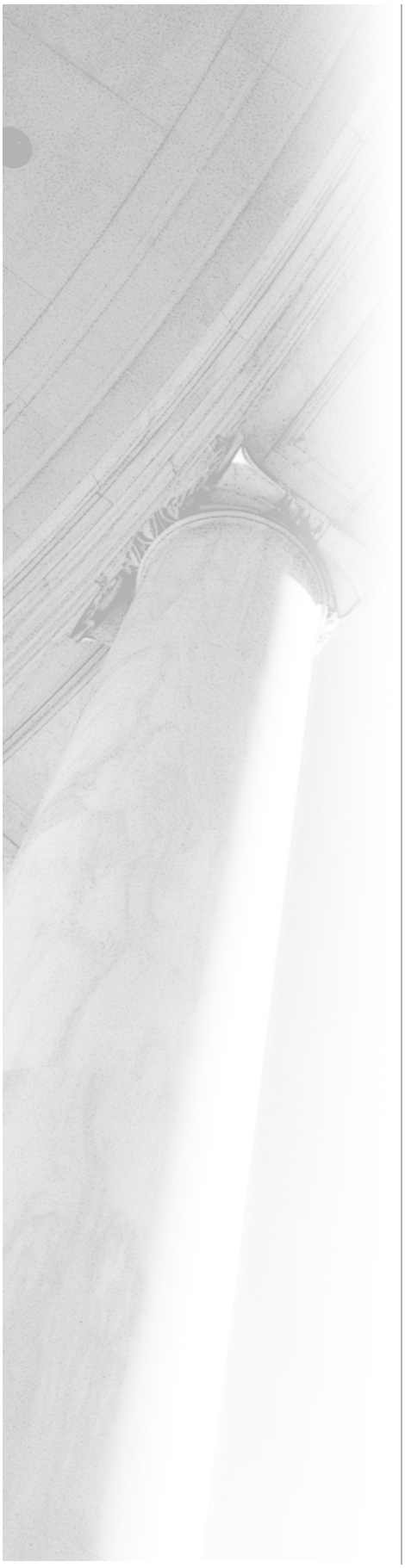
The following section provides an overview of important issues that the Education Legal Alliance (ELA) has been working on, such as a legal issue before a state agency, an issue in a trial court the Alliance is tracking, or an issue on which the Alliance is initiating legal action:

### School Finance Litigation

*Robles-Wong, et al. v. State of California / Alameda County Superior Court*

**Background:**

On May 20, 2010, the California School Boards Association (CSBA) filed a historic lawsuit against the State of California requesting that the current education finance system be



declared unconstitutional and that the state be required to establish a school finance system that provides all students an equal opportunity to meet the academic goals set by the state.

The case, *Robles-Wong, et al. v. State of California*, was filed in the Superior Court of California in Alameda County. Specifically, the suit asks the court to compel the state to align its school finance system—its funding policies and mechanisms—with the educational program that the state has put in place. To do this, plaintiffs allege, the state must scrap its existing finance system; do the work to determine how much it actually costs to fund public education to meet the state's own program requirements and the needs of California's schoolchildren; and develop and implement a new finance system consistent with constitutional requirements.

The lawsuit was filed by a broad coalition including more than 60 individual students and their families, nine school districts from throughout the state, CSBA, the California State PTA, and the Association of California School Administrators (ACSA).

### Alliance activities:

In December, the trial court rejected CSBA's claims that the state's failure to connect funding and program requirements violated the California Constitution's requirement to provide a "system" of schools; that the state's failure to connect funding and program violated the constitutional requirement to keep up and support its schools; and that the state is violating its obligation to first set aside the money necessary for the schools. In essence, the judge held that the constitution does not guarantee a particular level of education or level of funding.

The judge also rejected CSBA's claim that the state is violating the equal protection guarantee of the constitution because the impact of failing to fund the system falls disproportionately on certain groups of students, such as those who come from poverty, minority students, and English learners. However, the judge did grant the right to amend the complaint with regard to this cause of action and an amended complaint has been filed.

CSBA expects the state to again demurrer to the amended complaint arguing that CSBA failed to state a cause of action. It is likely the judge will sustain the state's demurrer. If he does, CSBA will appeal all of the trial judge's rulings. Should the judge overrule the state's demurrer, trial preparation will proceed on the equal protection claim. In litigating the equal protection claim, CSBA will be able to submit evidence supportive of the other claims initially rejected by the judge and thus all the claims/arguments can be made within the equal protection context.

For more information about the school finance lawsuit, please visit www.fixschoolfinance.org.

## AB 3632 Issues (Mental Health Services/Funding)

*CSBA/ELA v. Schwarzenegger / Court of Appeal*

### Issue:

Does the governor have the authority to suspend the mandate (AB 3632) imposed on county departments of mental health to provide mental health services for seriously emotionally disturbed students and veto funding for that mandate?

### Background:

The Individuals with Disabilities Improvement Act (IDEA) establishes a right to educational equity for disabled students and provides that states receiving money pursuant to the Act (such as California) guarantee that disabled children, including those who are seriously emotionally disturbed, receive a free, appropriate public education. This right includes not only special education, but also related services designed to meet a child's needs, including

mental health services such as counseling or residential placement, as determined by an individual education plan (IEP) developed for each student based on an assessment of that student's needs.

California implemented the federal requirements by adopting a state plan and implementing legislation (AB 3632) which divided responsibility between the Local Education Agencies (LEAs)—which provide the special education services—and county mental health offices—which provide the mental health services. The Commission on State Mandates (CSM) has determined this function is a reimbursable state mandate imposed on counties.

As part of the 2010 state budget, the governor suspended AB 3632 in an attempt to relieve counties from having to provide mental health services and thus eliminated the state's reimbursement of the mandate to counties. Since LEAs are responsible for implementation of the IEP under IDEA, this action eliminates state funding for those services and shifts full responsibility onto LEAs.

## Alliance activities:

CSBA/ELA filed a lawsuit to challenge the governor's suspension of the mandate and to void the veto of funding. As anticipated, another court case was filed on the same issue by 36 counties in the Sacramento County Superior Court seeking to have the mandate deemed unfunded and thus relieving the counties from providing AB 3632 services. CSBA/ELA intervened in that lawsuit in an attempt to dissuade the court from granting the counties' requested relief.

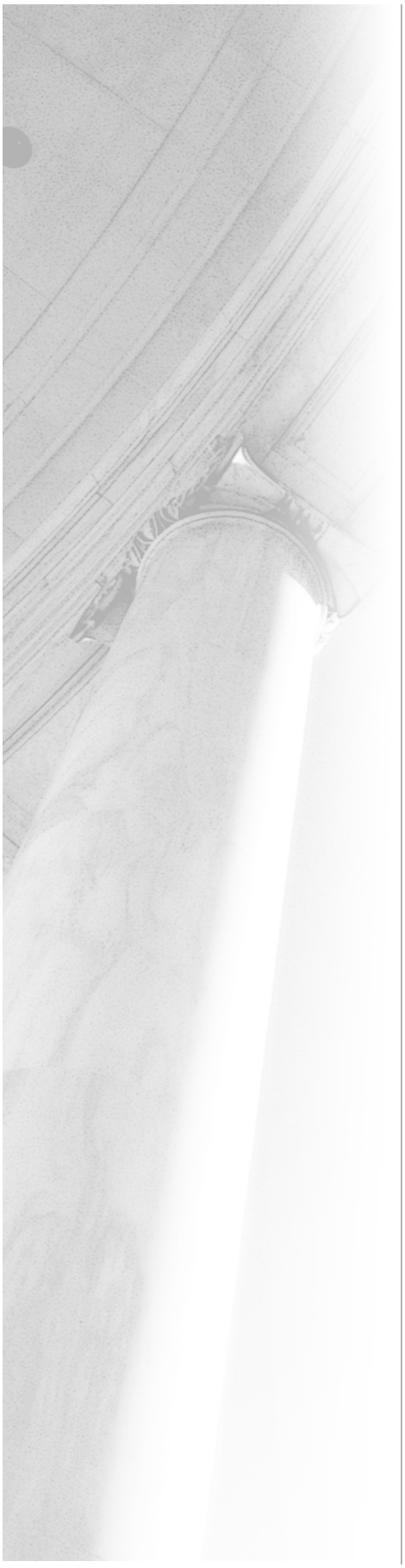
Unfortunately, the court of appeal disagreed with CSBA/ELA's position and upheld the governor's veto of the funding and his suspension of the mandate that required counties to provide AB 3632 services. CSBA/ELA has appealed that decision and filed a request for review by the California Supreme Court. Absent a reversal, the governor will have unilateral authority to relieve counties of the obligation to provide AB 3632 services on an annual basis. This theory could also apply to other mandates funded by the Legislature.

In the counties' lawsuit, the trial court, before the appellate court ruling in CSBA/ELA's case was issued, denied relief to the counties with the exception of responsibility for residential placements. However, in light of the appellate court ruling, it now appears the trial judge will amend that ruling and grant counties all the relief they requested—that is, counties are not required to provide AB 3632 mental health services in 2010–11.

While the petition for review is pending in the Supreme Court, CSBA/ELA are working with districts and Special Education Local Plan Areas (SELPAs) to assist in developing contracts with counties to have the county continue providing the AB 3632 services in 2010–11 at district expense. Most districts/SELPAs lack the capacity to provide services provided by counties, so a contract is the only viable solution. Interestingly, Governor Brown's budget proposes to restore the AB 3632 mandates on counties in 2011–12.

## Why this issue is important:

The governor's "suspension" of AB 3632 and veto of funding has created chaos in the delivery of vital mental health services to the students of greatest need, ultimately leaving the already fiscally-burdened LEAs as the provider of last resort under IDEA. Responsibility for AB 3632 mental health services should not be subject to the annual vagaries of state budgeting. CSBA/ELA, on behalf of LEAs, must lead the fight to restore these much-needed services for students pursuant to provisions enacted more than 25 years ago.



# Mandate Redetermination Lawsuit (2010 State Budget)

*CSBA/ELA v. State of California, et al. / Alameda County Superior Court*

## Issue:

Has the state violated its constitutional obligation to reimburse for state mandated programs with enactment of legislation that: (1) establishes a new mandate "redetermination" process; and (2) redirects existing teacher funding to pay for the high school graduation science course requirement?

## Background:

As part of the 2010–11 state budget, statutory provisions were enacted providing for a "new test claim" process (also referred to as "redetermination" process). Under this new process, the Department of Finance (DOF) can request that the CSM "re-determine" one of its prior rulings which had found a reimbursable mandate when there has been "a subsequent change in law." This new process was to apply to the behavioral intervention plan (BIPs) mandate and collective bargaining mandates.

With respect to BIPs, the combination of statute and regulations were deemed a reimbursable mandate by the CSM in 2000 as requiring services beyond those required by federal law. If the services were required by federal law, there would be no state mandate and thus no obligation for the state to reimburse. In the budget trailer bill, the underlying legal requirements were unchanged, but language was added stating that the State Board of Education's (SBE) regulations are "declaratory of federal law" and deemed necessary to implement federal law. These legislative declarations are deemed by the Legislature to constitute a "subsequent to change in the law" and the DOF was "requested" to file a new "test claim" under the redetermination procedure.

Likewise, without stating what change in law has occurred, the DOF is requested to file a new "test claim" under the redetermination procedure concerning the collective bargaining mandate.

With respect to the high school science graduation requirements, CSM had previously determined that legislation requiring students to complete at least two science courses in order to receive a high school diploma imposed a reimbursable mandate. In the 2010 budget trailer bill, the Legislature provided that any costs related to teacher salaries and benefits incurred to provide the science graduation requirement "shall be offset by the amount of state funding apportioned to the district . . .". It also stated that funding provided to districts for payment of teacher salaries, in general, "shall first be allocated to fund the teacher salary costs incurred to provide the courses required by the state."

## Alliance activities:

The ELA has filed a lawsuit challenging: (1) the state's recent enactment of statutory provisions establishing a new process that allows the DOF to file a claim with the CSM "encouraging" it to reconsider a prior decision finding that a mandate existed; and (2) the retroactive redirecting of past and future teacher funding to pay for the science course requirement for high school graduation.

## Why this case is important:

The ELA believes this legislative action violates the constitution's mandate reimbursement requirements. First, by self-servingly deeming the state BIP requirements to be equal to the federal requirements, the state avoids having to reimburse districts for a state mandate. Second, by re-designating existing revenues as payments, the state is providing "funding" and thus the need for reimbursement of the mandate no longer exists. The constitutional

provisions were intended to prevent the state from forcing local governments to use limited revenues to pay for programs required by the state. The state's attempt to designate existing funding as satisfying the mandate directly conflicts with and undermines that purpose. If this most recent legislation goes unchallenged, the Legislature will simply be able to point to district apportionments in order to avoid any reimbursable mandate or, using the new test claim process, to eliminate any previously established claim.

## 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 has been 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.

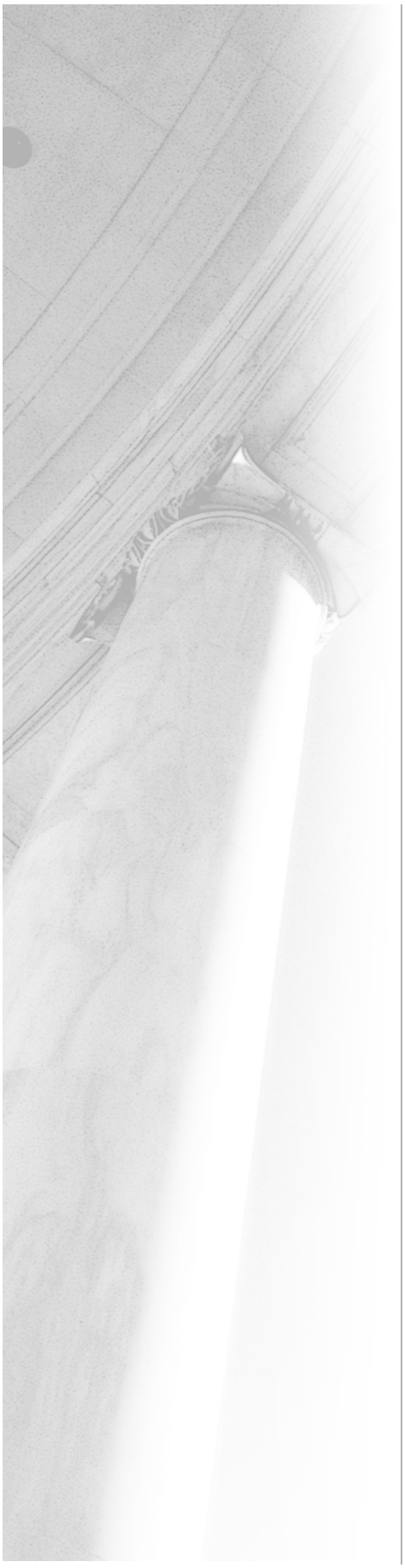
Over the last several years, the state budgets have failed to appropriate enough money to cover current mandates or pay off the amount owed by the state for prior claims. Annual amounts continue to increase and the carry-over "credit card debt" from prior years ($766 million) plus unfunded mandates is nearly $2.5 billion.

### Alliance activities:

In February, the court of appeal issued a ruling concurring with the trial court 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 court ruled that providing "nominal reimbursement" (such as $1,000 per mandate) is the functional equivalent of a failure to provide funding. However, the court denied CSBA's requested injunctive relief which was intended to force the Legislature to make decisions through the legislative process as to whether each mandate would be either fully funded or suspended. As a result, if a mandate is only partially funded or otherwise not suspended, each district must make the decision as to whether to perform the mandated services or to not perform the services and go to court to seek relief.

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



## Behavioral Intervention Plans

*CSM/Sacramento Superior Court/Legislature*

### Issue:

Do state requirements for BIPs, 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 BIPs for pupils who exhibit serious behavior problems that interfere with their education. Eventually, the CSM adopted a decision agreeing that the regulations imposed a reimbursable state mandate, but the CSM decision has not been implemented pending conclusion of what became stalled negotiations to settle the exact amount owed by the state. In 2003, the DOF filed litigation challenging the CSM's decision. It has also been held in abeyance. Negotiations resumed in late 2007.

### Alliance activities:

Claimants have now filed amended parameters and guidelines with CSM to begin LEA claiming procedures to recover BIP costs going back to 1994. It is anticipated the state will resist the claiming process by asserting the self-serving proclamation that the state BIP requirements are equal to the federal requirements despite the fact that the CSM has previously determined otherwise (see "Mandate Redetermination Lawsuit (2010 State Budget)" above).

### 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 is reimbursed.

# NEW ALLIANCE CASES

Alliance involvement in the following cases has been approved by CSBA's Executive Committee or the Alliance Steering Committee:

## Administration of Insulin to Students

*American Nurses Association et al. v. Jack O'Connell and the California Department of Education, American Diabetes Association Intervenor / California Supreme Court*

### Issue:

Under California law, may unlicensed, trained employees (i.e., without a nursing license) administer insulin to students pursuant to a Section 504 plan or a student's IEP?

### What this case is about:

In 2005, the American Diabetes Association (ADA) brought a class action lawsuit alleging that the state failed to ensure that school districts met their legal obligations to provide diabetes care because the districts would not permit any school personnel to help the children when they needed insulin. As part of this settlement, the California Department of Education (CDE) issued a legal advisory to all school districts which outlined the categories of persons that may administer insulin, including voluntary, trained, unlicensed school employees (i.e., without a medical license), as required by the student's IEP or Section 504 plan.

Following the issuance of the legal advisory, the nursing organizations sued the CDE seeking to strike down that part of the legal advisory. The appellate court held that state law authorizes the administration of insulin to a student only by a licensed health care professional acting within the scope of practice for which he or she is licensed (e.g., a nurse licensed under the Nursing Practices Act) or by an unlicensed person who is expressly authorized by statute to administer insulin in specified circumstances (e.g., contract nurse, emergency situation, etc.) The court acknowledged that nursing shortages and fiscal constraints result in a lack of qualified personnel to administer insulin to students and also acknowledged that the nurses did not present any evidence that unlicensed personnel could not administer insulin safely. But, according to the court, the existing statutes are clear and the issue is for the Legislature to resolve.

The ADA appealed the appellate court's ruling and the California Supreme Court granted review.

### Why this case is important:

This case is of statewide significance in that there could be great fiscal consequences if districts are required to hire a school nurse or contract with a nurse to administer insulin to students. Because the appellate ruling is quite broad, there is also the possibility that this decision could be applied to the administration of other medications to students, such as Diastat for epilepsy.

### Role of the Alliance:

The Alliance will file an amicus brief in support of the ADA's effort to expand those who can administer insulin.

## Bargaining Rights of Noon Duty Aides

*CSEA v. Castaic Union School District / California Court of Appeal*

### Issue:

Does the Education Code exclude part-time playground positions (e.g., noon duty aides who do not hold another position in the district) from the classified service?

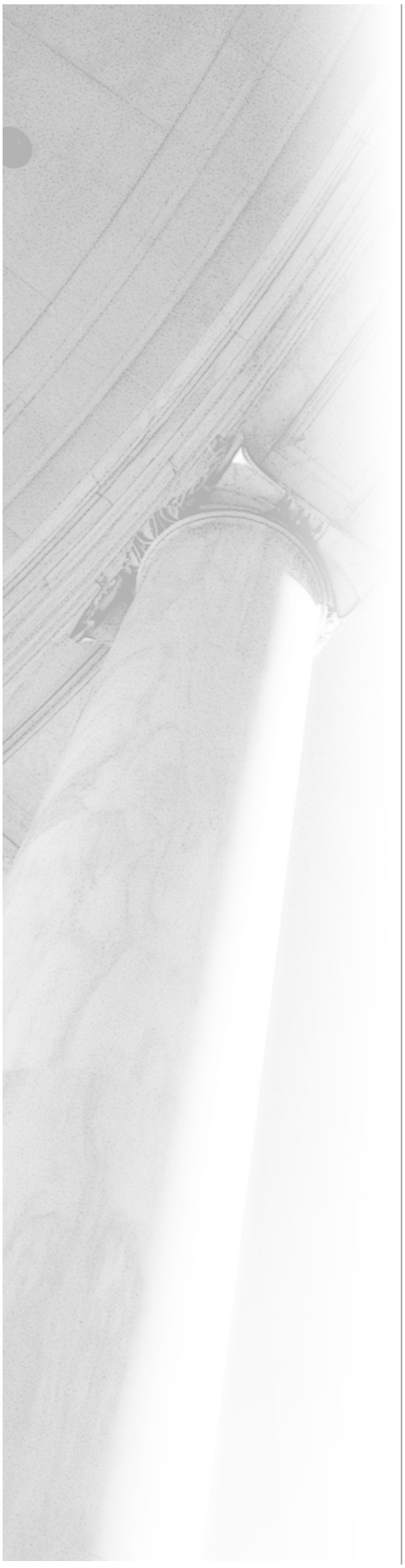
### What this case is about:

The Education Code states that "part-time playground aides" shall not be part of the classified service when the aide is not otherwise employed in another classified position. The California School Employees Association (CSEA) filed a petition before the Public Employment Relations Board (PERB) seeking to add 22 noon-duty aides to the district's classified bargaining unit. Although previous PERB decisions held that noon-duty aides could be included in a classified bargaining unit, in this case PERB overturned that prior precedent and held that an exclusive representative may only represent a bargaining unit of certificated or classified employees. Since the Education Code states that noon duty aides are not part of the classified service (unless the employee is otherwise employed in the district in a position within the classified service), PERB held that collective bargaining rights do not apply.

Pursuant to PERB procedure, PERB granted CSEA's motion for judicial review and the case proceeded directly to the appellate court.

### Why this case is important:

This case is of statewide significance in that, in addition to noon-duty aides, all categories of employees who are listed in the relevant Education Code section are removed from the



bargaining unit, including substitute and short-term employees, apprentices, professional experts, and students employed in part-time positions. This decision provides school districts with greater flexibility in hiring and terminating these "non-classified" employees.

### Role of the Alliance:

The Alliance will file an amicus brief in support of the district.

## Withdrawal of Compensation in Eminent Domain Actions

*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market / California Supreme Court*

### Issue:

When utilizing the "quick take" eminent domain proceedings, does a lender's withdrawal of the probable compensation deposit result in a waiver of the property owner's right to challenge the taking?

### What this case is about:

In response to a federal consent decree, the Los Angeles County Metropolitan Transportation Authority (MTA) was required to put additional buses into service which required expansion of its existing downtown facility. For this expansion, MTA acquired Alameda Produce's nearby property, which consisted of 115,000 square feet of vacant and undeveloped contiguous parcels.

The Code of Civil Procedure sets forth the "quick take" eminent domain proceeding for use by public agencies, including school districts. Under these proceedings, the public agency may apply to the court for a prejudgment order which allows for possession of the property upon deposit of probable compensation for the owner. The deposit must be supported by an appraisal and is designed to approximate the amount the owner will ultimately be awarded at a jury trial. If any portion of the deposited money is withdrawn, then the withdrawal constitutes a waiver and the owner loses the ability to challenge the agency's right to take the property. However, the owner can still seek to challenge the amount of compensation.

MTA utilized this procedure and deposited $6.3 million as the probable amount of compensation. However, a day before the action was filed in court, the existing property owner transferred title of the property to a related entity and, in exchange, took back a loan as part of the purchase price. After the action was filed in court, the former owner, who now held the loan, and several lenders with liens against the property, applied to the trial court to withdraw the compensation deposited by MTA in order to pay off the loans and liens. Eventually, nearly all of the $6.3 million was withdrawn. The new owner of the property did not object in court to these withdrawals. The appellate court held that the lenders' withdrawal of the deposited funds used to satisfy the debt owed by the original owner resulted in a statutory waiver of the right to challenge the proceeding.

### Why this case is important:

The appellate court's holding is consistent with current case law, thus the Supreme Court's granting of review raises concerns. If this decision is overturned, a loophole would be created which would allow the agency's deposit to be withdrawn by a lender for the benefit of the property owner, yet still give the property owner the right to challenge the taking—allowing the property owner to have their cake and eat it too.

### Role of the Alliance:

The Alliance will join in an amicus brief being filed by the League of California Cities and the California State Association of Counties.

## Classification of Temporary Certificated Employees

*McIntyre v. Sonoma Valley USD / California Court of Appeal*

### Issue:

Can a school district classify a certificated employee as "temporary" for multiple school years in a row and still retain release rights and non-reelect rights if the employee is subsequently hired in probationary position?

### What this case is about:

For two consecutive school years, the plaintiff was employed as a "temporary" teacher, released at the end of both school years, and then rehired. For the 2008–09 school year, she was again rehired and classified as "temporary," but in October 2008 was notified that the district had approved changing her status from temporary to second-year probationary employee. In converting her to second-year probationary status, the district "tacked on" her service as a temporary employee during one school year. However, in 2009 she was non-reelected from continued probationary employment.

The Education Code specifies that a person employed for one complete school year as a temporary employee, who is reemployed for the following school year to fill a vacant position, is then classified as a second year probationary employee. The previous year's employment as a temporary employee is deemed one year's employment as a probationary employee for purposes of acquiring permanent status. Districts have discretion to convert a certificated employee from temporary to probationary status during the year and to "tack on" the immediate prior full school year of temporary service as the employee's first year of probationary service.

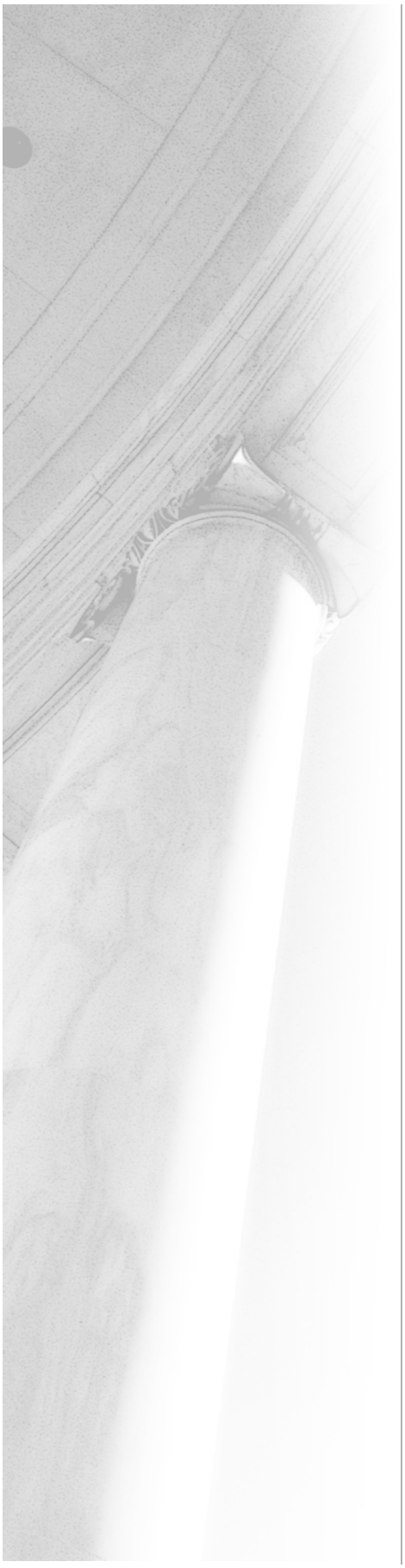
The teacher filed a suit alleging that the district did not have the authority to non-reelect her because her prior two years of service as a temporary employee should have been "tacked on," thus she had permanent status. According to the district, the Education Code does not require a one-to-one match between the temporary employee and the particular employee who is being replaced—meaning the district may hire multiple temporary employees at the beginning of the school year and then match up the number of temporary employees with the number of vacant positions after the school year has begun. In their view, the district is just required to prove that the number of vacant positions/employees on leaves of absence is greater than or equal to the number of employees classified as temporary in any given school year. The trial court agreed with the district's view and held that the district had the authority to non-reelect her.

### Why this case is important:

There is ambiguity in the statutes and the case law is not well-settled and, as a result, there are various interpretations and practices among districts. Hiring a large number of temporary employees for multiple years and then "matching up" the number of temporary employees with the number of employees on leave later is a common practice in large districts. Given the large number of layoffs by districts, this ambiguity is becoming a bigger concern.

### Role of the Alliance:

The Alliance will file an amicus brief in support of the district.



# RULINGS/SETTLEMENTS IN ACTIVE ALLIANCE CASES

The following section discusses cases in which the Alliance has filed a lawsuit or an amicus brief and where there has been a court ruling:

## Bargaining of the Decision to Lay Off Employees

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

### Issue:

Is the decision to lay off employees a mandatory subject of collective bargaining under the Meyers-Milias-Brown Act (MMBA)?

### Case status:

The California Supreme Court has ruled that, when faced with a budget deficit, the city's decision to lay off firefighters is not subject to negotiations under the MMBA and the duty to bargain with the employee representative extends only to the implementation and effects of the layoff decision.

This ruling is consistent with the Alliance's amicus brief and with how the decision to lay off school employees has been interpreted under the Educational Employment Relations Act (EERA). Given the state's fiscal condition, any limitation of a district's ability to lay off employees would have been devastating to district budgets.

In 2003–04, the City of Richmond 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.

## 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?

### Case status:

The court of appeal has sided with the SBE and determined the SBE, in exercising its quasi-legislative authority, adopted valid regulations implementing Proposition 39 requirements.

The case arises from regulations adopted by the SBE in 2008 and challenged by the Alliance in court. The court of appeal rejected the Alliance's appeal and, perhaps more importantly, reversed the trial court's ruling on conversion charter schools. The effect of the court of appeal's ruling is that, upon conversion of a school site to a charter school, the "charter" stays with that school site, unless the charter is amended and the SBE approves the change at the request of the school district. This regulation has implications for school closures and may restrict options of school boards in managing school facilities efficiently and economically.

The regulations have remained in effect since they were adopted in 2008 despite the pending litigation, so perhaps school districts have "adjusted" to the new requirements, making it difficult to predict the impact of this decision. The Alliance's petition for review by the California Supreme Court was recently denied thus ending this case.

## Statewide Benefit Charter Schools

*CSBA/ELA, CTA, ACSA, Stockton USD v. SBE / Alameda County Superior Court*

### Issue:

Must the SBE determine, based on credible evidence, whether a proposed statewide benefit charter will provide instructional services of statewide benefit that cannot be provided by a charter school operating in only one district or county before granting the charter statewide?

### Case status:

As previously reported, the appellate court overturned the lower court decision by holding that the SBE failed to make the necessary findings of fact when it approved the statewide charter petition filed by Aspire Public Schools, Inc. Review was denied by the California Supreme Court so the litigation has now returned to the trial court for further proceedings.

Statewide benefit charter schools are able to bypass the geographical limitations on charter schools and operate at multiple sites throughout the state. The charter petition comes directly to the SBE and the SBE is considered the charter school operator. In 2007, the SBE approved the petition of Aspire Public Schools to operate a statewide benefit charter in Stockton USD and LAUSD. The Alliance, joined by Stockton USD, CTA, and ACSA, filed suit against the SBE based on the fact that, when approving Aspire's petition, the SBE had not made the specific finding required by law as to whether Aspire's proposed charter would provide instructional services of a statewide benefit that could not be provided by a charter school operating within only one district or county.

The appellate court agreed with the Alliance that the SBE did not receive or review any evidence that a statewide charter—rather than a series of local charters approved by local boards—was necessary in order for Aspire to offer a statewide instructional program. The court noted that state law permits charter applicants to operate schools that offer similar services under local charters in a number of districts, and pointed out that as of 2005, Aspire was operating 17 charter schools chartered by seven different districts.

The case is now back in the trial court for further proceedings. CSBA will likely seek a summary judgment based on the grounds that there are no triable issues relating to the SBE's approval of the charter. Aspire is working with the SBE seeking approval of a "materially revised" charter petition which it claims comports with the court of appeal's interpretation. CSBA disagrees with that opinion and, should the SBE approve the revised charter, further Alliance litigation is likely.

This case is an important limitation on the SBE's authority to approve statewide benefit charters as a way for charter school operators to bypass local districts in an attempt to avoid local oversight.

## Applicability of State Wage Orders to Public Employers

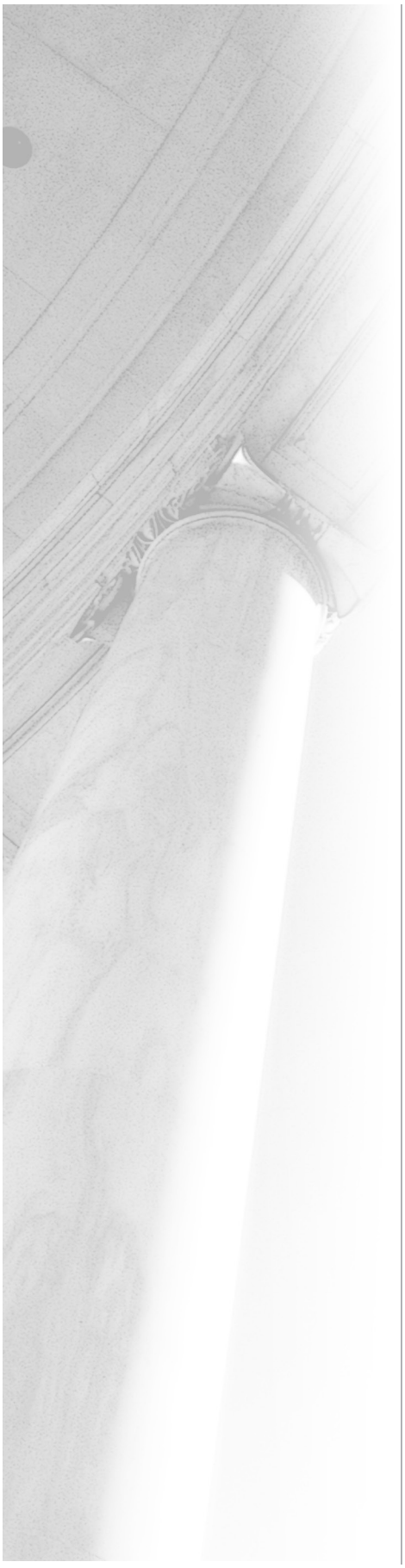
*Sheppard v. North Orange County Regional Occupation Program / California Court of Appeal*

### Issue:

Do minimum wage orders promulgated by the Industrial Welfare Commission (IWC) apply to public employers, such as school districts and regional occupation programs (ROPs)?

### Case status:

Unfortunately, the court of appeals, in a ruling against the North Orange County Regional Occupation Program (NOCROP) and the Alliance's amicus position, agreed with the plaintiff that minimum wage orders of the IWC apply to school districts and ROPs. The court further



found that a public employee has a contractual right to earned but unpaid compensation. The impact of this ruling on the plaintiff's claims against NOCROP will be resolved in further trial court proceedings. NOCROP's petition for review by the California Supreme Court, supported by the Alliance, was denied.

The plaintiff was a part-time vocational instructor at the NOCROP. His suit arises from a document that he was required to sign prior to each school year entitled "NOCROP Notice of Offer of Employment" which stated that part-time assignments require 20 minutes of unpaid preparation time for each hour of classroom/lab instruction. He alleged that this unpaid time is a violation of a wage order promulgated by the IWC.

The Alliance is assessing the potential result of this case on school districts and ROPs in other similar or related employment practices. The result of this case may open the door to increased litigation by employees claiming they have not been paid for required activity. Under the court of appeal's ruling, the plaintiff could receive minimum wage, or possibly a higher wage based on his hourly rate for classroom/lab work, as compensation for his preparation time.

## 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?

### Case status:

This case concerned construction of an elementary school. Although the contract specified a maximum price, the contractor asked for an additional $1.5 million on the grounds that latent defects existed which were outside the completion contract's scope and that the district failed to disclose material facts regarding those defects during the bidding process. The trial court decided in favor of the district, holding that a breach of contract action based on nondisclosure required a showing of active concealment or intentional omission of material information. The court of appeal disagreed and adopted a new standard of public entity liability by holding that a contractor need not prove active concealment in order to maintain a breach of contract action based on nondisclosure by the public entity. The California Supreme Court accepted review of the case.

The Supreme Court agreed with the appellate court but articulated four criteria that must be met for a contractor to recover against a public entity for nondisclosure: (1) the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information.

# OTHER ACTIVE CASES

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

## Reasonable Search and Seizure for Student Interviews

*Greene v. Camreta / U.S. Supreme Court*

### Issue:

Is an interview of a child on school grounds by a social worker in the presence of law enforcement a "seizure" requiring, absent exigent circumstances, that a warrant, court order, or parental consent first be obtained?

## Teacher's Right to Free Speech in Classroom

*Johnson v. Poway USD / 9th Circuit Court of Appeal*

### Issue:

To what extent may a district regulate a teacher's freedom of speech in the classroom on issues not related to the curriculum?

## Requirement to Arbitrate Preempted Law

*UTLA v. LAUSD / California Supreme Court*

### Issue:

Can courts compel binding arbitration over a board's approval of a charter school petition when the collective bargaining provisions upon which the grievance is based are preempted by the Education Code?

## Split Roll Parcel Tax

*Beery/Borikas v. Alameda Unified School District / California Court of Appeal*

### Issue:

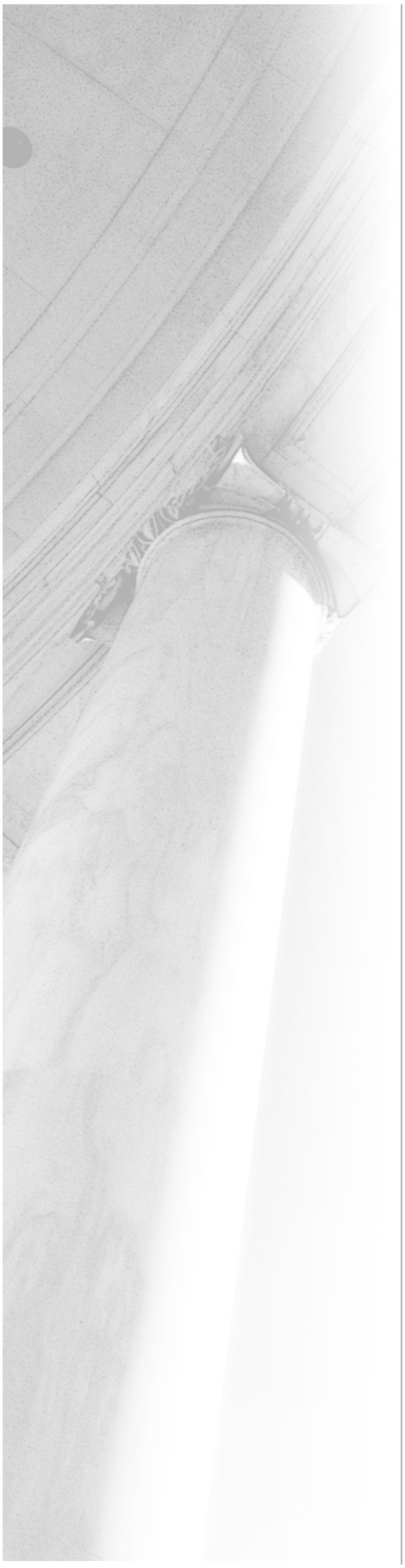
Does a parcel tax which charges different rates for residential and commercial parcels violate the requirement that the tax be "uniform?"

## 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 (FPPC) exceeded its statutory authority by adopting regulations regarding the use of public funds for communications about ballot measures?



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** 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.*

CSBA

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