COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

GOVERNING BOARD OF RIPON UNIFIED SCHOOL DISTRICT, Plaintiff/ Respondent vs. COMMISSION ON PROFESSIONAL COMPETENCE BY AND THROUGH THE OFFICE OF ADMINISTRATIVE HEARINGS, Defendant, THERESA MESSICK, Real Party in Interest	NO. CO58815 San Joaquin County Superior Court Case No. CV032098

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT

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I.

INTRODUCTION

Pursuant to California Rules of Court, Rule 8.200(c), the Education Legal Alliance of the California School Boards Association ("Amicus Curiae") respectfully requests permission to file the accompanying amicus curiae brief ("Amicus Curiae Brief") in support of Plaintiff and Respondent Governing Board of the Ripon Unified School District (hereinafter, "Respondent.") Amicus Curiae will address the questions of (1) the legal authority of a school district governing board to require all of its teachers to obtain, as a condition of continued employment, additional certification authorizing the teachers to teach students designated as English Language Learners, and (2) whether such requirement can be negotiated with the labor organization that represents those teachers.

II.

INTEREST OF AMICUS CURIAE CALIFORNIA SCHOOL BOARD ASSOCIATION'S EDUCATION LEGAL ALLIANCE

The California School Boards Association (CSBA) is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board

governance and advocates on behalf of school districts and county offices of education. As part of CSBA, the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, over 800 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake.

In the case at bench, school districts throughout the state have a very real interest in the determination that they have the legal authority to require teachers to obtain authorization to teach English Learner ("EL") students. Districts are prohibited by law from assigning EL students to classrooms taught by teachers without such authorization, and Districts have an affirmative legal obligation to take steps to assure that EL students are not discriminated against in their assignments to classes and their full access to the curricular offerings of the district. In the face of a teacher's refusal to obtain that certification, the districts need to be able to remove that teacher from employment, utilizing the statutory procedures for doing so.

IV.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully request the Court to accept for filing the attached Amicus Curiae Brief.

Respectfully submitted,

KRONICK, MOSKOVITZ, TIEDEMANN AND GIRARD

By Diana D. Halpenny

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PROPOSED AMICUS CURIAE BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PLAINTFFS/RESPONDENTS

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following Argument in the above captioned matter.

I.

INTRODUCTION

The Education Legal Alliance of the California School Boards Association ("Amicus Curiae") submits this amicus curiae brief ("Amicus Curiae Brief") in support of Plaintiff and Respondent Governing Board of the Ripon Unified School District (hereinafter, "Respondent") pursuant to California Rules of Court, Rule 8.200(c).

The California School Boards Association (CSBA) is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. As part of CSBA, the Education Legal Alliance ("Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance

represents its members, over 800 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake.

By submitting this Amicus Curiae Brief, Amicus Curiae asserts its vital interest in the outcome of this case and this court's review of the important issues of state-wide concern raised by Respondent: (1) whether a school district has the legal authority to require its tenured teaching staff to obtain an additional credential authorization for the teaching of students designated as English Learner ("EL") students; (2) whether the district can negotiate such a requirement with the labor organization that represents those teachers in their employment relationship with the district; and (3) whether such requirement can be imposed as a condition of continued employment, with the governing board's right to use the statutory dismissal procedures to terminate a teacher who persistently refuses to comply with that requirement. Amicus Curiae argues that the answer to all of these questions is "yes."

Amicus Curiae believes the following arguments will assist the court in reaching a decision that is in accordance with law and sound public policy: (1) Students designated as "English Learners" ("EL students") have specified rights in state and federal law to be free from discrimination and to have full access to the curriculum; (2) local school district governing

boards have the legal responsibility and authority to take such affirmative steps they deem necessary to secure and provide those rights, including requiring all teachers of the district to obtain the credential authorization legally required to teach EL students; (3) school district governing boards have the legal authority to negotiate this requirement as a condition of continued employment in the district in furtherance of sound public policy and the legislative intent underlying the applicable collective bargaining statute; and (4) school district governing boards have the authority to initiate a dismissal proceeding against a teacher who refuses and fails to comply with this reasonable work rule condition and obtain such credential authorization.

II.
STATEMENT OF THE CASE

A. Facts And Procedural History

Ripon High School in the Ripon Unified School District ("Respondent") has one, and only one, music teacher. That teacher is Theresa Messick ("Appellant"). Ms. Messick is credentialed to teach music, but she is not credentialed to teach music to students who have been designated as English Learners ("EL students"). Therefore, the district is unable to assign EL students to music classes at Ripon High School.

As a result of a state compliance review in 2002, Respondent was found out of compliance with state law when it assigned EL students to classes taught by teachers who lacked the state authorization to teach EL

students. As a result, Respondent negotiated an agreement with the union that represents the teachers in the district that required all teachers in the district to obtain EL credential authorization by the end of 2005. The agreement provided a financial incentive and district funding of the training requirement.

Appellant steadfastly refused to obtain the additional credential authorization. She is the only teacher in the district who failed to comply. She asserts that she cannot legally be compelled to obtain that authorization, thus effectively assuring that she will not have to teach students who are English language learners. She is effectively barring Respondent from being able to legally offer EL students music at the high school, short of wasting scarce resources by hiring an additional music teacher that the district does not need. Even at that, the district would then be compelled to place any EL student in the other class, a practice which could potentially subject the district to a claim of discrimination.

In the face of Appellant's obstinate and persistent refusal to comply with Respondent's requirement, Respondent attempted to terminate her employment through the statutory dismissal procedures provided in the Education Code sections 44932 et seq. That avenue was, however, foreclosed to it when the administrative law judge ("ALJ") assigned by the Office of Administrative Hearings to serve on the Commission on

Professional Competence decided to dismiss the district's dismissal charges following the pre-hearing conference and prior to a hearing on the merits.

Respondent appealed the decision to the Superior Court of California, County of San Joaquin. The Superior Court judge reversed the ALJ's decision, finding that (1) the ALJ misconstrued the statutory collective bargaining language (Government Code section 3543.2) as somehow limiting the district's discretion to negotiate the credential requirement and decide what actions qualify for dismissal; (2) Education Code section 45033 [containing a bar on reducing a teacher's salary for failure to obtain additional certification] does not address termination; (3) Education Code section 44924 [prohibiting the waiver of specified sections of the Code] is not applicable; and (4) there is sufficient evidence to raise a triable issue of fact as to whether Ms. Messick failed to conform to a work rule that the district was authorized to impose as a condition for continued employment with the district.

B. Issues Presented

The first issue presented on appeal is whether a local school district has the legal authority to enact a requirement for all teachers to obtain the state's credential authorization to teach students designated as "English Learners" ("EL students"). The second issue is whether a district and the exclusive representative of the teachers of the district can negotiate that requirement. The third issue is whether the district can utilize the statutory

dismissal procedures against a teacher who refuses to comply with such a requirement.

Amicus Curiae contends that local school district governing boards have the authority to adopt a requirement that all the district's teachers shall obtain the necessary credential authorization enabling them to instruct EL students in their classrooms; that governing boards may negotiate such a requirement; and that if the governing board finds that a teacher refuses to comply with such requirement, the governing board may initiate dismissal proceedings against that teacher.

III.

ARGUMENT

A. Public School Employers Have the Legal Authority to Require All Teachers to Obtain Certification to Enable Them to Teach English Learners

Before addressing the legal authority of school district governing boards to establish a requirement that all teachers obtain EL credential authorization, it is important to understand the context in which such a requirement would arise, to fully appreciate a local district's need to take such action.

1. School Districts Must Assure That Students of Limited English Are Provided an Education Free From Discrimination. This Includes Providing English Learners With Full Access to The Curriculum and Classes.

Public schools throughout the state are facing a demographic reality – there are increasing numbers of students for whom English is not their

native language. According to the California Department of Education's Fact Book (2008)[1], in the 2006-2007 school year there were nearly 1.6 million students in California identified as English Learners ("EL"), which was nearly twenty-five percent (25%), or one in four students, of the total enrollment in California public schools. Forty-three percent of students enrolled in the schools speak a language other than English in their homes. Sixty-eight percent of EL students were enrolled in the elementary grades (kindergarten through sixth), and thirty-one percent were enrolled in grades seven through twelve. Among the EL students, approximately ninety-five percent (95%) of them speak one of the top ten languages, with 85.3 percent of those speaking Spanish. Other languages in the top ten include Vietnamese (2.2%); Pilipino (Filipino or Tagalog – 1.4 %); Cantonese (1.4%); Hmong (1.3%); Korean (1.1%); Mandarin (0.8%); Punjabi (0.6%); Arabic (0.5%); and Armenian (0.5%).

Education Code section 44253.1 reflects a legislative recognition of these demographic factors and a need to have teachers adequately trained to provide appropriate instruction. This section, enacted in 1992, states:

> The Legislature finds and declares that almost one million, or one in every five, pupils in California's public schools are of limited English proficiency, and that the number of those pupils is increasing rapidly. In addition, the number of primary languages spoken by California's limited-English-proficient pupils is increasing. The Legislature recognizes that limited-English-

[1] See, *http://www.cde.ca.gov/re/pn/fb/documents/factbook2008.pdf*, pp. 112-114.

> proficient pupils have the same right to a quality education as all California pupils. For these pupils to have access to quality education, their special needs must be met by teachers who have essential skills and designed content instruction delivered in English, and content instruction delivered in the pupils' primary languages. It is the intent of the Legislature that the Commission on Teacher Credentialing implement an assessment system to certify those teachers who have the essential skills and knowledge necessary to meet the needs of California's limited-English-proficient pupils. [2]

California and federal laws require districts to provide an education to these students and to do so in a manner that is non-discriminatory and provides access to the full curriculum.

In 1964, the federal government enacted the landmark Civil Rights Act of 1964, (Pub.L. 88-352, Title VI, §601). This law prohibits discrimination on the bases of race, color and national origin in programs receiving federal funds. It provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *42 U.S.C. §2000d.*

The United States Supreme Court in 1974 ruled in *Lau v. Nichols*, 414 U.S. 563, that the San Francisco Unified School District was in violation of these provisions when it failed to provide adequate instructional services to students who were Chinese-speaking. The Court

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[2] The terms "limited-English-proficient" and "English Learners" are used interchangeably. *(Education Code section 306(a).)*

found the provisions in federal law prohibiting discrimination among students on account of race or national origin are violated when there is discrimination in the availability or use of any academic or other facilities of the grantee or other recipient (45 C.F.R. 80.5(b); see also, 34 C.F.R. §100.3.) The Court stated:

> It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program – all earmarks of the discrimination banned by the regulations. *414 U.S. at 568.*

The Court also referred to guidelines issued by the federal Department of Health, Education and Welfare (HEW) in 1970 for implementation of Title VI. The Court stated that these guidelines required school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to students who had "linguistic deficiencies." Further, the Court quoted HEW's regulations at 45 CFR 80.3 (b) (1), which specified that the recipients of federal funds may not:

> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> . . . .
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program."

In addition, the *Lau* decision quotes further from the 1970 guidelines including the following language:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.
>
> Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an education deadend or permanent track. *Lau v. Nichols, supra, 414 U.S. at 568.*

The holding in Lau was then codified in Title 20, U.S.C. section 1703(f). *Castanada v. Pickard* (1981) 648 F.2d 989 [Fifth Circuit]. See also *42 U.SC. §2000d,* Title VI of the Civil Rights Act of 1964*; Flores v. State of Arizona* (2008) 516 F.3d 1140 [Ninth Circuit].

Title 20 of the United States Code section 1703 [The Equal Educational Opportunities Act of 1974 ("EEOA")] provides in relevant part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by –. . .
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The Fifth Circuit Court of Appeal in *Castanada* held that Congress has not identified the specific type of programs or services necessary in order to comply with section 1703(f), but leaves to the sound discretion of state and local educational authorities "a substantial amount of latitude" to

develop a program that is "appropriate" to meet their obligations under the EEOA. *Castanada, ibid.*, 648 F.2d at 1009. The court developed a three-step analysis to apply to programs to assure that the program is "appropriate." The three-part test in *Castanada* has been adopted by the Ninth Circuit. See, *Flores v. State of Arizona* (2008) 516 F.3d 1140. The *Castanada* three-part test to determine whether the provision of services to EL students complies with federal law is: (1) it must be based on sound education theory or principles; (2) the program and practices actually used by a school system must be reasonably calculated to implement effectively the educational theory adopted by the school; and (3) the program must actually succeed after being employed for sufficient time; it should produce results indicating that the language barriers confronting students are actually being overcome. *Castanda, supra,* 648 F.2d at 1009-1010. The *Castanada* test was adopted by the Northern District federal court in the case of *Teresa P. v. Berkeley Unified School District* [(1989) 724 F.Supp. 698, 713] in which the Berkeley Unified School District's program for English Learners was upheld against a claim of discrimination.. In so doing, the court embraced the warning of *Castanada:*

> [C]ourts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school authorities and the expert knowledge of educators, since they are ill-equipped to do so. *Teresa P. v. Berkeley, ibid.* at 713, citing *Castanada* at 1009.

California law now establishes a system of identification and services for English Learners, the overriding purpose of which is to have the students ultimately integrated into regular classrooms and to become proficient in English language. California voters enacted Proposition 227, effective July 1, 1998, that provides in part, "All children in California public schools shall be taught English as rapidly and effectively as possible." (Education Code section 300 (f).) Further, Proposition 227 provides, "Once English learners have acquired a good working knowledge of English, they shall be transferred to English language mainstream classrooms." (Education Code section 305.) The system set forth in state law anticipates that EL students will eventually be moved into regular classrooms ("mainstreamed") and continue to receive from the regular classroom teacher the academic content delivered in a manner that accommodates the EL student's language difficulties. (Education Code sections 300-446.)

The students identified as EL continue to be identified as such even while they are served in the regular classrooms until they are deemed to have reached a proficiency level equal to native English speakers. (Education Code section 313.) Regular classroom teachers must by law have specific training and legal authorization to teach these EL students. If a teacher has even one EL student assigned to his or her class, by state law the teacher must be certified to teach EL students. (Education Code

sections 44253.3, 44253.4, and 44253.10.) There are several types of designations for the credentials that will authorize a teacher to teach EL students. For ease of reference herein, they will all be referred to collectively as "CLAD" – Crosscultural, Language and Academic Development. (Education Code sections 44253.1-44253.11; Title 5, California Code of Regulations, sections 80015-16[3].)

Districts are monitored and sanctioned if they assign EL students to non-compliant teachers. (Education sections 44258.9, 45037.) As reflected above in the EEOA, Districts are required to take affirmative steps to assure that EL students have access to the full scope of the curriculum and to do so in a non-discriminatory manner. Thus, a district does not meet its legal obligation to provide services to EL students who are in regular classrooms if the district groups all of those students into one regular education class simply because that is the only teacher with the appropriate EL authorization to teach them. While *Castanada* held that language grouping does not in and of itself violate the law, the context was for students identified as beginning English Learners. In other words, students with very limited English can be grouped together for the purpose of facilitating a more rapid acquisition of English. (Education Code section 305.) They cannot, however, be grouped together indefinitely and deprived of the

[3] *See also, http://www.ctc.ca.gov/credentials/leaflets/cl622.pdf.*

opportunity of taking classes in the regular program as their English skills improve.

For example, if a school has two third grade classrooms, but only one of the third grade teachers possesses an EL authorization, it would be discriminatory for the district to consistently place all of the third grade EL students in the one class in which the teacher has the statutory certification. Similarly, a district would be discriminating if it did not allow high school EL students to enroll in music on the basis that the music teacher lacks the authorization to teach them.

Given the increasing numbers of English Learner students combined with the districts' legal requirements to take affirmative actions to provide these students with an equal opportunity to access the curriculum, school districts are finding an increasing need to make sure all of their teachers have the appropriate legal credential authorization to open their classes to these students.

2. Districts Have Broad Authority to Take Actions Not In Conflict With Law and Which Are Consistent With the Purposes for Which School Districts Were Established

Since January 1, 1976, school districts have had plenary power to initiate and carry on any program, activity or otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established. (California Constitution, Article IX, §14; Education Code

section 35160.) This is referred to as the "permissive Education Code." Section 35160.1 states in relevant part:

> (a) The Legislature finds and declares that school districts, county boards of education, and county superintendents of schools have diverse needs unique to their individual communities and programs. Moreover, in addressing their needs, common as well as unique, school districts, county boards of education, and county superintendents of schools should have the flexibility to create their own unique solutions.
>
> (b) In enacting Section 35160, it is the intent of the Legislature to give school districts, county boards of education, and county superintendents of schools broad authority to carry on activities and programs, including the expenditure of funds for programs and activities which, in the determination of the governing board of the school district, the county board of education, or the county superintendent of schools are necessary or desirable in meeting their needs and are not inconsistent with the purposes for which the funds were appropriated. It is the intent of the Legislature that Section 35160 be liberally construed to effect this objective.

While primary authority over public education is vested in the Legislature, the Constitution and the Legislature have granted "substantial discretionary control to local school districts." *Dawson vs. East Side Union High School District* (1994) 38 Cal.App.4th 998, 1017, 34 Cal.Rptr.2d 108. In the area of public school funding, for example, the Legislature has declared that, "[t]he system of public school support should be designed to strengthen and encourage local responsibility for control of public education. Local school districts should be so organized that they can facilitate the provision of full educational opportunities for all who attend the public schools." (Education Code section 14000.) In the area of

curriculum, the Legislature has determined that due to common needs and interests of citizens of the state, there is a need [for the state] to establish broad minimum standards and general educational guidelines for selection of instructional materials, "but that because of economic, geographic, physical, political, educational, and social diversity, specific choices about instructional materials need to be made at the local level." (Education Code section 60000(b).)

There is a correlative limitation on the authority of the courts to control the actions of local school districts. *Dawson v. East Side Union High School District, supra,* 38 Cal.App.4th at 1018. Thus, courts should give substantial deference to decisions of local school districts and governing boards within the scope of their broad discretion. (*Ibid.* at 1019.)

A local school district is required by state law to make sure its teaching staff has the appropriate credential authorizations. Based on local need as determined by the governing board, it is within the governing board's authorization and sound discretion under section 35160 to adopt a requirement that every teacher obtain CLAD authorization. It can hardly be argued that providing educational opportunity and access to the curriculum for every student, including those designated as English Learners, is inconsistent with the purposes for which school districts were established. Therefore, unless there is some law that clearly prohibits it, the district has

the legal authority under section 35160 to impose this condition of employment on its teaching staff.

3. There Is No Law That Prohibits Districts from Enacting A Requirement for English Learner Certification By All Teachers

Appellant asserts that school districts lack the authority to require a credentialed teacher to obtain the additional CLAD authorization. Such a position is contrary to law and common sense. Appellant asserts that such a requirement usurps the state's role in determining the scope of credential authorization. This is simply untrue. Appellant's music teacher credential still authorizes her to teach music. Indeed, she must maintain that credential in order to teach music in the district. However, the state has also said she cannot teach music to EL students, absent obtaining an EL authorization. As she is the only music teacher at Ripon High School, the district is foreclosed from offering music to EL students, short of hiring a second, unneeded music teacher. The question becomes whether, due to local school district determination of need, the district can impose a local requirement that she become certified to teach a significant segment of the district's student population. Nothing prevents her from deciding that the local condition is one she is not willing to do, in which case, she is free to seek employment elsewhere. But that is far different from saying the district lacks the legal authority to establish this requirement as local condition of employment.

School districts are increasingly seeking avenues to require their more senior teachers to obtain this certification. Teachers who were admitted to a teacher training program to obtain their multiple or single subject credential on and after July 1, 2002, and therefore obtained their California teaching credentials after July 1, 2003, are by law CLAD certified as part of their credential program. (Education Code section 44259.5.) Thus, the least senior teachers, i.e. those hired from July 1, 2003 or later, are the ones most likely to have the proper EL authorization. The more senior teachers are often the ones who teach the higher levels of coursework or the more specialized subjects, such as Art and Music, thus effectively limiting EL students' access to those types of courses. Ironically, it is often precisely those types of classes in which EL students may have a greater chance to succeed, and in which the language barrier may not pose as high an obstacle to learning. By default, then, absent some mechanism to assure that more senior teachers obtain CLAD, a school district is often compelled to assign EL students to the least senior teachers, which is another potential argument that the district is discriminating against those students.

Appellant also asserts that Education Code section 45033 prohibits a district from requiring a teacher to obtain an additional credential. As noted by the lower court's decision, this section relates not to termination, but to salary. It should be noted that it follows section 45028 which is

known as the "uniform salary schedule" provision. Education Code section 45028 requires each certificated employee (except an administrator or supervisor) to be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience. The following Education Code sections, including section 45033, all relate to salaries of certificated employees and the governing board's obligations in that respect. Education Code section 45028 has been amended several times by the Legislature to authorize the district and the exclusive representative of credentialed teachers to negotiate various provisions allowing for deviation from this uniform salary schedule provision. (Education Code section 45028(b), (c), (d) and (e).) Government Code sections 3543.2 (d) and (e) also permit the district and the exclusive representative of the certificated employees to negotiate a salary schedule based on criteria other than uniform years of training and experience. That section provides that if they do not reach agreement, then the provisions of Education Code section 45028 apply. They further provide that the negotiated provisions may not result in a salary decrease for any teacher. (Government Code section 3543.2(e).) Given the statutory context of section 45033, it is clear that it relates to salary, and does not apply to the district's decision to require an EL authorization as a condition of employment.

In the face of a teacher's failure to obtain CLAD certification voluntarily, districts need to be able to impose a requirement on recalcitrant

teachers in order to assure the district's ability to open the full curriculum to EL students, and to be able to assign students without discriminating against them due to lack of teacher authorization. This is a reasonable requirement, and does not conflict with law.

B. Districts and Exclusive Representatives May Negotiate A Requirement That All Teachers Obtain English Learner Certification

The purpose of the Educational Employment Relations Act ("EERA") is to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California." (Gov't Code section 3540.) The Public Employment Relations Board ("PERB") administers the EERA and has the power to determine in disputed cases whether a particular item is within the scope of representation. (Gov't Code section 3541.3(b).) Among the rights afforded to employees is the right to be represented by the exclusive representative of their choosing in their professional and employment relationships with public school employers. The exclusive representative also has the right to represent its members in their employment relations with their employer. (Gov't Code section 3543.1(a).)

Government Code section 3543.2 defines the scope of bargaining for public school district employers and the exclusive representative of the certificated, non-management bargaining unit, i.e., the teachers. Basically, it includes wages, hours and other terms and conditions of employment, as

defined. If a matter is not specifically enumerated, it shall be reserved to the public school employer, but nothing shall be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation. (Gov't Code section 3543.2(a).) PERB has held that even if a subject is not specifically enumerated, it is nevertheless negotiable if it is (1) logically and reasonably related to an enumerated subject; (2) of sufficient concern to the parties that conflict is likely and the mediatory influence of bargaining is appropriate to resolve the conflict; and (3) negotiations will not significantly abridge managerial prerogatives. This test was upheld as an appropriate interpretation of the scope of bargaining in *San Mateo City School District v. PERB* (1983) 33 Cal.3d 850. PERB has not yet ruled on whether a requirement for teachers to obtain a CLAD credential is negotiable. However, even a decision that is not itself negotiable may have effects that are negotiable.

In the present case, the parties negotiated a requirement that every teacher must obtain their CLAD certification, and they negotiated a financial incentive as well as district payment of the cost of obtaining the credential. The latter topics clearly relate to wages and are negotiable. Appellant asserts that negotiating this requirement violates language in Government Code section 3540 that states, "This chapter shall not supersede other provision of the Education Code and the rules and

regulations of public school employers which establish and regulate tenure . . ."

Where a negotiable topic for bargaining is also addressed in the Education Code, PERB's test for negotiability, which was upheld by the California Supreme Court, is that negotiations on that topic are prohibited only where provisions of the Education Code would be "replaced, set aside or annulled by the language of the proposed contract clause." (*San Mateo City School District, ibid.* at 864.) Appellant has pointed to no provision of the Education that would be "replaced, set aside or annulled" by a requirement to obtain CLAD. This then distinguishes this situation from that in *Board of Education of the Round Valley Unified School District v. Round Valley Teachers Association* (1996) 13 Cal.4th 269. In *Round Valley*, the Court found that collective bargaining provisions that gave probationary employees greater procedural rights than did the Education Code was in conflict with the Education Code provisions. The Court found that the Legislature specifically gave to the school board the discretion to decide whether to release a probationary employee, and that such decision need not be for cause and does not afford the probationary teacher any procedural protections if the notice of nonreelection is given prior to March 15 of the employee's second year of probation. The Court found, then, that it would be inconsistent with that legislative scheme of governing board discretion to allow the parties to negotiate procedural protections in conflict

with the Education Code provisions. Here, the parties did not negotiate anything in violation of a statutory scheme. The credential requirements for teaching EL students are established by the Commission on Teacher Credentialing. The Legislature has determined that a teacher may not teach EL students in the absence of that credential authorization. Here, the parties simply negotiated a condition of employment in the district that all teachers must possess that authorization. None of the statutes referred to by Appellant limit a school district's authority to impose this condition on its teaching staff. That being the case, nothing precludes the district from negotiating the requirement as a working condition in that district.

C. Assuming Arguendo That the Requirement to Obtain English Learner Certification Is A Validly Adopted Condition of Employment, Respondent Is Entitled to Resort to the Statutory Dismissal Procedures in the Face of A Teacher's Persistent Refusal to Comply

The Education Code specifies the causes and procedures for dismissal of a tenured teacher. Section 44932 identifies the causes. Among those are unprofessional conduct (subsection (a) (1)); evident unfitness for service (subsection (a) (5); and persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her (subsection (a) (7).) Clearly, not every behavior is specified as a cause; rather, the causes

identified are broadly worded, with discretion left to the school district to ascertain whether specific conduct fits within one of those causes.

If a governing board adopts a reasonable regulation or rule, such as the requirement that every teacher must become certified to teach EL students, then a teacher's persistent refusal to comply with that rule may subject the teacher to a dismissal action. If a governing board elects to proceed in that manner, then it is bound by law to follow all of the due process procedures outlined in the statutes. Among those procedures are notice of the board's intent to dismiss including a written statement of charges (Education Code section 44934); opportunity to request a hearing or waive that right (Education Code section 44937); and exhaustive procedures governing the conduct of discovery and of the hearing itself (Education Code section 44944). The final decision as to whether or not the teacher shall be dismissed is made by a three-person panel comprised of two educators not employed by the district – one selected by the district and one selected by the teacher – and an administrative law judge (Education Code section 44944). This three-person panel is called the Commission on Professional Competency. These are the due process procedures created by the Legislature to protect tenured teachers. Thus, Appellant's assertion that she was not afforded due process rights is baseless.

In the present case, the ALJ cut the procedures short by ruling that the district's rule requiring teachers to obtain CLAD authorization was

invalid. As pointed out in Respondent's briefs and as found by the superior court, that ruling is itself invalid, and this matter should be allowed to proceed to the dismissal hearing, based on a finding that the requirement adopted by the Ripon Unified School District is a reasonable and legal exercise of its authority.

IV.

CONCLUSION

School districts in California have the legal responsibility to assure that all students have an equal access to educational opportunities. For English Learners, this is particularly important, to enable them to take their rightful place in a society in which English language skills can make or break their opportunity to survive and thrive. In order to provide that opportunity, school district governing boards must assure that they have teachers who have the legal qualifications to teach these students. For governing boards to achieve this goal, they must be able to require their teachers to obtain the necessary credentials to allow the district to assign the English Learner child to any class within the child's interest and capability. Labor organizations that represent teachers have a legitimate interest in negotiating the provisions of any such requirement, to assure that it is implemented fairly and without seriously impacting a teacher's finances. When the district and labor organization can agree on the terms of such a requirement, then the public policy of promoting personnel

management is achieved. When a teacher then stubbornly refuses to comply with this requirement over a period of many years and multiple notices, a district may choose to resort to the statutory dismissal procedures and seek to remove that teacher from the district's employment. Amicus Curiae strongly supports Respondent's position in this case, and respectfully urges the court to rule in its favor, so that school districts throughout the state can assure that all children, including those with language challenges, have an equal opportunity for an appropriate education.

Respectfully submitted,

KRONICK, MOSKOVITZ, TIEDEMANN AND GIRARD

By Diana D. Halpenny

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to California Rule of Court 8.204(c), and as counted by Microsoft Word, the attached Amicus Curiae Brief contains 6,173 words. This is less than the 14,000 word maximum.

Dated: February 2, 2009

KRONICK, MOSKOVITZ, TIEDEMANN AND GIRARD

By: Diana D. Halpenny

Diana D. Halpenny
Attorney for Amicus Curiae, Education Legal Alliance of the California School Boards Association

State of California
Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption:

Governing Board of Ripon Unified School District

v.

Commission on Professional Competence By and Through the Office of Administrative Hearings

Court of Appeal Case Number: CO58815

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Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.	
2.	
3.	

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KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

By: Diana D. Halpenny Date: February 2, 2009

Signature of Attorney or Unrepresented Party

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Party Represented: Amicus Curiae, Education Legal Alliance of the California School Boards Association

ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

PROOF OF SERVICE BY MAIL

I, Heather Veen, am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On February 3, 2009, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

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in a sealed envelope, postage fully paid, addressed as follows:

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Real Party in Interest
Theresa Messick

Thomas J. Driscoll
Driscoll & Associates
801 South Ham Lane, Ste. H
Lodi, CA 95242

Four (4) copies:
Supreme Court of California
350 McAllister St., Rm. 1295
San Francisco, CA 94102

One (1) copy:
Defendant Commission on Professional Competence

Geoffrey Graybill
Deputy Attorney General
Office of the State Attorney General
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Sacramento, CA 94244

One (1) copy:
Respondent Governing Board of Ripon USD

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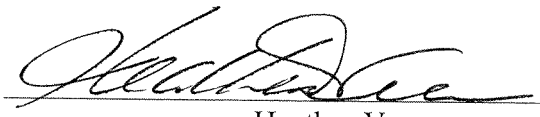

Heather Veen