CHAPTER II

THE LEGAL FOUNDATION AND STRUCTURE OF THE STATE SCHOOL SYSTEM

STATE CONSTITUTIONAL PROVISIONS

The California Constitution of 1879 replaced the Constitution of 1849. The Constitution of 1879 was more specific and detailed than its predecessor.[1] Although it has been amended many times, its basic pattern and structure has remained unchanged[2] including the provisions which most affect education.[3]

The framers of the Constitution of 1879 recognized the importance of education as essential to the preservation of the rights and liberties of the people of California when Article IX, Section 1 was enacted. Article IX, Section 1 requires the Legislature to encourage intellectual, scientific, moral and agricultural improvement.[4] Article IX, Section 5 requires the Legislature to provide for a state system of common schools with a free school in each district.[5] A primary purpose for establishing such a state educational system is to train school children in good citizenship, patriotism, and loyalty to the state and nation as a means of protecting the public welfare[6] and, therefore, the school system is a matter of statewide concern.[7]

The Constitution provides that no public money shall be appropriated for the support of sectarian or denominational schools and that no sectarian or denominational doctrine shall be taught in the public schools.[8] As discussed earlier, the Constitution authorizes school districts and community college districts to carry on any program, activity, or otherwise act in any manner which is not in conflict with the laws and purposes for which school districts and community college districts are established.[9] The Constitution also establishes a Superintendent of Public Instruction,[10] State Board of Education,[11] county superintendents of schools,[12] county

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[1] Palmer and Selvin, The Development of Law in California (1983), p. 17-18.
[2] Id. at 18.
[3] Ibid. (These provisions generally include Cal. Const., Articles IX, XI and XVI).
[4] Cal. Const., Article IX, Section 1 states, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." The distribution and sale of published material, including copyrighted material, has been declared by the Legislature to be a public purpose in furtherance of Article IX, Section 1. (See, Education Code sections 1045, 39528, 81459).
[5] Cal. Const., Article IX, Section 5 states, "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."
[6] In Re Shinn, 195 Cal.App.2d 683, 16 Cal.Rptr. 165 (1961).
[7] Hall v. City of Taft, 47 Cal.2d 177, 302 P.2d 574 (1956).
[8] Cal. Const., Article IX, Section 8 provides, "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State." Under this constitutional provision, the lending of state textbooks to parochial school students free of charge was declared unconstitutional. (See, California Teachers Association v. Riles, 29 Cal.3d 794, 176 Cal.Rptr. 300, 632 P.2d 953 (1981)).
[9] Cal. Const., Article IX, Section 14.
[10] Cal. Const., Article IX, Section 2.

boards of education,[13] a minimum salary for teachers,[14] minimum aid to schools,[15] and the adoption of textbooks by the State Board of Education for use in grades one through eight.[16]

Other articles of the Constitution contain provisions which apply to all local governmental agencies including school districts and community college districts. For example, the Constitution prohibits the payment of extra compensation to public employees after service has been rendered.[17] This provision has generally been interpreted to mean that compensation cannot be paid to a public employee unless the method of payment or type of compensation has been authorized by statute or case law.[18]

The prohibition against lending the credit of a public agency or making a gift of public funds applies to school districts and community college districts as well as other local agencies.[19] The courts have held that if the expenditure serves a public purpose and private entities are only incidentally benefitted, then the constitutional prohibition against a gift of public funds is not violated.[20] The debt limitation provisions of the Constitution apply to school districts and community college districts[21] as well as the provisions prohibiting aid to religion,[22] special assessments,[23] state support for schools,[24] and election requirements for bonded indebtedness.[25] Also affecting school districts and community college districts are the property tax limitation provisions enacted by the voters in 1978 (Proposition 13)[26] and the spending limitation enacted by the voters in 1979.[27]

In addition, the California Supreme Court has interpreted the equal protection provisions of the California Constitution[28] to prohibit large disparities in expenditures between school districts based on property tax revenue as an unconstitutional denial of equal protection of the laws.[29] The court ordered the Legislature to establish a new system of finance which has resulted in a largely state funded system of school finance in California.[30]

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[11] Cal. Const., Article IX, Section 7.
[12] Cal. Const., Article IX, Section 3.
[13] Cal. Const., Article IX, Section 7.
[14] Cal. Const., Article IX, Section 6.
[15] Ibid.
[16] Cal. Const., Article IX, Section 7.5.
[17] Cal. Const., Article XI, Section 10.
[18] Longshore v. County of Ventura, 25 Cal.3d 14, 22-23, 157 Cal.Rptr. 706, 710-711 (1979).
[19] Cal. Const., Article XVI, Section 6.
[20] California Housing Finance Agency v. Elliott, 17 Cal.3d 575, 583, 131 Cal.Rptr. 361 (1976); Wine v. Boyar, 220 Cal.App.2d 375, 379, 33 Cal.Rptr. 787 (1963).
[21] Cal. Const., Article XVI, Section 1.
[22] Cal. Const., Article XVI, Section 5.
[23] Cal. Const., Article XIII, Section 3. (The issue of special assessments levies against educational agencies has been litigated a number of times. The courts have held that public entities are exempt from charges which are used to finance capital improvements. The courts have held that these charges are disguised special assessments. See, Regents of the University of California v. City of Los Angeles, 148 Cal.App.3d 451 (1983); San Marcos Water District v. San Marcos Unified School District, 42 Cal.3d 154, 228 Cal.Rptr. 47 (1986)).
[24] Cal. Const., Article XVI, Section 8 states, "From all state revenues there shall first be set apart the moneys to be applied by the state for support of the public school system and public institutions of higher education."
[25] Cal. Const., Article XVI, Section 18.
[26] Cal. Const., Article XIIIA.
[27] Cal. Const., Article XIIIB.
[28] Cal. Const., Article I, Section 7(a).
[29] Serrano v. Priest, 5 Cal.3d 584, 96 Cal.Rptr. 601 (1971) (Serrano I).
[30] Serrano v. Priest, 18 Cal.3d 728 (1976) (Serrano II).

In Serrano v. Priest,[31] the California Supreme Court held that under the Equal Protection Clause of the California Constitution[32] education is a fundamental right. The California Supreme Court stated:

> "The need for an educated populous assumes greater importance as the problems of our society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed 'the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny.' . . . [citations omitted]. In Abington School District v. Schempp . . . it was said that 'Americans regard public schools as the most vital civic institution for the preservation of a democratic system of government.'
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> "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'
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> "First, education is essential in maintaining what several commentators have termed 'free enterprise democracy' – that is, preserving an individual's opportunity to compete successfully in the economic market place, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.
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> "Second, education is universally relevant . . . 'Every person . . . benefits from education . . .
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> "Third, public education continues over a lengthy period of life – between 10 and 13 years. Few other governmental services have such sustained, intensive contact with the recipient.
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> "Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents, but by the state. . . .

[31] 5 Cal.3d 584, 596, n.11 (1971) (Serrano I); 18 Cal.3d 728, 760-769 (1976) (Serrano II).
[32] Article IV, Section 16 and Article I Section 7(b).

> "Finally, education is so important that the state has made it compulsory – not only in the requirement of attendance but also by assignment to a particular district and school. . . ."[33]

In Serrano II, the California Supreme Court held that the state school financing system was unconstitutional due to large disparities in expenditures between school districts and ordered the State of California to develop a funding formula which was more equitable.

STATE BOARD OF EDUCATION

The Constitution establishes a State Board of Education.[34] The Legislature has provided for the appointment of its members by the Governor, its organization, meeting times and compensation.[35]

The State Board of Education consists of ten members appointed by the Governor[36] for a term of four years[37] and a student member for a term of one year.[38] Following any change in membership, the State Board of Education must reorganize by electing one of its members president.[39] The Superintendent of Public Instruction serves as the secretary and executive officer of the State Board of Education and is required to keep a record of its proceedings and take charge of its correspondence.[40]

The State Board of Education is required to meet at least six times a year and at least every three months as it determines by resolution.[41] At the request of the president of the State Board of Education or upon the request of four members in writing, the secretary of the State Board of Education may call a special meeting.[42] The secretary must give each member ten (10) days written notice of the meeting unless notice is waived in writing by all of the members of the board.[43] The concurrence of six members of the board is necessary for the State Board of Education to act.[44] Each member of the State Board of Education is compensated fifty dollars ($50) for each day the member is acting in an official capacity in addition to reimbursement for their actual and necessary traveling expenses while on official business.[45]

The State Board of Education is empowered to enact rules and regulations for its own governance, its appointees and employees, and the elementary and secondary schools of the state which are not inconsistent with state law.[46] The State Board of Education is required to study

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[33] Id. at 608-610.
[34] Cal. Const., Article IX, Section 7. (For a discussion of the respective duties of the State Superintendent of Public Instruction versus the State Board of Education, see, State Board of Education v. Honig, 13 Cal.App.4th 720, 16 Cal.Rptr.2d 727 (1993)).
[35] Education Code section 33000 et seq.
[36] Education Code section 33000.
[37] Education Code section 33001.
[38] Education Code section 33000.5.
[39] Education Code section 33003.
[40] Education Code section 33004.
[41] Education Code section 33007.
[42] Education Code section 33008.
[43] Education Code section 33009.
[44] Education Code section 33010.
[45] Education Code section 33006.
[46] Education Code section 33031.

the educational needs and conditions of the public schools, make plans for the administration and efficiency of the public schools[47] and to establish a course of study for inmates at state institutions when requested.[48]

The State Board of Education is empowered to waive certain parts of the Education Code.[49] The State Board of Education is required to approve any and all requests for waivers submitted by a school district or county board of education except where the State Board of Education specifically finds:

1. The educational needs of the pupils are not adequately addressed;

2. The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request;

3. The appropriate councils or advisory committees, including bilingual advisory committees, did not have an adequate opportunity to review the request and the request did not include a written summary of any objections to the request by the councils or advisory committees;

4. Pupil or school personnel protections are jeopardized;

5. Guarantees of parental involvement are jeopardized;

6. The request would substantially increase state costs;

7. The exclusive representative of employees, if any, was not a participant in the development of the waiver.[50]

A waiver or the renewal of a waiver may be granted for a period not to exceed two years.[51] If formal action is not taken by the State Board of Education in the time specified in the Education Code, the waiver is deemed approved for one year.[52]

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

The Constitution provides for the election of a Superintendent of Public Instruction at each gubernatorial election.[53] Upon the nomination of the state superintendent, the State Board of Education must appoint one deputy and three associate superintendents who are exempt for

[47] Education Code section 33032.
[48] Education Code section 33033.
[49] Education Code section 33050.
[50] Education Code section 33051.
[51] Education Code section 33051(c).
[52] Education Code section 33052.
[53] Cal. Const., Article IX, Section 2.

state civil service laws and whose terms of office are four years.[54] In addition, the Governor, with the recommendation of the state superintendent, may appoint three additional deputy superintendents and three additional associate superintendents who are exempt for state civil service laws.[55]

The Superintendent of Public Instruction serves as the Secretary to the State Board of Education[56] and the ex officio Director of Education.[57] The Director of Education is the executive officer of the State Board of Education and the director is vested with the executive and administrative functions of the State Department of Education.[58] The director may enter into agreements with the federal government and local agencies.[59]

The Superintendent of Public Instruction is required to execute the policies of the State Board of Education,[60] superintend the schools of the state,[61] prepare an estimate of the amount of state school funds which will be apportioned to each county[62] and prescribe regulations for contracts with the federal government.[63]

While the State Superintendent of Instruction is a constitutional officer, the California Constitution does not limit the authority of the Legislature to define the duties of the Superintendent of Public Instruction. These powers may be increased or decreased by the Legislature from time to time.[64]

STATE DEPARTMENT OF EDUCATION

The State Board of Education determines the policies of the State Department of Education, but the executive administrative functions of this Department are vested in the State Superintendent of Public Instruction.[65] The State Department of Education is responsible for revising and updating budget manuals,[66] conducting workshops[67] and evaluating educational programs.[68] However, program guidelines issued by the State Department of Education are exemplary only and must include written notification that they are not mandatory or binding.[69]

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[54] Cal. Const., Article IX, Section 2.1.
[55] Education Code section 33143.
[56] Education Code section 33004.
[57] Education Code section 33303.
[58] Education Code sections 33301, 33302.
[59] Education Code section 33117.
[60] Education Code section 33111.
[61] Education Code section 33112.
[62] Education Code section 33118.
[63] Education Code section 33113.
[64] State Board of Education v. Honig, 15 Cal.App.4th 720, 16 Cal.Rptr.2d 727 (1993).
[65] Education Code section 33301.
[66] Education Code section 33316.
[67] Education Code section 33360.
[68] Education Code section 33400.
[69] Education Code section 33308.5.

COUNTY SUPERINTENDENT OF SCHOOLS

A. Duties and Responsibilities

In each county, a superintendent of schools may be elected at each gubernatorial election or may be appointed by the county board of education.[70] The Legislature must prescribe the qualifications required for the office of county superintendent.[71] These qualifications are set forth in the Education Code and vary with the size of the county but in all cases, require a valid credential issued by the State Board of Education.[72]

The county superintendent of schools is the ex officio secretary and executive officer of the county board of education.[73] The county superintendent may appoint a deputy superintendent if he or she wishes.[74]

The county superintendent of schools is required to superintend the schools of the county, visit the schools of the county, distribute all laws and reports received for the use of school officers, keep all reports from the State Superintendent of Public Instruction, maintain a record of the proceedings of the county board of education, enforce the course of study, enforce the use of state textbooks and preserve all reports of school officers and teachers.[75] A county superintendent may enter into contracts of employment[76] and may, with the approval of the county board of education, conduct educational studies, maintain exhibits of educational programs and subscribe for membership in organizations whose purpose is the advancement of public or private education.[77]

The county superintendent of schools is considered a county officer pursuant to Government Code section 24000. Government Code section 24100 states, "Whenever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes deputies." Section 24101 authorizes a county officer to appoint as many deputies as are necessary for the prompt and faithful discharge of the duties of the office. Section 24102 requires written appointment by the deputy's principal and filing with the county clerk. The deputy is also required to take an oath of office.

The appointment remains in effect until revoked either by the present officer or the officer's successor.[78] It is not necessary to reappoint a deputy in the next term of office.[79]

Section 24105 states if the office of the county superintendent of schools is vacant, the duties of the office may temporarily be discharged by chief, assistant or deputy of such officer as the case may be next in line in authority to such county officers at the time the vacancy occurs.

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[70] Cal. Const., Article IX, Section 3.
[71] Cal. Const., Article IX, Section 3.1.
[72] Education Code section 1205 et seq.
[73] Education Code section 1010.
[74] Education Code section 1290.
[75] Education Code section 1240.
[76] Education Code sections 1293, 1294.
[77] Education Code section 1260.
[78] 1 Ops.Cal.Atty.Gen. 65 (1943).
[79] Ibid.

The chief, assistant, or deputy may exercise the authority of the office until the vacancy in the office is filled in the manner provided by law.

In a 1969 Attorney General's opinion,[80] the California Attorney General interpreted Government Code section 24100 as authorizing a deputy of the county treasurer to sit on the retirement board of the treasurer and make discretionary decisions and judgments on behalf of the county treasurer.

Therefore, once the county superintendent of schools appoints deputies and complies with the filing requirements of Section 24102, the deputies have all the powers and duties of the county superintendent of schools until the appointment is revoked by the present county superintendent of schools or the successor of the county superintendent of schools. In addition, the deputy county superintendent of schools may exercise the authority of the office until the vacancy in the office is filled.

B. Williams Settlement

In May 2000, the American Civil Liberties Union (ACLU) and other public interest groups filed a lawsuit against the State of California alleging the state had failed to provide poor and underprivileged students with equal educational opportunities, by providing poor and underprivileged students with inadequate facilities, insufficient educational materials, and with teachers who were not fully credentialed.

On August 13, 2004, Governor Schwarzenegger and the State of California settled the lawsuit (known as the "Williams Settlement"). As part of the lawsuit, the State of California agreed to enact legislation and provide funding to address the issues in the lawsuit. On September 29, 2004, Governor Schwarzenegger signed five bills to implement the settlement as urgency measures.

Education Code sections 17592.70 through 17592.74 created a new School Facilities Needs Assessment Grant Program administered by the State Allocation Board, for the purpose of awarding school districts on behalf of school sites ranked in deciles 1-3, inclusive. As a condition of receiving these funds, the school district is required to use the funds to develop a comprehensive needs assessment of all school sites eligible for grants. The assessments must be completed no later than January 3, 2006.

Education Code section 17592.71 established the School Facilities Emergency Repair Account, to be administered by the State Allocation Board for the purpose of awarding grants to school districts with schools ranked in deciles 1-3, inclusive, for emergency facilities repairs. Emergency facility needs are defined as structures or systems that are in a condition that poses a threat to the health and safety of pupils or staff while at school. Emergency facility needs do not include any cosmetic or non-essential repairs.

[80] 52 Ops.Cal.Atty.Gen. 75 (1969),

Senate Bill 550 amended Education Code section 1240 and established new county superintendent oversight requirements for schools in deciles 1-3, inclusive, relative to the sufficiency of textbooks and the adequacy of school facilities.

Education Code section 1240(c) requires the county superintendent of each county, to the extent that funds are appropriated, to annually present a report to the governing board of each school district under his or her jurisdiction, the county board of his or her county, and the board of supervisors of his or her county, describing the state of the schools in the county and of his or her office, that are ranked in deciles 1-3, inclusive, including observations while visiting the schools. The visits must be conducted at least annually while the reports are made quarterly. At least 25 percent of the visits must be unannounced.

The primary objective of the county superintendents of the county superintendent's designees' visits will be to determine the status of the following:

1. The sufficiency of textbooks.

2. The condition of facilities that pose an emergency or urgent threat to the health or safety of pupils or staff.

3. The accuracy of data reported on the school accountability report card with respect to availability of sufficient textbooks and instructional materials, and the safety, cleanliness, and adequacy of school facilities, including good repair.[81]

The provisions relating to the School Accountability Report Card are amended to require school districts to report the number of each school's fully credentialed teachers, the number of teachers relying upon emergency credentials, the number of teachers working without credentials, any assignment of teachers working outside their subject area of competence, misassignments of teachers of English learners, and the number of vacant positions for the most recent three-year period. Vacant teacher positions are defined as a position to which a single, designated certificated employee has not been assigned at the beginning of the year for an entire year.[82]

Assembly Bill 2727 amended Education Code section 35186 and requires school districts to use the uniform complaint procedure that the school district has adopted with modifications, as necessary, to help identify and resolve any deficiencies related to instructional materials, emergency or urgent facilities conditions that pose a threat to the health and safety of pupils or staff, and teacher vacancy or misassignment.

The principal or the designee of the district superintendent must make all reasonable efforts to investigate any problems within his or her authority. The principal or the designee of the district superintendent must remedy a valid complaint within a reasonable time, but not to exceed 30 working days from the date the complaint was received. The principal or designee of

[81] Education Code section 1240(i).
[82] Education Code section 33126.

the district superintendent must report to the complainant the resolution of the complaint within 45 working days of the initial filing.[83]

Education Code section 35186 requires a notice to be posted in each classroom in each school in the school district notifying parents and guardians that there should be sufficient textbooks and instructional materials for each student, that school facilities must be clean, safe and maintained in good repair, and the location where a form to file a complaint can be obtained.[84]

Commencing with the 2004-2005 audit of local educational agencies, each county superintendent of schools shall include in their review of audit exceptions performed, those audit exceptions related to the use of instructional materials program funds, teacher misassignments, information reported on the school accountability report card, and shall determine whether the exceptions were either corrected or an acceptable plan of correction was developed.[85]

Education Code section 60119 requires that the governing board of a school district hold a public hearing or hearings to make a determination, through a resolution, as to whether each pupil in each school in the district has sufficient textbooks or instructional materials in mathematics, science, history-social sciences, and English language arts. For the 2004-2005 fiscal year, the school district is required to make a diligent effort to hold the public hearing on or before December 1, 2004. Thereafter, the public hearing must take place on or before the end of the eighth week from the first day pupils attend school for that year.

Education Code section 42127.6 states that the county superintendent of schools shall report to the Superintendent of Public Instruction on the financial condition of school districts unable to meet their financial obligations and adds a seventh option that allows the county superintendent of schools to assign the Fiscal Crisis Management Assistance Team (FCMAT) to review teacher hiring practices, teacher retention rates, the percentage of highly qualified teachers, and the extent of teacher misassignment in the school district, and provide the district with recommendations to streamline and improve the teacher hiring process, teacher retention rate, extent of teacher misassignment, and percentage of highly qualified teachers. If a review team is assigned to a school district, the district must follow the recommendations of the team, unless the district shows good cause for failure to do so.

Each county superintendent of schools is required to annually monitor and review school district certificated employee assignment practices and give priority to schools that are likely to have problems with teacher misassignment and teacher vacancies based on past experience or other information, and to give priority to schools ranked in deciles 1-3, inclusive, if those schools are not currently under review in a state or federal intervention program. Each county superintendent of schools is required to investigate school and district efforts to ensure that any credentialed teacher working with limited English proficient students has completed the required training.[86]

[83] Education Code section 35186.
[84] Education Code section 35186(f).
[85] Education Code section 41020.
[86] Education Code section 44258.9.

C. Fiscal Oversight

Over the last two decades, the Legislature has passed legislation (e.g., A.B. 1200/A.B. 2756) which reflects the legislators' concern over the fiscal condition of school districts. The legislation reflects a trend of increased oversight by the State Superintendent of Public Instruction (SPI) and County Superintendents over school district budgets.[87]

Oversight of school district budgets occurs in two primary ways:

- Disapproval of the budget by the COE;
- By negative or qualified certification of the district interim reports by the district or county office of education (COE).

The superintendent of each school district is required to submit two interim reports to the governing board of the district during each fiscal year. The first report must cover the financial and budgetary status of a district for the period ending October 31. The second report must cover the period ending January 31. Both interim reports must be approved by the district governing board no later than 45 days after the close of the period being reported (December 15 and March 15).[88]

All reports must be in a format or on forms prescribed by the Superintendent of Public Instruction and must be based on standards and criteria for fiscal stability adopted by the State Board of Education. The reports and supporting data must be maintained and made available by the school district for public review. The governing board of each school district must certify, in writing, within forty-five days after the close of the period being reported, whether or not the school district is able to meet its financial obligations for the remainder of the fiscal year and for the subsequent fiscal year based on current forecasts.[89]

The certifications must be based upon the board's assessment, on the basis of standards and criteria for fiscal stability adopted by the State Board of Education as revised to reflect current information regarding the adopted state budget, district property tax revenues, and ending balances for the preceding fiscal year. The certification must be classified as positive, qualified or negative as prescribed by the Superintendent of Public Instruction for the purposes of determining subsequent actions by the Superintendent of Public Instruction, the state Controller or the county superintendent of schools. A negative certification must be assigned to any school district that, based upon current projections, will be unable to meet its financial obligations for the remainder of the fiscal year or the subsequent fiscal year. A qualified certification must be assigned to any school district that based upon current projections, may not meet its financial obligations for the current fiscal year or two subsequent fiscal years. A positive certification shall be assigned to any school district that, based upon current projections, will meet its financial obligations for the current fiscal year and subsequent two fiscal years.[90]

[87] Stats. 1991, ch. 1213 (A.B. 1200).
[88] Education Code section 42130.
[89] Education Code sections 42130, 42131.
[90] Education Code section 42131.

A copy of each certification and a copy of the report submitted to the governing board shall be filed with the county superintendent of schools. If a county office of education receives a positive certification from a school district when it determines a negative or qualified certification should have been filed, the county superintendent of schools shall change the certification to negative or qualified, as appropriate. Within 75 days after the close of the reporting period on all school district certifications that are classified as qualified or negative, the county superintendent of schools shall submit to the Superintendent of Public Instruction and the state Controller, his or her comments on the certifications and report any action proposed or taken.[91]

As to any school district having a negative or qualified certification, the county superintendent of schools must exercise his or her budget oversight authority as necessary pursuant to Section 42127.6. The county superintendent's budget oversight responsibilities include:

- Receiving district financial reports, studies, and audits,
- Determining whether the school district is able to meet its financial obligations,
- Taking steps to ensure the school district can meet its financial obligations, including, if necessary:
    - The appointment of a fiscal expert,
    - Conducting a financial study of the district,
    - Directing the district to submit financial projections of all fund and cash balances,
    - Requiring the districts to encumber all contracts and other obligations,
    - Requiring the district to submit proposals for meeting its financial obligations,
    - Withholding the compensation of the board members and the district superintendent for failure to provide requested financial information.[92]

A school district that has a qualified or negative certification must allow the county office of education in which the school district is located at least ten working days to review and comment on any proposed agreement made between the exclusive representative and the public school employer. The school district must provide the county superintendent of schools with all information relevant to yield an understanding of the financial impact of the collective bargaining agreement.[93]

The Superintendent of Public Instruction is required to develop a format for use by the appropriate parties in generating the financial information required. The county superintendent of schools must notify the school district, the county board of education, the district

[91] Education Code section 42131.
[92] Education Code section 42131.
[93] Government Code section 3540.2.

superintendent, the governing board of the school district, and each parent and teacher organization of the district within ten days if, in his or her opinion, the proposed collective bargaining agreement would endanger the fiscal wellbeing of the school district. A school district must provide the county superintendent of schools, upon request, with all information relevant to provide an understanding of the financial impact of any collective bargaining agreement that is reached.[94]

If a school district does not adopt all of the revisions to its budget needed in the current fiscal year to meet the costs of a collective bargaining agreement, the county superintendent of schools shall issue a qualified or negative certification for the district on the next interim report pursuant to Education Code section 42131.[95]

In Polster v. Sacramento County Office of Education,[96] the Court of Appeal upheld the actions of the county superintendent with respect to the reorganization of the Grant Union High School District

The county superintendent refused to process payroll requests pursuant to a transition plan adopted by the outgoing board of the Grant Union High School District, a plan that awarded severance buy out packages to several district administrative employees. The county superintendent's refusal to approve the payroll warrants to carry out the transition plan was based on the county superintendent's assessment that it might jeopardize the fiscal soundness of the new Twin Rivers Unified School District.[97] The case revolved around the meaning of Education Code section 42127.6 (j) which states:

> "Effective upon the certification of the election results for a newly organized school district pursuant to Section 35763, the county superintendent of schools may exercise any of the powers and duties of this section regarding the reorganized school district and the other affected school districts until the reorganized school district becomes effective for all purposes in accordance with Article 4 (commencing with Section 35530) of Chapter 3 of Part 21."

The Court of Appeal held that under Section 42127.6(j) the county superintendent had all of the authority under Section 42127.6 upon the certification of the election results for a newly organized school district. It did not have to go through all of the steps in Section 42127.6 (a) – (d). The Court of Appeal held that the purpose of the provisions of subsection (j) were to ensure that an outgoing board did not saddle a new board with fiscal responsibilities it could not afford. Therefore, the Court of Appeal held that the county superintendent did not abuse its discretion in staying and rescinding the warrants.[98]

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[94] Ibid.
[95] Government Code section 35475.5.
[96] 180 Cal.App.4th 649, 103 Cal.Rptr.3d 291, 252 Ed.Law Rep. 307 (2009).
[97] Id. at 655.
[98] Id. at 666-67.

Pursuant to Education Code sections 1280 and 1281, the county superintendent of schools may spend any funds in the total appropriated amount of the county office budget (excluding unappropriated reserves) without further approval from the county board of education. The county superintendent of schools may take transfers of funds between major object codes to the county board for approval. The county superintendent of schools must report changes to the budget to the county board in the interim report as required by Education Code sections 1280 and 1281.

In Hicks v. Orange County Board of Supervisors,[99] the Court of Appeal discussed the power of the Board of Supervisors versus the authority of the district attorney. The case indicates that the Board of Supervisors may not infringe on the statutory authority of the district attorney by using the budget to effect changes in the way the district attorney investigates crimes. The court ruled that the Board of Supervisors has no power to control the district attorney in the performance of his investigative and prosecutorial functions and may not do so indirectly by transferring funds for investigators to the sheriff's department.[100]

The relationship between the county superintendent of schools and the county board of education is similar to the relationship between the district attorney and a board of supervisors.

COUNTY BOARDS OF EDUCATION

A. Duties and Responsibilities of County Boards

The Legislature is required to provide for the appointment or election of a county board of education in each county or for the election of a joint county board of education for two or more counties.[101] The Education Code provides that, except in a city and county, the county board of education must consist of five or seven members each elected from a trustee area which the member represents.[102] In charter counties, the selection of members of the county board of education is prescribed in the county charter or by the board of supervisors.[103] In a county with one unified school district or elementary school district which includes all of the territory over which a county superintendent has jurisdiction, the governing board of the district shall serve as the county board of education.[104]

A county board of education is required to adopt rules and regulations consistent with the laws of the state for their own government, keep a record of their proceedings and approve the annual budget of the county superintendent of schools.[105] County boards of education may adopt and use an official seal, adopt rules and regulations governing the administration of the office of the county superintendent of schools, review the annual estimate of revenues and expenditures, acquire, lease-purchase and convey real property if these duties and functions have been

[99] 69 Cal.App.3d 228, 138 Cal.Rptr. 101 (1977).
[100] Id. at 241.
[101] Cal. Const., Article IX, Section 7.
[102] Education Code section 1000.
[103] Ibid.
[104] Ibid.
[105] Education Code section 1040.

transferred from the county board of supervisors and contract for special services.[106] A county board of education may have transferred from the county board of supervisors some or all duties and functions previously performed by the board of supervisors.[107]

B. Local Zoning Ordinances

The courts have held that in some cases the laws that apply to school districts do not apply to county boards of education. For example, whether the exemption from local zoning ordinances applies to county boards of education is currently being litigated in the courts.[108]

Government Code section 53091 states that each local agency shall comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated. However, Government Code section 53094 creates an exception to Section 53091 and states that Section 53091 does not require a school district to comply with the zoning ordinances of a county or city unless the zoning ordinance makes provision for the location of public schools, and unless the city or county has adopted a general plan.

Government Code section 53094(b) states that the governing board of a school district that has complied with the requirements of Government Code section 65352.2 and Public Resources Code section 21151.2 may render a city or county zoning ordinance inapplicable to a proposed use of property by the school district by a two-thirds vote. The governing board of the school district may not take this action when the proposed use of the property by the school district is for non-classroom facilities, including, but not limited to, warehouses, administrative buildings, and automotive storage and repair buildings.

Government Code section 53094(c) states that the governing board of a school district shall, within ten days, notify the city or county concerned of any action taken to render the zoning ordinance inapplicable. If the governing board has taken such an action, the city or county may commence an action in the Superior Court of the county whose zoning ordinance is involved, seeking a review of the action of the governing board of the school district to determine whether it was arbitrary and capricious.

In San Jose Unified School District v. Santa Clara Board of Education,[109] the Santa Clara County Superior Court ruled that Government Code section 53094(b), which authorizes the governing boards of school districts to override local zoning ordinances, does not apply to county boards of education. At page 9, the court stated, "County boards generally do not fulfill the same unique mass educational functions which are the duties of school districts. In short, there is such sufficient difference between what a county board of education does and what a normal 'school district' does that this court believes that if the Legislature had intended to grant

[106] Education Code section 1042.
[107] Education Code sections 1043, 1080. (Counties in which the county board of supervisors have transferred to the county board of education, commonly refer to the county boards of education as "fiscally independent" and rarely is approval of the county board of supervisors needed. See, Visnich v. County of Sacramento, 93 Cal.App.3d 626, 155 Cal.Rptr. 860 (1979); Board of Education of San Luis Obispo County v. County of San Luis Obispo, 126 Cal.App.3d 320, 178 Cal.Rptr. 703 (1981)).
[108] A Superior Court decision in San Jose Unified School District v. Santa Clara County Board of Education, Case No. 1-13-CV-241695 (February 7, 2014) is being appealed.
[109] Case No. 1-13-CV-241695 (February 7, 2014).

the power to override local zoning to county boards of education, the Legislature would have so stated. It has not done so." This decision is being appealed.

C. Charter School Appeals

In Today's Fresh Start v. Los Angeles County Office of Education,[110] the California Supreme Court in a case involving charter school appeals stated, "County boards do not operate public schools . . . though they are in some instances the governing boards of schools operated by county offices of education. . . . In turn, the schools county offices run are not for the general student population, but instead offer specialized vocational or technical training or educate specialty groups, including students who are homeless, on probation, in juvenile halls, or have been expelled from other schools. . . ."

D. Appointment of Outside Counsel

With respect to the appointment of outside counsel, a county board of education may not appoint outside counsel in addition to in-house counsel to provide unrestricted independent advice to the Board.[111] The Attorney General concluded that depending upon the facts in a particular matter and subject to statutory conditions, a county board of education may contract with outside counsel to provide legal advice to the Board when:

1. In-house counsel has a conflict of interest;

2. In-house counsel has failed to render timely advice in a particular matter;

3. The services being sought are in addition to those usually, ordinarily, and regularly obtained from in-house counsel; or

4. The Board desires a second legal opinion from that provided by in-house counsel in a particular matter.[112]

The Attorney General stated that pursuant to Education Code section 1042(d), a county board of education may contract with and employ any persons for the furnishing of special services and advice in financial, economic, accounting, engineering, legal, or administrative matters, if these persons are specially trained and experienced and competent to perform the special services required. The Attorney General interpreted the language in Section 1042 to mean that whether "special services" could be provided would depend on the nature of the services, the necessary qualifications required of the person furnishing the services and the availability of the services from public sources. The Attorney General stated, "The contract may be awarded based upon the qualifications of the person furnishing the services, including 'outstanding skill or expertise.' Each situation must be examined on its own merits."[113]

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[110] 57 Cal.4th 197, 303, P.3d 1140, 159 Cal.Rptr.3d 358 (2013).
[111] 86 Ops.Cal.Atty Gen. 57 (2003); see, also, Education Code section 35041.5.
[112] Id. at 61. See, also, Education Code section 35041.5.
[113] Id. at 61.

In summary, the Board may only retain outside counsel for its legal matters under limited circumstances and the person appointed must be an experienced school attorney and must possess the necessary qualifications, skills and expertise to advise a county board of education.[114]

E. Closed Session

In 2002, the Attorney General issued an opinion stating that a county board of education may not meet in closed session under either the "personnel exception" or the "labor negotiations exception" of the Brown Act to consider the appointment, employment, salaries, fringe benefits, evaluation of performance, discipline, or dismissal of certificated or classified employees of the county superintendent of schools, since county school employees are employed by the county superintendent of schools and not by the county board of education.[115] Opinions of the Attorney General are generally given "great weight" by courts in determining the meaning of statutes.[116]

In addition, the Public Employment Relations Board (PERB) has determined that the county superintendent of schools is the sole employer of certificated and classified employees. Agreements between the county superintendent of schools and employee unions are binding contracts.[117]

F. Expulsion Appeals

Pupils who are expelled by a local school district governing board may appeal the expulsion to the county board of education.[118] The appeal must be filed with the county board of education within 30 days following the decision of the governing board of the school district to expel. The period within which an appeal is to be filed is determined from the date that the governing board voted to expel, even if the enforcement of the expulsion action is suspended.[119]

The pupil must submit a written request for a copy of the written transcripts and supporting documents from the school district simultaneously with the filing of the notice of appeal with the county board of education. A school district must provide the pupil with the transcripts, supporting documents, and records within 10 school days following the pupil's written request. Upon receipt of the records, the pupil must immediately file suitable copies of these records with the county board of education.[120]

The county board of education must determine the appeal from a pupil expulsion upon the record of the hearing before the district governing board, together with such applicable documentation or regulations as may be ordered. No evidence other than that contained in the record of the proceedings of the school board may be heard unless a de novo proceeding is

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[114] We would recommend a minimum of six years representing school districts, community college districts, or county offices of education in education law matters.
[115] 85 Ops.Cal.Atty.Gen. 77 (2002).
[116] Freedom Newspapers Inc. v. Orange County Employees' Retirement System, 6 Cal.4th 821, 829 (1993).
[117] Alameda County Board of Education, PERB Order No. 323 (1983).
[118] Education Code section 48919.
[119] Education Code section 48919.
[120] Education Code section 48919.

granted. It shall be the responsibility of the pupil to submit a written transcription for a review by the county board of education.[121]

The review by the county board of education of the decision of the governing board of the school district to expel the student shall be limited to the following questions:

1. Whether the school district board acted without or in excess of its jurisdiction (i.e., time period violations, expulsion not based upon acts specified in the law as forming the basis for expulsion, or expulsion not based on acts related to school activity).

2. Whether the school district board conducted a fair hearing.

3. Whether there was a prejudicial abuse of discretion by the school district governing board (i.e., procedural requirements not met, the decision to expel is not supported by the findings, or the findings are not supported by the evidence).

4. Whether relevant evidence was improperly excluded by the school district board or new evidence could have reasonably been discovered exists. In either of these instances, the county board may remand the case to the local board for reconsideration or hold a hearing de novo.[122]

In all other cases, the county board of education shall enter an order either affirming or reversing the decision of the governing board. In any case in which the county board of education enters a decision reversing the local board, the county board may direct the local board to expunge the record of the pupil and the records of the district of any references to the expulsion action, and the expulsion shall be deemed not to have occurred.[123]

G. Interdistrict Transfer Appeals

Pupils may appeal the denial of interdistrict transfers to the county board of education. If either of the school districts fails to approve a transfer or fails, upon request, to enter into an agreement within 30 calendar days, the parent may appeal the failure to the county board of education. The county board of education has the responsibility within prescribed timelines and subject to certain procedures to determine whether the pupil should be permitted to attend and the applicable period of time.

H. Process for Budget Adoption in Fiscally Independent Counties

In fiscally independent counties such as Orange County, the county superintendent of schools submits the proposed budget to the county board of education in the form prescribed by

[121] Education Code section 48921.
[122] Education Code section 48922.
[123] Education Code section 48923.

the Superintendent of Public Instruction.[124] On or before July 1 of each year, the board holds a public hearing on the proposed budget and county office LCAP. The hearing must be held prior to adoption by the board and no sooner than three days after the proposed budget is made available for public inspection.[125] On or before July 1, the county board is directed to adopt and approve an annual budget and file the budget with the Superintendent of Public Instruction.[126] If the county board neglects or refuses to make a county office of education budget, the state will not appropriate any state or federal money to that county office for the fiscal year and appropriate county officials will be notified not to approve any warrants issued by the county office of education.[127]

Pursuant to recent legislation, if the Orange County Board of Education fails to approve the Local Control Accountability Plan (LCAP) and/or the budget, they are both deemed to be disapproved.

The Orange County Board of Education must approve both the LCAP and the budget. The LCAP approval process is tied to the budget approval and the budget approval is tied to the LCAP approval.

On or before September 8, the county board of education is required to revise the budget to reflect changes made necessary by revised projections of income and expenditures and to file that budget with the Superintendent of Public Instruction, the county board of supervisors, and the county auditor. The same notice provisions applicable to the July 1 adoption apply and the Superintendent of Public Instruction must approve the revisions.[128] As an alternative to this procedure, the county board of education may adopt a single adoption procedure.[129]

Education Code section 52070.5(d) states that the State Superintendent of Public Instruction must approve the LCAP or an annual update to the LCAP on or before October 8, if the State Superintendent of Public Instruction determines that the LCAP or the annual update to the LCAP adheres to the template and the budget for the applicable year adopted by the Orange County Board of Education. The budget must include expenditures sufficient to implement the specific actions and strategies included in the LCAP adopted by the Orange County Board of Education, based on the projections of the costs included in the plan. In addition, the LCAP or annual update to the LCAP must adhere to the expenditure requirements adopted pursuant to Section 42238.07 for funds apportioned on the basis of the number and concentration of unduplicated pupils pursuant to Sections 2574 and 2575.

Education Code section 1622(a) states that notwithstanding any other provision, for the 2014-15 fiscal year, and each fiscal year thereafter, the budget for a county office of education shall not be adopted or approved by the State Superintendent of Public Instruction before an LCAP or an update to an existing LCAP for the budget year is approved. Section 1622(d)(2) states that notwithstanding any other law, for the 2014-15 fiscal year, and each fiscal year

[124] Education Code sections 1621, 14050.
[125] Education Code section 1620.
[126] Education Code sections 1040, 1622(a).
[127] Education Code section 42120.
[128] Education Code section 1622.
[129] See, Education Code section 1622(e).

thereafter, if the State Superintendent of Public Instruction disapproves the budget for the county office of education for the sole reason that the State Superintendent of Public Instruction has not approved an LCAP or an annual update to the LCAP filed by the county superintendent of schools pursuant to Education Code section 52067, the State Superintendent of Public Instruction shall not call for the formation of a budget review committee pursuant to Education Code section 1623.

The county board of education is permitted, but not required, to review the county superintendent of schools' annual itemized estimate of anticipated revenue and expenditures before it is filed with the county auditor and make any revisions, reductions or additions it deems advisable and proper.[130] This itemized estimate is a separate document from the budget.

The county board of education is required to review two interim financial reports submitted by the superintendent. The first interim report is for the period ending October 31 and the second interim report is for the period ending January 31. Both reports must be reviewed by the board and approved by the county superintendent within 45 days of the close of the reporting period.[131] The county board is required to review the report of the annual audit.[132]

Once the budget prepared by the county superintendent is adopted by the county board of education, it is submitted by the superintendent to the Superintendent of Public Instruction for approval. Thereafter, administration of the budget is the responsibility of the county superintendent of schools.[133]

No funds may be expended in excess of the total expenditures approved by the Superintendent of Public Instruction without his or her approval.[134] The county superintendent of schools can spend within major budget categories without further approval. The necessary transfers among budget categories may be made by the superintendent to meet necessary expenses. Budget funds cannot, however, be transferred from the unappropriated fund balance without approval of the county board of education. In addition, a budget revision by the county superintendent in excess of $25,000 or a consultant contract for $25,000 or more is required to be incorporated in the next interim financial report or other board report when the report is submitted to the county board of education for discussion and approval at a regularly scheduled public meeting.[135]

I. County Board Failure to Adopt the LCAP

The Education Code does not specifically discuss what occurs if a county board refuses to adopt an LCAP presented by the county superintendent of schools. Education Code section 52071.5(a) states that if the Superintendent of Public Instruction does not approve an LCAP or annual update to the LCAP approved by a county board of education, or if the county board of education requests technical assistance, the Superintendent of Public Instruction shall provide

[130] Education Code section 1042(b).
[131] Education Code section 1240(l).
[132] Education Code section 1040(e).
[133] Statutory Functions, p. 11.
[134] Education Code section 1604.
[135] Education Code section 1280, 1281.

technical assistance, including the identification of the county board of education's strengths and weaknesses in regard to the state priorities. The Superintendent of Public Instruction may assign an academic expert or team of experts or the California Collaborative for Educational Excellence to assist the county board of education.

If the county board of education refuses to adopt an LCAP, it will be up to the State Superintendent of Public Instruction to determine how to respond. Most likely, the State Superintendent of Public Instruction will utilize the provisions of Education Code section 52071.5 and treat it as if the Superintendent of Public Instruction did not approve the LCAP or annual update to the LCAP. In such circumstances, the State Superintendent of Public Instruction may provide technical assistance to identify the county board of education's strengths and weaknesses in regard to the state priorities, or assign an academic expert or team of experts or the California Collaborative for Educational Excellence to assist the county board of education in identifying and implementing effective programs that are designed to improve the outcome for all pupil subgroups.

Education Code section 52072.5 also authorizes the Superintendent of Public Instruction, with the approval of the State Board of Education, to identify county offices of education in need of intervention. If a county board of education refuses to adopt an LCAP or an annual update to an LCAP, the Superintendent of Public Instruction might utilize the provisions of Education Code section 52072.5 to intervene.

COUNTY COMMITTEES ON SCHOOL DISTRICT ORGANIZATION

In each county, except a city and county, a committee on school district organization exists.[136] In counties with six or more school districts or community college districts, the committee is required to have eleven members.[137] In counties with fewer than six districts, the county superintendent shall determine the number of committee members.[138]

Employees of school districts, community college districts and county offices are not eligible for membership on the county committee but members of the governing board of a school district or community college district may serve simultaneously on the county committee if they are otherwise eligible.[139] The members of the county committee are reimbursed for actual and necessary travel expenses incurred in the performance of their duties.[140] The county superintendent of schools serves as the secretary to the county committee.[141] Upon a petition from a county committee or county board of education, the State Board of Education may order the county board of education to act as the county committee school district organization.[142]

[136] Education Code section 4000 et seq.
[137] Education Code section 4003.
[138] Education Code section 4002.
[139] Education Code section 4007.
[140] Education Code section 4010.
[141] Education Code section 4012.
[142] Education Code section 4020.

THE ROLE OF MUNICIPALITIES

The relationship of cities and municipalities to school districts at times is somewhat complex. Generally, cities are the agents or representatives of the state in the particular locality in which they exist.[143] Cities are subject to the laws of the state and where an ordinance conflicts with state law, the state law controls.[144] Preemption by state law as to a municipal ordinance exists if:

1. The subject matter has been fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;

2. The subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or

3. The subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local charter provision or ordinance on the transient citizens of the state outweighs the possible benefit to the city.[145]

In purely local affairs where no preemption exists, a city charter may take precedence over the general laws of the state.[146] However, the public schools are a matter of statewide concern and are not a municipal matter except where the state expressly delegates its power to the municipality.[147]

In Phelps v. Prussia, the Court of Appeal held that state laws applicable to teacher tenure superseded and preempted conflicting municipal ordinances. The court held that city ordinances control school affairs only insofar as state authority has been expressly delegated to the municipality.[148]

In Hall v. City of Taft, the California Supreme Court held that the construction of school buildings was not subject to municipal ordinances. The Court further held that the school district was not required to obtain a municipal building permit in order to build a school. The Court held that the state had preempted the construction of school buildings by enacting a comprehensive legislative scheme.[149] The court stated:

> "The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the

[143] 45 Cal.Jur.3d Municipalities, section 85, p. 151.
[144] Bishop v. City of San Jose, 1 Cal.3d 56, 81 Cal.Rptr. 465 (1969).
[145] Ibid.; 45 Cal.Jur.3d Municipalities, section 93, p. 162.
[146] Phelps v. Prussia, 60 Cal.App.2d 732 (1943).
[147] Hall v. City of Taft, 47 Cal.2d 177 (1956).
[148] 60 Cal.App.2d 732 (1943).
[149] 47 Cal.App.2d 177 (1956).

> state Legislature is given comprehensive powers in relation thereto. . . .
>
> ". . . The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. . . ."[150]

Therefore, cities may not regulate the activities of school districts unless authorized to do so by state law.[151] In addition, the California Constitution states that every local school district shall be under the control of a board of education or board of school trustees.[152] Therefore, cities or the mayors of cities may not take control of school districts.[153]

In Mendoza v. State of California,[154] the Court of Appeal held that legislation authorizing the mayor of Los Angeles to take control of a portion of the Los Angeles Unified School District was unconstitutional and violated a number of state constitutional provisions relating to control of the public schools. The Court of Appeal struck down the legislation and as a result, control of the public schools in Los Angeles remains under the control of the elected board of education.

The Court of Appeal reviewed Article IX of the California Constitution and noted that the Constitution provides for the election of a statewide Superintendent of Public Instruction,[155] a State Board of Education,[156] a county superintendent of schools,[157] a county board of education,[158] and school districts.[159] The Legislature implemented the Constitution by passing legislation that states that every school district shall be under the control of a board of school trustees or a board of education.[160] The Constitution permits charter cities to establish in their charters the manner in which the members of the board of education shall be elected or appointed and the size of the board.[161]

Article IX, Section 5 of the California Constitution states that the Legislature shall provide for a system of common schools. Under the California Constitution, the public school system includes all kindergarten schools, elementary schools, secondary schools, technical

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[150] Id. at 179-181.
[151] See, for example, Government Code section 53094 which requires school districts to comply with city zoning ordinances unless the governing board of the school district, by a two-thirds vote, renders the ordinance inapplicable. However, school districts must follow city ordinances applicable to non-classroom facilities. In City of Santa Cruz v. Santa Cruz City School Board of Education, 210 Cal.App.3d 1, 258 Cal.Rptr. 101 (1989), the Court of Appeal found that lights for an athletic field were not a non-classroom facility and allowed the school district to exempt itself from a city ordinance. In People v. Rancho Santiago College, 226 Cal.App.3d 1281, 277 Cal.Rptr. 69 (1990), the Court of Appeal held that the operation of a swap meet by a private organization or college property was a non-classroom facility and, therefore, subject to the city zoning ordinance regulating such activities.
[152] Cal. Const., Article IX, Section 14; Education Code section 35010(a).
[153] Ibid.
[154] 149 Cal.App.4th 1034, 57 Cal.Rptr.3d 505, 219 Ed.Law Rep. 116 (2007).
[155] Cal. Const., Article IX, Section 2.
[156] Cal. Const., Article IX, Section 7.
[157] Cal. Const., Article IX, Section 3.
[158] Cal. Const., Article IX, Section 7.
[159] Cal. Const., Article IX, Section 14.
[160] Education Code section 35010(a).
[161] Cal. Const., Article IX, Section 15.

schools and state colleges established in accordance with law.[162] The Constitution goes on to state:

> "No school or college or any part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System."[163]

The California Constitution also states that no public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools.[164] The California Constitution grants the power to the Legislature to authorize the governing boards of all school districts to initiate and carry on any programs, activities, or otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.[165] The Legislature implemented this constitutional provision.[166]

On September 8, 2006, the Legislature enacted the Romero Act.[167] This legislation formed a Council of Mayors to ratify the appointment, contract term, contract renewal, refusal to renew a contract, or removal of the district superintendent of the Los Angeles Unified School District. The Council of Mayors provision effectively granted to the mayor of Los Angeles complete veto power over the selection of the district superintendent. The Romero Act also established the Los Angeles Mayor's Community Partnership for School Excellence which gave the mayor of the city of Los Angeles, as a demonstration project, exclusive control over a school cluster consisting of poor performing high schools and its feeder middle and elementary schools. The Romero Act gave complete control to the mayor of the city of Los Angeles over the schools in the cluster, although it allowed initial approval by the county superintendent of schools. However, the grounds for allowing the county superintendent to disapprove of the mayor's takeover were very limited. The county superintendent had no authority to monitor the mayor's takeover or revoke the mayor's takeover.[168]

The Court of Appeal reviewed the provisions of Article IX of the California Constitution and held that while the Legislature had broad powers over the administration of the public school system, it must do so within the constitutional restraints of Article IX of the California Constitution.[169]

The Court of Appeal concluded that the Romero Act substantially interfered with the board of education's control of the Los Angeles Unified School District. The court held that the provisions relating to the mayor's partnership completely divested the board of education of its powers of control over the three school clusters in the demonstration project. The court also held

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[162] Cal. Const., Article IX, Section 6.
[163] Cal. Const., Article IX, Section 6.
[164] Cal. Const., Article IX, Section 8.
[165] Cal. Const., Article IX, Section 14.
[166] Education Code section 35160.
[167] Assembly Bill 1381, Stats. 2006, ch. 299.
[168] 149 Cal.App.4th 1034, 1044-48 (2007.)
[169] State Board of Education v. Honig, 13 Cal.App.4th 720, 16 Cal.Rptr.2d 727 (1993); Butt v. State of California, 4 Cal.4th 668, 15 Cal.Rptr.2d 480 (1992).

that the Council of Mayors transferred many of the powers of the Board of Education to employ a district superintendent since the approval and the removal of the district superintendent is now subject to the ratification of the Council of Mayors. The Court of Appeal stated:

> "It would be a clear violation of the plain language of Article IX, Section 16, if the Legislature passed a law giving the Mayor the right to appoint the members of the Board. But, the constitutional provision would be annulled if the Legislature could simply bypass it by taking the powers of the Board away from that entity and giving them to the Mayor, or the Mayor's appointee. This is nothing more than an end-run around the Constitution."[170]

The Court of Appeal held that the Legislature cannot transfer a local board of education's power to a different entity outside the public school system. The court held that the public school system entities are those entities listed in Article IX of the California Constitution (i.e. a State Superintendent of Public Instruction, State Board of Education, county superintendent of schools, county board of education, local board of education).

Based on the provisions of Article IX of the California Constitution, the Court of Appeal held that the provisions of the Romero Act transferring authority from the board of education of the Los Angeles Unified School District to a Council of Mayors headed by the mayor of the city of Los Angeles was unconstitutional.

MUNICIPAL BANKRUPTCY

In the case of In Re City of Stockton,[171] the United States Bankruptcy Court for the Eastern District of California confirmed the Chapter 9 plan of adjustment of debts by the City of Stockton.[172] The bankruptcy court held as a matter of law, pension contracts entered into by the city, including the pension administration contract, may be rejected pursuant to the Bankruptcy Code.[173] However, the bankruptcy court held that the city's Chapter 9 plan should be confirmed, even though the plan does not directly impair the city's sponsored pensions.

The bankruptcy court rejected the argument of the California Public Employee Retirement System (CalPERS) that California law insulates its contract from rejection and that the pensions themselves may not be adjusted. The court rejected the CalPERS argument for the following reasons:

1. The California statute prohibiting rejection of a contract with CalPERS in a Chapter 9 bankruptcy case is unconstitutional and federal law controls.[174]

[170] 149 Cal.App.4th 1034, 1053 (2007).
[171] 526 B.R. 35 (E.D.Cal. 2015).
[172] See, 11 U.S.C. Section 365.
[173] See, 11 U.S.C. Section 365.
[174] See, Article I, Section 8 of the United States Constitution.

2. The $1.6 billion lien granted to CalPERS by state statute in the event of termination of a pension administration contract is vulnerable to avoid once in bankruptcy as a statutory lien.[175]

3. The contracts clause of the federal and state constitutions do not preclude contract rejection or modification in bankruptcy.

Thus, the bankruptcy court concluded the city's contracts with CalPERS including the administration contract and the pensions themselves may be adjusted as part of a Chapter 9 bankruptcy claim.[176]

The bankruptcy court held that Government Code section 20487 which states that a contract with CalPERS is entitled to special protection in Chapter 9 bankruptcy cases by forbidding the rejection of any contract between a municipality and CalPERS under 11 U.S.C. Section 365 is unconstitutional. The court held that under the Supremacy Clause of the United States Constitution bankruptcy law prevails.

The bankruptcy court noted that Government Code section 20574 discourages government agencies from terminating their participation in the CalPERS pension plan by imposing a termination charge that is backed by a confiscatory statutory lien.[177] Upon termination, either voluntary or involuntary, CalPERS holds accumulated contributions for the benefit of employees and beneficiaries with respect to previous credit services. All plan assets are merged into a single termination pool that CalPERS invests so as to yield about half of the rate of return realized on CalPERS general investment pools.

CalPERS then calculates the difference between accumulated contributions and the total amount that would be required to be in the termination pool to enable CalPERS to pay all then vested benefits of terminating municipality in full. The municipality is then billed for the difference.[178]

The effect of shifting contributions from the CalPERS general investment pool to the termination pool means the municipality that has been deemed fully funded instantaneously becomes underfunded by virtue of lower projected investment returns in the termination pool. Since the termination pool is invested on a more conservative basis than the normal pool, it produces a lower yield. While the City may have been fully funded at the regular CalPERS 7.5 percent expected rate of return the City becomes underfunded at the termination pool of 2.98 percent expected rate of return. As a result, the lump sum liability resulting from a potential shift to the termination pool in the case of the City of Stockton is $1.6 billion.[179]

Pursuant to Government Code section 20577, CalPERS is not liable to pay underfunded pensions in full. If the terminating municipality does not pay the termination liability, then all benefits under the contract, payable after the board declares the agency in default are reduced by the percentage of the underfunding of the termination pool. In essence, benefits to retirees are automatically reduced if a terminating municipality does not pay its CalPERS bill in full.

[175] See, 11 U.S.C. Section 545.
[176] 176 526 B.R. 35, 39 (2015).
[177] Government Code section 20574.
[178] Id. at 45.
[179] Id. at 44-46.

Potentially, the municipality would be liable for the underfunding of the pension benefits to the employees of retirees.[180]

The bankruptcy court noted that Congress has the exclusive power to legislate uniform laws on the subject of bankruptcy.[181] The essence of bankruptcy is impairing the obligation of contract.[182] The states are forbidden in enact any law impairing the obligation of contract.[183]

The Supremacy Clause of the United States of Constitution causes federal bankruptcy laws to trump state laws, including state constitutional provisions that are inconsistent with the exercise by Congress of its exclusive power to enact uniform bankruptcy laws.[184]

The bankruptcy court noted there is a balance between federal and state sovereignty with respect to bankruptcy. The states are the gatekeepers and control whether a municipality is authorized to file a chapter 9 bankruptcy petition.[185] As a result, the state acts as a gatekeeper to determine when and under what conditions municipalities may file a chapter 9 bankruptcy.[186]

California has passed legislation exercising its gate keeping function by requiring that a municipality, before filing a chapter 9 case must either engage in a neutral evaluation process with a mediator for a specified period of time or declare a fiscal emergency under specified procedures.[187] A municipality that has satisfied California's statutory prerequisites has the state's permission to file a chapter 9 case. Once a chapter 9 case has been filed under circumstances authorized by state law, the federal bankruptcy laws control all the proceedings in the case.

The bankruptcy court held that Government Code section 20487 is inconsistent with the Bankruptcy Code. The bankruptcy court held that once a municipality meets the state's condition for filing a chapter 9 case, federal law controls and the state may not impose any further conditions.[188]

The bankruptcy court also held that Government Code section 20574 which creates a termination lien upon termination of the CalPERS pension contract is controlled by federal bankruptcy law. The bankruptcy court held that the CalPERS termination lien would be avoidable in a chapter 9 case and the debtor municipality would hold the subject property free of the statutory lien.[189]

Despite the fact that the bankruptcy court held that the pension contract with CalPERS could be avoided, the bankruptcy court upheld the plan of adjustment even though it did not include any adjustments to pension obligations. The bankruptcy court held that the City of

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[180] Id. at 48-49.
[181] U.S. Constitution Article I, Section 8, Clause 4.
[182] United States v. Bekins, 304 U.S. 27, 54, 58, S.Ct. 811 (1938); Ashton v. Cameron County Water Improvement District, 298 U.S. 513, 530, 56 S.Ct. 892 (1936).
[183] U.S. Constitution Article I, Section 10, Clause 1.
[184] International Brotherhood of Electrical Workers, Local 2376 v. City of Vallejo, 432 B.R. 262, 268-70 (E.D.Cal.2010).
[185] See, 11 U.S.C. Section 109(c)(2).
[186] In Re City of Stockton, 475 B.R. 720, 727 (E.D.Cal. 2012).
[187] See, Government Code section 53760.
[188] See, Mission Independent School District v. Texas, 116 F.2d 175, 178, (5th Cir. 1940).
[189] Id. at 58-59.

Stockton had pared down its cost in other ways by reducing salaries and lifetime retiree health benefits.[190] The bankruptcy court concluded by stating:

> "Although pensions may, as a matter of law, be modified by way of a chapter 9 plan of adjustment and although a CalPERS pension serving contract may be rejected without fear of an enforceable termination lien, the City's choice to achieve savings in total compensation by negotiating salary and benefit adjustments rather than modification of existing pension rights is appropriate. Total compensation, of which pensions are a component, has been reduced. Indeed, the City's employees and retirees have surrendered more value in this chapter 9 case than the capital markets creditors.
>
> "The plan is feasible and is in the best interest of creditors. All other elements of confirmation having been established, the plan will be confirmed."[191]

If an appellate court reached a similar conclusion, the holding in In Re City of Stockton might apply to community college districts, school districts, and county offices of education.

JOINT POWER AGENCIES

The joint power statutes date back to 1921.[192] In City of Oakland v. Williams,[193] the California Supreme Court ruled that the joint powers statutes authorize public entities to delegate to one of their members the exercise of a power or the performance of an act on behalf of all of the agencies to the Joint Powers Agreement. The Joint Powers Agency statutes authorize the joint exercise of powers separately possessed by public agencies but do not enlarge upon the powers of those agencies. The statutes grant no new powers but merely set up a new procedure for the exercise of existing powers. The 1921 statute provides a procedure whereby this power may be exercised by cooperative action.[194]

The Attorney General in a 1967 opinion reiterated the purpose of the Joint Exercise of Powers Act. The Attorney General stated that the Joint Exercise of Powers Act provides a procedure whereby existing powers may be exercised by cooperative action, rather than granting new powers.[195] The primary authority of the Joint Exercise of Powers Act is now set forth in Government Code section 6502. Government Code section 6502 states, in part:

> "If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting powers, even

[190] Id. at 60-62.
[191] Id. at 62.
[192] See, Stats. 1921, p.542; City of Oakland v. Williams, 15 Cal.2d 542, 547(1940).
[193] Ibid.
[194] City of Oakland v. Williams, 15 Cal.2d 542, 548-549, 103 P.2d 168, 171-172 (1940).
[195] 50 Ops.Cal.Atty.Gen. 1 (1967).

> though one or more of the contracting agencies may be located outside the state."

The Attorney General, in a 1998 opinion, has interpreted Government Code section 6502 as not allowing different classes of membership in a Joint Powers Agency.[196] The Attorney General stated:

> "The Act contains no authority for a joint powers agency, by contract or otherwise, to enlarge upon or weigh the provisions of the Act. A member may only act jointly by agreement….
>
> "In answer to the final question, we conclude that a joint powers agency may not allow a public entity to become a limited or associate member without becoming a party to the agreement creating the agency."[197]

REDEVELOPMENT AGENCIES

A. Legislation Dissolving Redevelopment Agencies

In 2011, the California Legislature passed legislation barring redevelopment agencies from engaging in new business and providing for their dissolution.[198] On December 29, 2011, the California Supreme Court, the California Redevelopment Association v. Matosantos[199] upheld the provisions of the legislation. As a result, redevelopment agencies were dissolved on February 1, 2012. The purpose of the legislation is to increase the amount of property taxes going to school districts, thereby decreasing the amount of funding the state must provide to schools.

The California Redevelopment Association, the League of California Cities, and other affected parties filed suit alleging that the legislation was unconstitutional. The California Supreme Court held that under the California Constitution, the Legislature may dissolve redevelopment agencies. The California Supreme Court held that AB1X 26, the dissolution measure, is a proper exercise of the legislative power vested in the Legislature by the California Constitution. That power includes the authority to create entities, such as redevelopment agencies, to carry out the state's ends, and the corollary power to dissolve those same entities when the Legislature deems it necessary and proper.

The California Supreme Court, however, held that Assembly Bill 1X 27, which conditioned further redevelopment agency operations on additional payments by the redevelopment agency to schools and special districts, was unconstitutional and violated

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[196] 81 Ops.Cal.Atty.Gen. 362, 369 (1998).
[197] Id. at 370.
[198] Assembly Bill 1X 26 and Assembly Bill 1X 27, Stats. 2011, First Extraordinary Session 2011-2012, ch. 5-6.
[199] 53 Cal. 4th 231, 135 Cal.Rptr.3d 683 (2011). The California Supreme Court extended all statutory deadlines arising before May 1, 2012 by four months.

Proposition 22.[200] The California Supreme Court held that Proposition 22 expressly forbids the Legislature from requiring such payments.

B. Successor Agency and Enforceable Obligation

The legislation, Assembly Bill 1X 26, replaces redevelopment agencies with successor agencies. Health and Safety Code section 34171(j) defines a "successor agency" as a county, city, or city and county that authorizes the creation of each redevelopment agency. Section 34170.5 requires a successor agency to create within its treasury a redevelopment obligation retirement fund to be administered by the successor agency. Section 34170.5 requires the County Auditor-Controller to create within the county treasury a Redevelopment Property Tax Trust Fund for the property tax revenues related to each former redevelopment agency, for administration by the County Auditor-Controller.

Health and Safety Code section 34171 defines "enforceable obligation" as any of the following:

1. Bonds, including the required debt service, reserve set-asides and any other payments required under the indenture or similar documents governing the issuance of the outstanding bonds of the former redevelopment agency.

2. Loans of monies borrowed by the redevelopment agency for a lawful purpose, to the extent they are legally required to be repaid pursuant to a required repayment schedule or other mandatory loan terms.

3. Payments required by the federal government, preexisting obligations to the state, or obligations imposed by state law, other than passthrough payments that are made by the County Auditor-Controller, or legally enforceable payments required in connection with the agency's employees, including, but not limited to, pension payments, pension obligation debt service, unemployment payments, or other obligations conferred through a collective bargaining agreement.

4. Judgments or settlements by a competent court of law or binding arbitration decisions against the former redevelopment agency, other than passthrough payments that are made by the County Auditor-Controller. Along with the successor agency, the oversight board shall have the authority and standing to appeal any judgment or to set aside any settlement or arbitration decision.

5. Any legally binding and enforceable agreement or contract that is not otherwise void as violating debt limit or public policy. However, nothing in the legislation shall prohibit either the

[200] See, Cal. Const., Article XIII, Section 25.5(a)(7).

successor agency, with the approval or at the direction of the oversight board, or the oversight board itself from terminating any existing agreements or contracts in providing any necessary and required compensation or remediation for such termination.

6. Contracts or agreements necessary for the administration or operation of a successor agency including, but not limited to, agreements to purchase or rent office space, equipment and supplies, and pay related expenses and for carrying insurance.

7. Amounts borrowed from or payments owing to the low and moderate income housing fund of a redevelopment agency, which had been deferred as of the effective date of the act adding this part, provided however, that the repayment schedule is approved by the oversight board.

Section 34171(d)(2) states that "enforceable obligation," does not include any agreements, contracts or arrangements between the city, county, or city and county that created the redevelopment agency and the former redevelopment agency. However, written agreements entered into at the time of issuance but in no event later than December 31, 2010, of indebted obligations, and solely for the purpose of securing or repaying those indebtedness obligations may be deemed enforceable obligations for purposes of this part. Loan agreements entered into between the redevelopment agency and the city, county, or city and county that created it, within two years of the date of creation of the redevelopment agency, may be deemed to be enforceable obligations. Contracts or agreements between the former redevelopment agency and other public agencies, to perform services or provide funding for governmental or private services or capital projects outside of redevelopment project areas that do not provide benefit to the redevelopment project and thus, were not properly authorized, shall be deemed void on the effective date of this legislation provided, however, that each contract or agreement for the provision of housing properly authorized shall not be deemed void.[201]

Health and Safety Code section 34171(g) defines "recognized obligation" as an obligation listed in the Recognized Obligation Payment Schedule (ROPS). Section 34171(h) defines "Recognized Obligation Payment Schedule" as a document setting forth the minimum payment amounts and due dates of payments required by enforceable obligations for each six month fiscal period, as set forth in Section 34177(m).

Health and Safety Code section 34172(a) states that all redevelopment agencies and redevelopment agency components of community development agencies are dissolved and shall no longer exist as a public body.[202] Section 34172 prohibits a community from creating a new redevelopment agency. However, a community in which the agency has been dissolved and the

[201] Health and Safety Code section 34171(d)(3).
[202] By order of the California Supreme Court in California Redevelopment Association v. Matosantos, all deadlines set forth in the statutes are advanced for a period of four months. As a result, redevelopment agencies are dissolved effective February 1, 2012.

successor entity has paid off all the former agency's enforceable obligations may create a new agency.

Health and Safety Code section 34173 designates successor agencies as successor entities to the former redevelopment agencies. Section 34174 states that solely for the purposes of Article XVI, Section 16 of the California Constitution, all agency loans, advances or indebtedness and interest thereon shall be extinguished and paid, provided, however, that nothing herein is intended to absolve the successor agency of payment or other obligations due or imposed pursuant to the enforceable obligations. Section 34175 states that it is the intent of the legislation that pledges of revenue associated with enforceable obligations of the former redevelopment agencies are to be honored. Section 34175(b) states that all assets, properties, contracts, leases, books and records, buildings and equipment of the former redevelopment agency are transferred to the control of the successor agency effective October 1, 2011 (now February 1, 2012 by order of the California Supreme Court).

Health and Safety Code section 34176 states that the city, county or city and county that authorized the creation of a redevelopment agency may elect to retain the housing assets and functions previously performed by the redevelopment agency. In the alternative, the city or county may transfer responsibility for the housing assets and functions to a local housing authority.

Health and Safety Code section 34177 outlines the duties required of successor agencies since successor agencies are required to continue to make payments due for enforceable obligations.

On and after October 1, 2011 (now February 1, 2012) and until a Recognized Obligation Payment Schedule (ROPS) becomes operative, only payments required pursuant to an enforceable obligation payment schedule shall be made. The initial enforceable obligation payment schedule shall be the last schedule adopted by the redevelopment agency. Payments associated with obligations excluded from the definition of enforceable obligations shall be excluded from the enforceable obligation payment schedule and be removed from the last schedule adopted by the redevelopment agency prior to the successor agency adopting it as its enforceable obligation payment schedule. The enforceable obligation payment schedule may be amended by the successor agency at any public meeting and shall be subject to the approval of the oversight board as soon as the board has sufficient members to form a quorum.[203]

The State Department of Finance and the State Controller shall have the authority to require any documents associated with the enforceable obligations to be provided to them in a manner of their choosing. Any taxing entity, the Department of Finance and the State Controller shall each have standing to file a judicial action to prevent a violation and to obtain injunctive or appropriate relief.[204]

Commencing on January 1, 2012 (now May 1, 2012), only those payments listed in the Recognized Obligation Payment Schedule (ROPS) may be made by the successor agency from

[203] Health and Safety Code section 34177(a)(1).
[204] Health and Safety Code section 34177(a)(2).

the funds specified in the Recognized Obligation Payment Schedule (ROPS). In addition, commencing January 1, 2012 (now May 1, 2012), the Recognized Obligation Payment Schedule shall supersede the statement of indebtedness, which shall no longer be prepared nor have any effect under the community redevelopment law.[205]

Nothing in the legislation is to be construed as preventing a successor agency, with the prior approval of the oversight board, as described in Section 34179, from making payments for enforceable obligations from sources other than those listed in the Recognized Obligation Payment Schedule.[206] From October 1, 2011 to July 1, 2012 (now February 1, 2012 to November 1, 2012), a successor agency shall have no authority and is hereby prohibited from accelerating payment or making any lump sum payments that are intended to pre-pay loans, unless such accelerated repayments were required prior to the effective date of this legislation (i.e., February 1, 2012).[207]

Successor agencies are required to maintain reserves in the amount required by indentures, trust indentures, or similar documents governing the issuance of outstanding redevelopment agency bonds, to perform obligations, required pursuant to any enforceable obligation, to remit unencumbered balances of redevelopment agency funds to the County Auditor-Controller for distribution to the taxing entities. In addition, successor agencies are required to:

1. Dispose of assets and properties of the former redevelopment agency as directed by the oversight board.

2. Enforce all former redevelopment agency rights for the benefit of the taxing entities.

3. Effectuate transfer of housing functions and assets to the appropriate entity.

4. Expeditiously wind down the affairs of the redevelopment agency in accordance with the direction of the oversight board.

5. Continue to oversee development of properties until the contracted work has been completed, or the contractual obligations of the former redevelopment agency can be transferred to other parties.

6. Prepare or propose an administrative budget and submit it to the oversight board for its approval.[208]

Successor agencies are also required to provide administrative cost estimates from its administrative budget that are paid from property tax revenues deposited in the Redevelopment

[205] Health and Safety Code section 34177(a)(3).
[206] Health and Safety Code section 34177(a)(4).
[207] Health and Safety Code section 34177(a)(5).
[208] Health and Safety Code section 34177(b)-(j).

Property Tax Trust Fund to the County Auditor-Controller for each six month fiscal period, and before each six month fiscal period, prepare a Recognized Obligation Payment Schedule (ROPS) in accordance with the requirements of Section 34177. For each recognized obligation, the Recognized Obligation Payment Schedule shall identify one or more of the following sources of payment:

1. Low and Moderate Income Housing Fund.

2. Bond proceeds.

3. Reserve balances.

4. Administrative cost allowance.

5. The Redevelopment Property Tax Trust Fund.

6. Other revenue sources.[209]

A draft Recognized Obligation Payment Schedule shall not be deemed valid unless all of the following conditions have been met:

1. A draft Recognized Obligation Payment Schedule (ROPS) is prepared by the successor agency for the enforceable obligations of the former redevelopment agency by November 1, 2011 (now March 1, 2012).[210]

2. The certified Recognized Obligation Payment Schedule (ROPS) is submitted to and duly approved by the oversight board.

3. A copy of the approved Recognized Obligation Payment Schedule is submitted to the County Auditor-Controller, the State Controller and the Department of Finance, and posted on the successor agency's Internet website.[211]

Commencing February 1, 2012, agreements, contracts or arrangements between the city or county that created the redevelopment agency and the redevelopment agency are invalid and shall not be binding on the successor agency. However, the successor agency may enter or reenter into agreements with the city or county that formed the redevelopment agency if approved by the oversight board.[212] However, the following agreements are not invalid and may bind the successor agency:

[209] Health and Safety Code section 34177(l).
[210] It is unclear how the California Supreme Court's order affects this date.
[211] Health and Safety Code section 34177(l)(2).
[212] Health and Safety Code section 34178(a).

1. A duly authorized, written agreement entered into at the time of issuance, but in no event later than December 31, 2010, of indebtedness obligations, and solely for the purpose of securing or repaying those indebtedness obligations.

2. A written agreement between a redevelopment agency and the city or county that created it that provided loans or other startup funds for the redevelopment agency that were entered into within two years of the formation of a redevelopment agency.

3. A joint exercise of powers of agreement in which the redevelopment agency is a member of the joint powers authority.

C. Composition of the Oversight Board

Health and Safety Code section 34179 states that each successor agency shall have an oversight board composed of seven members. The members shall elect one of their members as the chairperson and shall report the name of the chairperson and other members to the Department of Finance on or before January 1, 2012 (now May 1, 2012 by order of the California Supreme Court). The members are selected as follows:

1. One member appointed by the county board of supervisors.

2. One member appointed by the mayor for the city that formed the redevelopment agency.

3. One member appointed by the largest special district, by property tax share, with territory in the territorial jurisdiction of the former redevelopment agency, which is of the type of special district that is eligible to receive property tax revenues.

4. One member appointed by the county superintendent of schools to represent schools if the superintendent is elected.

5. One member appointed by the Chancellor of the California Community Colleges to represent community college districts in the county.

6. One member of the public appointed by the County Board of Supervisors.

7. One member representing the employees of the former redevelopment agency appointed by the mayor or the chair of the Board of Supervisors, as the case may be, from the recognized employee organization representing the largest number of former

redevelopment agency employees employed by the successor agency at that time.[213]

If any oversight board member position has not been filled by May 15, 2012, or any member position remains vacant for more than sixty days, the Governor may appoint individuals to fill the position.[214] The oversight board may direct the staff of the successor agency to perform work in furtherance of the oversight board's duties and responsibilities. These successor agencies shall pay for all of the costs of meetings of the oversight board and may include such costs in its administrative budget. Oversight board members shall serve without compensation or reimbursement for expenses.[215]

Oversight board members shall have personal immunity from suit for their actions taken within the scope of their responsibilities as oversight board members.[216] A majority of the total membership of the oversight board shall constitute a quorum for the transaction of business. A majority vote of the total membership of the oversight board is required for the oversight board to take action. The oversight board shall be deemed to be a local entity for purposes of the Ralph M. Brown Act, the California Public Records Act and the Political Reform Act of 1974.[217]

All notices required by law for proposed oversight board actions shall also be posted on the successor agency's Internet website or the oversight board's Internet website.[218] Each member of an oversight board shall serve at the pleasure of the entity that appointed such member.[219]

The Department of Finance may review an oversight board action and as such, all oversight board actions shall not be effective for three business days, pending a request for review by the Department of Finance. Each oversight board shall designate an official to whom the Department of Finance may make such requests and who shall provide the Department of Finance with the telephone number and e-mail contact information for the purpose of communicating with the Department of Finance. In the event that the Department of Finance requests a review of a given oversight board action, the oversight board shall have ten days from the date of its request to approve the oversight board action or return it to the oversight board for reconsideration and such oversight board action shall not be effective until approved by the Department of Finance. In the event that the Department of Finance returns the oversight board action to the oversight board for reconsideration, the oversight board shall resubmit the modified action for Department of Finance approval and the modified oversight board action shall not become effective until approved by the Department of Finance.[220]

Oversight boards shall have fiduciary responsibilities to holders of enforceable obligations and the taxing entities that benefit from distribution of property tax and other

[213] Health and Safety Code section 34179(a).
[214] Health and Safety Code section 34179(b).
[215] Health and Safety Code section 34179(c).
[216] Health and Safety Code section 34179(d).
[217] Health and Safety Code section 34179(e).
[218] Health and Safety Code section 34179(f).
[219] Health and Safety Code section 34179(g).
[220] Health and Safety Code section 34179(h).

revenues. An individual may simultaneously be appointed to up to five oversight boards and may hold an office in a city or county, special district, school district, or community college district.[221]

Commencing on and after July 1, 2016, in each county where more than one oversight board was created by operation of this legislation, there shall be only one oversight board appointed as follows:

1. One member appointed by the county board of supervisors.

2. One member appointed by the city selection committee established pursuant to Section 50270 of the Government Code.

3. One member appointed by the independent special district selection committee established pursuant to Section 56332 of the Government Code, for the types of special districts that are eligible to receive property tax revenues pursuant to Section 34188.

4. One member appointed by the county superintendent of schools to represent schools if the superintendent is elected.

5. One member appointed by the Chancellor of the California Community Colleges to represent community colleges in the county.

6. One member of the public appointed by the county board of supervisors.

7. One member appointed by the recognized employee organization representing the largest number of successor agency employees in the county.[222]

The Governor may appoint individuals to fill any oversight board member position that has not been filled by July 15, 2016, or any member position that remains vacant for more than sixty days.[223] Commencing on and after July 1, 2016, in each county where only one oversight board was created by the operation of this legislation, there will be no change to the composition of that oversight board.[224] Any oversight board for a given successor agency shall cease to exist when all of the indebtedness of the dissolved redevelopment agency has been repaid.[225]

The oversight board must approve all of the following successor agency actions before the successor agency can act:

1. The establishment of new repayment terms for outstanding loans where the terms have not been specified prior to February 1, 2012.

[221] Health and Safety Code section 34179(i).
[222] Health and Safety Code section 34179(j).
[223] Health and Safety Code section 34179(k).
[224] Health and Safety Code section 34179(l).
[225] Health and Safety Code section 34179(m).

2. Refunding of the outstanding bonds and other debt of the former redevelopment agency by successor agencies in order to provide for savings or to finance debt service spikes provided that no additional debt is created and debt service is not accelerated.

3. Setting aside amounts in reserves as required by indentures, trust indentures, or similar documents governing the issuance of outstanding redevelopment agency bonds.

4. The merging of project areas.

5. Continuing the acceptance of federal or state grants, or other forms of financial assistance from either public or private sources, where assistance is conditioned upon the provision of matching funds, by the successor entity as successor to the former redevelopment agency, in an amount greater than five percent.

6. Development of a compensation agreement between a city or county wishing to retain any properties or assets for future redevelopment activities with other taxing entities to provide payments to them in proportion to their shares of the base property tax for the value of the property retained. If no other agreement is reached on evaluation of the retained assets, the value will be the fair market value as of the 2011 property tax lien date, as determined by the county assessor.

7. Establishment of Recognized Obligation Payment Schedules (ROPS).

8. A request by the successor agency to enter into an agreement with the city or county that formed the redevelopment agency that it is succeeding.

9. A request by a successor agency or taxing entity to pledge, or to enter into an agreement for the pledge of property tax revenues.[226]

The oversight board is required to direct the successor agency to do all of the following:

1. Dispose of all assets and properties of the former redevelopment agency that were funded by tax increment revenues of the dissolved redevelopment agency provided that the oversight board may instead direct the successor agency to transfer ownership of those assets that were constructed and used for a governmental purpose, such as roads, school buildings, parks, and fire stations, to the appropriate public jurisdiction pursuant to any existing agreements

[226] Health and Safety Code section 34180.

relating to the construction or use of such an asset. Any compensation to be provided to the successor agency for the transfer of the asset shall be governed by the agreements relating to the construction or use of that asset. Disposal shall be done expeditiously and in a manner aimed at maximizing value.

2. Cease performance in connection with and terminate all existing agreements that do not qualify as enforceable obligations.

3. Transfer housing responsibilities and all rights, powers, duties, and obligations, along with any amounts on deposit in the Low and Moderate Income Housing Fund, to the appropriate entity.

4. Terminate any agreement, between the dissolved redevelopment agency and any public entity located in the same county, obligating the redevelopment agency to provide funding for any debt service obligations of the public entity, or for the construction, or operation of facilities owned or operated by such public entity, in any instance where the oversight board has found that early termination would be in the best interests of the taxing entities.

5. Determine whether any contracts, agreements or other arrangements between the dissolved redevelopment agency and any private parties should be terminated or renegotiated to reduce liabilities and increase net revenues to the taxing entities, and present proposed termination or amendment agreements to the oversight board for its approval. The board may approve any amendments to or early termination of such agreements where it finds that amendments or early termination would be in the best interests of the taxing entities.[227]

D. Audit of Former Redevelopment Agency Funds

The County Auditor-Controller is required to conduct or arrange to be conducted audits of each redevelopment agency in the county to be completed by March 1, 2012 (now July 1, 2012). The purpose of the audits is to establish each redevelopment agency's assets and liabilities, to document and determine each redevelopment agency's passthrough payment obligations to other taxing agencies, and to document and determine both the amount and the terms of any indebtedness incurred by the redevelopment agency and certify the initial Recognized Obligation Payment Schedule (ROPS). The County Auditor-Controller may charge the Redevelopment Property Tax Trust Fund for any costs incurred by the County Auditor-Controller.[228]

[227] Health and Safety Code section 34181.
[228] Health and Safety Code section 34182(a).

By March 15, 2012 (now July 15, 2012), the County Auditor-Controller shall provide the State Controller's office a copy of all audits performed. The County Auditor-Controller shall maintain a copy of all documentation and working papers for the use by the state controller.[229]

The County Auditor-Controller shall determine the amount of property taxes that would have been allocated to each redevelopment agency in the county had the redevelopment agency not been dissolved. These amounts are deemed property tax revenues under the California Constitution, Article XIIIA, Section 1(a), and are available for allocation and distribution in accordance with the provisions of this legislation. The County Auditor-Controller shall calculate the property tax revenues using current assessed values on the last equalized roll on August 20, pursuant to Revenue and Taxation Code section 2052, and pursuant to statutory formulas or contractual agreements with other taxing agencies, as of the effective date of this section, and shall deposit that amount in the Redevelopment Property Tax Trust Fund.[230]

Each County Auditor-Controller shall administer the Redevelopment Property Tax Trust Fund for the benefit of the holders of former redevelopment agency enforceable obligations and the taxing entities that received passthrough payments and distributions of property taxes. In connection with the allocation and distribution by the County Auditor-Controller of the property tax revenues deposited in the Redevelopment Property Tax Trust Fund, the County Auditor-Controller shall prepare estimates of amounts to be allocated and distributed and provide those estimates to both the entities receiving the distributions and the state Department of Finance, no later than November 1 and May 1 of each year. Each County Auditor-Controller shall disburse proceeds of asset sales or reserve balances, which have been received from the successor entities to the taxing entities. In making such distributions, a County Auditor-Controller shall utilize the same methodology for allocation and distribution of property tax revenues as provided in Health and Safety Code section 34188.[231]

By October 1, 2012, the County Auditor-Controller shall report the following information to the State Controller's office and the Director of Finance:

1. The sums of property tax revenues remitted to the Redevelopment Property Tax Trust Fund related to each former redevelopment agency.

2. The sums of property tax revenue remitted to each agency.

3. The sums of property tax revenue remitted to each successor agency.

4. The sums of property tax revenue paid to each successor agency.

5. Sums paid to each city, county and special district and the total amount allocated for schools.

[229] Health and Safety Code section 34182(b).
[230] Health and Safety Code section 34182(c)(1).
[231] Health and Safety Code section 34182(c).

6. Any amount deducted from other distributions.[232]

A County Auditor-Controller may charge the Redevelopment Property Tax Trust Fund for the cost of administering the provisions of this legislation.[233] The State Controller may audit and review any County Auditor-Controller action taken pursuant to this legislation. As such, all County Auditor-Controller actions shall not be effective for three business days, pending a request for review by the State Controller. In the event that the State Controller requests a review of a given County Auditor-Controller action, he or she shall have ten days from the date of his or her request to approve the County Auditor-Controller's action or return it to the County Auditor-Controller for reconsideration, and such County Auditor-Controller action shall not be effective until approved by the State Controller. In the event that the State Controller returns the County Auditor-Controller's action to the County Auditor-Controller for reconsideration, the County Auditor-Controller must resubmit a modified action for State Controller approval and such modified County Auditor-Controller action shall not become effective until approved by the State Controller.[234]

Health and Safety Code section 34183 sets forth a formula for the allocation of property taxes in each Redevelopment Property Tax Trust Fund following the County Auditor-Controller's deduction for administrative costs. Section 34183 also establishes an order of priority for payments listed in the Recognized Obligation Payment Schedule (ROPS).

The distribution to each taxing entity shall be in an amount proportionate to its share of property tax revenues in the tax rate area in that fiscal year as follows:

1. For distributions from the Redevelopment Property Tax Trust Fund, the share of each taxing entity shall be applied to the amount of property tax available in the Redevelopment Property Tax Trust Fund after deducting the amounts of any distributions under paragraphs (2) and (3) of Subdivision (a) of Section 34183 (e.g., debt payments and obligations).

2. For each taxing entity that receives passthrough payments, that agency shall receive the amount of any passthrough payments identified under paragraph (1) or Subdivision (a) of Section 34183, in an amount not to exceed the amount that it would receive pursuant to Section 34188 in the absence of the passthrough agreement. However, to the extent that the passthrough payments received by the taxing entity are less than the amount that the taxing entity would receive pursuant to Section 34188 in the absence of a passthrough agreement, the taxing entity shall receive an additional payment that is equivalent to the difference between those amounts.[235]

[232] Health and Safety Code section 34182(d).
[233] Health and Safety Code section 34182(e).
[234] Health and Safety Code section 34182(f).
[235] Health and Safety Code section 34188(a).

Property tax shares of local agencies shall be determined based on property tax allocation laws in effect on the date of distribution, without revenue exchange amounts allocated pursuant to Section 97.68 of the Revenue and Taxation Code, and without the property taxes allocated pursuant to Section 97.70 of the Revenue and Taxation Code.[236] The total school share, including passthroughs, shall be the share of the property taxes that would have been received by school entities, as defined in Subdivision (f) of Section 95 of the Revenue and Taxation Code, in the jurisdictional territory of the former redevelopment agency, including, but not limited to, the amount specified in Sections 97.68 and 97.70 of the Revenue and Taxation Code.[237]

E. Effect of Repeal of Community Redevelopment Law

Effective February 1, 2012, all of the provisions of the community redevelopment law that depend on the allocation of tax increment to redevelopment agencies shall be inoperative.[238] The California Law Revision Commission is required to draft a Community Redevelopment Law clean-up bill for consideration by the Legislature no later than January 1, 2013.[239]

Nothing in this legislation relieves a successor agency of the obligations of the former redevelopment agency under the collective bargaining laws. The collective bargaining agreements negotiated by the redevelopment agencies shall be enforceable obligations of the successor agency and the successor agency shall become the employer of all employees of the redevelopment agency as of February 1, 2012.[240]

F. Transfer of Redevelopment Agency Funds to School Districts

In California Redevelopment Association v. Matosantos,[241] the Court of Appeal held that the Legislature acted within its constitutional authority in directing redevelopment agencies to deposit portions of their property tax funding into Supplemental Educational Revenue Augmentation Funds (SERAFs) to be used for financing K-12 education in redevelopment areas. Assembly Bill 4X-26 further required that the funds deposited in SERAFs be counted toward the state's overall obligation to fund education, and as a result, the state was not obligated to increase school funding. Redevelopment agencies were forced to transfer funds to the state general fund as reimbursement for other state-funded local programs.

The Court of Appeal noted that in California Redevelopment Association v. Matosantos,242 the California Supreme Court upheld the Legislature's power to dissolve redevelopment agencies completely. The Court of Appeal held that inherent in the power to dissolve is the power to limit funding available to redevelopment agencies. The Court of Appeal held that since A.B. 4X-26 does not otherwise violate constitutional limitations on the use of property taxes or impair contractual obligations of redevelopment agencies or their successors, the Legislature had inherent authority to enact the legislation.

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[236] Health and Safety Code section 34188(b).
[237] Health and Safety Code section 34188(c).
[238] Health and Safety Code section 34189.
[239] Health and Safety Code section 34189(b).
[240] Health and Safety Code section 34190.
[241] 212 Cal.App.4th 1457 (2013).
[242] 53 Cal.4th 231 (2011).

CITIZENS' OVERSIGHT COMMITTEE

A. Formation of the Citizens' Oversight Committee

The California Constitution authorizes school districts to submit local bond measures to the voters for approval.[243] The proceeds from the bonded indebtedness must be used for the construction, reconstruction, rehabilitation, or replacement of school facilities, including the furnishing and equipping of school facilities.[244]

If a bond measure is approved by the voters, the governing board of the school district or community college district is required to establish and appoint members to an independent citizens' oversight committee. The purpose of the citizens' oversight committee is to inform the public of the expenditure of bond revenues by reviewing and reporting on the expenditure of funds for school construction.[245]

The school district is required to provide the citizens' oversight committee with any necessary administrative and technical assistance it needs to meet its legal obligations. All committee proceedings are open to the public. The committee is required to issue a report at least once a year on the expenditure of bond proceeds.[246]

Pursuant to Article XIIIA of the California Constitution, a Citizens Oversight Committee is required to be created to provide oversight of the issuance of any school bond issued under Proposition 39. Proposition 39 allows for passage of a bond for the construction, replacement, or rehabilitation of school facilities by a 55% majority vote if the proposition includes the accountability requirements specified in Proposition 39. The Citizens Oversight Committee is required to inform the public about the expenditures of Proposition 39 proceeds, review the audits, and inspect school facilities financed with bond proceeds. The Citizens Oversight Committee also is required to review and recommend cost-saving measures for school districts.

Education Code section 15280(a)(2) requires the governing board of the school district to provide the Citizens Oversight Committee with responses to any and all findings, recommendations, and concerns addressed in the annual independent financial and performance audits within three months of receiving the audits. Education Code section 15286 requires the required annual independent financial and performance audits for the preceding fiscal year be submitted to the Citizens Oversight Committee at the same time they are submitted to the school district or the community college district, no later than March 31st of each year.

B. Membership of the Citizens' Oversight Committee

The membership of the citizens' oversight committee is regulated by statute.[247] Education Code section 15282(a) states in part, "The citizens' oversight committee shall consist

[243] Article XIIIA, Section 1(a)(3) of the California Constitution authorizes a school district to pass a local bond by a 55% vote. See, also, Article XVI, Section 18(b).
[244] Cal. Const., Article XIIIA, Section 1(a)(3).
[245] Education Code section 15278.
[246] Education Code section 15280.
[247] Ibid.

of at least seven members to serve for a term of two years without compensation and for no more than two consecutive terms."

While consisting of a minimum of at least seven members, the citizens' oversight committee shall be comprised as follows:

1. One member shall be active in a business organization representing the business community located within the district.

2. One member shall be active in a senior citizens' organization.

3. One member shall be active in a bona fide taxpayers' organization.

4. For a school district, one member shall be the parent or guardian of a child enrolled in the district. For a community college district, one member shall be a student who is currently enrolled and active in a community college group, such as student government.

5. For a school district, one member shall be both a parent or guardian of a child enrolled in the district and active in a parent-teacher organization, such as PTA or school site council. For a community college district, one member shall be active in support of the community college district, such as a member of an advisory council or foundation.[248]

No employee or official, vendor, contractor or consultant of the district shall be appointed to the citizens' oversight committee. Members of the committee are required to comply with state conflict of interest laws.[249]

C. Term Limits for Members of the Citizens' Oversight Committee

There have been no court decisions interpreting the term limit provisions in Education Code section 15282, which state that individuals may not serve more than two consecutive terms. Therefore, it is necessary to draw analogies to other term limit provisions. The California Constitution, Article IV, Section 2 (a)[250] limits members of the state assembly to no more than three terms.

In Schweisinger v. Jones,[251] the Court of Appeal held that service of any part of a term counts as service of a full term.[252] The Court of Appeal held that the primary purpose of Proposition 140 was to limit the advantages of incumbency and eliminate a class of career politicians. For four reasons, the court concluded that the language in the California Constitution

[248] Education Code section 15282(a).
[249] Education Code section 15282(b).
[250] Article IV, Section 2 of the California Constitution was amended by an Initiative Measure (Proposition 140) passed by the voters on November 6, 1990.
[251] 68 Cal.App.4th 1320, 81 Cal.Rptr.2d 183 (1998).
[252] Id. at 1323.

must be read to count a portion of the term as a full term. First, the court held that the people did not say that one may serve three terms rather they said no member may serve more than three terms and concluded that this was a lifetime limitation.[253] Second, the Court of Appeal held that the people did not allow for service of more than three terms and only allowed one limited exception where the remainder of the term is less than half of the full term. By expressing one exception in which it is possible to serve more than three terms, the court held that it was presumed that other exceptions were forbidden.[254] Third, the Court of Appeal held that if other exceptions were allowed it would create a loophole which would frustrate the intention of the people when they passed Proposition 140 and amended the California Constitution. Fourth, at common law where no provision fixed the length of a term of office, the shortest permitted term was implied.[255]

In Conde v. City of San Diego,[256] the Court of Appeal held that under the City Charter of the City of San Diego a former council member was not barred by term limits from running for the city council. The City Charter stated in part, "…no person shall serve more than two consecutive four year terms as a Council member of any particular district. If for any reason a person serves a partial term as Council member from a particular district in excess of two (2) years, that partial term shall be considered a full term for purposes of this term limit provision."

The Court of Appeal held that unlike Proposition 140 which placed a lifetime term limit on members of the Legislature, the San Diego City Charter only placed a ban on consecutive terms. The Court of Appeal interpreted consecutive terms as meaning that if there is a break in service, the former council member could run and serve another term.[257]

In Arntz v. Superior Court,[258] the Court of Appeal held that under the City Charter of the City and County of San Francisco, partial terms counted as a full term. The City Charter stated in part, ". . . no person elected or appointed as a supervisor may serve as such for more than two successive four year terms. Any person appointed to the office of supervisor to complete in excess of two years of a four year term shall be deemed, for the purpose of this section, to have served one full term upon expiration of that term."[259]

Based on the cases cited above, most likely the courts would interpret Education Code section 15282 to mean that any person appointed to the Citizens' Oversight Committee who serves a partial term and one more full term for two years would not be eligible to serve another consecutive term.

However, the limit is on consecutive terms. Therefore, if there is a break in service, the individual may be reappointed to the Citizens' Oversight Committee for another term. Since there is no prescribed amount of time for the break in service, the school district is not limited by a prescribed amount of time with respect to a break in service.

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[253] Id. at 1325.
[254] Id. at 1326.
[255] Id. at 1327.
[256] 134 Cal.App.4th 346, 36 Cal.Rptr.3d 54 (2005).
[257] Id. at 350. See, also, Legislature v. Eu, 54 Cal.3d 492, 505, 286 Cal.Rptr. 283, 816 P.2d, 309 (1991).
[258] 187 Cal.App.4th 1082, 114 Cal.Rptr.3d 561 (2010).
[259] Id. at 1085-1086.

LIABILITY OF COUNTY TREASURER TO SCHOOL DISTRICTS

A. Holding of the Court

In San Mateo Union High School District v. County of San Mateo,[260] the Court of Appeal held that the county treasurer was immune from suit by school districts that brought an action for breach of contract, statutory violations of the prudent investor standard, violations of the statutory maximum security maturity limits and violations of county's investment policies. The Court of Appeal sustained the demurrer granted by the trial court without leave to amend. The Court of Appeal affirmed.

B. Factual Background

The plaintiffs in the present action were school districts that invested money in the San Mateo Pooled Investment Fund by defendants San Mateo County, and the former County Treasurer, Lee Buffington. A portion of the pool was invested by defendants in nine notes issued by Lehman Brothers Holdings, Inc. (Lehman). When Lehman declared bankruptcy in September 2008, the pool lost approximately $155 million, plaintiffs' share of which was approximately $20 million.

On January 4, 2011, the plaintiffs filed a complaint against defendants. The plaintiffs alleged breach of contract, violations of the prudent investor standards,[261] violations of the statutory maximum security maturity limits,[262] and violations of the county's investment policies. The plaintiffs argued that the county and Buffington were not immune from liability.

The Court of Appeal noted that Government Code sections 27000.3 and 53600.3, provide that the county treasurer shall serve as a fiduciary when investing or managing funds deposited with the county treasury, and shall act according to the prudent investment standard with the care, skill, prudence, and diligence under the circumstances then prevailing, to safeguard the principal and maintain the liquidity needs of the county and the depositors. The Court of Appeal noted that the essence of the alleged statutory violation of the prudent investor standard is that defendants invested an excessive portion of the pool's funds in Lehman, failed to diversify the investment portfolio, and failed to recognize the foreseeable, impending collapse of Lehman.[263]

C. Liability of County of San Mateo

The Court of Appeal observed that public entities in California are not liable for tortious injury unless liability is imposed by statute.[264] Public entities may be held liable only if a statute (not including a charter or provision, ordinance or regulation) is found declaring them to be liable.[265]

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[260] 213 Cal.App.4th 418, 152 Cal.Rptr.3d 530 (2013).
[261] See, Government Code sections 27000.3, 53600.3.
[262] Government Code section 53601.
[263] Id. at 426-27.
[264] Government Code section 815.
[265] Id. at 427.

The Court of Appeal concluded that the liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care to the plaintiff.[266] Plaintiffs argue that Government Code section 815.6 provides the statutory basis for direct liability of a public entity for violation of the prudent investor standard. Section 815.6 states:

> "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

The plaintiffs argue that the use of the term "shall" in Government Code section 27000.3 and 53600.3 impose a mandatory duty to comply with the prudent investor standard for purposes of liability under Government Code section 815.6. The court noted that Government Code section 815.6 has three requirements that must be met before a governmental entity is liable:

1. An enactment must impose a mandatory duty;

2. The enactment must be meant to protect against the kind of risk of injury suffered by the party asserting Section 815.6 as a basis of liability; and

3. Breach of the mandatory duty must be a proximate cause of the injury suffered.

The Court of Appeal stated that the first requirement, that the enactment at issue be obligatory, rather than merely discretionary or permissive, was the key issue in this case. Whether an enactment creates a mandatory duty is a question of law and the courts must determine whether a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function.[267]

The Court of Appeal noted that the California Supreme Court has articulated rigid requirements for the imposition of government liability under Government Code section 815.6.[268] An enactment creates a mandatory duty if it requires a public agency to take a particular action. An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion.[269] The courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment affirmatively imposes the duty and provides implementing guidelines.[270]

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[266] Id. at 428.
[267] Id. at 428-429.
[268] See, Ellerbee v. County of Los Angeles, 187 Cal.App.4th 1206, 1215, 114 Cal.Rptr.3d 756 (2010).
[269] See, Lockhart v. County of Los Angeles, 155 Cal.App.4th 289, 308, 66 Cal.Rptr.3d 62 (2007).
[270] See, Guzman v. County of Monterey, 46 Cal.4th 887, 898, 95 Cal.Rptr.3d 183 (2009); see also, Department of Corporation v. Superior Court, 153 Cal.App.4th 916, 932, 63 Cal.Rptr.3d 624 (2007).

The Court of Appeal noted that under Section 815.6 of the Government Code, inclusion of the term "shall" in an enactment does not necessarily create a mandatory duty. There may be other factors that indicate that the apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.[271]

In determining whether a mandatory duty is actionable under Section 815.6 of the Government Code, the Legislature's use of mandatory language is not the dispositive criteria. Instead, the courts have focused on the particular action required by the statute, and have found that the enactment created a mandatory duty under Section 815.6 only where the statutorily commanded act did not lend itself to a normative or qualitative debate over whether it was adequately fulfilled.[272] The California Supreme Court stated that it is not enough that the public entity or officer has been under an obligation to perform a function if the function itself involves the exercise of discretion.[273]

The Court of Appeal concluded that the basic compulsory obligation imposed on the county treasurer by Government Code sections 27000.3 and 53600.3 to act as a prudent investor, while stated in mandatory language, is quite general. The court found that the statutes do not command specific acts designed to achieve compliance with the prudent investor standard but that the standard requires the exercise of extensive discretion that is not in the least specified by the statutes or any accompanying implementing measures.[274]

The court held that Government Code sections 27000.3 and 53600.3 left to the expertise and judgment of the county treasurer a myriad of investment evaluations, appraisals and choices that are the very essence of discretion. The issue of defendants' compliance with the prudent investor standard would therefore necessitate a complex qualitative analysis, rather than merely a straightforward determination that a specific ministerial directive has been ignored or violated.[275]

The Court of Appeal concluded that Government Code section 27000.3 and 53600.3 granted to the board of supervisors and county treasurer comprehensive discretion to evaluation and decide how best to comply with the command to act as a prudent investor. Therefore, the plaintiff's claim demands inquiry into highly subjective and speculative investment decisions. While the prudent investor standard sets forth general policy goals to act with care, skill, prudence, and diligence in the investment or management of funds deposited with the county treasury, the prudent investment standard does not specifically direct the manner in which the goals will be performed. Therefore, the Court of Appeal held that defendants were immune from liability for violation for the prudent investor standards as alleged for the second and fourth causes of action.[276]

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[271] Id. at 429.
[272] Id. at 429; Citing de Villers v. County of San Diego, 156 Cal.App.4th 238, 260, 67 Cal.Rptr.3d 253 (2007).
[273] Haggis v. City of Los Angeles, 22 Cal.4th 490, 498, 93 Cal.Rptr.2d 327 (2007).
[274] Id. at 429-30.
[275] Id. at 430.
[276] Id. at 431-32.

D. Liability of County Employees

Plaintiffs argue that even if the County of San Mateo and the county treasurer as entities enjoy immunity under Government Code section 815.6, they would still be liable for Buffington's acts and omissions under Government Code section 815.2, which holds a government entity vicariously liable for the acts and omissions of government employees acting in the course and scope of their employment. While a public entity may be liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would have given rise to a cause of action against the employee, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.[277]

Government Code section 820.2 provides that a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in the employee whether or not such discretion was abused. Section 820.2 immunizes a public employee from liability for the acts or omissions resulting from the exercise of discretion vested in the public employee despite abuse of discretion.[278] The immunity for discretionary acts under Section 820.2 confers immunity only with respect to those basic policy decisions which have been committed to coordinate branches of government, and does not immunize government entities from liability for subsequent ministerial actions taken in the implementations of those basic policy decisions. The court evaluated the immunity of former County Treasurer, Lee Buffington and determined that the former county treasurer's acts as an investor were not ministerial or operational level decisions but were crucial investment policy decisions that assessed the risks and advantages of competing investment opportunities.[279]

The Court of Appeal stated, "His decisions as a public servant investor bear the hallmarks of discretionary activity which should not be the subject of scrutiny and second-guessing by a coordinate branch of government."[280] The Court of Appeal therefore concluded that pursuant to Government Code section 820.2, both Buffington and the county have immunity from liability for the acts alleged in the plaintiffs' second cause of action.

E. Statutory and Policy Violations

The Court of Appeal noted that the third cause of action alleges that defendants purchased two Lehman notes in violation of the Government Code, which prohibited the county from purchasing corporate debt securities with the remaining maturity of more than five years.[281] The fourth cause of action seeks to impose liability for Buffington's violation of the county's investment policy, which was approved by the Board of Supervisors. The Court of Appeal reviewed the language of Government Code section 53601 and held that it applies to public entities that do not invest in the county investment pool and that the provisions of Government Code section 53635 apply to local agencies that pool money in deposits or investments with

[277] Id. at 432-33.
[278] Id. at 433.
[279] Id. at 434.
[280] Id. at 434.
[281] See, Government Code section 53601(k).

other local agencies. The Court of Appeal noted that Section 53635 does not contain the same provision limiting investments to five years.[282]

The Court of Appeal reviewed the allegation that former County Treasurer. Buffington violated the investment policy approved by the County's Board of Supervisors and concluded that the allegations of violation of the investment policy were based on the same failure to adhere to the prudent investor standard. Therefore, the Court of Appeal concluded public entity immunity applied and affirmed the dismissal of the fourth cause of action.[283]

F. Breach of Contract

The plaintiffs' first case of action alleged that the parties entered into a contract, implied by the conduct of the parties. The Court of Appeal concluded that while a county may be bound by an implied contract under California law, the plaintiffs failed to show that under a contract theory, the defendant's breach of its obligation proximately caused harm. The court noted that the plaintiffs did not allege that the defendants failed to perform investment duties specified in the contract, but rather that the plaintiffs have alleged violations of the statutory requirements similar to their tort claims, not the breach of any separate or additional contractual obligations. The Court of Appeal held that the county's statutory obligations cannot serve as the consideration for a contract or promise and concluded that the plaintiffs have not alleged formation or breach of contract.[284]

G. Conclusion

The Court of Appeal concluded that the trial court properly sustained the demurrer without leave to amend since there was a reasonable possibility that the defect in the complaint could be cured by amendment. The court concluded that no amendment could change the result. The court stated:

> "We conclude that there is no reasonable possibility the defects in the first amended complaint may be cured by yet another amendment of plaintiffs' pleadings. Plaintiffs were granted ample opportunity to cure the defects in the pleading, but failed to do so. The first amended complaint is unsuccessful not because the pleading is inartful, but because neither the property asserted facts nor the remaining conclusory allegations adequately state causes of action that are not defeated by immunity defenses…Therefore, the trial court did not abuse its discretion by sustaining defendants' demurrer without leave to amend, and dismissing the action."[285]

[282] Id. at 438.
[283] Id. at 438-39.
[284] Id. at 440.
[285] Id. at 441.

COUNTY TREASURY OVERSIGHT COMMITTEES

A. Statutory Provisions

Government Code section 27130 establishes county treasury oversight committees and states that local agencies should participate in reviewing the policies that guide the investment of funds in the County Treasury. Section 27131 states that the board of supervisors in each county shall establish a county treasury oversight committee, and determine the exact size of the committee. Section 27132 states that the county treasury oversight committee shall consist of members appointed from the following:

1. The County Treasurer.

2. The County Auditor, Auditor-Controller, or Finance Director.

3. A representative appointed by the County Board of Supervisors.

4. The County Superintendent of Schools or his or her designee.

5. A representative selected by a majority of the presiding officers of the governing bodies of the school districts and community college districts in the county.

6. A representative selected by a majority of the presiding officers of the legislative bodies of the special districts in the county that are required or authorized to deposit funds in the County Treasury.

7. Up to five other members of the public. The majority of the other public members shall have expertise or an academic background in public finance, and the other public members shall be economically diverse and bipartisan in political registration.

Government Code section 27132.1 states:

> "A member may not be employed by an entity that has (a) contributed to the campaign of a candidate for the office of local treasurer, or (b) contributed to the campaign of a candidate to be a member of a legislative body of any local agency that has deposited funds in the county treasury, in the previous three years or during the period that the employee is a member of the committee."

Government Code section 27132.2 states:

> "A member may not directly or indirectly raise money for a candidate for local treasurer or a member of the governing board of

> any local agency that has deposited funds in the county treasury while a member of the committee."

Government Code section 27133 states that the purpose of the county treasury oversight committee is to review and monitor the investments of the county treasurer. The county treasurer is required to annually prepare an investment policy and submit it to the county treasury oversight committee. Section 27133(c)(d) requires the county treasury oversight committee to annually prepare an investment policy which must include limits on campaign contributions to the county treasurer by security brokers and dealers who may do business with the county treasury. The purpose of these provisions is to ensure the independence of the county treasury oversight committee members from the investment industry, and independence from political influence with respect to the investment of county treasury funds.

B. Attorney General Opinion

In a 1997 Attorney General opinion,[286] the Attorney General concluded that there was nothing in Section 27132.1 or Section 27132.2 that would prohibit the making of contributions. The Attorney General concluded that the prohibition is on fundraising, which involves the solicitation of contributions.

[286] 80 Ops.Cal.Atty.Gen. 60, 66 (1997).