CHAPTER III

LOCAL SCHOOL DISTRICTS

STATE CONSTITUTIONAL PROVISIONS

The California Constitution specifically includes school districts in the public school system.[1] It grants to the Legislature the power to provide for the incorporation, classification and organization of school districts and community college districts.[2]

The California Constitution authorizes the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.[3] The Legislature has enacted legislation to implement this broad grant of authority.[4]

School districts are agencies of the state for the local operation of the state school system[5] and the Legislature has conferred broad general powers upon school districts by repealing previously restrictive statutory provisions in order to allow school districts to act under the general authority of Education Code section 35160.[6] The Legislature has broad authority over school districts and may restrict the authority of school districts if it wishes; however, the trend for the immediate future appears to be to broaden the legal authority of school districts.

LOCAL GOVERNING BOARDS

The Legislature, by statute, requires every school district to be under the control of a board of school trustees or a board of education.[7] The Education Code generally uses the term "governing board" to designate such boards while the general public usually refers to such boards as "school boards."

The compensation of board members is regulated by statute[8] and any person 18 years of age or older, who is a citizen of the state, a resident of the district, a registered voter and not disqualified to hold a civil office is eligible to be a member of the governing board of a school district. An employee of a school district may not be sworn into office as a member of the governing board until he or she resigns as an employee. If the employee does not resign, the employment will automatically terminate upon being sworn into office.[9]

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[1] Cal. Const., Article IX, Section 6.
[2] Cal. Const., Article IX, Section 14.
[3] Ibid.
[4] Education Code sections 35160, 35160.1.
[5] Hall v. City of Taft, 47 Cal.2d 177 (1956).
[6] Stats.1987, ch. 1452, Section 1.
[7] Education Code section 35010.
[8] Education Code section 35120.
[9] Education Code section 35107.

Generally, the governing board of a school district has five members elected at large by the voters of the district.[10] A unified school district may have a seven member board if it has been reorganized under the state plan for unification of local districts.[11] The terms of the board members are four years; terms generally being staggered so that as nearly as practicable, one-half of the members are elected at each election. The voters of a district, by initiative, may impose a limit on the number of terms a board member may serve.[12]

After the initial election of board members, governing board elections are held every two years on the first Tuesday after the first Monday in November of each succeeding odd-numbered years.[13] The term of the member expires on the first Friday in December following the election.[14] Governing boards may consolidate their elections with primary, municipal or general elections.[15] As a result, many school districts hold their elections in even numbered years to coincide with municipal or state-wide general elections.

In school district elections, voters may vote for as many candidates as there are members to be elected.[16] Voters qualified to vote in state-wide elections are qualified to vote in school district elections.[17]

Vacancies on a governing board may result from any of the following reasons:

1. A failure to elect;

2. A written resignation filed with the county superintendent of schools;[18]

3. Death of the incumbent; judicial declaration that incumbent is unable to perform the duties of the office;

4. Removal of officer ceasing to be a resident of the district;

5. Absence from the state without permission beyond the period allowed by law;

6. Failure to discharge the duties of office for a period of three consecutive months (except when prevented by illness or when absent from the state with the permission required by law);

[10] Education Code section 35011.
[11] Education Code section 35012.
[12] Education Code section 35012, 35107.
[13] Education Code section 5000.
[14] Ibid. (Exceptions exist for certain specific districts.)
[15] Education Code section 5000.5.
[16] Education Code section 5015, repealed by Stats.1987, ch. 1452, Sections 49 and 50, now Elections Code section 24000.
[17] Education Code section 5390.
[18] Education Code section 5090.

7. Conviction of a felony or of any offense involving a violation of his official duties;
8. Refusal or neglect to file the required oath or bond within the time prescribed;
9. Judicial decision declaring the election void or;
10. The incumbent's commitment to a hospital by a court of competent jurisdiction as a drug addict or inebriate.[19]

When a vacancy occurs or a resignation with a deferred effective date is filed with the county superintendent of schools, the governing board of the school district, within 60 days of the vacancy or the filing of the resignation, must order an election or make a provisional appointment to fill the vacancy. The county superintendent must call an election if the governing board fails to act within 60 days.[20] If a provisional appointment is made by the governing board, the registered voters of the district may petition for the holding of a special election to fill the vacancy. The voters must collect signatures equaling 12 percent of the number of registered voters of the district at the time of the last governing board election within 30 days of the date of the appointment and file it with the county superintendent of schools. The county superintendent has 30 days to verify the signatures. If the petition has a sufficient number of signatures, the provisional appointment is terminated and a special election is called.[21]

A provisional appointment confers all of the powers and duties of a governing board member upon the appointee immediately after the appointment. A person appointed to fill a vacancy shall hold office until the next regularly scheduled election whereupon an election is held to fill the vacancy for the remainder of the term.[22]

FORMATION AND TYPES OF DISTRICTS

The Education Code sets forth the procedures for the organization and reorganization of school districts.[23] Generally, there are three types of school districts in California: elementary (kindergarten through sixth or eighth grade), high school (seventh or ninth through twelfth grade), and unified districts (kindergarten through twelfth grade).

An action to reorganize one or more school districts is initiated upon the filing of a petition with the county superintendent of schools.[24] If the territory is inhabited, at least twenty-five percent of the registered voters residing in the territory must sign the petition. If the territory is uninhabited, the owner of the property must sign the petition, provided the owner has filed either a tentative subdivision map or an application for a project with the appropriate local

[19] Government Code section 1770. See, Government Code section 1064 for list of situations allowing a governing board member to be absent from the state for more than 60 days.
[20] Education Code section 5091.
[21] Ibid.
[22] Education Code section 5091.
[23] Education Code section 35500.
[24] Education Code section 35700.

agency.[25] Reorganization may also be initiated by a majority vote of the governing boards of the districts affected.[26]

The county superintendent has 20 days to review the petition and if it is deemed sufficient as required by law, it must be transmitted to the county committee on school organization and the State Board of Education.[27] Within 60 days after receipt of the petition, the county committee must hold public hearings in each of the districts affected by the petition.[28] The county committee may amend the petition and, 10 days prior to the public hearings, provide to the public and the governing boards affected a description of the petition including:

1. The rights of the employees in the affected districts to continued employment;

2. The effect on the revenue limit of each district and the present level of revenue of each affected district;

3. Whether the governing board of the new district will have five or seven members;

4. A description of the territory in which the election will be held;

5. Whether the new district will elect members of the governing board by trustee area or by the voters of the entire district;

6. A description of how the property obligations and bonded indebtedness of existing districts will be affected; and

7. A description of when the first governing board will be elected and how the terms of office for each new member will be determined. [29]

Within 120 days after the public has had an opportunity to comment on the petition, the county committee must recommend approval or disapproval of the petition.[30] The county committee then transmits the petition and its recommendations to the State Board of Education.[31] A public hearing is then held by the State Board of Education.[32]

[25] Ibid.
[26] Ibid.
[27] Education Code section 35704.
[28] Education Code section 35705.
[29] Education Code section 35705.5.
[30] Education Code section 35706.
[31] Education Code section 35707.
[32] Education Code section 35708.

The State Board of Education may approve proposals for reorganization if all statutory conditions have been met.[33] The State Board of Education may amend the petition for reorganization if it wishes.[34] Following notification of approval by the State Board of Education, the county superintendent must call an election in the affected districts.[35] The county superintendent is required to prepare a statement of official information and statistics relating to the proposed reorganization for the election ballot.[36] When a majority of the voters vote in favor of the proposal for reorganization, it is approved.[37]

The election result is certified and the board of supervisors must then order the change in boundaries.[38] The action is then complete[39] and the changes become effective after assessed valuation is determined, the appointment or election of governing board members takes place, budgets are prepared, necessary employees are hired and funds are received.[40] The action to reorganize then becomes effective on July 1 of the calendar year following the calendar year which all of the actions are completed.[41]

Districts may also be organized upon the recommendation of the county committee and approval by the State Board of Education[42] or by action of the Legislature.[43]

DISTRICT FUNDS

A. Deposit of Funds and Surplus Funds

Generally, all funds received by a school district are required to be deposited into the county treasury to the credit of the district.[44] Funds received for student scholarships or loans, from the sale of food from school cafeterias, from the sale of produce or livestock, funds of a student body organization, funds in a revolving cash fund, funds for community recreation purposes, funds pursuant to law or the California School Accounting Manual may be deposited outside of the county treasury or in a bank or other institution insured by the Federal Deposit Insurance Corporation.[45] Education Code section 41001 requires school districts to deposit all monies received or collected by it for any source into the county treasury to be placed to the credit of the proper fund of the district. Education Code section 41015 states that the governing board of any school district or county office of education which has funds in a special reserve fund or any surplus monies not required for the immediate necessities of the district is, ". . . hereby authorized to invest all or any part of the funds in any of the investments specified in Section 16430 or 53601 of the Government Code."

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[33] Education Code section 35753.
[34] Education Code section 35754; see, also, San Rafael Elementary School District v. State Board of Education, 73 Cal.App.4th 1018, 87 Cal.Rptr.2d 67 (1999).
[35] Education Code section 35756.
[36] Education Code section 35757.
[37] Education Code section 35764.
[38] Education Code section 35765.
[39] Education Code section 35530.
[40] Education Code section 35532.
[41] Education Code section 35534.
[42] Education Code section 35720.
[43] Mountain View Union High School District v. City Council of Sunnyvale, 168 Cal.App.2d 89, 97 (1959).
[44] Education Code section 41002.
[45] Education Code section 41002.5.

Section 41015 does not define surplus monies or surplus funds. However, the attorney general has indicated that funds, in order to be surplus, must not be required for use by the district in that fiscal year.[46]

Government Code section 16430 provides a list of eligible securities for the investment of surplus monies. Government Code section 53601 states that it applies to a local agency that is a city, a district, or other local agency that does not pool money in deposits or investments with other local agencies, other than local agencies that have the same governing body. Section 53601 states that Government Code section 53635 shall apply to all local agencies that pool money in deposits or investments with other local agencies that have separate governing bodies.

Government Code section 53635(a) states that it applies to a local agency that is a county, a city and county, or local agency that pools money in deposits or investments with other local agencies, including local agencies that have the same governing body. A local agency that is a county or other local agency that pools money in deposits or investments with other agencies, may invest in commercial paper pursuant to Section 53601(g) subject to the following limits:

1. No more than forty percent of the local agency's money may be invested in eligible commercial paper.

2. No more than ten percent of the local agency's money that may be invested pursuant to the section may be invested in the outstanding commercial paper of any single issuer.

3. No more than ten percent of the outstanding commercial paper of any single issuer may be purchased by the local agency.

Education Code section 41016 authorizes the governing board of a school district which has made an investment pursuant to section 41015 to deposit such security for safekeeping with a state or national bank or trust company located in California. The county treasurer is not responsible for securities delivered to a bank under the authority of Section 41016.

In addition, Government Code section 53607 authorizes the governing board of a school district to delegate, for a one year period, to the treasurer of the local agency (i.e. the county treasurer) the authority to invest or reinvest funds of the school district, subject to the review of the legislative body to renew the delegation of authority. However, the governing board of a school district may not set conditions with respect to contracts for investment management services executed by the treasurer under Section 53607.[47]

In addition, a governing board of a school district may establish a pension trust funded by individual life insurance contracts, individual annuities, group policies of life insurance, or group annuities, or by any other investment authorized for the benefits of its officers and employees.[48]

[46] 2 Cal.Atty.Gen. 269, 271 (1943).
[47] 88 Ops.Cal.Atty.Gen. 62 (2005).
[48] Government Code sections 53215, 53216.

The governing board of the school district may employ investment counsel, trust companies or trust departments of banks to advise the school district with respect to its investments.[49]

Based on the statutory provisions cited above, in our opinion, a community college district, school district or county office of education, may invest its surplus funds outside the county treasury.

B. Special Funds

Districts may establish a special reserve fund for the accumulation of funds for capital outlay purposes and salaries of employees directly related to projects financed from the special reserve fund.[50] If the fund is not needed for capital outlay purposes, the governing board, by resolution, may expand the purpose of the fund.[51]

Districts may establish a revolving cash fund and by resolution, establish the purposes of the fund.[52] The resolution must specify who is authorized to use the revolving cash fund and a bond is required.[53]

Districts must provide for an annual audit of their books and accounts, including an audit of income and expenditures or make arrangements for the County Superintendent to provide for the audit.[54]

C. Payments from District Funds

Payments from the funds of the district for the expenses of the district must comply with the provisions of the Education Code.[55] All payments must be approved by written order of the governing board.[56] Each order for payment must be signed by a person authorized by the governing board and submitted to the county superintendent for approval.[57] The county superintendent may examine each order for payment to determine if it is legally authorized and if there are sufficient funds to pay it.[58]

D. Investment Policy

Districts are required to annually render a statement of investment policy and a quarterly report of investments. Most districts invest their funds with the county treasurer and the county treasurer's quarterly reports will satisfy this statutory requirement. Withdrawals from the county treasurer's investment pool are subject to review by the county treasurer. Persons authorized to

[49] Government Code section 53216.3.
[50] Education Code section 42840.
[51] Education Code section 42842.
[52] Education Code section 42800.
[53] Education Code section 42801.
[54] Education Code section 41020 et seq.
[55] Education Code section 42630.
[56] Education Code section 42631.
[57] Education Code sections 42632, 42635.
[58] Education Code section 42636.

invest district funds are trustees subject to the prudent investor standard and can only invest district funds in specified investments.[59]

E. Interfund Borrowing

Education Code section 42603 authorizes the governing board of a school district to temporarily transfer funds from one account to another or one fund to another for the payment of district obligations. The amounts transferred must be repaid either in the same fiscal year or in the following fiscal year if the transfer takes place within 120 calendar days of the end of the fiscal year. Borrowing must occur only when the fund or accounts receiving the money will earn sufficient income, during the current fiscal year, to repay the amount transferred. No more than 75% of the maximum of monies held in any fund or account during a current fiscal year may be transferred.

While Education Code section 42603 may provide general authority for the transfer of funds, the provisions in the Education Code relating to the issuance of bonds may limit the authority of the governing boards of school districts to transfer bond funds to other accounts. For example, Education Code section 15100 authorizes the issuance of bonds for the following purposes:

1. The purchasing of school lots.

2. The building or purchasing of school buildings.

3. The making of alterations or additions to the school building or buildings other than as may be necessary for current maintenance, operational repairs.

4. The repairing, restoring or rebuilding of any school building damaged, injured, or destroyed by fire or other public calamity.

5. The supplying of school buildings and grounds with furniture, equipment, or necessary apparatus of a permanent nature.

6. The permanent improvement of the school grounds.

7. The refunding of any outstanding valid indebtedness of the district, evidence by bonds, or of state school building aid loans.

8. The carrying out of projects or purposes authorized in Section 17577 or 81613.

[59] Government Code sections 53646, 27136, 53601, 53601.6, 53635, 53600.3, 53600.5, 53607. See, also, Probate Code section 16047.

9. The purchase of school buses. The useful life of which is at least 20 years.

10. The demolition or raising of any school building with the intent to replace it with another school building, whether in the same location or in any other location.

Education Code section 15278 provides for a Citizens' Oversight Committee if a bond measure is issued under provisions allowing approval by a 55% vote.[60] The purpose of the Citizens Oversight Committee is to inform the public concerning the expenditure of bond revenues and to review and report on the proper expenditure of tax payers' money of school construction.

In San Lorenzo Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District,[61] a community advocacy group filed suit against the school district alleging improper use of bond funds. The court noted that generally speaking, school bond financing is restricted to projects of a capital or permanent character and may not be used for teacher and administrative salaries and other school operating expenses.[62]

The Court of Appeal in San Lorenzo held that the proceeds of a bond issue may only be expended for the purpose authorized by the voters in approving the issuance of the bonds. The power of the district to expend bond proceeds is limited by the voter's approval and four main factors:

1. The authorizing statutes.

2. The resolution by which the public entity submitted the issue to the district voters.

3. The ballot proposition submitted to the voters for the approval of the voters.

4. Ratification by the voters.[63]

Similar requirements apply to certificates of participation.[64] Generally, bond counsel prepares the documents relating to the issuance of bonds and certificates of participation, and bond counsel issues a legal opinion to the underwriter indicating that the bonds comply with all of the provisions of federal and state law relating to the issuance of municipal bonds. The underwriter and the bondholders rely on the opinion of bond counsel when purchasing the bonds.

Since bond counsel drafted the documents and bond counsel would be familiar with whether the issuing documents would authorize the transfer of money from the bond fund to

[60] Cal. Const. Article XIII, Section 1(d), Cal. Const. Article XVI, Section 18(b); Education Code section 15274.
[61] 139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128, 209 Ed.Law Rep. 290 (2006).
[62] Id. at 1396.
[63] Id. at 1397; citing, Associated Students of North Peralta Community College v. Board of Trustees, 92 Cal.App.3d 672, 155 Cal.Rptr. 250 (1979).
[64] Education Code sections 17170-17199.5.

other funds, districts should obtain a written legal opinion from bond counsel before transferring such funds.

F. Payroll Deductions from District Funds

On February 24, 2009, the United States Supreme Court in Ysursa v. Pocatello Education Association,[65] held that the Idaho legislature could prohibit state and local agencies from allowing a public employee to elect to have a portion of his wages deducted by his employer and remitted to the union for political activities. Under Idaho law, a public employee could elect to have a portion of his wages deducted by the employer and remitted to the union to pay union dues, but not for a political action committee or for political activities. The U.S. Supreme Court held that such a prohibition did not violate the First Amendment rights of county municipal school districts and other local public employees.

The U.S. Supreme Court held that the First Amendment prohibits government from abridging the freedom of speech, but it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. The court held that Idaho's law does not restrict political speech but rather declines to promote that speech by allowing public employee check-offs for political activities. The court held that such a decision is reasonable in light of the state's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity.[66]

The U.S. Supreme Court held that since counties, cities and school districts are instrumentalities of the state or political subdivision of the state, the state could prohibit payroll deductions for political activities and that such prohibition would be justified by the state's interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics.[67]

In California, Government Code section 1157.3 authorizes employees with the approval of the governing board of the agency, to authorize deductions to be made from employee's salaries wages or retirement allowances for the payment of dues in any bona fide organization whose membership is comprised, in whole or in part, of employees of such agency. In a 2001 opinion, the Attorney General stated that a school district or community college district is not prohibited from using district resources to implement, at the request of an employee organization, a voluntary payroll deduction program allowing employees to make monthly contributions to a political action committee established by the employee organization.[68]

The Attorney General concluded that Education Code section 7054 did not prohibit the payroll deduction, since the payroll deduction did not involve the funds, services, supplies or equipment of a school district or community college district. The Attorney General concluded that it was the employee's funds that would be used for the political action committee, not district funds.

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[65] 555 U.S. 353, 129 S.Ct. 1093 (2009).
[66] Id. at 354.
[67] Id. at 363.
[68] 84 Ops.Cal.Atty.Gen. 52 (2001).

Therefore, while a state may prohibit payroll deductions for political action committees, it appears that California has authorized such deductions when it enacted Government Code section 1157.3.

G. Use of Bond Funds

In Committee for Responsible School Expansion v. Hermosa Beach City School District,[69] the Court of Appeal held that a school district was not required to list on the ballot all of the specific school facilities projects to be funded by the bond proceeds. The Court of Appeal held that the school district satisfied the California Constitution's requirements by preparing and making available the required list of projects, which included a gymnasium. The Court of Appeal stated:

> "Neither the State Constitution nor the Education Code requires that the list of specific school facilities projects to be funded through a bond measure be included on the ballot."[70]

On July 24, 2002, the governing board of the school district approved a resolution ordering an election on the question of whether $13.6 million dollars in school district bonds should be issued. The resolution stated that the election would be subject to the provisions of Proposition 39.[71] Two exhibits were attached to the resolution. Exhibit A contained the text of the ballot measure and Exhibit B was entitled, "Full Text Ballot Proposition." Exhibit A gave a general summary of the facilities to be funded but did not include a gymnasium. Exhibit B outlined the needs of the school district and specified a list of school and classroom improvements on which the bond funds would be spent including a gymnasium for school and community use.[72]

An election was held on November 5, 2002. The text of the ballot measure was identical to Exhibit A of the Board's resolution. The text of Exhibit B did not appear on the ballot. Within the ballot, the County Counsel's Impartial Analysis gave a legal analysis of the bond measure and indicated that the funds received from the sale of bonds may be expended only on the specific projects listed by the district and subject to oversight by a citizen's committee. The ballot arguments both in favor of and in opposition to the bond measure discussed that the bonds would be used to build a gymnasium.[73]

The Court of Appeal reviewed the intent and language of Proposition 39 and ruled that a complete list of facilities to be funded is not required to be listed on the ballot. The Court of Appeal noted that ballot measures are limited to 75 words pursuant to the Election Code.[74] The court further noted that the Education Code provisions implementing Proposition 39 do not require an exhaustive list of facilities to be funded to be placed on the ballot, but only that the proposition include the accountability requirements. The court noted that there is a distinct

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[69] 142 Cal.App.4th 1178, 48 Cal.Rptr.3d 705, 212 Ed.Law Rep. 822 (2006).
[70] Id. at 1181.
[71] Cal. Const. Article XIIIA, Section 1(b)(3)(B).
[72] 142 Cal.App.4th 1178, 1182-83 (2006).
[73] Ibid.
[74] See, Election Code section 13247(a).

difference between a proposition and a ballot measure and that while Exhibit A to the Resolution was the ballot measure, Exhibit B constituted the proposition.[75] The Court of Appeal also noted that statements in the ballot pamphlet, including the impartial analysis and the arguments for and against the proposition refer to the full proposition contained in Exhibit B and referred to a list of specific school facilities projects including the building of a gymnasium. The court noted that while some school districts list all specific school facilities projects on the ballot, the Constitution and the Education Code do not require that they do so. The court stated:

> "While perhaps the better practice is to include the list of specific school facilities projects on the ballot when feasible, there is no constitutional or statutory requirement mandating its inclusion on the ballot."[76]

H. Construction Projects and Use of District Funds

In Sanchez v. State of California,[77] the Court of Appeal held the State Allocation Board (SAB) and Office of Public School Construction (OPSC) properly determined that the Val Verde Unified School District possessed $89 million in certificates of participation proceeds that could be used as a local match to fund school construction in the district. The Court of Appeal held that the state properly determined that even though the $89 million was deposited in the school district's general fund, rather than its facility funds, the state could determine that the $89 million was available for school construction.

The State School Facilities Fund was established by the State of California to pay for school construction.[78] It is the duty of the State Allocation Board (SAB) to apportion money from the State Fund to eligible school districts[79] and to determine which school districts are eligible to receive money from the state fund.[80]

Before the SAB apportions money from the state fund, a school district must show that it has money from local sources to match the money granted from the state fund. If the school district has money from local sources, the school district must contribute 50% of the school construction money, and the other 50% is derived from the state fund.[81]

If the school district does not have money from local sources then the school district may apply for state funding through the financial hardship program and the SAB may adjust or defer the amount of local money required for a school construction project.[82] In determining whether a school district has sufficient local funds, the SAB can consider the unencumbered funds in a district's facility accounts. The SAB may exclude funds encumbered for a specific capital outlay purpose, and other funds that are not reasonably available for the construction project.[83]

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[75] See, Education Code sections 15264-15284.
[76] Id. at 1191.
[77] 179 Cal.App.4th 467, 101 Cal.Rptr.3d 670 (2009).
[78] Education Code sections 17070.40, 17070.63.
[79] Education Code sections 17070.35, 17070.40.
[80] Education Code section 17070.35.
[81] Education Code section 17072.30.
[82] Education Code sections 17075.10, 17075.15.
[83] 2 Cal.Admin.Code section 1859.81(a).

The Val Verde Unified School District participated in the financial hardship program from 1999-2007. During that time the school district received over $340 million in financial hardship apportionments, constructed 24 new facilities and modernized two other facilities. All but three of the school district's construction projects received 100% funding from the state fund, due to the district's financial incapacity.

In 2006, the OPSC reviewed the district's finances to determine if the district had any money to contribute toward the construction of school facilities. During the financial review, the OPSC determined that the district possessed approximately $25 million in available net proceeds from certificates of participation. Data from the State Treasurer's office indicated that since the district was admitted into the financial hardship the school district had issued 12 certificates of participation totaling over $402 million which would provide total net proceeds in the approximate amount of $89,234,421 to the school district.[84]

The executive officer of the SAB alleged by not disclosing the certificates of participation, the district received a funding advantage of $11,830,232 because the District would not have qualified for 100% financial hardship funding if the certificates of participation proceeds had been disclosed. Following this determination, the Executive Officer recommended that the SAB find that the school district failed to disclose material information about the certificates of participation during the prior financial hardship reviews, directed the school district to repay the $11,830,232, plus interest, for a total of $12,504,792, and apply the total net certificates of participation proceeds of $89,234,421 as a local money contribution to the school district's next construction project.[85]

The school district took the position that the proceeds from certificates of participation were encumbered, and therefore, not reasonably available for the construction projects, and were deposited into the district's general fund account, rather than its facility accounts, and therefore did not constitute available funds for construction. The district argued that the certificates of participation proceeds were encumbered because they were needed to fill the shortfall created between the construction money provided by the financial hardship program and the money that it actually took to build an adequate school. The school district contended that the financial hardship program did not provide enough money to build an adequate school, and therefore, the district could not use the certificates of participation proceeds as matching funds, because it needed the money to finish the construction, which would be incomplete if the only money for the projects was the money from the state fund. The school district asserted that it already spent $20 million to fill the short fall in the construction funding provided by the financial hardship program and estimated that it would need to spend an additional $81,500,000 million to fill the funding gaps for construction projects that were in the planning stages.[86]

The Executive Officer contended that the construction funds provided to the district through the financial hardship program were sufficient to build a complete school but that the district wasted the funds by making unnecessary modifications during the construction, such as adding sky lights to an administrative office and by building unnecessary facilities, such as a

[84] 179 Cal.App.4th 462, 474 (2009).
[85] Id. at 474-75.
[86] Id. at 475.

weight room in a high school. The Executive Officer argued that any enhancements to a construction project should be borne by the district. At the SAB meeting on July 25, 2007, a motion was made to deny the district's request, and to recommend the $89,234,421 of certificates of participation revenue be deemed available for future school facility projects. The motion passed.[87]

The Court of Appeal held that Section 17075.15(c) authorizes the SAB to adopt regulations defining the amount and sources of financing that a school district could reasonably provide for school facilities including unencumbered funds in all facility accounts in the school district including, but not limited to certificates of participation for facility purposes. The court held that the SAB may exclude from consideration all funds encumbered for a specific capital outlay purpose.[88]

The Court of Appeal concluded that the plain language of the regulation is very specific that a fiscal review shall consist of the funds available from all capital facility accounts and that after a request for financial hardship status is granted, then all prospective revenue made available to the district's capital facility accounts shall be deemed available. While the regulation speaks of capital facility accounts, the Court of Appeal held that the intent of the legislation and regulations was meant to assist school districts that do not have sufficient funds for constructing new schools regardless of which accounts the construction money was deposited into.[89] The court stated:

> "Therefore, we can infer that it was not the intent of the Legislature or the regulatory body to limit consideration of 'available' funds to those deposited into a capital facility account, rather, the intent was to include all money designated for construction purposes, regardless of which account it was deposited into.
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> "In sum, a reasonable interpretation of the regulation and the related statute is that all funds designated for constructing school facilities that were not otherwise encumbered, should be deemed 'available' for a school district's matching contribution, regardless of which account the funds were deposited into. Therefore, we conclude that SAB and the trial court properly construed the applicable statute and regulation."[90]

The Court of Appeal rejected the school district's argument that each subsequent application for financial hardship status was independent of the previous application and therefore each application is the initial application. The Court of Appeal held that after the initial application for financial hardship no further encumbrances will be approved by the OPSC and all

[87] Ibid.
[88] Id. at 477-78.
[89] Id. at 479.
[90] Id. at 479-80.

prospective revenue made available to the district's capital facility accounts shall be deemed available as a matching contribution on the subsequent financial hardship review.[91]

In summary, regardless of where proceeds from the issuance of certificates of participation are deposited, the Court of Appeal's decision indicates that the SAB and OPSC may consider these funds as possibly be available as matching funds if these funds have not been expended or encumbered by contractual agreement for a specific capital outlay purchase prior to the initial request for financial hardship status. After the initial request for financial hardship status is granted, the Court of Appeal upheld OPSC's position that no further encumbrances will be approved by the OPSC and all prospective revenue made available to the district's capital facility accounts or other accounts shall be deemed available as a matching contribution on the subsequent financial hardship review.

In light of the Court of Appeal's decision in Sanchez, school districts should consult legal counsel to determine if the school district has properly reported to the SAB and OPSC its available funds.

I. Misappropriation of Public Funds; Improper Use of Public Funds for Campaign Purposes

On December 21, 2010, the Court of Appeal in Fleming v. Superior Court,[92] dismissed three criminal counts against former Capistrano Unified School District Superintendent James Fleming. The Court of Appeal held that because Fleming was within his lawful authority to authorize his subordinates to compile the two lists, his authorizations were not criminal.

The Court of Appeal based its dismissals on facts most unfavorable to Fleming. Under this version of the facts, Fleming directly asked his assistant superintendent or a secretary to compile a list of the names from the addresses of an e-mail proposing the recall. That person in turn developed a series of spreadsheets that converted the addresses in the original e-mail into a spreadsheet that had columns of the real people's names. Next to the names were corresponding e-mail addresses. In some cases relevant high school, middle school or elementary school attendance areas were included.[93]

The spreadsheets could not have been compiled without access to a student information database known as Aeries. The secretary testified that the typing of the spreadsheets took no more than half an hour. In addition, there was no evidence that Fleming actually did anything with the first list, other than to maintain it over the course of the ensuing months.[94]

The recall effort failed in December 2005, not due to lack of support but due to the failure of the recall petition circulators to comply with the Election Code and require the signers to fill in the address themselves.[95]

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[91] Id. at 480.
[92] 191 Cal.App.4th 73, 119 Cal.Rptr.3d 275 (2010).
[93] Id. at 78-81.
[94] Id. at 79.
[95] Ibid. See, Capo for Better Representation v. Kelley, 158 Cal.App.4th 1455 (2008).

The second list was compiled after the assistant superintendent and district communication director viewed the actual petitions that had been turned in. McGill, the assistant superintendent, and Smollar, the communications director, viewed the actual petitions and copied down names of recall petition circulators. McGill, in turn, instructed her secretary to create a spreadsheet of these signature gatherers using information from the Aeries database. The secretary created two new lists. One list included the "hard-core" gatherers who were responsible for 90 percent of the signatures and the other list included the rest of the gatherers. McGill then sent Fleming a cover sheet for the lists with the words, "Per your request, attached are the lists of individuals who were listed as petition signature-gatherers along with the information on whether they have children in CUSD and which schools those children attend."[96]

Word of the two lists leaked out and the District Attorney's office initiated grand jury proceedings. The grand jury returned an indictment in May 2007 against Fleming and McGill. The indictment sets forth three counts against Fleming all centering on the misuse of public funds, with the fourth against McGill for perjury based on allegedly false statements made to the grand jury. The three counts against Fleming were:

- Count 1 for violation of Penal Code section 424 based on the willful and unlawful appropriation of public moneys for his own use in ordering the creation of the two lists.

- Count 2 for violation of Education Code section 7054 based on the use of District funds to urge support or defeat of a ballot measure (i.e., the recall of the District's board). Count 2 is based exclusively on the first list.

- Count 3 for conspiracy, along with his Assistant Superintendent McGill, to violate Education Code section 49073 based on the use of the Aeries computer program with its confidential information about pupil records, plus conspiracy to commit acts injurious to the public by creating the two lists.[97]

In October 2009, Fleming brought a motion, pursuant to Penal Code section 995, to set aside the indictment for lack of probable cause. In February 2010, the trial court granted the motion with respect to Counts 2 and 3, finding that there was no evidence that Fleming ever urged resistance to the recall effort or attempted to persuade or influence any vote in the attempted recall. Count 1 was not dismissed and both parties appealed to the Court of Appeal.[98]

The Court of Appeal noted that under Penal Code section 424 the violation requires that the misappropriation must be made without authority of law. The Court of Appeal framed the

[96] Id. at 79-80.
[97] Id. at 80-81.
[98] Id. at 81.

question as to whether Fleming's authorization of staff time to prepare the two lists was inside or outside of Fleming's lawful authority as district superintendent.[99]

The Court of Appeal stated that under Education Code section 35035, a district superintendent has broad authority as the chief executive officer of the school district. The court noted that under Education Code section 35020, the governing board of the school district may delegate its powers to the superintendent. Under Education Code section 35172(a), the governing board may conduct studies through research and investigation as determined by it in connection with the present and future management, conditions, needs, and financial support of the schools. Section 42130 of the Education Code requires school superintendents to submit two semi-annual reports to the governing board on the financial and budgetary status of the district.[100]

In addition, the court noted that Education Code section 35172 (c) provides that the governing board may inform and make known to the citizens of the district, the educational programs and activities of the schools. Also, pursuant to Education Code section 35293, the governing board of any school district is required to treat each of its schools equally as far as possible. Therefore, the court held that it was within the legitimate purview of the district superintendent to investigate whether any discontent in the school district was limited to a particular school, or whether it is evenly spread throughout the district.[101]

The Court of Appeal noted that in Morrow v. Los Angeles Unified School District,[102] the court recognized that a district superintendent has informational duties to publically explain a school district's action. In Morrow, the district superintendent stated that the principal should have shown stronger leadership in the wake of violence at the school.[103]

The Court of Appeal stated, "In the instant case, Fleming, as superintendent, had a legitimate interest in ascertaining if there was a pattern to the discontent represented by the 'nascent' recall movement."[104] A comparison of school attendance with recall leadership might show if the discontent was correlated with areas in the district affected by recent attendance boundary changes or the controversial location of the new high school. An analysis of the location of the recall supporters could reveal whether the discontent was associated with Fleming's policies in general or localized to particular pockets within the district.[105]

In addition, the lists could serve as valuable tools in allowing Superintendent Fleming to actually meet with his critics to learn their grievances and allow Fleming to explain his position to them. The court concluded that Fleming would have been perfectly within his lawful authority as superintendent to have used the list to actually contact recall proponents and ask them to meet with him so he could learn firsthand what their grievances were.[106]

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[99] Id. at 81-82.
[100] Id. at 84-85.
[101] Id. at 85-86.
[102] 149 Cal.App.4th 1424 (2007).
[103] 191 Cal.App.4th 73, 85-86 (2010).
[104] 191 Cal.App.4th 73, 86 (2010).
[105] Ibid.
[106] Ibid.

The Court of Appeal rejected the District Attorney's argument that even though a school official was within his or her authority of law to do a given act using public resources, if there is some wrongful motivation for the act, the act is criminal. The Court of Appeal held that Section 424 of the Penal Code says nothing about motivation. The court held that the key factor in Section 424 is whether there is authority in the law for the appropriating act.[107]

The Court of Appeal held that allowing motivation to be inserted could lead to absurd results. The Court of Appeal gave the example of a dedicated public servant trying to do a really good job while working for an elected boss because one of his or her motivations for doing so might be so the boss would be reelected. The court reasoned that following the District Attorney's logic, the public servant would be committing a crime.[108]

The Court of Appeal noted that Education Code section 35030 gives the district superintendent a fairly broad grant of authority and that being chief executive officer of a school district requires a reasonable amount of discretion. The Court of Appeal stated:

> "Here, Fleming was in charge of policy for the district, intimately involved in attendance and new school locations. Research and investigation into the question of whether district policy in those areas had generated such ill-feeling that it sparked a recall was a legitimate concern within his discretion. The fact that a possible election might ultimately have been involved somewhere down the line does not obviate the legitimacy of the concern or area of investigation. Thus, the District Attorney's office's argument that the grand jury 'saw things differently' in terms of Fleming's subjective motive is irrelevant to the question of whether Fleming had the lawful authority to make the authorizations in the first place. To repeat: the words of the statute itself are framed in terms of lawful authority, not motivation."[109]

With respect to Education Code section 7054, the Court of Appeal noted that the key phrase is "shall be used." Section 7054 states, "No school district or community college district funds, services, supplies or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district."[110]

Section 7054(b) authorizes the use of public money to provide information about the effects of a ballot measure or bond issue if that use is otherwise authorized by law and constitutes a fair and impartial presentation. The Court of Appeal noted that prior case law distinguishes between campaign materials and activities and informational material.[111]

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[107] Id. at 88-89.
[108] Id. at 89-90.
[109] Id. at 89.
[110] Education Code section 7054(a). [Emphasis added.]
[111] See, Stanson v. Mott, 17 Cal.3d 206 (1976); Vargas v. City of Salinas, 46 Cal.4th 1 (2009); DiQuisto v. County of Santa Clara, 181 Cal.App.4th 236 (2010).

In DiQuisto v. County of Santa Clara, the Court of Appeal held that collective bargaining negotiations between a county and several public employee unions in which the county bargained for union agreement not to support a union-sponsored ballot measure to mandate binding arbitration with the county was not an improper use of public funds. The Court of Appeal in DiQuisto held that the proposals were part of contract negotiations, no election campaign was yet underway, the audience was not the electorate, and there was no attempt to persuade or influence any vote.

In Fleming, the Court of Appeal noted that the first list was not used to urge anything, but was a strictly internal document. Neither list expressed any opinion at all about the recall. The two lists were just lists of recall supporters, correlated in some cases with school attendance boundaries and children in various schools in the district. Thus, the Court of Appeal concluded they were well within the limitations established in case law.[112]

The Court of Appeal observed that the use of resources in DiQuisto in talking to union negotiators is analogous to the use of the lists to facilitate a meeting with recall supporters. When the first list was prepared, no recall election had been set.[113] The Court of Appeal concluded that the first list did not come within the prohibition in Section 7054 against using school resources for the purposes of urging defeat of a recall and dismissed Count 2.

Count 3 alleges a conspiracy to commit an act injurious to the public health, public morals, or to pervert or obstruct justice or due administration of the laws. The Court of Appeal noted that it had already rejected the underlying substance of the District Attorney's conspiracy theory under Penal Code section 182, and held that even if Fleming and McGill had, as one of their motives in compiling the lists, the hope of eventually heading off the recall, McGill and Fleming were still within their lawful authority to compile the lists, and that the compiling of the lists in no way constituted a violation of Education Code section 7054. The Court of Appeal further held that there was no reasonable connection between the compiling of the lists and anything that even remotely resembles classic obstruction of justice or the due administration of the laws. The Court of Appeal noted that all criminal conspiracies require at least a criminal objective, even if all the specific actions taken to implement the criminal objective are otherwise not criminal.[114]

The Court of Appeal concluded by stating that the District Attorney's office presented no evidence whatsoever that the lists were used in any political campaign, that they were used to intimidate anybody, or that any child in the district was in any way affected by the lists or their preparation. Therefore, the compilation of the lists was not criminal. The Court of Appeal concluded by saying that this case had consumed an inordinate amount of taxpayer resources and

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[112] See, Stanson v. Mott, 17 Cal.3d 206 (1976); Vargas v. City of Salinas, 46 Cal.4th 1 (2009); DiQuisto v. County of Santa Clara, 181 Cal.App.4th 236 (2010).

[113] See, Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments, 167 Cal.App.4th 1229 (2008). (County transportation agency's hiring of a political consultant to survey voter support for a possible extension of a sales tax to fund various projects did not constitute unlawful campaign activity mainly because all of the activity at issue occurred before the measure was placed on the ballot.)

[114] Id. at 99-103.

that it appeared that prosecutors were overreaching by trying to stretch criminal law beyond its proper bounds.[115]

J. Registered Warrant Procedures

The registered warrant procedures are set forth in Education Code sections 42670-42678 and 42690-42694. When a warrant or order against the funds of a school district is presented to the county superintendent of schools and the order constitutes a valid claim against the funds of the district, and district funds are not available to pay the order, the county superintendent shall endorse on the order the words "Not Approved for Want of Funds" and shall register the order in the records of the county superintendent's office.[116] The registered warrants must be numbered and dated and transmitted to the governing board of the school district which drew the order. The district then delivers the registered order to the payee. From the date of registration, the registered order bears interest at the rate of five percent (5%) per annum until the date upon which notice is given that the county superintendent is ready to approve the registered order.[117]

Whenever monies are available for the payment of the registered order, the county superintendent of schools shall give notice, in a newspaper published in the county, stating that he is ready to approve the order. The notice may list any number of registered orders of one or more districts for the payment of which monies are available, giving the name or names of the district or districts and listing the registered orders in the order of registration for each district.[118]

At the time of giving the notice, the county superintendent of schools shall set aside in the funds of each district for a period of sixty (60) days the amount necessary for the payment of the registered orders of the district listed in the notice. If any registered order is not presented to the county superintendent of schools for payment within sixty (60) days after the notice has been given, and monies are not available to pay the registered order at the time of presentation, it shall not be approved until money becomes available for that purpose and notice is given that the county superintendent of schools is ready to pay it.[119]

The county superintendent of schools shall approve the registered orders of each district and sign them as requisitions on the county auditor in the order of their presentation. The county superintendent shall enter on each the amount of interest due and the total amount, including principle and interest, payable. Each approved registered order shall thereupon be governed by the procedures established in this code relative to payments from school district funds.[120]

As an alternative to the procedures set forth in Section 42674, when any corporation, firm, or person presents two or more registered orders for payment at the same time, registered on the same date, and issued against the funds of the same district, the registered orders may be approved, allowed, and consecutively numbered by the county superintendent of schools, and the county auditor as requisitions and warrants on the funds of the district, and a special interest

[115] Ibid.
[116] Education Code section 42670.
[117] Education Code section 42671.
[118] Education Code section 42672.
[119] Education Code section 42673.
[120] Education Code section 42674.

requisition may be issued by the county superintendent of schools against the funds of the district for the total amount of the interest payable on the registered orders.[121]

The special interest requisition shall bear upon its face substantially the following notation: "In full payment of interest due on warrants numbered ____ to ____, inclusive, of the _____ School District."[122]

The special interest requisition shall be numbered by the county superintendent of schools and the county auditor, being given the number immediately succeeding the number assigned to the last of the requisitions and warrants referred to in Section 42675.[123]

The county superintendent shall report to the county treasurer and the county auditor within ten days after the end of each month the amount of the interest computed. The report shall show each district for which interest has been computed, the number of the registered orders for which the interest is to be paid, and the total amount of the interest charged to each district. The county superintendent shall also, upon transmitting to the governing board of any school district, registered orders which have been approved and allowed as warrants against the funds of the district, report in writing to the clerk or secretary of the district the amount of interest computed on the registered orders and the number of registered orders for which the interest is to be paid.[124]

In lieu of the registration of school district orders, the county board of education may follow an alternate procedure upon adopting a resolution.[125]

When any order on school district funds is received by the county superintendent of schools and there is insufficient money in the fund or funds against which the order is drawn to pay the order in full, the county superintendent shall endorse on the order "To be Registered for Lack of Sufficient Funds," signed, dated, and numbered as a requisition on the county auditor, and transmit the requisition to the county auditor. The county auditor shall endorse on the order "Examined and Allowed," signed, dated, and numbered as a warrant on the county treasurer, and return the warrant to the county superintendent of schools who shall transmit it to the governing board of the school district for issuance to the payee or to his order.[126]

When the warrant is presented to the county treasurer for payment, the county treasurer shall endorse, register, advertise and pay it, with interest at the rate of five percent (5%) per annum, in the manner prescribed for county warrants.[127]

If the warrants are not again presented for payment within sixty (60) days from the time of the notice provided as given, the funds set aside for the payment of warrants shall be applied by the county treasurer to the payment of unpaid warrants next in order of registry.[128] Within ten

[121] Education Code section 42675.
[122] Education Code section 42676.
[123] Education Code section 42677.
[124] Education Code section 42678.
[125] Education Code section 42690.
[126] Education Code section 42691.
[127] Education Code section 42692; see, also, Government Code sections 29821-29824, 29826, 29827.
[128] Education Code section 42693.

days after the end of each month, the county auditor shall report to the superintendent of schools the amount of interest added to registered warrants and paid during the preceding month. The report shall show each district the interest that was added and the amount of the interest for the district. The superintendent of schools shall immediately report, in writing, to the clerk or secretary of each district for which interest was paid, the amount of the interest paid by the district.[129]

K. Stale-Dated Warrants

Government Code section 29802 (a) provides that any warrant is void if not presented to the county treasurer for payment within six months after its date. However, subsection (b) notes that any time within two years from the date on which the original warrant became void, the payee/assignee of any void warrant may present the warrant to the governing body of the agency on which the warrant was drawn, or declare by affidavit that the warrant has been lost or destroyed, and the governing body may by resolution authorize the auditor to draw new warrants within the limitations prescribed by the resolution. The new warrant shall be subject to the same limitations as the original warrant which it replaces. For warrants that are dated beyond two years from the date presented, subsection (c) provides the following:

> "If, at any time after a period of two years from the date on which the original warrant became void, or during such other period of time as specified by ordinance, the payee or assignee presents such warrant to the governing body of the agency on which the warrant was drawn, the governing body may adopt an order instructing the county auditor to draw a new warrant in favor of the payee or assignee in the same amount as the original warrant, or the governing body, by resolution, may authorize the auditor, without prior individual order of the governing body, to draw warrants within the limitations prescribed by the resolution in any case in which the auditor determines that it would be inequitable or unreasonable not to draw the warrant, and money is available in the county treasury to make payment on the indebtedness. If the auditor deems it necessary, he or she may present a voided warrant to the governing body for its review, approval, and appropriation of funds. Any such new warrant shall be subject to the same limitations as the original warrant which it replaces." (Emphasis added.)

Government Code section 29802 (c) authorizes the governing board to adopt a resolution to provide for reissued warrants within the parameters of the statute. A timeframe is not specified but is also not prohibited. In an unpublished decision, a court approved a school district's timeframe of four years from the date the warrant was originally issued as reasonable, and that case directly involved payroll warrants. Several school district governing boards have adopted resolutions authorizing reissuance up to four years from the original date of the warrant

[129] Education Code section 42694.

(see attached examples). Although the statute of limitations for claims, including claims for payment, is three years pursuant to Code of Civil Procedure section 338, the timeframe for retention of records[130] and the statutes of limitations for related causes of action such as discrimination would make four years more reasonable.

L. Budget Reserves

In June 2014, the Legislature passed a Budget Trailer Bill, Senate Bill 858.[131] Senate Bill 858 included a provision related to budget reserves.

Senate Bill 858 limited school district budget reserves contingent on the passage of Proposition 2 which established new statewide budget reserves for school districts. The unofficial election returns indicates that Proposition 2 is expected to pass with approximately 70% of the vote. As a result, Senate Bill 858 will impose a cap on local school district budget reserves, unless the legislation is subsequently amended.

Senate Bill 858 amended Education Code section 42127. Section 42127, as amended, states that commencing with the 2015-2016 fiscal year, the governing board of a school district that proposes to adopt a budget, or revise a budget that includes a combined assigned and unassigned ending funding balance in excess of the minimum recommended reserve for economic uncertainties adopted by the state board of education, pursuant to Education Code section 33128(a), shall, at a public hearing provide all of the following for public review and discussion:

1. The minimum recommended reserve for economic uncertainties for each fiscal year identified in the budget.

2. The combined assigned and unassigned ending fund balances that are in excess of the minimum recommended reserve for economic uncertainties for each fiscal year identified in the budget.

3. A statement of reasons that substantiates the need for an assigned and unassigned ending fund balance that is in excess of the minimum recommended reserve for economic uncertainties for each fiscal year that the school district identifies an assigned and unassigned ending fund balance that is in excess of the minimum recommended reserve for economic uncertainties.

The governing board of the school district shall include the information in its budgetary submission each time it files an adopted or revised budget with the county superintendent of schools. The information required shall be maintained and made available for public review.

[130] Title V, California Code of Regulations section 16020 and following prescribe records retention, which would be four years for Class 3 records. For Internal Revenue Service, four years is also appropriate.
[131] Stats. 2014, ch. 32.

Education Code section 42127(c)(4) requires a county superintendent of schools to determine whether the adopted budget includes a combined assigned and unassigned ending fund balance that exceeds the minimum recommended reserve for economic uncertainties. If the adopted budget includes a combined assigned and unassigned ending fund balance that exceeds the minimum recommended reserve for economic uncertainties, the county superintendent of schools shall verify that the school district complied with the requirements of Section 42127.

Senate Bill 858 added Education Code section 42127.01. Section 42127.01(a) states that in a fiscal year immediately after a fiscal year in which a transfer is made into the public school system stabilization account, a school district's budget that is adopted or revised pursuant to Section 42127, shall not contain a combined assigned or unassigned ending fund balance that is in excess of the following:

1. For school districts with fewer than 400,000 units of average daily attendance, the sum of the school district's applicable minimum recommended reserve for economic uncertainties adopted by the State Board of Education pursuant to Education Code section 33128(a), multiplied by two.

2. For school districts with more than 400,000 units of average daily attendance (i.e., Los Angeles Unified School District), the sum of the school district's applicable minimum recommended reserve for economic uncertainties adopted by the State Board of Education pursuant to Section 33128(a), multiplied by three.

A county superintendent of schools may grant a school district under its jurisdiction an exemption from the requirements of Section 42127.01(a) for up to two consecutive fiscal years within a three year period if the school district provides documentation indicating that extraordinary fiscal circumstances, including, but not limited to, multiyear infrastructure or technology projects, substantiate the need for a combined assigned or unassigned ending fund balance that is in excess of the minimum recommended reserve for economic uncertainties. As a condition of receiving an exception, a school district shall do all of the following:

1. Provide a statement that substantiates the need for an assigned and unassigned ending fund balance that is in excess of the minimum recommended reserve for economic uncertainties.

2. Identify the funding amounts in the budget adopted by the school district that are associated with the extraordinary fiscal circumstances.

3. Provide documentation that no other fiscal resources are available to fund the extraordinary fiscal circumstances.

PARCEL TAXES

In Borikas v. Alameda Unified School District,[132] the Court of Appeal held that the parcel tax passed by the voters in the Alameda Unified School District in June 2008 violated Government Code section 50079(a). The Court of Appeal held that the parcel taxes failed to apply uniformly to all taxpayers or all real property within the school district, except for taxpayers 65 years of age or older.

The parcel tax passed by the voters of the Alameda Unified School District imposed different tax rates on residential and commercial/industrial properties, as well as different rates on different sized commercial/industrial properties. The parcel tax taxed nonexempt residential parcels at $120 per year. Commercial and industrial parcels less than 2,000 square feet were also taxed at $120 per year. However, commercial and industrial parcels greater than 2,000 square feet were taxed at $0.15 per square foot to a maximum of $9,500 per year.

The Court of Appeal reversed the lower court's judgment in favor of the school district and directed the trial court to enter judgment declaring the special tax imposed by Measure H invalid to the extent it imposes a tax other than $120 per parcel.

ISSUANCE OF BONDS

A. Recent Legislation

Assembly Bill 182[133] adds a number of provisions to the Education Code and Government Code relating to the issuance of bonds, which take effect on January 1, 2014. Assembly Bill 182 establishes parameters for the issuance of local education bonds, including capital appreciation bonds.

B. Limits on Interest and Term of Bonds

Education Code section 15140.5 defines "bonds" as bonds, notes, warrants or other evidence of indebtedness payable, both principal and interest, from the proceeds of ad valorem property taxes that may be levied without limitation as to rate or amount upon property subject to taxation by the governing board of the school district or community college district. Section 15144.1 states that the ratio of total debt service to principal from each bond series shall not exceed 4 to 1. Section 15144.2 states that a bond that allows for the compounding of interest, including, not but limited to, a capital appreciation bond, maturing more than ten years after its date of issuance, shall be subject to redemption before its fixed maturity date, with or without a premium, at any time, or from time to time, at the option of the issuer, beginning no later than the tenth anniversary of the date the bond that allows for the compounding of interest was issued.

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[132] 214 Cal.App.4th 135, 154 Cal.Rptr.3d 186, 290 Ed.Law Rep. 925 (2012).

[133] Stats. 2013, ch. 477. A.B. 182 adds Education Code sections 15140.5, 15144.1, 15144.2, and 15144.3 and Government Code sections 53508.5 and 53508.6. AB 182 amends Education Code section 15146.

C. Waiver of Requirements

Education Code section 15144.3 states that a school district or community college district with a note issued before December 31, 2013, pursuant to Section 15150, may seek from the State Board of Education or the Chancellor of the California Community Colleges, as applicable, a one-time waiver from one or more of the requirements of Sections 15144.1, 15144.2, 15146, and Government Code section 53508.5, if both of the following are satisfied:

1. The proceeds of the issuance subject to the waiver will be used only for the purpose of paying the note.

2. The school district or community college district has provided to the State Board of Education or the Chancellor of the California Community Colleges, as applicable, an analysis from a financial advisor unaffiliated with the school district, the community college district, or the underwriter used by the school district or community college district, showing the total overall costs of the proposed bond, how the issuance is the most cost effective method, and the reasons why the school district or community college district is unable to meet the requirements of Sections 15144.1, 15144.2, 15146, and Government Code section 53508.5.

D. Issuance of Bonds

Education Code section 15146 states that bonds shall be issued and sold pursuant to Section 15140, payable out of the interest and sinking fund of the district. The governing board may sell the bonds at a negotiated sale or by competitive bidding. Before the sale, the governing board shall adopt a resolution, as an agenda item at a public meeting, that includes all of the following:

1. Express approval of the method of sale.

2. Statement of the reasons for the method of sale selected.

3. A disclosure of the identity of the bond counsel, and the identities of the bond underwriter and the financial advisor, if either or both are used for the sale, unless these individuals had not been selected at the time the resolution was adopted, in which case the governing board shall disclose their identity at the public meeting occurring after they have been selected.

4. Estimates of the costs associated with the bond issuance.

5. If the sale includes bonds that allow for the compounding of interest, including, but not limited to, capital appreciation bonds, disclosure of the financial terms and time of maturity, repayment ratio and the estimated change in the assessed value of taxable property within the school district or community college district over the term of the bonds.[134]

Education Code section 15146 states that if the sale includes bonds that allow for the compounding of interest, including, but not limited to, capital appreciation bonds, the resolution shall be publicly noticed on at least two consecutive meeting agendas, first as an information item and second as an action item. Section 15146(c) states that if the sale includes bonds that allow for the compounding of interest, including, but not limited to, capital appreciation bonds, the agenda item shall identify that bonds that allow for the compounding of interest are proposed and the governing board shall be presented with all of the following:

1. An analysis containing the total overall costs of the bond that allow for the compounding of interest.

2. A comparison to the overall cost of current interest bonds.

3. The reason bonds that allow for the compounding of interest are being recommended.

4. A copy of the disclosure made by the underwriter in compliance with Rule G-17 adopted by the federal municipal securities rulemaking board.

Section 15146(d) states that after the sale, the governing board shall do both of the following:

1. Present the actual cost information for the sale at its next scheduled public meeting.

2. Submit an itemized summary of the costs of the bond sale to the California Debt and Investment Advisory Commission.

Education Code section 15146(e) states the governing board shall ensure that all necessary information and reports regarding the sale or planned sale of bonds by the district that governs are submitted to the California Debt and Investment Advisory Commission in compliance with Government Code section 8855. Section 15146(f) states that the bonds may be sold at a discount not to exceed five percent and at an interest rate not to exceed the maximum

[134] Education Code section 15146(b).

rate permitted by law. If the sale is by competitive bid, the governing board shall comply with Education Code sections 15147 and 15148. The bonds shall be sold by the governing board no later than the date designated by the governing board as the final date for the sale of the bonds.

E. Proceed of the Sale of Bonds

Education Code section 15146(g) states that the proceeds of the sale of the bonds, exclusive of any premium received, shall be deposited in the county treasury to the credit of the building fund of the school district, or community college district as designated by the California Community Colleges Budget and Accounting Manual. The proceeds deposited shall be drawn out as other school monies are drawn out. The bond proceeds withdrawn shall not be applied to any purposes other than those for which the bonds were issued. Any premium or accrued interest received from the sale of the bonds shall be deposited in the interest and sinking fund of the school district or community college district.

Education Code section 15146(h) states that the governing board may cause to be deposited proceeds of sale of any series of the bonds in an amount not exceeding two percent of the principal amount of the bonds in a cost of issuance account, which may be created in the county treasury, or held by a fiscal agent appointed by the school district or community college district for this purpose, separate from the building fund and the interest and sinking fund of the district. The proceeds deposited shall be drawn out on the order of the governing board or an officer of the district duly authorized by the governing board to make the order, only to pay authorized costs of issuance of the bonds. Upon the order of the governing board or duly authorized officer, the remaining balance shall be transferred to the county treasury to the credit of the building fund of the school district or community college district. The deposit of bond proceeds shall be a proper charge against the building fund of the school district or community college district.

Education Code section 15146(i) states that the governing board may cause to be deposited proceeds from the sale of any series of the bonds in the interest and sinking fund of the district in the amount of the annual reserve permitted by Education Code section 15250 or in any lesser amount, as the governing board shall determine from time to time. The deposit of bond proceeds shall be a proper charge against the building fund of the school district or community college district. Section 15146(j) states that the governing board may cause to be deposited proceeds of sale of any series of the bonds in the interest and sinking fund of the district in the amount not exceeding the interest scheduled to become due on that series of bonds for a period of two years from the date of issuance of that series of bonds. The deposit of bond proceeds shall be a proper charge against the building fund of the school district or community college district.

F. Compliance with Requirements of Education Code

Government Code section 53508.5 states that notwithstanding any other law, and except as provided in Government Code section 53508.6, a school district or community college district that intends to issue bonds that allow for the compounding of interest, including, but not limited to, capital appreciations bonds, shall comply with the requirements of Education Code sections

15143, 15144, 15144.1, 15144.2, and 15146. Government Code section 53508.6 states that notwithstanding any other law, a school district or community college district may issue bonds that do not allow for the compounding of interest and that have a maturity greater than thirty years, but not greater than forty years, if the school district or community college district does both of the following:

1. Complies with the requirements of subdivisions (b) and (c) of Section 15146[135] of the Education Code.

2. Makes a finding that the useful life of the facility financed with the bonds that do not allow for the compounding of interest and that have a maturity greater than thirty years, but not greater than forty years, equals or exceeds the maturity date of those bonds.

G. 2011 Attorney General Letter

On April 13, 2014, the Orange County Register ran an article entitled, "Schools Continue Illegal Bond Use." The article referred to a 2011 Attorney General letter regarding selling bonds at a premium.

In a letter dated March 1, 2011, the Attorney General stated that the Attorney General was concerned about the proposed bond issued by the Poway Unified School District. The Attorney General indicated that the school district was offering to sell otherwise authorized bonds at a premium in exchange for additional upfront cash. The cash would then be used to pay the cost of bond issuance and interim financing. The Attorney General stated:

> "It is our office's view that this proposed use of premium for costs of issuance as described in the complaint is not authorized by the law. The law is clear that any premium, even if legitimate, must be deposited into a special fund, applied to pay debt service, and therefore, cannot be diverted to pay costs of issuance."[136]

Government Code section 29303 states in part:

> "Whenever any bonds issued by any county or by any school, drainage, or other district in any county, whose accounts are required by law to be kept by the county auditor and treasurer, are sold at a premium or with accrued interest, or both, the amounts received for the premiums and accrued interest shall be deposited in the debt service fund of the county or district unless it is expressly provided by law that they be deposited in some other fund."

[135] Education Code section 15146(b) requires the adoption of a resolution with specified requirements. Section 15146(c) requires that bonds allowing compounding of interest must be placed on the board agenda in a specified manner.
[136] See, Government Code section 29303; Education Code section 15146(g).

Education Code section 15146(g) states:

> "The proceeds of the sale of the bonds, exclusive of any premium received, shall be deposited in the county treasury to the credit of the building fund of the school district, or community college district as designated by the California Community Colleges Budget and Accounting Manual. The proceeds deposited shall be drawn out as other school moneys are drawn out. The bond proceeds withdrawn shall not be applied to any purposes other than those for which the bonds were issued. Any premium or accrued interest received from the sale of the bonds shall be deposited in the interest and sinking fund of the school district or community college district."

The Attorney General further stated that the practice of artificially inflating the interest rate to generate premium for unauthorized uses translates into additional bond proceeds over and above what the voters authorized. By diverting premium to unauthorized uses and by artificially inflating interest rates to generate premium, the school district did not act consistently with statutory law and is also incurring debt beyond what the voters authorized in violation of the California Constitution, according to the Attorney General's letter.

The Attorney General went on to state in the March 1, 2011 letter, that the Attorney General intends to scrutinize proposed bond issues in the future and should these practices continue, the Attorney General may be compelled to intervene.

H. Los Angeles County Letter

On May 16, 2011, the treasurer and tax collector for the County of Los Angeles, Mark J. Saladino, issued a memo to school finance professionals regarding school district general obligation bonds. In the memo, the county treasurer and tax collector indicated that his office would not support bond issuances that include a bond premium to pay the costs of issuance. The county treasurer and tax collector based his position on the March 1, 2011 letter from the California Attorney General stating that the law is clear that any premium, even if legitimate, must be deposited into a special fund, applied to pay debt service, and cannot be diverted to pay costs of issuance.

I. 2009 Attorney General Opinion

On January 9, 2009, the Attorney General issued an opinion[137] which concluded that absent specific approval from the school district's electors, a school district may not issue refunding general obligation bonds at a price or an interest rate that would generate proceeds in excess of the amount needed to retire the designated outstanding bonds. The Attorney General further stated that without voter approval, a district may not use proceeds from a refunding general obligation bond to provide supplemental funding for unfinished projects, even if the projects were previously approved by the electorate, or for any other purpose except to pay off the designated outstanding bonds. The Attorney General stated that the school district is also

[137] 92 Ops.Cal.Atty.Gen. 1 (2009).

prohibited from setting or maintaining an ad valorem property tax rates at a level higher than necessary to refinance the debt of the original bonds absent voter approval.[138]

The Attorney General, in a lengthy opinion, reviewed California law with respect to financing school construction with the issuance of general obligation bonds. The Attorney General indicated that bond buyers supply the issuing school district with immediate funds to apply for construction projects and the district then repays the bonds over time, with interest, by an annual levying of an ad valorem tax on real property located within the area of the district. Ad valorem taxes are based on the appraised value of the property.[139]

The issuance of school district bonds are subject to a number of constitutional and statutory provisions, including a constitutional requirement for voter approval. Traditionally, school construction bonds require approval by 2/3 of the district's voters.[140] In 2000, the voters amended the state Constitution to allow approval of school construction bonds by a 55% approval rate if specified conditions are met.[141]

Article XVI, Section 18(a) of the California Constitution establishes a constitutional debt limit to ensure long-term expenditures are subject to taxpayers' oversight and approval.[142] In addition, Article XIIIA, Section 1, establishes a one percent ceiling on the ad valorem property tax rate that a local school district may levy, with some exceptions. One exception authorizes the levying of an additional ad valorem tax on real property to pay the principle and interest on voter-approved bonds.[143] Article XIIIA, Section 1, and Article XVI, Section 18, work in tandem and require voter approval for the issuance of bonds and the levying of the tax to repay the bonds.[144]

In 2000, when the voters approved Proposition 39 and lowered the threshold for approval of general obligation bonds to 55% for school districts, community colleges, and county offices of education, the language of Proposition 39 stated that bonded indebtedness was for the construction, reconstruction, rehabilitation, or replacement of school facilities, including the furnishing and equipping of school facilities, or the acquisition or lease of real property for school facilities.[145] Proceeds from the sale of such bonds may not be used for any other purpose, including salaries or other operating expenses.[146]

Under the Education Code, voters authorize a maximum principal amounts for bonds, approve the purpose for which bond proceeds may be spent, and ratify the projects to which the

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[138] Id. at 1-2.

[139] Id. at 2-3. See, also, San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District, 139 Cal.App.4th 1356, 1395 (2006); 62 Ops.Cal.Atty.Gen. 209, 210 (1979).

[140] California Constitution, Article XIIIA, Section 1(b)(2); Article XVI, Section 18(a).

[141] California Constitution, Article XIIIA, Section 1(b)(3); Article XVI, Section 18(b); Committee for Responsible School Expansion, 142 Cal.App.4th 1178, 1184-1185 (2006); 87 Ops.Cal.Atty.Gen. 157, 157-159 (2004).

[142] In Re County of Orange, 31 F.Supp.2d 768, 776-777 (1998).

[143] California Constitution, Article XIIIA, Section 1(b); Article XVI, Section 18.

[144] 92 Ops.Cal.Atty.Gen. 1, 3 (2009).

[145] California Constitution, Article XIIIA, Section 1(b)(3).

[146] California Constitution, Article XIIIA, Section 1(b)(3)(A). See, also, San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District, 139 Cal.App.4th 1356, 1403 (2006) (costs of bond issuance, as itemized in Education Code section 15145(a), may be paid from bond proceeds); 87 Ops.Cal.Atty.Gen. 157, 161-163 (2004) (employees' salaries may be paid from bond proceeds only to the extent that employees perform work on approved bond projects).

bond proceeds may be applied.[147] Voter materials must specify a maximum interest rate and a maximum duration for each bond.[148] These parameters have been likened to terms of a contract between a district and the voters.[149] School construction bonds may be sold by negotiated sale or by competitive bidding.[150] The statutory provisions are intended to ensure that bond sales are made on the best terms available to the district and its voters.[151]

When school construction bonds permit early redemption, school districts sometimes consider issuing another set of bonds to refinance the earlier bonds at a lower interest rate. Such bonds issued for the purpose of refinancing a district's outstanding bonded indebtedness are called refunding bonds. The refunding process may generate a premium if the district issues the refunding bonds at an interest rate which, while still below the rate of the original bonds, is set above the current market rate.[152]

The Attorney General concluded that refunding bonds issued only for the purpose of refunding valid, existing general obligation bonds do not create new indebtedness within the meaning of the constitutional debt limit and do not, therefore, require voter approval.[153] However, if the bonds are issued to raise funds in excess of the amount needed to pay off the old debt new voter approvals are required.[154] The Attorney General concluded, "Absent specific approval from the district's electors, a school district may not issue refunding general obligation bonds at a price or an interest rate that would generate proceeds in excess of the amount needed to retire the designated outstanding bonds."[155]

The Attorney General further stated that refunding bonds may not be used to complete unfinished projects that were approved by the voters in the original bond issuance. The Attorney General concluded that such an expenditure would be new bonded indebtedness which must be approved by the voters.[156] The Attorney General stated, "We think it is unreasonable to construe a positive vote on those previously requested bond amounts as constituting an open-ended border endorsement of future funding schemes and of subsequent indebtedness not then proposed."[157]

The Attorney General stated that districts must obtain new voter approval for new bonds if the school district wishes to complete the construction projects.[158] The Attorney General stated:

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[147] Education Code section 15122.
[148] Education Code sections 15122, 15140(a), 15143, 15144.
[149] Committee for Responsible School Expansion, 142 Cal.App.4th 1178, 1191 (2006) (courts have described the relationship between the public entity and the electorate arising out of a bond election as either strictly contractual or analogous to a contract); Metropolitan Water District v. Dorff, 138 Cal.App.3d 388, 398 (1982); Peery v. City of Los Angeles, 187 Cal. 753, 769 (1922).
[150] Education Code section 15146.
[151] Golden Gate Bridge v. Filmer, 217 Cal. 754, 760-761 (1933) (public officials issuing bonds on behalf of a local agency are presumed to act in good faith and to sell bonds on the best terms obtainable).
[152] 92 Ops.Cal.Atty.Gen. 1, 4 (2009).
[153] 92 Ops.Cal.Atty.Gen. 1, 4 (2009).
[154] Id. at 5.
[155] Id. at 5.
[156] Id. at 5-9.
[157] Id. at 9.
[158] Id. at 9.

> "Without voter approval, a district may not use proceeds from a refunding general obligation bond to provide supplemental funding for unfinished projects, even if the projects were previously approved by the electorate, or for any other purpose except to pay off the designated outstanding bonds."[159]

The Attorney General concluded that the use of proceeds derived from refunding bond sales, including the premium, is restricted to paying off the district's outstanding bonded indebtedness.[160] The Attorney General cited Government Code section 53555 as requiring that all proceeds received from the sale of refunding bonds be deposited in the local agency's treasury for the purpose of refunding the bonds to be refunded.[161] The Attorney General concluded:

> "Because a school district lacking voter approval may not issue refunding general obligation bonds to generate more proceeds than are necessary to refinance the district's targeted debt, the district is likewise prohibited from setting or maintaining ad valorem property tax rates at a level higher than necessary to refinance that targeted debt."[162]

The Attorney General went on to state that a school district's use of proceeds from the sale of refunding general obligation bonds for purposes not authorized by law could result in litigation to invalidate the bond issue or to restrain unauthorized expenditures.[163] The Attorney General noted that Education Code section 15284 authorizes legal action to restrain or prevent certain unauthorized expenditures. Action by the Attorney General is also authorized.[164]

J. Use of School Bond Funds

In Taxpayers for Accountable School Bond Spending v. San Diego Unified School District,[165] the Court of Appeal held that a school district could not use voter-approved bond proceeds for field lighting at a high school stadium because the ballot measure approved by the voters on November 4, 2008, did not specifically list field lighting as a project to be funded by the bonds for that school.

The Court of Appeal noted that the California Constitution, Article XIIIA, Section 1(b)(3), was added to the Constitution by California voters when they passed Proposition 39 on November 7, 2000. Prior to November 2000, school districts, like other government agencies, were required to attain a two-thirds vote for bonds to acquire or improve real property.

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[159] Id. at 9.
[160] Id. at 9.
[161] Id. at 10. See, also, Government Code section 29303.
[162] Id. at 10.
[163] Id. at 11.
[164] Id. at 11.
[165] 215 Cal.App.4th 1013, 156 Cal.Rptr.3d 449, 293 Ed.Law Rep. 404 (2013).

Proposition 39 reduced the required voter approval from two-thirds to 55% for a school facility bond proposition. Education Code sections 15264 through 15284 implement Proposition 39.[166]

Article XIIIA, Section 1(b), includes a provision that requires school districts to provide a list of the specific school facilities projects to be funded as part of the ballot proposition. The Court of Appeal concluded that the field lighting for Hoover High School was not listed and was not incidental to or necessary for the completion of the renovation or replacement of the stadium bleachers or the press box. The Court of Appeal stated:

> "We conclude Proposition S does not authorize the use of bond funds to pay for new field lighting for Hoover's football stadium or for other high school stadiums for which Proposition S did not specifically list field lighting as part of their projects. The trial court erred by completing otherwise and dismissing Taxpayers' first cause of action."[167]

K. Surplus Bond Campaign Funds

The Fair Political Practice's Commission (FPPC) is the state agency which regulates campaign funds and campaign expenditures. In a series of letters, the FPPC has addressed a number of the issues related to surplus bond campaign funds.

In a letter dated August 14, 1990,[168] the FPPC stated that campaign funds possessed by a local ballot measure committee at the end of a campaign may be used to make contributions to another committee to the extent permitted by Government Code section 85803 (now Government Code section 89515) Section 89515 states:

> "Campaign funds may be used to make donations or loans to bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organizations, where no substantial part of the proceeds will have a material financial effect on the candidate, elected officer, campaign treasurer, or any individual or individuals with authority to approve the expenditure of campaign funds held by a committee, or member of his or her immediate family, and where the donation or loan bears a reasonable relation to a political, legislative, or governmental purpose."

In a letter dated December 13, 1996,[169] the FPPC concluded that funds remaining in the account of a local ballot measure committee may be contributed to another bona fide political action committee. The FPPC noted that the general rule for expenditures of ballot measure committees was set forth in Government Code section 89512.5, which states:

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[166] Id. at 457.
[167] Id. at 461-62.
[168] Letter to Thomas W. Hiltachk, FPPC File No. I-90-053.
[169] Letter to John L. Bailey, FPPC File No. A-96-309.

> "(a) Subject to the provisions of subdivision (b), any expenditure by a committee not subject to the trust imposed by subdivision (b) of Section 89510 shall be reasonably related to a political, legislative, or governmental purpose of the committee.
>
> "(b) Any expenditure by a committee that confers a substantial personal benefit on any individual or individuals with authority to approve the expenditure of campaign funds held by the committee, shall be directly related to a political, legislative, or governmental purpose of the committee."

Based on the language in Government Code section 89512.5, the FPPC concluded that a local ballot measure committee in Moreno Valley could contribute funds leftover after the recent election to an existing general purpose committee called the Moreno Valley Action Committee without violating the personal use restrictions of the Political Reform Act, since the purpose of Moreno Valley Action Committee would be reasonably related to the political, legislative, or governmental purpose of the ballot measure committee.

In a letter dated April 8, 1997,[170] the FPPC concluded that funds remaining in the account of a local ballot measure committee may be used for a "thank you for your support" luncheon or dinner for supporters of the ballot measure and to purchase overhead projectors, cameras, and computers for the new middle school since these expenditures would be reasonably related to a political, legislative, or governmental purpose. The FPPC based its opinion on the language of Government Code section 89512.5 quoted above.

In a letter dated June 24, 2008,[171] the FPPC concluded that a ballot measure committee may retain funds leftover from the election to support an anticipated ballot measure for the same purpose in a future election. The FPPC stated, "There is nothing in the Act that would prohibit a primarily-formed ballot measure committee from retaining funds it holds on the day of the election."

In a letter dated September 24, 2008,[172] the FPPC concluded that a bond measure committee may contribute its remaining campaign funds to the general fund of the Convention and Visitors Bureau, a nonprofit organization. The ballot measure campaign committee raised funds to pass a ballot measure on November 6, 2002; however, the bond measure failed. The purpose of the bond measure was to support the expansion of the City of San Jose's convention center.

The FPPC concluded that the campaign committee may donate the funds to the Convention Bureau pursuant to Government Code section 89515 to support expansion of the convention center. The FPPC stated that even though the Convention Bureau donated funds to the original bond campaign and would receive a refund of its contribution, the refund may be made so long as the refund is reasonably related to a political, legislative, or government purpose. Since the return of the funds was for the purpose of advocating expansion of the

[170] Letter to Joseph P. Enserro, FPPC File No. A-97-136.
[171] Letter to Michael J. O'Neill, FPPC File No. A-08-097.
[172] Letter to Ash Pirayou, FPPC File No. A-08-143.

convention center, the FPPC concluded that the return of the funds related to a political purpose and would, therefore, be permissive.

In summary, the existing Measure P bond committee may:

1. Donate the remaining funds to a bona fide non-profit organization.

2. Donate the remaining funds to another political action committee so long as the purpose of the political action committee is reasonably related to the political, legislative or governmental purpose of the Measure P bond committee.

3. Donate the money to the school district to purchase equipment or supplies to improve school grounds and facilities or for another school purpose.

4. Retain the remaining funds for the next election and transfer the funds to the new bond committee when formed.

L. 2016 Attorney General Opinion

On January 26, 2016, the California Attorney General issued an opinion regarding bond elections and the use of public funds. The Attorney General opinion raises some significant issues for districts[173] planning to conduct a bond election. Districts may want to review their current practices with legal counsel and their financial advisors.

The Attorney General concluded that a school district or community college district violates the California Constitution and California law if it uses public funds to advocate passage of a bond measure by contracting with a person or entity for services related to a bond election campaign if the pre-election services may be fairly characterized as campaign activity. The Attorney General further concluded:

- A school district or community college district violates prohibitions against using public funds to advocate passage of a bond measure if the district enters into an agreement with a municipal finance firm[174] under which the district obtains pre-election services of any sort in return for guaranteeing the firm an exclusive contract to provide bond-sale services if the election is successful, under circumstances where the district enters into the agreement for the purpose (sole or partial) of inducing the firm to support the contemplated bond-election campaign or the

[173] The Attorney General stated that the opinion applies to both community college districts and school districts.

[174] The Attorney General uses the term "municipal financial firm" to include investment bankers, financial consultants and bond attorneys.

firm's fee for bond-sale services is inflated to account for the firm's campaign contributions and the district fails to take reasonable steps to ensure that the fee was not inflated.

- A school district or community college district violates California law concerning the use of bond proceeds if the district reimburses the municipal finance firm for the cost of providing pre-election services from the proceeds raised from the bond sale.

- A school district or community college district violates California law concerning the use of bond proceeds if the district reimburses the municipal finance firm for the cost of providing pre-election services from the fees the district pays to the firm in connection with the bond sale, whether or not the reimbursement is evident as a component of the fees the district pays to the firm in connection with the bond sale made on an itemized service-by-service basis.

- Where an entity provides campaign services to a bond-measure campaign in exchange for an exclusive agreement with the district to sell the bonds, the entity has an obligation to report the value of its services as a contribution to the bond-measure campaign in accordance with state law.

The Attorney General reviewed state law related to school district bonds and bond elections and noted the usual method of funding new school construction in California has been for school districts to obtain voter approval for the issuance of general obligation bonds.[175] State law authorizes a school district or community college district to submit a proposed bond measure when, in its judgment, it is advisable.[176]

The Attorney General noted that bond elections typically involve a range of pre-election activities which can include:

1. Conducting an opinion survey to evaluate voters' attitudes toward a bond issue;

2. Developing a financial plan;

3. Determining appropriate bond issuance size and tax rates;

4. Drafting documents needed to place a bond measure on the

[175] *See* San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. 139 Cal.App.4th 1356, 1395 (2006).
[176] Education Code § 15100.

ballot;

5. Conducting a public-information program;

6. Training staff to inform the community about funding needs and bond financing;

7. Preparing a tax-rate statement for the voter pamphlet;

8. Providing information to the election campaign;

9. Conducting informational workshops; and

10. Preparing the ballot measure itself.

In many cases district staff is able to provide some or all of these functions, but it is not uncommon for districts to contract with private vendors to perform these services. It is common for the municipal finance firm to provide the pre-election services at no cost or at a reduced fee to the district in exchange for the district's promise to select the firm as its contractor to provide post-election bond services if the bonds are approved by the voters. If the bond measure passes, the municipal finance firm recoups the cost of pre-election services from its substantially greater post-election earnings.

The Attorney General noted that providing bond services can be quite lucrative, and that municipal finance firms typically allowing a percentage of the bond sale as compensation. Bond-issuance costs, including underwriting costs, are a charge against the bond sale and therefore reduce the amount of revenue garnered by the school district. For example, if the bond measure is for $100 million and the fee for underwriting the bond is $500,000 then the public agency receives $99,500,000.

The Attorney General stated that state law prohibits districts from campaigning in support of a bond measure. However, a municipal finance firm is free to contribute to a bond campaign. The Attorney General expressed concern that these contingent-compensation contracts implicate important constitutional issues involving the proper use of public funds.[177] Districts, for example, are not legally required to competitively bid for consultant contracts.[178]

The Attorney General observed that generally speaking, districts may contract for services related to a bond election campaign. In previous opinions, the Attorney General stated a school district may pay for printing, handling, translating, and mailing of trustee candidates statements contained in a voters' pamphlet.[179]

The Attorney General's Office has stated that a community college district may use district funds to hire a consultant to conduct surveys and establish focus groups to assess voter

[177] *See* Stanson v. Mott 17 Cal.3d.206 (1976).
[178] *See* Public Contract Code §§ 20111(c), 20651(c).
[179] *See* Ops.Cal.Atty.Gen.. 49 (2002).

support for the measure and the feasibility of developing a bond measure that could win voter approval.[180] The Attorney General noted that a district may not use public funds to hire a consultant to develop a strategy for building support for a ballot measure and that impermissible activities could include, for example, assisting the district chancellor or district superintendent in scheduling meetings with civic leaders and potential campaign contributors in order to gauge their support for the bond measure, if the purpose or effect of certain actions were to develop a campaign to promote the bond measure.[181] The Attorney General concluded that a school district or community college district violates prohibitions against using public funds to advocate passage of a bond measure by contracting for services related to a bond-election campaign if those services may be fairly characterized as campaign activity.

The Attorney General stated that a school district may enter into an agreement with a municipal finance firm under which the district obtains pre-election services in return for guaranteeing the firm an exclusive contract to provide bond-sale services if the election is successful. The Attorney General concluded that such agreements run afoul of state law, however, when the district enters into the agreement for the sole or partial purpose of inducing the firm to contribute to the bond-election campaign either financially or with in-kind services or when the firm's fee for its post-election services is inflated to account for its campaign contributions and the district fails to take reasonable steps to ensure the fee was not inflated.

The Attorney General noted that state law permits schools to let contracts for consultant services on a "no bid" basis.[182] The Attorney General also noted that for post-election services the Legislature has expressly refused to require school districts to sell bonds by competitive bidding and permits districts to sell their bonds by negotiated sale.[183] Therefore, the Attorney General concluded that a district may guarantee that a municipal finance firm will be selected as the underwriter of the district's bond issuance, should the issuance be approved by the voters, in exchange for the firm's performance of pre-election services so long as it is not an inducement for the firm to fund or contribute to the bond-election campaign either financially or with in-kind services or when the financial firm inflates its fee.

The Attorney General stated that if a district enters into a contingent-contribution arrangement with a municipal finance firm, the courts will focus on the district's motivation to determine whether the district was seeking to induce the financial firm to make a campaign contribution or inflate its fee. The Attorney General stated that a district would violate Education Code section 7054 if it expended district funds or services for the purpose of urging the support or defeat of a bond measure as well as Government Code section 8314 if it were to use public resources for a campaign activity or other purposes not authorized by law. The Attorney General stated:

> "In the absence of evidence to the contrary, of course, it is to be assumed that a district's actions are proper. We therefore would not conclude that the existence of a contingent-

[180] *See* 88 Ops.Cal.Atty.Gen. 46 (2005)
[181] *Id.* at 50-53.
[182] Public Contract Code § 20111.
[183] Education Code § 15146.

> compensation contract, standing alone, violates the law. On the other hand, evidence of an improper campaigning motive needs not be express. Indeed, it seems to us that the Legislature understood section 7054 to proscribe the use of funds or services as an implicit inducement for others to campaign."[184]

The Attorney General concluded that a contingent-compensation agreement between a district and a municipal finance firm violates California prohibitions against permitting others to use public funds to advocate passage of a bond measure if the firm's fee for the bond-sale services is inflated to account for its campaign contributions, and the district fails to take reasonable steps to prevent the inflated fee. The Attorney General also concluded that a district violates California law if the district reimburses the municipal finance firm for providing pre-election services as an itemized component of the fee that the district pays in connection with the bond-sale.

The Attorney General stated that proceeds from the bond cannot be used to pay for pre-election services of any sort from the proceeds raised from the bond sale as a component of the fees the district pays to the firm in connection with the bond sale. In addition, the municipal finance firm cannot inflate its fee for post-election services to account for its costs of providing pre-election services and be paid from bond proceeds. The Attorney General concluded:

> "We conclude that a school district or community college violates California law concerning use of bond proceeds if it reimburses a municipal finance firm for the cost of providing pre-election services (of any sort), from the proceeds raised from a bond sale, as a component of the fees the district pays to the firm in connection with the bond sale."

The Attorney General analyzed the laws relating to providing campaign services and concluded that if a municipal finance firm provides campaign services to a bond-measure campaign in exchange for an exclusive agreement with the district to sell the bonds, the cost of such services must be reported as a contribution under state and local campaign disclosure laws. The Attorney General stated:

> "We conclude that where an entity provides campaign services to a bond-measure committee in exchange for future financial consideration, such as an exclusive agreement with the district to sell the bonds, the entity has an obligation to report the value of the services as a contribution to the bond-measure campaign in accordance with state law, if the value of the contribution totals $10,000 or more in a calendar year."[185]

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[184] *Id.* at _____.
[185] *Id.* at ____.

DISTRICT LIABILITIES

A. Liabilities in General

The California Constitution states that school districts may not incur debts or liabilities exceeding in any year the income provided for that year unless approved by a two-thirds vote of qualified electors or in the case of general obligation bonds, a majority vote.[186] This constitutional debt limitation provision does not apply to indebtedness or liability imposed by operation of law or resulting from tort liability.[187]

School districts are liable for all debts and contracts not made in excess of school moneys accruing to the district during the school year and usable for the purposes of debts and contracts during the school year for which the debts and contracts are made.[188] However, the courts have held that despite the statute, school districts are liable for breach of contract.[189] Judgments rendered by a court against a school district are payable, with interest, in the current or ensuing fiscal year.[190] If the governing board of the school district by resolution determines that payment of the judgment is a hardship, a court may order payment in ten equal installments.[191]

B. Liability under the Field Act

1. Personal Liability

Whether board members are personally liable for failure to comply with the Field Act is a question that has been raised.[192] The Field Act requires defined school buildings to meet stringent earthquake safety requirements.[193] In our opinion, in some circumstances, board members may be held personally liable if school buildings fail to comply with the building and safety standards of the Field Act. However, board members, in most cases, would be indemnified by the district for any judgment rendered against them.[194]

In our opinion, when school buildings comply with the building standards of the Field Act but the compliance has not been certified, board members would not be personally liable. In our view, the remedy for lack of certification is to complete the certification process.

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[186] Cal. Const., Article XVI, Section 18.
[187] Wright v. Compton Unified School District, 46 Cal.App.3d 177, 181 (1975).
[188] Education Code section 35200.
[189] Wright v. Compton Unified School District, 46 Cal.App.3d 177, 184 (1975).
[190] Government Code section 970.5.
[191] Government Code section 970.6.
[192] The Field Act comprises several articles of the Education Code. Education Code section 17281 states, "This article, together with Article 6 (commencing with Section 17365), and Article 7 (commencing with Section 81130) of Chapter 1 of Part 49, shall be known and may be cited as the 'Field Act.'"
[193] Education Code sections 15501-15516; Stats. 1933, ch. 59. The Field Act of 1933 was enacted as an emergency measure as a direct result of a series of earthquakes, in order that the lives and property of the people would be protected. The rules and regulations prescribed under the authority of the Field Act establish minimum requirements for the design, construction and reconstruction of public school buildings in order to obtain the requisite stability to withstand vertical loads and lateral forces from wind or earthquakes.
[194] The only exceptions to indemnifying a board member are if the act or omission was due to actual fraud, corruption or actual malice. See, Government Code sections 825 and 995.2.

2. Letter from DSA

On October 31, 2008, the Department of General Services, Division of State Architect (DSA) for the State of California, sent a letter to district superintendents stating, "The Division of State Architect (DSA) requests that you inform your governing board members that they may be held personally liable for the failure of educational buildings not certified by DSA." This portion of the letter is unclear as to whether DSA is referring to lack of certification by DSA or failure to comply with the building and safety standards of the Field Act.

In addition, DSA published a Project Certification Guide on October 22, 2008, which states, "School board members may be personally liable for projects until certified."[195]

The letter from DSA further states that California Education Code sections 17371 and 81177 shield members of the governing board of a community college district or school district from personal liability for injuries to persons or damages to property resulting from the failure of an educational building as long as the building and safety requirements of the Field Act are met.

Education Code section 17371 states in part:

> "No member of the governing board of a school district shall be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Article 3 (commencing with Section 17280) of this chapter, if such governing board complies with the provisions of this article. Such limit on liability shall commence when such governing board initiates action to comply with the provisions of Section 17367. …[196] [Emphasis added]

Education Code section 17367 states:

> "The governing board of any school district which has in use for school purposes any school buildings which were not constructed under approved plans and the supervision and inspection requirements of Article 3 (commencing with Section 17280) of this chapter shall have such buildings examined pursuant to this section and shall have completed on or before January 1, 1970, the examination, reporting and estimate requirements of this section and Section 39223.
>
> "Whenever an examination of the structural condition of any school building of a school district has been made by the Department of General Services, or by any licensed structural

[195] Department of General Services, Division of State Architect, "Project Certification Guide," (October 22, 2008), p. 2 of 81. As indicated in this legal opinion, we would disagree with DSA's statement.

[196] Education Code section 81177 contains similar language applicable to community college districts. Section 17371 was formerly Section 39226. See Stats. 1996, ch. 277 (SB 1562), operative January 1, 1998.

engineer or licensed architect for the governing board of the school district, or under the authorization of law, and a report of the examination, including the findings and recommendations of the agency or person making the examination, has been made to the governing board of the district, and the report shows that the building is unsafe for use, the governing board of the district shall immediately have prepared an estimate of the cost necessary to make such repairs to the building or buildings as are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or reconstructed, or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law. The estimate shall be based on current costs and may include other costs to reflect modern educational needs. Also an estimate of the cost of replacement based on the standards established by the State Allocation Board for area per pupil and cost per square foot, shall be made and reported.

"The report required by this section shall include a statement that each of the buildings examined is safe or unsafe for school use. For the purpose of this statement the sole consideration shall be protection of life and the prevention of personal injury at a level of safety equivalent to that established by Article 3 (commencing with Section 17280) of this chapter and the rules and regulations adopted thereunder, disregarding, insofar as possible, such building damage not jeopardizing life which would be expected from one disturbance of nature of the intensity used for design purposes in said rules and regulations.

"The governing board, utilizing the information acquired from the examination and report developed pursuant to this section, shall establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings."[197] [Emphasis added]

Therefore, it appears that Sections 17367 and 17371 would limit the personal liability of board members when the governing board initiates action to establish a system of priorities for the repair, reconstruction or replacement of school buildings that do not comply with the building and safety standards of the Field Act.

3. Statutory Liability

Education Code section 17315 states that when a school building was constructed in accordance with plans and specifications approved by the Department of General Services, the project is completed, the notice of completion is filed, and all final verified reports and all testing

[197] Education Code section 81162 contains similar language applicable to community college districts.

and inspection documents, as required by the Field Act, are submitted to and filed with the Department of General Services, and all required fees paid by the school district, the Department of General Services shall issue a certification that the school building complies with the requirements of the Field Act. However, Section 17315(a) also states, "Nothing in this Article shall prevent beneficial occupancy by a school district prior to the issuance of this certification."[198]

The language of Section 17315(a) would indicate that certification is a clerical process that should be completed but should not delay occupancy of the building if the building otherwise complies with the requirements of the Field Act.[199] Therefore, in our opinion, the failure to complete the certification process would not give rise to civil liability but would suggest the completion of the administrative process of certification may be completed after the building is occupied.

A public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury (e.g. failure to comply with the requirements of the Field Act), that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and either:

1. A negligent or wrongful act or omission of an employee[200] of the public entity within their scope of employment created the dangerous condition; or

2. The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.[201]

Under Section 835.2, a public entity has actual notice of a dangerous condition, if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.[202] A public entity had constructive notice of the dangerous condition within the meaning of Section 835(b) only if the plaintiff establishes that the condition had existed for such a period of time and it was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its character.[203] On the issue of due care, admissible evidence includes but is not limited to, evidence as to:

1. Whether the existence of the condition and its dangerous character would have been discovered by an inspection

[198] Education Code section 81162 contains similar language applicable to community college districts.
[199] There can be a number of reasons as to why certification has not been completed which may be outside the control of the district. Section 17315 represents legislative recognition that failure to complete the certification process should not delay occupancy of the building.
[200] The term "employee" includes officers of the public entity such as board members. See, Government Code section 81012.
[201] Government Code section 835. See, also, Legislative Counsel Opinion #24479 (August 14, 1996).
[202] Government Code section 835.2(a).
[203] Government Code section 835.2(b).

system that was reasonably adequate to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

2. Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.[204]

A public entity is not liable under Section 835(a) for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or protecting against the risk of injury.[205]

A public entity is not liable under Government Code section 835(b) for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity is determined by taking into consideration the time and opportunity the public entity had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.[206]

A dangerous condition is defined as a condition of property that creates a substantial, as distinguished from a minor, trivial or insignificant, risk of injury when such property, or property adjacent to it, is used with due care in a manner that is reasonably foreseeable.[207] Public property is in a dangerous condition whenever it involves an unreasonable risk of injury to the public.[208]

A public entity and a public employee are not liable for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance by either the legislative body of the public entity or by some other body (e.g., DSA) or employee exercising discretionary authority to give such approval.[209] Where the plan or design is prepared in conformity with standards on the basis of which a reasonable public employee could have adopted the plan or design, or a reasonable legislative

[204] Government Code section 835.2(b).
[205] Government Code section 835.4(a).
[206] Government Code section 838.4(b).
[207] Government Code section 830(a).
[208] Akins v. Sonoma County, 67 Cal.2d 185, 60 Cal.Rptr. 499 (1967); Fuller v. State of California, 51 Cal.App.3d 926, 125 Cal.Rptr. 586 (1975).
[209] Government Code section 830.6

body could have approved the plan or design or the standards for the plan or design, there is no liability.[210]

If an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury rising out of an act or omission occurring within the scope of his or her employment, and such request is made in writing not less than ten days before the day of trial, and the employee or former employee cooperates in good faith in the defense of the claim or action, the public entity must pay any judgment based on it or any compromise or settlement of the claim or action to which the entity has agreed.[211]

4. Defense of Civil Actions

Generally, in civil actions, a public entity has a duty to defend a public officer or employee.[212] A public entity may refuse to provide for the defense of a civil action or proceeding brought against an officer, employee or former employee if the public entity determines:

1. The act or omission was not within the scope of his or her employment;

2. He or she acted or failed to act because of actual fraud, corruption or actual malice;

3. The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee. "Specific conflict of interest" is defined to mean a conflict of interest or an adverse or pecuniary interest.[213]

If an employee or former employee requests in writing that the public entity through its designated legal counsel provide a defense, the public entity shall, within 20 days, inform the employee or former employee whether it will or will not provide a defense and the reason for the refusal to provide a defense.[214] If an actual and specific conflict of interest arises after the 20 day period following the employee's written request for defense, the public entity may refuse to provide further defense to the employee. The public entity shall inform the employee of the reason for the refusal to provide a further defense.[215]

The California Government Code provides that in civil actions, public agencies, including school districts, are required to provide a legal defense for public officers and

[210] Ibid.
[211] Government Code section 825(a).
[212] Government Code section 995.2; see, also, 57 Ops.Cal.Atty.Gen. 358 (1974) (defense of an action may include both board members and employees).
[213] Government Code section 995.2(a).
[214] Government Code section 995.2(b).
[215] Government Code section 995.2(c).

employees when the action is brought against them in their official or individual capacity on account of an act or omission in the scope of their employment for the school district.

Government Code section 995.2 states in part:

> "A public entity has the right to refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following:
>
> "a) The act or omission was not within the scope of his or her employment;
>
> "b) He or she acted or failed to act because of actual fraud, corruption or actual malice;
>
> "c) The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee . . ."

5. Attorney General Opinions

In a 1964 opinion, the Attorney General concluded that members of a governing board of a school district, when advised of the unsafe condition of a school building under Education Code sections 15503-15516, are under a mandatory duty to repair the building if funds are available, if the building is to be continued in use as a school building.[216] The Attorney General stated that failure to repair these school buildings will result in personal liability, although indemnification is available under Government Code section 825.[217]

The Attorney General noted that there is general immunity under Education Code section 15515,[218] which stated in part:

> "No member of the governing board of the district shall be held personally liable for injury to personal property by use and abuse of any building."

The Attorney General noted that Government Code section 840.2 imposes liability upon officers and employees of governmental agencies for injury or damage caused by dangerous and defective conditions on school property. A dangerous and defective condition is defined as a condition of property that creates a substantial risk of injury when such property is used with due

[216] 43 Ops.Cal.Atty.Gen. 209 (1964).
[217] Id. at 209.
[218] Education Code section 15515 became Section 39226/81177 and is now Section 17371/81177. Section 17371 now states, in part, "No member of the governing board of a school district shall be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Article 3 (commencing with Section 17280) of this chapter, if such governing board complies with the provisions of this article. Such limit on liability shall commence when such governing board initiates action to comply with the provisions of Section 17367. . . ."

care in a manner in which it is reasonably foreseeable that it will be used.[219] Government Code section 840.2 states:

> "An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> "(a) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition; or
>
> "(b) The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition under Section 840.4 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

The Attorney General noted that the governing board has no discretion after notice is received that a school building is unsafe from the Division of State Architect. Therefore, the board must take action to remedy the situation, or attempt to obtain funds to do so.

Under Government Code section 825, public officials will be indemnified, except where they have acted fraudulently, corruptly, or with actual malice. A public official will not, however, be indemnified for punitive or exemplary damages.[220]

In a 1966 opinion, the Attorney General stated that an unsafe building which failed to meet the structural support requirements of the Field Act would be a dangerous condition for which a school district would be held liable.[221] The Attorney General noted that if it can be shown that the dangerous condition existed at the time of the injury, that the dangerous condition proximately caused the injury and that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, a public entity would be liable for injury caused by the dangerous condition of which it had actual or constructive notice, a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.[222]

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[219] Government Code section 830(a).
[220] Government Code section 818.
[221] 47 Ops.Cal.Atty.Gen. 163 (1966).
[222] Id. at 164; see, also, Government Code section 835.

A public entity has constructive notice that the condition has existed for some time and it is of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.[223] On the issue of due care, Government Code section 835.2(b) provides that admissible evidence includes whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate to inform the public entity whether the property was safe for the use or uses by which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.[224]

In a 1967 opinion, the Attorney General stated that a school district which has complied with the requirements to inspect pre-1933 school buildings is not exempt, as a matter of law, from liability from injury caused by a dangerous condition of a pre-1933 school building.[225] However, under the provisions of Government Code section 835.4(b), a school district may be found not liable where it has complied with the required action specified in the Education Code prior to an injury such compliance would be prima facie evidence of reasonable conduct on the part of the agents of the public entity.

6. Legislative Counsel Opinion

In a 1996 opinion, the Legislative Counsel discussed the civil liability of board members for failure to comply with the Field Act.[226] The Legislative Counsel noted that a public entity or public officer or employee will not be liable for injuries caused by the dangerous condition of its property, even if it had actual or constructive notice of the existence of that condition, if the public entity or public employee took reasonable action to protect against the risk of injury created by the condition, or if the failure to take protective action was reasonable.[227]

The availability of funds and the authority to dispose of the funds are essential elements of liability. The Legislative Counsel stated that it is an open question whether the liability of a member of the governing board of a school district is predicated on his or her own personal control of the funds and his or her own authority, acting alone, to dispose of them. Under one view, a member of the governing board of a school district could not be held personally liable under Section 840.2 for the dangerous condition of a school building, because no one of the governing board members acting individually would have the requisite authority and available funds.[228] The Legislative Counsel noted that a contrary view was held by the Attorney General, that if a statutory duty arises to perform certain actions upon the occurrence of certain conditions, the governing board of a school district must take action after notice is received and failure to take that action can result in personal liability for a member of the governing board of the school district under Government Code section 840.2.[229]

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[223] Government Code section 835.2(b).
[224] Government Code section 835.2(b).
[225] 50 Ops.Cal.Atty.Gen. 74 (1967).
[226] Ops.Cal.Legis. Counsel, No. 24479 (August 14, 1996).
[227] See, Government Code sections 835.4 and 840.6.
[228] Ops.Cal.Legis. Counsel, No. 24479 (August 14, 1996), p. 8, citing A. Van Alstyne, Cal. Government Tort Liability Practice (CEB 1992), Sections 3.97 and 3.99.
[229] See, 43 Ops.Cal.Atty.Gen. 209 (1964).

The Legislative Counsel noted that there are no recorded judicial decisions resolving the issue of availability of funds. The Legislative Counsel went on to state that despite the conflict in view, a board member could lessen their potential liability if he or she established that they took reasonable action to protect against the risk of injury created by the condition, or if the failure to take protective action was reasonable, such action could include applying for funds to repair buildings not in compliance with the Field Act.[230] The Legislative Counsel concluded:

> "Accordingly, it is our opinion that, depending on the facts and reasonableness of the action or inaction of the governing board of a school district and its individual members in response to a dangerous condition, the governing board of a school district and its individual members may be held civilly liable for personal injury resulting from a relocatable building that the school district purchases or leases, and requires pupils and teachers to occupy, whether or not the relocatable building complies with the Field Act."[231]

7. Summary

In summary, board members may, in some circumstances, be held personally liable if a school building owned by the school district fails to comply with the requirements of the Field Act and, as a result of the failure of a school building to meet the building and safety standards of the Field Act, an individual is injured by the collapse of that school building in an earthquake or other natural disaster. For example, if the governing board of a district is advised by district employees that school buildings (including relocatables) utilized and operated by the district do not meet the building and safety standards of the Field Act and the governing board does not establish a system of priorities for the repair, reconstruction or replacement of the buildings that do not comply with the Field Act, including making application for state funding, as required by Education Code sections 17367 and 17371, then board members could possibly be held personally liable.[232] However, if a system of priorities is put in place and funding is sought, the members of the governing board, would, most likely, not be held personally liable. It should also be kept in mind that the district would have a duty to defend and indemnify the board member unless the board member caused the school district's failure to comply with the Field Act due to actual fraud, corruption or actual malice.

We do not believe that board members would be personally liable when school buildings comply with the building standards set forth in the Field Act but compliance has not been certified by DSA. In our opinion, the remedy for lack of certification is to complete the certification process.

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[230] See, Education Code section 17373, which states that whenever a school district does not have funds available to repair, reconstruct or replace school buildings not in compliance with the Field Act, the school district shall apply for any funds that may be necessary to accomplish the repair, reconstruction or replacement by applying to DSA.

[231] Ops.Cal.Legis. Counsel, No. 24479 (August 14, 1996), p. 9.

[232] See, for example, Education Code section 17372 which states, in part, that no school building found to be unsafe for school use and not repaired in accordance with the Field Act shall be used as a school building.

C. State Law Prohibiting Sex Discrimination in Education Programs

On July 2, 2015 Governor Brown signed Assembly Bill 1538[233] effective January 1, 2016.

Assembly Bill 1538 amends and renumbers Education Code sections 270 and 271. Assembly Bill 1538 removed the language from the article entitled Athlete's Bill of Rights to Sex Equity and Education Act and made conforming changes. Education Code section 221.6 states that by July 1, 2016 the State Department of Education shall post on its website, in both English and Spanish and at a reading level that may be comprehended by pupils in high school, the information set forth in federal regulations implementing Title IX of the Education Amendments of 1972.[234]

Education Code section 221.8 as amended lists the rights of students under Title IX as follows:

1. The right to fair and equitable treatment and not to be discriminated on the basis of sex.

2. The right to be provided with an equitable opportunity to participate in all academic extracurricular activities, including athletics.

3. The right to inquire of the athletic director of your school as to the athletic opportunities offered by the school.

4. The right to apply for athletic scholarships.

5. The right to receive equitable treatment and benefits in the provision of all of the following:

    a) Equipment and supplies.

    b) Scheduling of games and practices.

    c) Transportation and daily allowances.

    d) Access to tutoring.

    e) Coaching.

    f) Locker rooms.

    g) Practice and competitive facilities.

[233] Stats. 2015, ch. 43.
[234] 20 U.S.C. §1681 et seq.

h) Medical and training facilities and services.

i) Publicity.

Education Code section 221.8 states that students have the right to contact the State Department of Education and the California Interscholastic Federation to access information on gender equity laws. Section 221.8(h) states that students have the right to file a confidential discrimination complaint with the U.S. Office of Civil Rights or the State Department of Education if they feel they have been discriminated against or if they believe they have received unequal treatment on the basis of sex. Section 221.8(i) states that students have the right to pursue civil remedies if they have been discriminated against, and Section 221.8(j) states that students have the right to be protected against retaliation if they file a discrimination complaint.

Assembly Bill 1538 was enacted to implement Title IX. Title IX of the Education Amendments of 1972 is a federal law that states:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX applies to all educational institutions, both public and private, that receive federal funds. Community colleges and school districts receive federal funding and must abide by Title IX regulations.

Title IX applies to a wide range of programs including athletics. With respect to athletics, there are three basic parts to Title IX:

1. Participation – Title IX requires that men and women be provided equitable opportunities to participate in sports. Title IX does not require institutions to offer identical sports but an equal opportunity to participate;

2. Scholarships – Title IX requires that female and male student athletes receive athletic scholarship dollars proportional to their participation; and

3. Other Benefits – Title IX requires the equal treatment of male and female student athletes in the provisions of equipment and supplies, scheduling of games and practice times, travel and daily allowance/per diem, access to tutoring, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, housing and dining facilities and services, publicity and

promotions, support services and recruitment of student athletes.

An institution must meet all of the following requirements in order to be in compliance with Title IX:

1. With respect to participation requirements, the district must meet one of the following three tests:

   - Provide participation opportunities for men and women that are substantially proportionate to their respective rates of enrollment;

   - Demonstrate a history and continuing practice of program expansion for the underrepresented sex;

   - Fully and effectively accommodate the interests and abilities of the underrepresented sex.

2. Female and male student athletes must receive athletic scholarship dollars proportional to their participation; and

3. Equal treatment of female and male student athletes with respect to equipment and supplies, scheduling of games and practice times, travel and daily allowance/per diem, access to tutoring, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, housing and dining facilities and services, publicity and promotions, support services and recruitment of student athletes.

The Office for Civil Rights (OCR) of the U.S. Department of Education enforces Title IX. Title IX is assessed through a total program comparison. The entire boy's program is compared to the entire girl's program, not just one team to another in the same sport. The broad comparative analysis is intended to emphasize that Title IX does not require the creation of identical programs and that males and females can participate in different sports according to their respective interests and abilities.

Legitimate and justifiable discrepancies for nongender related difference in sports may be taken into account. The different costs of equipment or event management may be considered. For example a male football player may need more protective equipment than a female soccer player. Title IX allows for a discrepancy in the cost of equipment as long as the same quality of equipment is received. However, in the same sports male and female players must receive the same protective equipment.

D. Federal Law Prohibiting Discrimination Based on Sex

In Ollier v. Sweetwater Union High School District,[235] the Ninth Circuit Court of Appeals affirmed a lower court decision that the school district had violated Title IX[236] and had discriminated against female students by providing unequal treatment and benefits in athletic programs, and unequal participation and opportunities in athletic programs.

In July 2008, the plaintiffs moved for partial summary judgment on their Title IX claims alleging unequal participation opportunities in athletic programs. The school district conceded that female athletic participation at Castle Park High School was lower than overall female enrollment, but argued that the figures were substantially proportionate for Title IX compliance purposes. The school district noted that there were more athletic teams for girls (23) than for boys (21) at Castle Park High School.

The district court granted summary judgment to plaintiffs on their unequal participation claim in March 2009.[237] The district court found that substantial proportionality requires a close relationship between athletic participation and enrollment, and concluded that the school district had not shown a close relationship because it failed to provide female students with opportunities to participate in athletics in substantially proportionate numbers as male students. The district court based its decision on the actual number and the percentage of females participating in athletics and not the number of teams offered to female students. The Ninth Circuit Court of Appeals affirmed the trial court decision.

With respect to plaintiffs' other claims, after a 10-day bench trial, the district court granted plaintiffs' declaratory and injunctive relief on their Title IX claims that alleged unequal treatment of and benefits to female athletes at Castle Park and retaliation.[238] The district court concluded that Sweetwater violated Title IX by failing to provide equal treatment and benefits in nine different areas, including recruiting, training, equipment, scheduling, and fundraising.[239] The district court found that female athletes at Castle Park High School were supervised by overworked coaches, provided with inferior competition and practice facilities, and received less publicity than male athletes.[240] The district court also found that female athletes received unequal treatment and benefits as a result of systemic administrative failures at Castle Park High School, and that Sweetwater failed to implement policies or procedures designed to cure the many areas of noncompliance with Title IX.[241]

The district court also ruled that the school district violated Title IX when it retaliated against plaintiffs by firing the Castle Park softball coach after the father of one of the two named plaintiffs complained to school administrators about inequalities for girls in the school's athletic programs.[242] The district court found that the softball coach was fired six weeks after the Castle

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[235] 768 F.3d 843 (9th Cir. 2014).
[236] 20 U.S.C. Section 1681.
[237] See, Ollier v. Sweetwater Union High School District, 604 F.Supp.2d 1264 (S.D.Cal.2009).
[238] Ollier v. Sweetwater Union High School District, 858 F.Supp.2d 1093 (S.D.Cal.2012).
[239] Id. at 1098-1108, 1115.
[240] Id. at 1099-1104, 1107.
[241] Id. at 1108.
[242] Id. at 1108.

Park athletic director told him that he could be fired at any time for any reason, a comment the coach understood to be a threat that he would be fired if additional complaints were made about the girls' softball facilities.[243] The trial court made further findings as follows:

> 1. The plaintiffs engaged in protective activity when they complained to the school district about Title IX violations and when they filed their complaint;
>
> 2. The plaintiffs suffered adverse actions including the firing of their softball coach and his replacement by a less experienced coach, the cancellation of the team's annual awards banquet in 2007, and being unable to participate in a Las Vegas tournament attended by college recruiters that caused their long-term and successful softball program to be significantly disrupted; and
>
> 3. That a causal link between the protected conduct and the school district's retaliatory actions could be established by an inference derived from circumstantial evidence, including proximity and time.[244]

In addition, the district court rejected Sweetwater's non-retaliatory reasons for firing the softball coach, concluding that they were not credible and were pretextual.[245] The district court determined that the school district's suggested non-retaliatory justifications were rationalizations for its decision to fire the coach in retaliation for the complaints.[246]

In 1979, the Office for Civil Rights published a "policy interpretation" of Title IX setting a three-part test to determine whether an institution is complying with Title IX requirements as follows:

> 1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;
>
> 2. Where members of one sex have been and are underrepresented among athletes, whether the institutions can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

[243] Id. at 1108.
[244] Id. at 1113-14.
[245] Id. at 1114.
[246] Id. at 1114.

3. Where the members of one sex are underrepresented among athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[247]

The Court of Appeals analyzed whether the number of participation opportunities is substantially proportionate to each sex's enrollment. Between 1998 and 2008, female enrollment at Castle Park High School ranged from a low of 975 to a high of 1133. Male enrollment ranged from 1128 to 1292. Female athletes ranged from 144 to 198, while male athletes ranged from 221 to 343. Girls made up 45.4% to 49.6% of the student body at Castle Park, but only 33.4% to 40.8% of the athletes from 1998 to 2008. At no point in that ten-year span between 1998 and 2008 was the disparity between the percentage of female athletes and the percentage of female students less than 6.7%. It was less than 10% in three years, and at least 13% in five years.[248]

While there were more athletic sports teams for girls (23) than boys (21), the Court of Appeals held that it is the number of female athletes that matters. The Court of Appeals noted that at Castle Park, the 6.7% disparity in the 2007-2008 school year was equivalent to 47 girls who would have played sports if participation were exactly proportional to enrollment and no fewer boys participate. As the district court noted, 47 girls can sustain at least one viable competitive team.

The Court of Appeals also concluded that there was no history and continuing practice of program expansion for women's sports at Castle Park High School, and that female athletic participation is not substantially proportionate to overall female enrollment at Castle Park High School. The Court of Appeals also concluded that the school district had not fully and effectively accommodated the interests and abilities of female athletes and noted that it had cut the field hockey team despite student interest.[249]

The Court of Appeals rejected the school district's argument that the students did not have standing to allege retaliation against them for the firing of the softball coach. The Court noted that sometimes adult employees are the only effective advocates against discrimination in schools.[250] The Court found that the fired softball coach gave players extra practice time and individualized attention by persuading volunteer coaches to help with specialized skills and arranged for the team to play in tournaments attended by college recruiters. After the coach was fired, the school district stripped the softball team of its volunteer assistant coaches, canceled the team's 2007 awards banquet, and prohibited the team from participating in a Las Vegas tournament attended by college recruiters. The district court found these injuries, among others, sufficient to confer standing on plaintiffs and the Court of Appeals affirmed.

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[247] See, 44 Fed.Reg. 71,413, 71,418 (Dec. 11, 1979). The Ninth Circuit has adopted this standard in Neal v. Board of Trustees of the California State Universities, 198 F.3d 763, 767-68 (9th Cir. 1999).
[248] Id. at _____.
[249] Id. at _____.
[250] Id. at _____; See, also, Jackson v. Birmingham Board of Education, 544 U.S. 167, 181 (2005).

The Court of Appeals concluded by stating:

> "Having determined that the district court did not clearly err when it found (1) that Plaintiffs established a *prima facie* case of Title IX retaliation, and (2) that Sweetwater's purported non-retaliatory reasons for firing Coach Martinez were pretextual excuses for unlawful retaliation, we conclude that it was not an abuse of discretion for the district court to grant permanent injunctive relief to Plaintiffs on their Title IX retaliation claim. We affirm the grant of injunctive relief to Plaintiffs on that issue."[251]

POWER TO ENTER INTO CONTRACTS

A. Authority to Enter into Contracts

The governing board of a school district has the power to enter into contracts on behalf of the district within the scope of its authority.[252] With the passage of the "permissive" Education Code, school districts have broad authority to enter into contracts so long as it is not in conflict with or preempted by any other provisions of law.[253] Governing boards have broad authority to delegate their powers and duties.[254] Although previous legislation limited somewhat the authority to delegate the power to contract,[255] the possible conflict between these provisions will have to be resolved by the courts or subsequent legislation.

As part of its authority to enter into contracts, school districts may enter into contracts with special experts[256] such as attorneys for legal services, hearing officers,[257] insurance companies,[258]security personnel,[259] and for other services not in conflict with or preempted by other provisions of law.[260] When the method for letting certain contracts is prescribed by statute, that method must be followed.[261]

B. Definition of Contract

In California, the Civil Code defines a contract as an agreement to do or not to do a certain thing.[262] Once entered into, a contract gives rise to an obligation or legal duty,

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[251] Id. at _____.
[252] Education Code section 35200.
[253] Education Code section 35160.
[254] Education Code section 35161.
[255] Education Code section 39656.
[256] Government Code section 53060 states in part: "The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required."
[257] Education Code section 35207.
[258] Education Code section 35208.
[259] Education Code section 39670 et seq.
[260] Education Code section 35160.
[261] Public Contract Code section 20110 et seq.
[262] Civil Code section 1549.

enforceable in an action at law.[263] To be enforceable, a written agreement does not have to be called a contract.[264] A contract has been defined as an agreement which includes sufficient consideration to do, or refrain from doing, a particular lawful thing.[265]

An agreement is defined as a manifestation of mutual assent by two or more persons to one another and may or may not have a binding legal effect.[266] A contract is defined as the total legal obligation resulting from the agreement.[267] A contract is a promise or set of promises for which the law gives a remedy or the performance of which the law in some way recognizes as a duty.[268]

In common practice, the word "contract" is often used as a synonym for "agreement." Many times, individuals reach agreements, but whether that agreement results in a legally binding obligation can be complicated. In essence, an agreement is a manifestation of mutual assent on the part of two or more persons. A contract is an agreement which results in a binding legal obligation which can be enforced under the law.

The four basic elements of a contract are (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration.[269] In addition, there must be at least two parties to a contract, a promisor and a promisee.[270]

C. Formation of Contracts

To form a contract, every contract requires consenting parties.[271] Mutual consent is usually accomplished through an offer and acceptance.[272] An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his or her assent to that bargain is invited and will conclude it.[273] A contract is made when one party makes a proposal or offer that is accepted by another party.[274]

Acceptance of an offer is the offeree's manifestation of assent to its terms in the manner invited or required by law.[275] To create a contract, acceptance of an offer must be communicated to the offeror.[276] The acceptance must be by the person to whom the offer was made.[277] Generally, an acceptance once made cannot be revoked.[278]

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[263] Civil Code sections 1427, 1428.
[264] Agosta v. Astor, 120 Cal.App.4th 596, 15 Cal.Rptr.3d 565 (2004).
[265] 14 Cal.Jur.3d, Contracts, Section 1, p. 198-199.
[266] Uniform Commercial Code section 1201(3).
[267] Uniform Commercial Code section 1201(11).
[268] Rest.2d, Contracts, Section 1.
[269] Civil Code section 1550; see, also, Weddington Productions v. Flick, 60 Cal.App.4th 793, 811, 71 Cal.Rptr.2d 265 (1998).
[270] Rest.2d, Contracts, section 9.
[271] Civil Code sections 1550, 1565.
[272] Summary of California Law (10th Ed.), Contracts, Section 117, p. 156 (2005).
[273] Rest.2d, Contracts, Section 24; see, also, Donovan v. RRL Corp., 26 Cal.4th 261, 109 Cal.Rptr.2d 807 (2001); City of Moorpark v. Moorpark Unified School District, 54 Cal.3d 921, 1 Cal.Rptr. 896, 901, 71 Ed.Law Rep. 213, 218 (1991).
[274] Tuso v. Green, 194 Cal. 574 (1924).
[275] In Re First Capital Life Ins. Co., 34 Cal.App.4th 1283, 40 Cal.Rptr.2d 816 (1995).
[276] Commercial Casualty Ins. Co. v. Industrial Accident Comm., 116 Cal.App.2d 901, 254 P.2d 954 (1953).
[277] Ott v. Home Savings & Loan Assoc., 265 F.2d 643 (9th Cir. 1958).
[278] Martyn v. Western Pacific Railroad Co., 21 Cal.App. 589, 132 P. 602 (1913).

In addition to offer and acceptance, every contract requires consideration.[279] A promise unsupported by consideration has no binding force or effect and is not enforceable at law.[280] It is the benefit that is given or the detriment suffered that is the consideration for the act or promise of another.[281] The consideration, if it consists of a benefit, must have some value.[282]

In addition to offer, acceptance, and consideration, the parties must be legally competent to enter into the contract (e.g., eighteen years of age), and the subject matter of the contract must be legal or lawful.[283] If any part of a contract is unlawful, the entire contract is void.[284] For example, a contract which includes the payment of interest above legal limits would be unlawful and unenforceable.

D. Statutory Provisions Relating to District Contracts

The Education Code authorizes school districts and community college districts to enter into contracts. The governing board of the district is liable in the name of the district for all debts and contracts made in conformance with law.[285]

Education Code sections 35160 and 70901 provide school districts and community college districts broad authority to initiate and carry on any program activity or to act in any manner which is not in conflict with, or inconsistent with, or preempted by any law, and which is not in conflict with the purposes for which school districts are established. In addition, the governing board may execute any powers delegated by law to it by delegating to an officer or employee of the district any of those powers or duties. The governing board, however, retains ultimate responsibility over the performance of those powers or duties so delegated.[286] Section 35161 states:

> "The governing board of any school district may execute any powers delegated by law to it or to the district of which it is the governing board, and shall discharge any duty imposed by law upon it or upon the district of which it is the governing board, and may delegate to an officer or employee of the district any of those powers or duties. The governing board, however, retains ultimate responsibility over the performance of those powers or duties so delegated."

Other provisions of the Education Code authorize districts to delegate authority to agents or employees. Education Code section 17604 states:

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[279] Civil Code section 1550; Rest.2d, Contracts, Section 71.
[280] Western Lithograph Co. v. Vanomar Producers, 185 Cal. 366, 197 P. 103 (1921); U.S. Ecology Inc. v. State of California, 92 Cal.App.4th 113, 111 Cal.Rptr.2d 689 (2001).
[281] Pacific Imperial Co. v. Maxwell, 26 Cal.App. 265, 146 P. 900 (1915).
[282] See, Civil Code section 1605.
[283] See, Civil Code section 1607.
[284] See, Civil Code section 1608.
[285] Education Code section 35200.
[286] Education Code section 35161.

"Wherever in this code the power to contract is invested in the governing board of the school district or any member thereof, the power may by a majority vote of the board be delegated to its district superintendent, or to any persons that he or she may designate, or if there be no district superintendent then to any other officer or employee of the district that the board may designate. The delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct. However, no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted. In the event of malfeasance in office, the school district official invested by the governing board with the power of contract shall be personally liable to the school district employing him or her for any and all moneys of the district paid out as a result of the malfeasance."

Education Code section 17605 states:

"The governing board by majority vote may adopt a rule, delegating to any officer or employee of the district as the board may designate, the authority to purchase supplies, materials, apparatus, equipment, and services. No rule shall authorize any officer or employee to make any purchases involving an expenditure by the district in excess of the amount specified by Section 20111 of the Public Contract Code. The rule shall prescribe the limits of the delegation as to time, money, and subject matter. All transactions entered in by the officer or employee shall be reviewed by the governing board every 60 days.

"In the event of malfeasance in office, the school district officer or employee invested by the governing board with the power to contract shall be personally liable for any and all moneys of the district paid out as a result of the malfeasance."

E. Basic Terms and Conditions of Contracts

All contracts should contain certain basic information. This information should include but is not limited to the following:

- The name of the parties.
- The dates or term of the contract.

- The responsibilities and obligations of the parties.
- The terms of payment.
- The procedure for termination of the contract.
- Signature lines for the authorized individuals executing the contract.

F. The Most Common Errors in Contracting

The most common errors in contract preparation include:

- Failure to clearly identify the parties.
- Failure to explain the justification or the reason for the contract.
- Including unacceptable terms and conditions in the contract.
- Failure to clearly define terms and conditions.
- Failure to clarify fictitious names of businesses so as to clearly indicate the responsible parties.
- Referencing attachments and/or exhibits in the contract and then failing to carefully review them and/or include the attachments/exhibits with the contract.
- Making changes to the terms and conditions of the contract without a written amendment executed by the parties to the contract.

G. Checklist for Drafting Contracts

1. <u>Identification of the Other Party to the Contract</u>

   - Determine if the other party is an individual, sole proprietor, partnership, or corporation.
   - If the other party uses a fictitious name, clearly identify the other party by name and acknowledge the fictitious name (i.e., John Smith d/b/a Smith's Repairs).

- Verify that all data of the other party is up to date, including social security number and/or federal identification number, address, and telephone number. Avoid using a post office box number as the address.

- If a contract involves activities requiring additional licensing or permits (i.e., asbestos abatement, transportation services, etc.), include the license number/permit information in the contract.

- The identification of the other party should be consistent throughout the contract.

- Explicitly identify the other party as an "independent contractor" or as an employee of the district. (Before a party is identified as an independent contractor, the district administrator should carefully analyze whether the independent contractor test is met. (See, www.irs.gov/businesses/ small/article/0,,id=99921,00.html.)

2. Dates

- The effective/commencement date should be stated.

- Are the dates throughout the contract consistent as to the commencement date and the termination date?

- If the contract must be completed by a certain date, is that noted as a specific condition within the contract?

- If a renewal, is it being prepared prior to the expiration of the previous contract? **(If not, then a new contract must be completed)**

- If an amendment, is the amendment completed prior to the termination of the contract? **(If not, no amendment is possible.)**

- Are the signatures dated prior to the commencement of the services? **(If not, the other party is working without the benefit of a contract.)**

3. Title of Contract

- If a renewal, amendment or modification, is this indicated on the first page of the contract?

- Are all pages, including attachments, properly numbered for identification and marked with the number of the contract should the papers separate from the contract?

4. Services Requested in Contract

- Are the specific terms of the contract clearly set forth without contradiction as to any other provisions in the contract?

- Does the contract clearly state its justification and purpose within the description of services requested (e.g., the district is unable to provide this service, the district does not have the equipment to provide this service)?

- Is there a need to attach, incorporate and reference other documents to the contract (e.g., the district's request for proposal, the response to the RFP and/or an estimate prepared by the other party)?

- If there is a mandatory time frame for the completion of services, is it clearly stated in the contract?

- Does the term of the contract exceed five years (including renewals, original plus four renewals equals five years)?[287]

- Does the contract include terms as to the place, time and method of payment?

- Does the contract clearly state any and all per diem expenses or travel expenses?

- If for rental services of a hotel/motel or restaurant, does the contract prohibit alcoholic beverage charges? If for rental/lodging/catering services, does the contract specify that the charge will be based on a pre-confirmed number or the actual number of attendees?

- If a contract for written, photographic or artistic services, does the contract specify that the services requested are a work for hire and that the district retains any and all copyright interest in the product?

[287] Education Code sections 17596, 81644 limit contracts for services to five years.

5. Standard Terms and Conditions

- Duties and obligations of the parties
- Term of Contract
- Renewals
- Cost of the Contract
- Compensation/Expenses
- Invoices
- Payment
- Taxes
- Assignment of Antitrust Claims
- Ownership Rights
- Termination of Contract
- Independent Contractor Status
- Audit Provisions
- Warranty
- Compliance with Americans with Disabilities Act
- Assignability and Subcontracting
- Nondiscrimination/Sexual Harassment Clause
- Force Majeure
- Default
- Hold Harmless/ Indemnification Provision
- Insurance
- Patent, Copyright and Trademark Indemnity Amendments/ Modifications

- Integration
- Severability
- Compliance with Law
- Applicable Law

6. Signatures

- If a corporation and an officer cannot sign, is there a certified resolution giving an individual the ability to sign on behalf of the officer and bind the corporation to the contract? (A resolution may not confirm signatory authority of a corporation to one person.)
- Are the titles of the signatories noted?
- Does the district administrator have a written delegation from the Board of Trustees of the district, to sign contracts on behalf of the district?

7. Attachments

- If a renewal, modification or amendment, is the original contract attached?
- Are all exhibits attached to the contract? (If a public works contract, then all bid documents must be attached.)

8. Miscellaneous

- Are all "blank" spaces in the contract completed or marked "not applicable" (i.e., N/A)?
- Are all handwritten changes, amendments, modifications, and insertions initialed by **ALL** signatories? (If two signatures of the other party are required, **both** individuals must initial these items.)
- If a corporate seal is required on any document, the name on the seal must identically match the other party's name as it appears on the contract.

H. Contract Review Checklist

Initial Review**:** The district administrator should review the contract in its entirety and ensure that all attachments and exhibits referred to in the contract are attached or available for review. The district administrator should discuss background facts and circumstances with persons or administrators most closely involved in the contract.

Identification of the Parties: The district administrator should ensure that the company or agency contracting with the district is properly identified. The district administrator should check to be sure that all abbreviated descriptions of the parties are consistent throughout the contract.

Recitals: The district administrator should review the recitals to be sure that they clearly state the intent of the parties and the reasons for entering into the contract. The recitals should state the expectations and understandings of the parties.

Term and Termination: The district administrator should ascertain that there is a clear starting and ending date for the contract. The contract should include a no-fault termination clause that allows the district to end the contract by giving written notice (e.g., thirty days' written notice). The agreement may include a provision for renewal of the contract at the district's option or by mutual written agreement. Automatic renewals of contracts should be avoided.

The contract should also include clauses that allow termination for breach of the contract, termination upon the happening of an event, termination upon payment of a stipulated amount, automatic termination at the end of the contract, termination for unsatisfactory performance or default. The termination for default or breach of contract should be mutual and apply to both parties. There should be a procedure for the provision of written notification of default, and there may be a provision which allows either party to cure a breach or default.

Consideration: There should be adequate consideration for the contract. The contract should clearly and accurately state the consideration for the contract if cash payments are to be made, and when and where payments are due.

Duties and Obligations: The contract should be reviewed to make sure that the parties' obligations under the contract are clear. Each duty and obligation should be clearly stated in the contract. If appropriate, clear time limits should be stated for the performance of duties and obligations. If any obligations are conditional upon a triggering event, that triggering event and the resulting obligation should be clearly stated in the contract. If appropriate, the location of the performance of each duty and obligation should be clearly identified and described with sufficient clarity so that the parties know how each duty and obligation will be performed.

Hold Harmless/Indemnification: The contract should include an indemnification clause which indemnifies the district's Board of Trustees, its officers, employees, and agents.

Arbitration Clause or Alternative Dispute Resolution Clause: Generally, districts should avoid arbitration clauses or alternative dispute resolution clauses unless it is clearly in the best

interest of the district. Districts should have legal counsel review arbitration clauses or alternative dispute resolution clauses to be sure that it is appropriate for that specific contract. Legal counsel should also review the arbitration or alternative dispute resolution clauses to be sure that the particular rules of arbitration are identified clearly and are acceptable to the district.

Insurance: The contract should require the other party to obtain insurance. The type of insurance required, the minimum amount of insurance required, the provision of proof of insurance, and the requirement that the insurance be acceptable to the district should be included in the insurance clause. The district administrator should review with the district's risk manager the type of insurance and the minimum amount of insurance required. If appropriate, the other party should be required to name the district as an additional insured with proper endorsements.

Miscellaneous Provisions: The contract should be dated and state that it will be governed by California law and that the contract will not be assigned to another company, agency or party without the express written agreement of the district. The contract should state specifically where written notices under the contract should be sent, it should be gender-neutral, and contain a severability clause in case one of the provisions of the contract is found to be void or voidable. The contract should contain a signature line with the appropriate signatures. If the contract is being submitted for a second review as a result of it being returned by the other party with corrections or additions, the district administrator needs to approve them **prior to submission** to the district's Board of Trustees.

THE CALIFORNIA PUBLIC RECORDS ACT

A. Introduction

Recently, we have received a number of requests under the California Public Records Act. These requests have been for both paper records and electronic records. The purpose of this memorandum is to summarize the requirements of the California Public Records Act.

In general, the scope of the Public Records Act is very broad. Almost all records maintained by public agencies are public records with certain specified exceptions (e.g., student records, personnel, medical and litigation records or drafts) as discussed below.

Public agencies may only charge the direct cost of duplication for photocopying records, but if electronic records are involved and data compilation, extraction or computer programming to produce the record would be required, then the hourly rate of the employees involved to produce the record may be charged.[288]

B. Purpose and Scope of the Public Records Act

The purpose and scope of the Public Records Act[289] is to provide the public access to information concerning the conduct of the people's business. Public access to public records is a

[288] On June 3, 2014, California voters approved a ballot measure amending Article I, Section 3 and Article XIII B, Section 6 of the California Constitution. As a result, the state will no longer be obligated to reimburse local agencies for unfunded state mandates for any changes in the California Public Records Act.

[289] Government Code section 6250 et seq.

fundamental and necessary right of every person in California, but the right to access to information must be weighed against the right of individuals to privacy. In the November 2, 2004, election, the voters approved Proposition 59, which added to the California Constitution a provision guaranteeing the people of California the right of access to public records.[290]

C. Definitions under the Public Records Act

Under the California Public Records Act, a local agency is defined as a county, city, school district, district, political subdivision, or any board, commission or agency. Public records do not include student records which are governed by other statutory provisions.[291] Student records are generally confidential and not accessible to the general public except with respect to certain specified education officials and others.

Public records are defined as:

> "(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[292]

A writing is defined as:

> "(g) "Writing" means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."[293]

The California Public Records Act broadly requires public agencies to provide public access to public records:

> "(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.
>
> "(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly

[290] California Constitution, Article I, Section 3(b)(1).
[291] See, Education Code sections 49061 et seq.; 20 U.S.C. Section 1232g.
[292] Government Code section 6252(e).
[293] Government Code section 6252(g).

> available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so."[294]

In Sierra Club v. Superior Court of Orange County,[295] the California Supreme Court held that the O.C. Land Base is subject to disclosure in a GIS file format at the actual cost of duplication under the California Public Records Act. The court held that the GIS mapping software falls within the ambit of Government Code section 6254.9(a) which excludes computer software. However, the California Supreme Court held that a GIS formatted database like the O.C. Land Base is not excluded from the Public Records Act and is a public record unless otherwise exempt and must be produced upon request at the actual cost of duplication.[296]

The California Supreme Court noted that Government Code section 6254.9(a) excludes computer software from the definition of the public record. Section 6254.9(b) states that computer software includes computer mapping systems, computer programs and computer graphic systems. However, the court held that the GIS formatted O.C. Land Base is a public record subject to disclosure. The court held that the GIS mapping software is exempt from the Public Records Act, but not the GIS formatted data. The court held that computer mapping systems as set forth in Government Code section 6254.9 does not refer to or include basic maps and boundary information per se, but rather denotes unique computer programs to process such data using mapping functions. Therefore, the court held that parcel map data maintains an electronic format by a county assessor does not qualify as a computer mapping system, under the exemption provisions of Government Code section 6254.9.[297]

The court held that since O.C. Land Base is not excluded from the definition of a public record under Section 6254.9(b), and because the county does not argue that the database is otherwise exempt from disclosure, the County of Orange was ordered to produce the O.C. Land Base in response to the Sierra Club's request in any electronic format in which it holds the information at a cost not to exceed the direct cost of duplication.[298]

In City of San Jose v. Superior Court,[299] the California Supreme Court unanimously held that when public employees use a personal account to communicate about the conduct of public business, the writings so created will, in many cases, be subject to disclosure under the California Public Records Act (CPRA).[300] The court stated, "…we hold that a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account."[301] The court's decision may have a significant impact on the way districts conduct business. Districts should review their current practices and consult with legal counsel to discuss the impact of this decision.

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[294] Government Code section 6253.
[295] 57 Cal.4th 157, 158 Cal.Rptr.3d 639 (2013).
[296] Id. at 161.
[297] Id. at 167-68.
[298] Id. at 176-77.
[299] ___ Cal.4th ___ (2017).
[300] Government Code section 6250 et seq.
[301] Id. at ___.

In City of San Jose, a member of the public sought disclosure of 32 categories of public records from the City of San Jose, its redevelopment agency, and the agency's executive director, along with other elected officials and their staffs. The documents requested concerned redevelopment efforts in downtown San Jose, including e-mails and text messages sent or received on private electronic devices used by the Mayor, two city council members, and their staffs. The City disclosed communications made using City telephone numbers and e-mail accounts, but did not disclose communications made using the individuals' personal accounts.

The member of the public sought declaratory relief from the courts declaring that the California Public Records Act definition of "public records" encompasses all communications about official business, regardless of how they are created, communicated, or stored. The trial court ordered disclosure but the Court of Appeal reversed the trial court and blocked disclosure.

The California Supreme Court noted that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state.[302] In 2004, voters added a provision to the California Constitution that stated, "The people have the right of access to information concerning the conduct of the people's business, and, therefore…the writings of public officials and agencies shall be open to public scrutiny."[303]

The California Supreme Court further stated that although public access to information must sometimes yield to personal privacy interests, openness in government is essential to the functioning of a democracy, and implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files so that there is a check against the arbitrary exercise of official power and secrecy in the public process.[304]

The California Supreme Court cited Government Code section 6253 and held that it creates a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency.[305] Every such record must be disclosed unless a statutory exception applies.[306]

The California Supreme Court observed that the California Public Records Act defines a public record as any writing containing information related to the conduct of the public's business, prepared, owned, used, or retained by a local agency, regardless of physical form or characteristics.[307] Under this definition, the California Supreme Court noted that a public record has four aspects:

1. A writing.

2. Content relating to the conduct of the public's business,

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[302] See, Government Code section 6250.
[303] California Constitution, Article I, Section 3(b)(1).
[304] International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal.4th 319, 328-29 (2007); Commission on Peace Officer Standards and Training v. Superior Court, 42 Cal.4th 277, 288 (2007).
[305] Sander v. State Bar of California, 58 Cal.4th 300, 323 (2013).
[306] Ibid.
[307] Government Code section 6252(e).

which is

3. Prepared by, or

4. Owned, used, or retained by any state or local agency[308]

The California Public Records Act defines a writing as any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, in any record thereby created, regardless of the manner in which the record has been stored.[309] The Supreme Court then went on to state that e-mail, text messaging, and other electronic platforms fall within the definition of a writing.[310]

The California Supreme Court then analyzed the meaning of the term related to the conduct of the public's business. The court stated that generally, any record kept by an officer because it is necessary or convenient to the discharge of his official duty is a public record.[311] The California Supreme Court recognized that not all writings will be sufficiently related to public business and that sometimes it will be unclear whether a particular writing relates to the conduct of public business. The court suggested that the following factors could help resolve the question of writings kept in personal accounts:

1. The content of the writing itself.

2. The context in, or purpose for which, the document was written.

3. The audience to whom the document was directed.

4. Whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment.[312]

The California Supreme Court then focused on whether a writing communicated from a personal account is prepared by a local agency within the meaning of the California Public Records Act.[313] The court stated that if an agency employee prepares a writing that substantively relates to the conduct of public business, that writing satisfies the CPRA's definition of a public record. The court noted that public agencies can only act through their individual officers and employees and when employees are conducting agency business, they are working for the

[308] City of San Jose v. Superior Court, ___Cal.4th ___ (2017).
[309] Government Code section 6252(g).
[310] Id. at ___. For example, the court stated that an employee's electronic musings about a colleague's personal shortcomings will not be related to the conduct of the public's business. However, an e-mail to a superior reporting a co-worker's mismanagement of an agency project might well be a public record. Id. at ___.
[311] Braun v. City of Taft, 154 Cal.App.3d 332, 340 (1984).
[312] Id. at ___.
[313] See, Government Code section 6252(e).

agency and on its behalf.[314] The California Supreme Court concluded:

> "A writing prepared by a public employee conducting public agency business has been 'prepared by' the agency within the meaning of Section 6252(e), even if the writing is prepared using the employee's personal account."[315]

The California Supreme Court then analyzed the meaning of the term in the California Public Records Act, "owned, used, or retained by any local agency." The court held that documents otherwise meeting the California Public Records Act definition of public records do not lose their status as public records because they are located in an employee's personal account. A writing retained by a public employee conducting agency business has been retained by the agency within the meaning of Government Code section 6252(e), even if the writing is retained in the employee's personal account.[316]

The California Supreme Court rejected the City's interpretation of the California Public Records Act as requiring the documents to be in the City's e-mail accounts. The court expressed concern that the City's interpretation would allow evasion of the California Public Records Act simply by the use of a personal account. The court stated:

> "If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation 'would not only put an increasing amount of information beyond the public's grasp, but also encourage government officials to conduct the public's business in private.'"[317]

The California Supreme Court said that open access to government records is essential to verify that government officials are acting responsibly and held accountable to the public they serve. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. The whole purpose of the California Public Records Act is to ensure transparency in government activities. The court then stated, "If public officials could evade the law simply by clicking into a different e-mail account, or communicating through a personal device, sensitive information could routinely evade public scrutiny."[318]

The California Supreme Court noted that any personal information not related to the conduct of public business or material falling under a statutory exemption can be redacted from public records that are produced or presented for review.[319] The court also rejected the City's

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[314] See, Suesuki v. Superior Court, 58 Cal.2d 166 (1962); Alvarez v. Felker Manufacturing Company, 230 Cal.App.2d 987, 998 (1964); Reno v. Baird, 18 Cal.4th 640, 656 (1998); California Association of Health Facilities v. Department of Health Services, [16] Cal.4th 284, 296-97 (1997).

[315] City of San Jose v. Superior Court, ___Cal.4th ___ (2017).

[316] Id. at ___.

[317] Id. at ___.

[318] Id. at ___; citing CBS, Inc. v. Block, 42 Cal.3d 646, 651 (1986).

[319] Id. at ___; see, Government Code section 6253(a).

concerns that the search of public records in employees' accounts would itself raise privacy concerns because the public agency would have to demand the surrender of employees' electronic devices and passwords to their personal accounts. The court stated that searches can be conducted in a manner that respects individual privacy.[320] The court went on to state that public agencies may develop their own internal policies for conducting searches and made the following observations:

> 1. Once an agency receives a California Public Records Act request, it must communicate the scope of the information requested to the custodians of its records.
>
> 2. If the Public Records Act request seeks public records held in employees' non-governmental accounts, the public agency should communicate the request to the employee in question.
>
> 3. The public agency may reasonably rely on the employee in question to search their own personal files, accounts, and devices for responsive material.[321]

The California Supreme Court further stated that agencies can adopt policies that will reduce the likelihood of public records being held in employee's private accounts. Public agencies may require that employees transmit a copy to their government accounts of all communications touching on public business. Public agencies may also require that officers and employees use their government accounts for all communications touching on public business.[322] The court noted that federal agency employees must follow such procedures to ensure compliance with the Freedom of Information Act.[323] The California Supreme Court concluded by stating:

> "Consistent with the legislature's purpose in enacting CPRA, and our Constitution mandate to interpret the Act broadly in favor of public access…we hold that a City employee's writings about public business are not excluded from the CPRA simply

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[320] Id. at ___.

[321] Federal courts applying the Freedom of Information Act have approved of individual employees conducting their own searches and segregating public records from personal records, so long as the employees have been properly trained in how to distinguish between the two. See, Ethyl Corp. v. U.S. Environmental Protection Agency, 25 F.3d 1241, 1247 (4th Cir. 1994). A federal employee who withholds a document identified as potentially responsive may submit an affidavit providing the agency and reviewing court with sufficient factual basis upon which to determine whether the contested items were agency records or personal materials. Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 481 (2nd Cir. 1999). The Washington Supreme Court adopted a procedure under its state public records law holding that employees who withhold personal records from their employer must submit an affidavit with facts sufficient to show the information is not a public record and that so long as the affidavits give the requestor and the trial court a sufficient factual basis to determine that the withheld material is indeed nonresponsive, the public agency has performed adequate search under state law. Nissen v. Pierce County, 357 P.3d 45, 57 (Wash. 2015).

[322] Id. at ___.

[323] See, 44 U.S.C. Section 2911(a), which prohibits use of personal electronic accounts for official business, unless messages are copied or forwarded to an official account; 36 C.F.R. 1236.22(b), requiring that federal agencies ensure official e-mail messages in federal employees' personal accounts are preserved in the federal agency's recordkeeping system.

> because they have been sent, received, or stored in a personal account."[324]

In summary, the California Supreme Court has held that writings related to the conduct of public business prepared, sent, received, or stored in the personal account of a public official or employee are public records subject to disclosure. Therefore, we would recommend that districts review their current practices and policies to identify whether the district needs to modify or change its current practices or policies to ensure disclosure of all public records and to protect the privacy of its board members and employees. In reviewing district policies, districts may wish to consider requiring board members and employees use district e-mail accounts when conducting public business. Requiring the use of district e-mail accounts will reduce the need to search personal e-mail accounts. After conducting this internal review, we would recommend that districts contact legal counsel to discuss the adoption of policies or procedures or the modification of current policies or procedures that will meet the requirements of the California Supreme Court's decision in City of San Jose v. Superior Court.

In League of California Cities v. Superior Court,[325] the Court of Appeal held that a party may file a petition for the issuance of an extraordinary writ to challenge an order of the trial court either directing or refusing disclosure under the Public Records Act[326].

In League of California Cities, a nonparty to the action, League of California Cities, filed a petition for an extraordinary writ in the Court of Appeal arguing it was a real party in interest that would be irreparably damaged by the trial court's order to disclose records allegedly protected from disclosure by the attorney-client privilege and attorney work product doctrine. The Court of Appeal concluded that the term "party," as used in the California Public Records Act, is not limited to an actual party to the action. Accordingly, the Court of Appeal held that the League of California Cities, even though it was a nonparty in the trial court, had standing to file a petition challenging the trial court's order.[327]

The Court of Appeal further concluded that the trial court erred by not conducting an in camera review of the documents as requested by the party asserting that the documents were exempt from disclosure. Accordingly, the Court of Appeal granted the petition and remanded the matter back to the trial court for further proceedings.[328]

D. Inspection and Photocopying of Public Records

Public records are open to inspection at all times during the office hours of the local agency, and every person has the right to inspect any public record, with limited exceptions. The district may request but not require an individual to identify themselves and make a written request. Any reasonable portion of a record must be available for inspection by any person

[324] City of San Jose v. Superior Court, ___ Cal.4th ___ (2017).
[325] 241 Cal. App.4th 976 (2015).
[326] Gov. Code section § 6259(c).
[327] Id. at 981-982.
[328] Id. at 982.

requesting the record after deletion of the portions that are exempted by law.[329]

Except for public records exempt from disclosure, each local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, must make the records promptly available to any person upon payment of fees covering the district's costs of duplication. Upon request, an exact copy must be provided unless the agency is unable to make an exact copy.[330]

Government Code section 6253(f) states that in addition to maintaining public records for public inspection during the office hours of the public agency, a public agency may comply with the requirements of Section 6253 to ensure that public records are open to inspection at all times by posting any public record on its Internet Web site and, in response to a request for a public record posted on the Internet Web site, directing a member of the public to the location on the Internet Web site where the public record is posted. However, if after the public agency directs a member of the public to the Internet Web site, the member of the public requesting the public record requests a copy of the public record due to an inability to access or reproduce the public record from the Internet Web site, the public agency shall promptly provide a copy of the public record.

The amount of fees that may be charged by a public agency to make a copy of a record is limited to the direct cost of producing the record.[331] Direct cost does not include the ancillary tasks associated with retrieval, inspection and handling of the file from which the copy is extracted.[332] The same rule would apply to copies made from electronic records.[333]

An additional fee may be charged if there is a cost to construct the record including the cost of programming and computer services to produce a copy of the record. The fee may include data compilation, extraction or programming to produce the record.[334] An hourly rate covering the salary of employees required to construct a record, including the cost of programming and computer services necessary to compile data, extract data, or computer programming to produce a record, may be charged.[335]

In California Public Records Research, Inc., v. County of Stanislaus,[336] the Court of Appeal held that the County of Stanislaus must reduce the fees it charges for copies of official records. The County of Stanislaus charged the fee of $3.00 for the first page and $2.00 for each subsequent page. The plaintiffs alleged that the County violated Government Code section 27366, which states that copy fees shall be set by the board of supervisors in an amount necessary to recover the direct and indirect costs of providing the product or service.

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[329] Government Code section 6253.

[330] In Los Angeles Unified School District v.. Superior Court, 151 Cal.App.4th 759, 60 Cal.Rptr.3d 445 (2007), the Court of Appeal held that a public agency such as the City of Long Beach could make a public records request of the Los Angeles Unified School District. The court held that the Los Angeles Unified School District was required to produce records relating to a school construction project requested by the City of Long Beach.

[331] Government Code section 6253; North County Parents Organization v. Department of Education, 23 Cal.App.4th 144, 148 (1994).

[332] 85 Ops.Cal.Atty.Gen. 225, 227-229 (2002).

[333] Government Code section 6253.9(a).

[334] 88 Ops.Cal.Atty.Gen. 153 (2005); County of Santa Clara v. Superior Court, 170 Cal.App.4th 1301 (2009).

[335] Id. at 160.

[336] 246 Cal.App.4th 1432 (2016).

The trial court ruled in the County's favor and allowed the County to factor in the cost of estimated staff time for processing a copy request. The Court of Appeal reversed, holding that there was a complete lack of evidence to support the County's fees. The Court of Appeal held that the County's board of supervisors abused its discretion when it set the copying fees.

Each local agency, upon a request for a copy of records, shall, within 10 days of receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and must promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension of more than 14 days. When the agency dispatches the determination the agency shall state the estimated date and time when the records will be made available.[337]

The Public Records Act defines "unusual circumstances" as:

1. The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

2. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

3. The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

4. The need to compile data, to write programming language, or a computer program, or to construct a computer report to extract data.[338]

When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist a member of the public to make a focused and effective request that reasonably describes an identifiable record or records, must do all of the following to the extent reasonable under the circumstances:

1. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request.

[337] Government Code section 6253.
[338] Government Code section 6253(c).

2. Describe the information technology and physical location in which the records exist.

3. Provide suggestions for overcoming any practical basis for denying access to the records sought.[339]

The requirements to assist the public are deemed to be satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requestor that will help identify the record or records. The requirement to assist the public in identifying the record does not apply if the public agency makes the record available, or if the agency determines that the request should be denied, and bases that determination on an exemption to the Public Records Act, or the public agency makes available an index of its records.[340]

In Crews v. Willows Unified School District,[341] the Court of Appeal reversed the trial court's decision awarding attorneys' fees to the Willows Unified School District pursuant to Government Code section 6259(d) which provides for an award of attorney fees and costs to the public agency in the event of a clearly frivolous Public Records Act case. The trial court awarded attorney fees in the amount of $53,926.00 and $2,669.50 in costs.

The Court of Appeal noted that Government Code section 6259 does not define the term "clearly frivolous." The court stated that the California Supreme Court in In re Marriage of Flaherty,[342] held that an appeal that is simply without merit is not by definition frivolous and should not incur sanctions. The Supreme Court held that an appeal may be deemed frivolous only when prosecuted for an improper motive such as to harass the respondent or for purposes of delay or when so lacking in merit that any reasonable attorney would agree the appeal is totally without merit.[343] The Court of Appeal concluded that the Public Records Act request by Crews was not completely lacking in merit or brought for an improper purpose. The court stated:

> "In sum, Crews's PRA petition is not utterly devoid of merit or taken for an improper purpose. Consequently, his action was not frivolous and he should not have been ordered to pay attorney fees and costs to the District under Section 6259, subdivision (d)."[344]

In Bertoli v. City of Sebastopol, [345] the Court of Appeal held that the plaintiff's lawsuit was not clearly frivolous. Therefore, the Court of Appeal reversed the lower court's decision and denied attorneys' fees and costs to the City of Sebastopol.

The Court of Appeal characterized the Plaintiff's actions as overly aggressive, unfocused and poorly drafted to achieve their desired outcomes but not clearly frivolous. The Court of

[339] Government Code section 6253.1.
[340] Government Code section 6253.1.
[341] 217 Cal.App.4th 1368, 159 Cal.Rptr.3d 484 (2013).
[342] 31 Cal.3d 637, 183 Cal.Rptr. 508 (1982).
[343] Id. at 650-651.
[344] 217 Cal.App.4th 1368, 1385 (2013).
[345] 233 Cal.App.4th 353 (2015).

Appeal noted that under the California Public Records Act, a request that requires an agency to search an enormous volume of data for a needle in a haystack or which compels the production of a huge volume of material may be objectionable, as unduly burdensome.[346] The court stated:

> "Indeed, under the PRA, a governmental agency is only obliged to disclose public records that can be located with reasonable effort and cannot be subjected to a 'limitless' disclosure obligation."[347]

In San Diegans for Open Government v. City of San Diego[348], the Court of Appeal upheld the trial court's finding that the plaintiff was the prevailing party entitled to attorney's fees and costs.

The Court of Appeal found that the plaintiff submitted a Public Records Act request to the City for all email communications pertaining to the City's official business sent to or from City Attorney Goldsmith's personal email account during certain periods of time. The City refused to produce any email communications, stating that the emails in City Attorney Goldsmith's personal account were not owned, used, prepared or retained by the City and did not qualify as public records.

The trial court entered a judgment in favor of the plaintiff on its claim under the California Public Records Act and granted the plaintiff declaratory relief against the City. The trial court found that the City did not produce documents stored in its email systems because it improperly narrowed the request to email messages maintained on a private server and should have sought clarification or attempt to provide a partial response. The trial court granted plaintiff's request for attorney's fees as the prevailing party under the California Public Records Act, finding that the City disclosed public records as a result of the action and could have avoided litigation had it not improperly narrowed the request but instead sought clarification.

The Court of Appeal held that a plaintiff prevails under the California Public Records Act when it files an action which results in the defendant releasing a copy of a previously withheld document.[349]

The Court of Appeal rejected the City's claim that it did not understand the plaintiff's request for emails included emails stored in the City computer system, and noted that the City conceded that private emails stored on City servers would be considered public records. The City declined to produce any documents claiming it did not retain them, and the Court held that the City should actually have looked for emails on the City's server. Based on the trial court's findings, the Court of Appeal upheld the award of attorney's fees.

In Sukumar v. City of San Diego,[350] the Court of Appeal held that plaintiff Sukumar should be deemed to be a prevailing party entitled to an attorney fee award. The Court of Appeal

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[346] Id. at 370-372.
[347] Id. at 372.
[348] 247 Cal.App.4th 1306 (2016).
[349] Los Angeles Times v. Alameda Corridor Transportation Agency, 88 Cal.App.4th 1381, 1391 (2001).
[350] 14 Cal.App. 5th 451 (2017).

held that the plaintiff prevailed within the meaning of the California Public Records Act (CPA)[351] when he filed an action that results in defendant releasing a copy of a previously withheld document.[352]

The Court of Appeal held that even though plaintiff did not achieve a favorable final judgment in the Public Records Act litigation, a defendant's voluntary action in providing public records that is induced by plaintiff's lawsuit will still support an attorney fee award on the rationale that the lawsuit spurred defendant to act or was a catalyst speeding defendant's response.[353]

The superior court denied the plaintiff's Motion for Attorney's Fees. The Court of Appeal reversed because the undisputed evidence established that the City produced, among other things, five photographs of Sukumar's property and 146 pages of e-mails directly as a result of court-ordered depositions in the litigation. The Court of Appeal remanded the matter back to the superior court to determine the amount of attorney's fees to which the plaintiff is entitled.

The City of San Diego represented to the court in original litigation that it had produced all records requested. However, when an aide to a city councilmember was served with a deposition notice, the City Attorney asked the employee to check again to see if there were any records. The City employee then found the additional records.

The Court of Appeal held that there was no intentional delay on the part of the City, but held that under the Public Records Act, the plaintiff is considered a prevailing party entitled to attorney's fees. If litigation was the motivating factor for the production of documents, the court stated, "The key is whether there is a substantial causal relationship between the lawsuit and the delivery of the information."

Based on these facts, the Court of Appeal ruled that the plaintiff was a prevailing party entitled to attorney's fees and remanded the matter back to the superior court to determine the amount of reasonable attorney's fees and costs the plaintiff will be entitled to under Government Code section 6259(d).

E. Exempt Records

The California Public Records Act includes two categories of exemptions. The first category of exemptions is the enumerated exemptions in Government Code section 6254, and the second category is the general exemption section in Government Code section 6255.[354] In Section 6254, the Legislature listed a number of express exemptions.

[351] Government Code section 6250, et seq.
[352] See, Belth v. Garamendi, 232 Cal.App.3d 896, 898 (1991).
[353] Id. at 901.
[354] City of San Jose v. Superior Court, 74 Cal.App.4th 1018, 1019 (1999).

Exempt records include:

1. Preliminary drafts, notes, or interagency or intraagency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.

2. Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to the Tort Claims Act, until the pending litigation or claim has been finally adjudicated or otherwise settled.

3. Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.[355]

The home addresses and home telephone numbers of school district and county office of education employees are not be deemed to be public records and are not open to public inspection, except as follows:

1. To an agent or family member of the individual to whom the information pertains.

2. To an officer or employee of another school district or county office of education, when necessary for the performance of its official duties.

3. To an employee organization pursuant to regulations and decisions of PERB, except that the home addresses and home telephone numbers of employees performing law enforcement related functions shall not be disclosed.

4. To an agent or employee of a health benefit plan providing health services or administering claims for health services to employees and their enrolled dependents for the purpose of providing the health services or administering claims for employees and their enrolled dependents.

5. Upon written request of any school district or county office employee, the agency shall not disclose the employee's home address or home telephone number to an employee organization, and the agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.[356]

[355] Government Code section 6254.
[356] Government Code section 6254.3.

Government Code section 6255 allows a government agency to withhold records if it can demonstrate that, on the facts of the particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. This exemption contemplates a case-by-case balancing process, with the burden of proof on the proponent of non-disclosure to demonstrate a clear need for confidentiality.[357] When the public interest in non-disclosure of records is outweighed by disclosure of the records, the courts will direct the government to disclose the requested information.[358]

In County of Santa Clara v. Superior Court,[359] the Court of Appeal held that the County of Santa Clara must produce its geographic information system (GIS) base map to the party requesting the documents. The Court of Appeal broadly interpreted the Public Records Act and held that the public's interest in disclosure outweighed the public's interest in non-disclosure.

Government Code section 6254(a) states that nothing in the California Public Records Act shall be construed to require disclosure of records that are, "Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."

In Citizens for a Better Environment v. Department of Food and Agriculture,[360] the Court of Appeal interpreted the meaning of Government Code section 6254(a). The Court of Appeal concluded:

> "The Department failed to show that certain records were 'not retained…in the ordinary course of business'; these records must be disclosed in their entirety. Regarding the remaining records, we hold that only the recommendations to the Department concerning the action to be taken are exempt but that the factual report of the investigations and what was found must be disclosed."[361]

The Department of Food and Agriculture has the primary responsibility for enforcement of the federal pesticide use law. It shares this responsibility with the agriculture commissioner of each county acting under its direction and supervision.[362]

In November 1980, Citizens for a Better Environment requested that the Department supply copies of all documents from 1977 regarding its evaluations of pesticide surveillance and enforcement activities in several California counties. The request included final and draft reports, staff drafts and reports, notes of conversations and meetings, and any county or federal documents in the department's possession which concern matters of pesticide surveillance and enforcement. The Department responded that evaluations were conducted only in Contra Costa

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[357] Michaelis, Montanari & Johnson v. Superior Court, 38 Cal.4th 1065, 1071 (2006).
[358] City of San Jose v. Superior Court, 74 Cal.App.4th 1018, 1019 (1999).
[359] 170 Cal.App.4th 1301 (2009).
[360] 171 Cal.App.3d 704, 217 Cal.Rptr.504 (1985).
[361] Id. at 707.
[362] Id. at 707-08.

and San Francisco and that the reports were in process and would not be completed before the end of January 1981. The Department claimed the documents were exempt under Government Code section 6254(a).[363]

The Department stated in a declaration to the trial court that the writings presently maintained by the Department were the basis for the reports to be published later and that they consist of individual team member's impressions and opinions of the operations of the county agriculture departments which were visited, inspected and evaluated. The Department declared that the use of the writings is limited to the preparation of the draft or drafts which ultimately result in the reports of the Department and that they are not normally retained after the report is completed.[364]

The trial court reviewed the documents in camera pursuant to Evidence Code section 915 and Government Code section 6259. The trial court ruled that the documents were exempt from disclosure.[365]

Following the trial court's ruling, the final reports were completed. The final reports contained few comments or recommendations and do not reveal what evidence, if any, was gathered by the monitors. The final reports do not say how the investigation was conducted, who or what was investigated, or when the investigations took place.[366]

The Court of Appeal reviewed the writings. The documents contain a checklist form identical to the form used for the final reports. The documents are annotated with handwritten notes and appear to have been prepared during on-site visits to the counties. Each file contains other handwritten documents also apparently prepared on-site. The San Francisco file contains a type written document stamped "draft" which tracks the categorical format of the final reports but does so in a narrative style stating county practices found by the investigator. The court noted that these documents consist of recommendations for improvement of county operations and proposals for the disposition of the items on the checklist forms of the final reports. The Court of Appeal ruled that these matters are not subject to disclosure.[367]

However, the Court of Appeal also ruled that these documents also provide a wealth of detail concerning the methodology of the Department inspection in monitoring visits and the facts concerning the county operations as perceived by the monitors. The Court of Appeal ruled that these documents were subject to disclosure.[368]

The Court of Appeal noted that the California Public Records Act expresses a policy favoring disclosure of public records.[369] The Court of Appeal also noted that the policy of disclosure can only be accomplished by narrow construction of the statutory exemptions.[370]

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[363] Id. at 708.
[364] Id. at 709.
[365] Ibid.
[366] Id. at 710.
[367] Ibid.
[368] Ibid.
[369] Id. at711.
[370] Id. at 711. See also, San Gabriel Tribune v. Superior Court, 143 Cal.App. 3d 762, 773, 192 Cal.Rptr. 415 (1983).

The Court of Appeal reviewed the provisions of Government Code sections 6254(a) and noted that there were three statutory conditions for exemption:

1. The records must be a preliminary draft, note, or memorandum.

2. The record is not retained by the public agency in the ordinary course of business.

3. The public interest in withholding must clearly outweigh the public interest in disclosure.[371]

The burden of proof and of persuasion of the existence of each of these conditions is on the Department of Food and Agriculture. The purpose of the exemption is to provide a measure of agency privacy through written discourse concerning matters pending administrative action. The Court of Appeal discerned this purpose from reading the statute and reviewing its antecedents.[372]

The Court of Appeal noted that the California Public Records Act is modeled after the federal Freedom of Information Act (FOIA). Although the wording in the California Public Records Act is different than the Freedom of Information Act, the Court of Appeal noted that the key to all the cases is that the exemption protects the deliberative materials produced in the process of making agency decisions but not factual materials and not agency law. The purpose of the exception is to foster robust discussion within the agency of policy questions pending administrative decisions. The means to achieve this is an exemption from disclosure of those portions of predecisional writings containing advisory opinions, recommendations and policy deliberations. However, the Court of Appeal held that memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context are not exempt from disclosure.[373]

The Citizens for Better Environment conceded in the lower court that the records that they were seeking were preliminary drafts, notes or interagency or intra-agency memoranda and that the records are documents produced in the course of a deliberative process of evaluating compliance of a county with state criteria of an effective pesticide law enforcement program. However, the Citizens for Better Environment argued that the second condition of Government Code section 6254(a) has not been met. This condition requires that the records are documents which are not retained by the Department in the ordinary course of business. If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed. Thus, the agency controls availability of a forum for expression of controversial views on policy matters by its policy and custom concerning retention of preliminary materials.[374]

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[371] Id. at 711-12.
[372] Id. at 712.
[373] Id. at 712-13. See also, NLRP v. Sears, Roebuck & Co., 421 U.S., 132, 149, 155, 95 S.Ct. 1504 (1975); EPA v. Mink, 410 U.S. 73, 87-89, 93 S.Ct 82 (1973).
[374] Id. at 714.

The Court of Appeal also considered the third condition in Government Code section 6254(a) – whether the public interest in withholding the records clearly outweighs the public interest in disclosure. The court noted that in determining whether there is a public interest in disclosure the nature of the information in the documents must be considered. In Citizens for Better Environment, the factual matters in the preliminary documents concerned the conduct of county officials in enforcing the pesticide use laws and the conduct of state officials in the investigation and supervision of that task. The court ruled that these are grave public matters in which the public has a substantial interest in disclosure.[375]

The Court of Appeal went on to discuss the public interest in withholding such records. The court ruled that the phrase "public interest in withholding such records," must be narrowly construed. If it were to be broadly construed it would render the California Public Records Act superfluous.[376]

The Court of Appeal held that memoranda consisting of factual material or severable factual material along with deliberative material may be disclosed without doing violence to the public interest in withholding such records. The Court of Appeal ruled that it is a simple matter to separate the actual descriptions of what went on, such as the times and places of the inspections and the observations made at those places, from the recommendations made on the basis of those facts. The court ruled that to the extent that the notes and memoranda refer to things that were seen and heard by the team members, they contain what may be considered factual material.[377]

The Court of Appeal ruled that only opinions which are recommendations may be withheld. The court stated, "A statement of opinion concerning whether county conduct, policy or practice conforms to the law or whether the Department should endorse, rebuke, or take some other action in view of the conduct, policy or practice is 'recommendatory' and meets the definition for withholding."[378]

The Court of Appeal reviewed the documents in question and observed that the documents include the times and places of the investigations and the observations made. The court ruled that this was factual matter that must be disclosed.[379]

F. Employment Contracts and Salary Information

In International Federation of Professional and Technical Engineers v. Superior Court,[380] the California Supreme Court held that the Public Records Act requires the City of Oakland to disclose the name, job title and gross salary of all city employees who earned $100,000 in a fiscal year. The California Supreme Court overruled an earlier Court of Appeal decision and held that public employees do not have a reasonable expectation of privacy in their gross

[375] Id. at 715.
[376] Id. at 715-16.
[377] Id. at 716-17.
[378] Id. at 717.
[379] Id. at 714.
[380] 42 Cal.4th 319, 64 Cal.Rptr.3d 693 (2007).

salary.[381]

The California Supreme Court held that openness in government is essential to the functioning of a democracy and that implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, the court held that individuals must have access to government files. The court noted that the Public Records Act declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.[382] In addition, the voters in 2004 added a provision to the California Constitution that states that the people have the right of access to information concerning the conduct of the people's business and therefore, the writings of public officials and agencies must be open to public scrutiny.[383]

The court noted that courts must balance the disclosure of public records against the privacy rights of individuals. The court stated:

> "This exemption requires us to balance two competing interests, both of which the Act seeks to protect – the public's interest in disclosure and the individual's interest in personal privacy. Balancing these interests, we conclude that disclosure of the salary information at issue in the present case would not constitute an unwarranted invasion of personal privacy."[384]

The court held that counterbalancing any interest that public employees may have in avoiding the disclosure of their salaries is the strong public interest in knowing how the government spends its money. The court drew an analogy to the Brown Act and noted that under the Brown Act employees' salaries must be discussed in open session.[385]

Thus, the California Supreme Court concluded that the City of Oakland must provide the names, job titles and gross salaries of all City employees who earned $100,000 or more in fiscal year 2003-2004 to the Contra Costa newspapers.

G. Personnel Files and Disciplinary Records

The Court of Appeal in Bakersfield City School District v. Superior Court[386] held that a local newspaper may have access to the disciplinary records of a school district employee. The school employee was under investigation by local enforcement in a highly publicized investigation of a violent crime.

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[381] See, Teamsters Local 856 v. Priceless, LLC, 112 Cal.App.4th 1500, 5 Cal.Rptr. 3d 847 (2003). We summarized this case in a memo dated December 23, 2003 (OPAD 03-91). That memo should now be disregarded and is superseded by this memo as International Federation overrules the Priceless decision.

[382] See, Government Code section 6250.

[383] See, California Constitution, Article I, Section 3(b)(1).

[384] Id. at 329-330.

[385] Id. at 331-334; see, San Diego Union v. City Council, 146 Cal.App.3d 947 (1983).

[386] 118 Cal.App.4th 1041, 13 Cal.Rptr.3d 517 (2004). See also, Caldecott v. Superior Court, 243 Cal.App.4th 212 (2015), in which the Court of Appeal remanded the matter back to the Superior Court to review in camera the records in dispute to determine if they are protected by the attorney-client privilege. The Court of Appeal held that case was not moot even though plaintiff possessed some of the records because plaintiff wanted to make the records public.

On July 24, 2003, the Bakersfield Californian, the local newspaper, filed a court action under the California Public Records Act,[387] seeking disclosure of disciplinary records that the Bakersfield City School District currently maintained regarding the district employee.

On September 5, 2003, a Superior Court judge reviewed the personnel records of the employee in court. As to some of the records, the Superior Court denied disclosure after concluding that the records were not substantial in nature and that there was no reasonable cause to believe the complaints were well founded. However, as to complaints regarding an incident that allegedly occurred on February 20, 1996, which the court described on the record as "sexual type conduct, threats of violence and violence" the court found that the complaint was substantial in nature and that there was reasonable cause to believe the complaint was well founded. The Superior Court did not make any findings with regard to the truth of the allegations or truth of complaints that were in the document but ruled that the documents must be produced after being redacted to exclude names, addresses and telephone numbers of all persons mentioned except for the employee.[388]

After reviewing the redacted documents, the court ordered seven pages of the document to be disclosed but ordered the documents to remain sealed to permit the Bakersfield City School District the opportunity to appeal to the Court of Appeal.[389]

The Court of Appeal reviewed the provisions of the California Public Records Act, Government Code sections 6250, et seq. and noted that there is a strong policy in favor of disclosure of public records in California. Any refusal to disclose public information must be based on a specific exception to that policy. The burden of proof is on the proponent of nondisclosure to demonstrate a clear reason not to disclose the documents.

The Court of Appeal noted that Government Code section 6254(c) provides for an exemption for personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. The Court of Appeal held that the "personnel exemption" was developed to protect intimate details of personal and family life, not business judgments and relationships.[390]

The Court of Appeal noted that in American Federation of State Employees v. Regents of the University of California,[391] the Court of Appeal ruled that where complaints of public employees' wrongdoing and a resulting disciplinary investigation reveal allegations of a substantial nature and there is reasonable cause to believe the complaint is well founded, public employee privacy must give way to the public's right to know.

The Court of Appeal ruled that in determining whether a particular document supports a reasonable conclusion that the complaint was well founded, the trial court or Superior Court is required to examine the documents presented to determine whether they reveal sufficient indications of reliability to support a reasonable conclusion that the complaint was well founded.

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[387] Government Code sections 6250 et seq.
[388] Id. at 1043-1044.
[389] Id. at 1044.
[390] See, Braun v. City of Taft, 154 Cal.App.3d 332, 343-344 (1988).
[391] 80 Cal.App.3d 913, 918 (1978).

The Court of Appeal held that the Superior Court must balance the competing concerns of a public employee's right to privacy and the public's interest in disclosure.[392]

In Bakersfield City School District, the Court of Appeal held that the trial court properly concluded that the documents reviewed provided a sufficient basis upon which to reasonably conclude that the complaint in question was well founded. The Court of Appeal held that exemption from disclosure is evaluated on a case by case basis and where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government agency to disclose the requested information.[393]

The Court of Appeal noted that the trial court redacted the records to eliminate all identifying information about the alleged victim and the witnesses. Therefore, the Court of Appeal ruled that the confidentiality expectations of the victims or the witnesses were not compromised and the disclosure will not have a chilling effect on future complaints.[394]

In BRV, Inc. v. Superior Court,[395] the Court of Appeal upheld the release of an investigative report that reviewed allegations of misconduct by the school district superintendent. Even though the report tended to exonerate the superintendent, the court held that the release of the report was warranted. The court in BRV also ordered that the documents be redacted to exclude names, addresses and telephone numbers of individuals other than the employee who was the subject of the complaint.[396]

In Marken v. Santa Monica – Malibu Unified School District,[397] the Court of Appeal held that the school district was required to disclose an investigatory report that concluded that a teacher had more likely than not engaged in sexual harassment in violation of the school district's policy and the school district's written reprimand of the teacher. In Marken, the school district hired an attorney to conduct an investigation after a parent complained that the teacher had sexually harassed her daughter. The attorney was unable to interview students but based on several other interviews, the investigator made partial findings and determined that sexual harassment had probably occurred. Two years later, another parent requested copies of all public records concerning the investigation. The district informed Marken that it intended to comply with the request.

Marken then sued the school district seeking an order to prevent the disclosure. The Court of Appeal ruled that a school district employee has standing to sue the school district to prevent disclosure under the California Public Records Act.[398]

The Court of Appeal noted that not every claim of misconduct is substantial or well-founded, and thus not every complaint must be disclosed because of the potential impact of an unjustified accusation on the reputation of an innocent public employee. However, if the information in the school district's files is reliable and, based on the information, the court can

[392] Id. at 1046.
[393] Ibid.
[394] Id. at 1046-1047.
[395] 143 Cal.App.4th 742 (2006).
[396] Id. at 759.
[397] 202 Cal.App.4th 1250, 136 Cal.Rptr.3d 395 (2012).
[398] Id. at 1255-57, 1262-71.

determine that the complaint is well-founded and substantial, the information must be disclosed.[399] The court went on to state that the school district concluded that Marken's misconduct violated the school district's policy prohibiting the sexual harassment of students and the district issued a written reprimand of the teacher. Therefore, the court concluded as follows:

> "In light of the investigator's factual findings, the District's conclusion based on those findings that Marken had violated its board policy prohibiting the sexual harassment of students and imposition of discipline, the exemption for mandatory disclosure in Section 6254, subdivision (c), is inapplicable; and release of the investigation report and disciplinary record (redacted as directed by the Superior Court) is required under the CPRA. Under governing case law, summarized above, the public's interest in disclosure of this information – the public's right to know – outweighs Marken's privacy interest in shielding the information from disclosure."[400]

In contrast, in Versaci v. Superior Court,[401] the Court of Appeal ruled that the Palomar Community College District was not required to disclose the personal performance goals of its former superintendent under the California Public Records Act.[402] The Court of Appeal held that the personal performance goals of the former superintendent were exempt from disclosure in that the former superintendent's privacy interest in her evaluation process, including her personal performance goals, outweighed the public's interest in disclosure.

In May 2001, the Palomar Community College District hired Sherrill Amador, Ed.D., as its superintendent and president under a four-year contract beginning July 1, 2001. Paragraph 4 of the employment contract provided that the former superintendent would receive an annual written evaluation by the governing board of the community college district no later than May 1, of each year. The evaluation was based on overall performance and mutually agreed upon goals and objectives established each year prior to July 1 and would also include a mid-term progress meeting. The contract provided that all evaluations would be held in closed session.[403]

In June 2002, in a closed session, Dr. Amador and the Board mutually established Dr. Amador's personal performance goals for the 2002-2003 academic year. The District included the goals in her personnel file and maintained their confidentiality. Between January and May, 2003, the Board held closed sessions to evaluate Dr. Amador's performance. At a May 13 open session the Board reported that Dr. Amador's overall evaluation was satisfactory and that in light of budgetary constraints, she agreed to forego one-half of the raise to which she was entitled. The Board minutes of the meeting indicated that the Board directed Dr. Amador to focus on building relationships and improving morale, with progress to be monitored on an

[399] Id. at 1275.
[400] Id. at 1276.
[401] 127 Cal.App.4th 805, 26 Cal.Rptr.3d 92, 196 Ed.Law Rep. 629 (2005).
[402] Government Code sections 6250, et seq.
[403] Id. at 811.

ongoing basis.[404]

At a May 27, 2003 open session, the Board voted three to two to extend Dr. Amador's contract through June 2007, and to increase her compensation by 2.5 percent. In June 2003, Versaci asked the District, under the Public Records Act, for a copy of the eleven annual job goals of Dr. Amador for the 2002-2003 academic year. The District denied the request based on provisions of the Act and Dr. Amador's right of privacy under Article I, Section 1 of the California Constitution.[405]

In November 2003, Versaci petitioned the Superior Court to compel disclosure of the information under the Act. Versaci argued that Section 6254.8 mandates disclosure of Dr. Amador's performance goals because they were terms of her employment contract and that there was no exemption under the Public Records Act allowing the District to withhold the information.[406]

The Superior Court denied the petition and Versaci appealed. On November 13, 2003, Dr. Amador announced her retirement from the District effective July 1, 2004.[407]

The Court of Appeal noted that the disclosure of public records involves two fundamental but competing interests: prevention of secrecy in government and protection of individual privacy. The Court of Appeal noted that under Government Code section 6254, a public agency may invoke an exemption for several types of public records from disclosure including personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. If an employment contract between a state or local agency and any public official or public employee is involved, it is considered a public record.[408]

The Court of Appeal rejected the argument that because paragraph four of the employment contract refers to goal setting in conjunction with Dr. Amador's yearly performance evaluations, the written goals are "key terms" of the contract that must be disclosed under Section 6254.8. The Court of Appeal noted that there is no secrecy regarding Dr. Amador's compensation and that the Board announced in open session the result of its evaluations (i.e., whether it found her performance satisfactory or granted a pay raise or contract extension).[409]

The Court of Appeal concluded that Dr. Amador's personal performance goals were not part of the contract and that a mere reference in paragraph four of the employment contract to future goal setting in conjunction with Dr. Amador's evaluation process does not clearly and unequivocally evidence the parties' intent to incorporate the yet to be determined goals into the contract.[410]

The Court of Appeal rejected Versaci's position that essentially any topic the employment contract mentions is incorporated into the contract. The Court of Appeal concluded

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[404] Ibid.
[405] Id. at 811-12.
[406] Id. at 812.
[407] Ibid.
[408] Id. at 813-14; see, also, Government Code section 6254.8.
[409] Id. at 814-15.
[410] Id. at 815-17.

that Dr. Amador's personal performance goals constituted a personnel file or other similar file and the disclosure of her personal performance goals would be an invasion of her personal privacy. The Court of Appeal noted that there was a substantial amount of information available to assist the public in assessing the trustee's conduct with respect to Dr. Amador as well as determining whether Dr. Amador achieved her goals.[411]

The Court of Appeal concluded Dr. Amador had a reasonable expectation of privacy in her performance goals and that it was common practice to keep personal performance goals confidential. The Court of Appeal also noted that the Brown Act authorizes a public agency to meet in closed session regarding the evaluation of performance of a public employee.[412] The underlying purpose of the personnel exception is to protect the employee from public embarrassment and to permit free and candid discussion of personnel matters by a local governmental body.[413] The Court of Appeal held that under the employment contract, Dr. Amador's personal performance goals were an integral part of the confidential evaluation process. The Court of Appeal stated:

> "There is an inherent tension between the public's right to know and the public interest in protecting public servants, as well as protecting private citizens, from unwarranted invasion of privacy . . . On certain occasions, the public's right to disclosure must yield to the privacy rights of governmental agencies . . . We conclude that this is such a case, as Dr. Amador's privacy interest in her entire evaluation process – including her personal performance goals – outweighs the public minimal interest in the matter."[414]

H. Electronic Records

Under Government Code section 6253.9, a public agency that has information that constitutes an identifiable public record not exempt from disclosure that is in an electronic format must make that information available in electronic format when requested by any person. The public agency must make the information available in any electronic format in which it holds the information or in the format requested if the requested format is one that has been used by the public agency to create copies for its own use or for provision to other agencies. The cost of duplication is limited to the direct cost of producing a copy of the record in an electronic format.[415]

The public agency may charge an individual requesting public records the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:

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[411] Id. at 817-21.
[412] Id. at 821; see, also, Government Code section 54957(b)(1).
[413] San Diego Union v. City Council, 146 Cal.App.3d 947, 955 (1983).
[414] Id. at 822.
[415] Government Code section 6253.9(a).

1. In order to comply with the request, the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

2. The request would require data compilation, extraction or programming to produce the record.[416]

The Public Records Act does not require a public agency to reconstruct a record in an electronic format if the public agency no longer has the record available in an electronic format.[417] If the request is for information in other than electronic format, and the information also is in electronic format, the public agency may inform the individual requesting the information that the information is available in an electronic format.[418] However, a public agency is not allowed to make information available only in an electronic format.[419]

A public agency is not required to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.[420] The scope of public access to records held by any agency is the same for electronic records as for all other records.[421]

I. Attorney-Client Privilege

In Los Angeles County Board of Supervisors v. Superior Court,[422] the California Supreme Court held that legal invoices are protected by the attorney-client privilege and are therefore exempt from disclosure under the California Public Records Act in most circumstances. The California Supreme Court held that invoices for work in pending and active legal matters are so closely related to attorney-client communications that the invoices are exempt from disclosure in their entirety. However, in matters that are no longer pending, fee totals may not be privileged if the fee totals on the invoice do not communicate substantive information related to the legal consultation, or risk exposing information that was communicated for the substantive purpose of legal consultation.

The California Supreme Court had to balance the confidentiality of the attorney-client privilege[423] against the need for public disclosure under the California Public Records Act.[424] In a prior case, the California Supreme Court recognized that the attorney-client privilege applies to public entities and the provisions of the California Public Records Act makes the attorney-client privilege applicable to public records.[425]

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[416] Government Code section 6253.9(b).
[417] Government Code section 6253.9(c).
[418] Government Code section 6253.9(d).
[419] Government Code section 6253.9(e).
[420] Government Code section 6253.9(f).
[421] Government Code section 6253.9(g).
[422] ___ Cal.4th ___ (2016).
[423] See, Evidence Code section 952.
[424] Government Code section 6250 et seq.
[425] See, Roberts v. City of Palmdale, 5 Cal.4th 363, 370 (1993).

The Evidence Code defines the attorney-client privilege.[426] The Evidence Code defines a client for the purpose of the privilege as a "person" which includes a public entity.[427] The courts have interpreted the Evidence Code to grant public agencies the right to assert the attorney-client privilege.[428]

The attorney-client privilege applies to communications in the course of professional employment that are intended to be confidential. Under the Evidence Code, a client holds a privilege to prevent the disclosure of confidential communications between client and lawyer.[429] Confidential communication is defined as including a legal opinion formed and the advice given by the lawyer in the course of the attorney-client privilege. The attorney-client privilege applies to confidential communications within the scope of the attorney-client relationship, even if the communication does not relate to pending litigation. The privilege applies not only to communications made in anticipation of litigation, but also the legal advice when no litigation is threatened.[430] Thus, the communication from an attorney advising a public entity may be exempt from disclosure under both the California Public Records Act and the Evidence Code.[431]

The Brown Act[432] authorizes the legislative body of a local agency, based on advice of its legal counsel, to hold a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.[433] The Brown Act goes on to state that for purposes of the Brown Act, all expressions of the lawyer-client privilege, other than those provided in the Brown Act, are hereby abrogated and the Brown Act is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to the Brown Act.[434] However, the abrogation does not apply to the California Public Records Act.[435]

In addition, the Brown Act prohibits a person from disclosing confidential information that has been acquired by being present in a closed session to a person not entitled to receive the confidential information, unless the legislative body authorizes the disclosure of that confidential information.[436] The Brown Act defines "confidential information" as a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under the Brown Act.[437]

In Roberts v. City of Palmdale, the California Supreme Court reviewed the provisions of the California Public Records Act, the Evidence Code, and the Brown Act and concluded that the language in the Brown Act stating that all expressions of the lawyer-client privilege, other than those provided in the Brown Act, are hereby abrogated, and that the Brown Act is the exclusive

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[426] Evidence Code section 950 et seq.
[427] See, Evidence Code sections 951 and 175.
[428] Roberts v. City of Palmdale, 5 Cal.4th 363, 370, 20 Cal.Rptr.2d 330 (1993).
[429] Id. at 371; see, also, Evidence Code section 954.
[430] Id. at 371; see, also, Evidence Code section 952.
[431] Id. at 372.
[432] Government Code section 54950 et seq.
[433] Government Code section 54956.9.
[434] Government Code section 54956.9.
[435] See, Roberts v. City of Palmdale, 5 Cal.4th 363, 377, 20 Cal.Rptr.2d 330, 338 (1993).
[436] Government Code section 54963(a).
[437] Government Code section 54963(b).

expression of the lawyer-client privilege for purposes of conducting closed session meetings under the Brown Act was limited to closed session meetings and did not apply to the attorney-client privilege under the California Public Records Act or the Evidence Code.[438] The California Supreme Court concluded:

> "We see nothing in the legislative history of the amendment [to the Brown Act] suggesting the Legislature intended to abrogate the attorney-client privilege that applies under the Public Records Act, or that it is intended to bring written communications from counsel to governing body within the scope of the Brown Act's open meeting requirements."[439]

The California Supreme Court observed that the public's interest in open government must be balanced against the attorney-client privilege and the need for the efficient administration of justice. The purpose of the attorney-client privilege is to allow the client the ability to confer and confide in an attorney having knowledge of the law. The court held that the attorney-client privilege is vital to the effective administration of justice, and that the privilege promotes forthright legal advice, eliminates meritless litigation, and encourages full and frank communication between attorneys and their clients, thereby promoting a broader public interest in the observance of law and the administration of justice.[440] The California Supreme Court stated:

> "A city council needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who also seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements…The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public.
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> "The balance between the competing interest in open government and effective administration of justice has been struck for local governing bodies in the Public Records Act and the Brown Act. We see no reason to disturb the equilibrium achieved by that legislation. We conclude that although the Brown Act limits the attorney-client privilege in the context of local governing body meetings, it does not purport to abrogate the privilege as to written legal advice transmitted from counsel to members of the local governing body."[441]

[438] Id. at 374-377.
[439] Id. at 377.
[440] Id. at 380.
[441] Id. at 380-381.

In Ardon v. City of Los Angeles,[442] the California Supreme Court held that an inadvertent release of exempt privileged documents and memos to opposing counsel did not waive the exemption under the Public Records Act. The Supreme Court held that Government Code section 6254.5 applies to an intentional, not an inadvertent, disclosure. The Court held that a government entity's inadvertent release of privileged documents under the Public Records Act does not waive the attorney-client privilege.[443]

The California Supreme Court directed the Reporter of Decisions to publish the Court of Appeal opinion in Newark Unified School District v. Superior Court of Alameda County.[444] In Newark Unified School District v. Superior Court, the Court of Appeal held that in order to harmonize the provisions of Government Code section 6254.5 with Evidence Code section 912, an inadvertent waiver did not effect a waiver of the attorney-client and work-product privileges. The Court of Appeal held that Government Code section 6254.5 does not apply to an inadvertent release of privileged documents.[445]

J. Retention of Public Records

We have been asked what the legal requirements are for retaining records in California. Under California law, there are public records and pupil or student records. Below we have summarized the requirements for both public records and student records.

In general, it is not permissible to destroy public records.[446] School districts and county offices of education are authorized to destroy records in accordance with Title 5 regulations.[447] In addition, school districts and county offices of education may photograph, microfilm, or make electronic copies of records.[448]

The Title 5 regulations, with respect to district records, require the district superintendent to review and classify all district records as either permanent, optional, or disposable. Following classification, the records must be retained or destroyed in accordance with the applicable regulations.

The Title 5 regulations state the district superintendent or a person designated by the district superintendent shall classify documents as Class 1–Permanent, Class 2-Optional, or Class 3–Disposable. Records of a continuing nature (useful for administrative, legal, fiscal, or other purposes over a period of years) are not to be classified until such usefulness has ceased. A pupil's cumulative record, if not transferred, is a continuing record until the pupil ceases to be

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[442] 62 Cal.4th 1176 (2016).
[443] Id. at 1186.
[444] 386 P.2d 1005 (March 17, 2016).
[445] 245 Cal.App.4th 887 (2015).
[446] Government Code section 6200.
[447] Education Code section 35253.
[448] Education Code section 35254. Education Code section 35254 states: "The governing board of any school district may make photographic, microfilm, or electronic copies of any records of the district. The original of any records of which a photographic, microfilm, or electronic copy has been made may be destroyed when provision is made for permanently maintaining the photographic, microfilm, or electronic copies in the files of the district, except that no original record that is basic to any required audit shall be destroyed prior to the second July 1st succeeding the completion of the audit." [Emphasis added.]

enrolled in the district.[449] An original record may be photographed, microphotographed, or otherwise reproduced on film and the copy then must be classified as a Class 1, Class 2, or Class 3 document.

With respect to permanent records, the original of each record or one exact copy thereof must be retained indefinitely.[450] Permanent records include the following:

1. Annual reports;

2. Official budget;

3. Financial report of all funds, including cafeteria and student body funds;

4. Audit of all funds;

5. Average daily attendance, including period 1 and period 2 reports;

6. Other major annual reports including information relating to property, activities, financial condition or transactions and those declared by board minutes to be permanent;

7. Official actions, such as minutes of board meetings, rules, regulations, policies or resolutions not set forth verbatim in the minutes but included by reference;

8. Elections, including the call for the election, recall elections, issuance of bonds, changes in maximum tax rates, reorganization or any other purpose;

9. Records transmitted by another agency but pertaining to the agency's action with respect to district organization;

10. Personnel records, all detailed records relating to employment, assignment, amounts and dates of services rendered, termination or dismissal of an employee in any position, sick leave record, rate of compensation, salaries or wages paid, deductions or withholdings made and the person or agency to whom such amounts were paid. In lieu of the detail records, a complete proven summary payroll record for every employee of the school district containing the same data may be classified as Class 1–Permanent, and the detail records may then be classified as Class 3–Disposable;

[449] Cal. Code. Regs., Title 5, section 16022.
[450] Cal. Code. Regs., Title 5, section 16023.

11. Information of a derogatory nature, only if it becomes final after the time for filing a grievance has lapsed or the document has been sustained by the grievance process;

12. The pupil records of enrollment and scholarship for each pupil;

13. All records pertaining to any accident or injury involving a minor for which a claim of damages has been filed, including any policy of liability insurance relating to the claim, except that these records cease to be Class 1-Permanent records one year after the claim has been settled or the statute of limitations has run; and

14. All detailed records relating to land, buildings and equipment. In lieu of such detailed records, a complete property ledger may be classified as Class 1-Permanent, and the detailed records may then be classified as Class 3–Disposable, if the property ledger includes all fixed assets and equipment inventory and for each unit of property the date of acquisition or augmentation, the person from whom acquired, an adequate description or identification, and the amount paid, and comparable data if the unit is disposed of by sale, loss, or otherwise.[451]

Any record worthy of temporary preservation but not classified as Class 1–Permanent may be classified as Class 2–Optional and shall then be retained until reclassified as Class 3–Disposable.[452] All records not classified as Class 1–Permanent or Class 2–Optional shall be classified as Class 3–Disposable, including but not limited to detail records relating to records basic to audit and periodic reports.[453] A Class 3–Disposable record shall not be destroyed until after the third July 1 succeeding the completion of the annual audit required by Education Code section 41020 or of any other legally required audit, or after the ending date of any retention period required by any agency other than the state of California, whichever date is later. A continuing record shall not be destroyed until the fourth year after it has been classified as Class 3–Disposable.[454] Unless otherwise specified, all Class 3–Disposable records shall be destroyed during the third school year after the school year in which they originated (e.g. 2006-07 records may be destroyed after July 1, 2010).[455]

[451] Cal. Code. Regs., Title 5, section 16023.
[452] Cal. Code. Regs., Title 5, section 16024.
[453] Cal. Code. Regs., Title 5, section 16025.
[454] Cal. Code. Regs., Title 5, section 16025.
[455] Cal. Code. Regs., Title 5, section 16027.

Section 432 defines Mandatory Permanent Pupil Records as those records which schools have been directed to compile by California statute or regulation. The Mandatory Permanent Pupil Record includes the following:

1. Legal name of pupil;
2. Date of birth;
3. Method of verification of birth date;
4. Sex of pupil;
5. Place of birth;
6. Name and address of parent of minor pupil;
7. Address of minor pupil if different than the above;
8. An annual verification of the name and address of the parent and the residence of the pupil;
9. Entering and leaving date of each school year and for any summer session or other extra session;
10. Subjects taken during each year, half year, summer session or quarter;
11. If marks or credits are given, the mark or number of credits toward graduation allowed for work taken;
12. Verification of or exemption from required immunization;
13. Date of high school graduation or equivalent.[456]

The Mandatory Interim Pupil Records include the following:

1. A log or record identifying those persons (except authorized school personnel) or organizations requesting or receiving information from the record. The log or record shall be accessible only to the legal parent or guardian or the eligible pupil, or a dependent adult pupil, or an adult pupil, or the custodian of records;
2. Health information, including Child Health Developmental Disabilities Prevention Program verification or waiver;

[456] Cal. Code. Regs., Title 5, section 432.

3. Participation in special education programs including required tests, case studies, authorizations, and actions necessary to establish eligibility for admission or discharge;

4. Language training records;

5. Progress slips and/or notices as required by Education Code sections 49066 and 49067;

6. Parental restrictions regarding access to directory information or related stipulations;

7. Parent or adult pupil rejoinders to challenged records and to disciplinary action;

8. Parental authorizations or prohibitions of pupil participation in specific programs;

9. Results of standardized tests administered within the preceding three years.[457]

All other pupil records are defined as Permitted Pupil Records.

In addition, Education Code section 48918(k) states that records of expulsions shall be a non-privileged disclosable public record and, "… the expulsion order and the causes therefore shall be recorded in the mandatory interim record and shall be forwarded to any school in which the pupil subsequently enrolls upon receipt of a request from the admitting school for the pupil's school records."

Mandatory Permanent Pupil Records must be preserved in perpetuity by all California schools. Mandatory Interim Pupil Records may be determined to be disposable when the student leaves the district or when their usefulness ceases. Destruction of Mandatory Interim Pupil Records may be destroyed during the third school year after the school year in which they originated. Permitted Pupil Records may be destroyed when their usefulness ceases, which is defined as six months following the pupil's completion of or withdrawal from the educational program.[458]

K. Summary

As discussed above, almost all records maintained by public agencies are public records except for student records, personnel records, medical records, litigation records and drafts of documents.

Public agencies may only charge the direct cost of duplication for photocopying records, but if electronic records are involved and data compilation, extraction or computer programming

[457] Cal. Code. Regs., Title 5, section 432.
[458] Cal. Code. Regs., Title 5, sections 437 and 16027.

to produce the record would be required, then the hourly rate of the employees involved to produce the record may be charged.

Invoices or billings from the school district's law firm may contain confidential information. Therefore, in our opinion, to the extent that invoices or billings from the school district's law firm contains confidential information regarding legal advice and litigation strategy, that information may be redacted from the billing statements that are produced to a member of the public under the California Public Records Act. Information such as the names of students, parents, employees, and information and descriptions on the billings that would reveal the attorney's legal advice to the school district may be redacted.

In summary, with respect to public records, permanent records (Class 1) must be retained indefinitely. A Class 2 record is worthy of temporary preservation and shall be retained until reclassified as Class 3 – Disposable.[459] A Class 3-Disposable record may be destroyed during the third school year after the school year in which the document originated (e.g., 2006-07 records may be destroyed after July 1, 2010).

With respect to pupil records, Mandatory Permanent Pupil Records must be kept indefinitely. Mandatory Interim Pupil Records may be determined to be disposable when the student leaves the district or when their usefulness ceases and may be destroyed during the third school year after the school year in which they originated (e.g., 2006-07 records may be destroyed after July 1, 2010). Permitted Pupil Records may be destroyed when their usefulness ceases, which is defined as six months following the pupil's completion of or withdrawal from the educational program.

CIVIC CENTER ACT

The Education Code creates a civic center at each and every public school facility and grounds within the State.[460] Citizens and organizations such as the Parent-Teachers Association, Camp Fire Girls, Boy Scout troops, farmers' organizations, school community advisory councils, senior citizens' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public schools may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment pertain to the educational, political, economic, artistic and moral interests of the citizens of the communities in which they reside.[461]

The governing board of any school district may grant the use of school facilities or grounds as a civic center on the terms and conditions the board may deem proper, subject to the limitations, requirements and restrictions set forth in the Civic Center Act.[462] The use of school facilities or grounds as a civic center may be granted for the following purposes:

[459] Cal. Code. Regs., Title 5, section 16024.
[460] Education Code section 38130 et seq.
[461] Education Code section 38131(a).
[462] Education Code section 38131(b).

1. Public, literary, scientific, recreational, educational, or public agency meetings.

2. The discussion of matters of general or public interest.

3. The conduct of religious services for temporary periods, on a one-time or renewable basis, by any church or religious organization that has no suitable meeting place for the conduct of the services, provided the governing board charges the church or religious organization using the school facilities or grounds a fee as specified in Section 38134(b).

4. Child care or day care programs to provide supervision and activities for children of preschool and elementary school age.

5. The administration of examinations for the selection of personnel or the instruction of precinct board members by public agencies.

6. Supervised recreational activities including, but not limited to, sports league activities for youths that are arranged for and supervised by entities, including religious organizations or churches, and in which youths may participate regardless of religious belief of denomination.

7. A community youth center.

8. Other purposes deemed appropriate by the governing board.[463]

The management, direction, and control of school facilities under the Civic Center Act which is required to promulgate rules and regulations necessary to provide, at a minimum for the aid, assistance and encouragement of civic center activities, the preservation of order in school facilities and on school grounds, and a provision that the use of school facilities or grounds is not inconsistent with the use of the school facilities or grounds for school purposes or interfere with the regular content of schoolwork.[464]

The governing board of any school district is required to authorize the use of any school facilities or grounds under its control, when an alternative location is not available, to nonprofit organizations, and clubs or associations organized to promote youth and school activities, including, but not limited to:

1. Girl Scouts, Boy Scouts, Camp Fire, Inc.,

[463] Education Code section 38131(b).
[464] Education Code section 38133.

2. Parent-Teachers Associations,

3. School Community Advisory Councils.[465]

This requirement does not apply to any group that uses school facilities or grounds for fundraising activities that are not beneficial to youth or public school activities of the district, as determined by the governing board.[466]

Except as otherwise provided by law, the governing board may charge an amount not to exceed its direct costs for use of its school facilities. Each governing board that decides to levy these charges shall first adopt a policy specifying which activities shall be charged an amount not to exceed direct costs.[467]

The governing board of any school district may charge an amount not to exceed its direct costs for use of its school facilities by any entity, including a religious organization or church that arranges for and supervises sports league activities for youths.[468] The governing board of any school district that authorizes the use of school facilities or grounds for the purposes of conducting religious services shall charge the church or religious denomination an amount at least equal to the district's direct costs.[469]

In the case of entertainments or meetings where admission fees are charged or contributions are solicited and the net receipts are not expended for the welfare of the pupils of the districts or for charitable purposes, a charge must be levied for the use of school facilities or grounds which charge must be equal to fair rental value.[470]

If any group activity results in the destruction of school property, the group may be charged for an amount necessary to repay the damages, and further uses of facilities may be denied.[471] Direct costs to the district for the use of school facilities or grounds is defined as those costs of supplies, utilities, janitorial services, services of any other district employee and salaries paid school district employees required by the organization's use of school facilities and grounds of the district.[472] Fair rental value is defined as the direct costs to the district plus the amortized costs of the school facilities or grounds used for the duration of the activity authorized.[473]

Education Code section 38134(g) defines "direct costs" as including all of the following:

1. The share of the costs of supplies, utilities, janitorial services, services of school district employees, and salaries paid to school district employees directly associated with the administration of Section 38134 to operate and maintain

[465] Education Code section 38134(a).
[466] Education Code section 38134(a).
[467] Education Code section 38134(b).
[468] Education Code section 38134(c).
[469] Education Code section 38134(d).
[470] Education Code section 38134(e).
[471] Education Code section 38134(f).
[472] Education Code section 38134(g).
[473] Education Code section 38134(h).

school facilities or grounds that is proportional to the entity's use of the school facilities or grounds.

2. The share of the costs for maintenance, repair, restoration, and refurbishment proportional to the use of the school facilities or grounds by the entity using the facilities or grounds.

3. For purposes of Section 38134(g), school facilities shall be limited to only non-classroom space and school grounds shall include, but not be limited to, playing fields, athletic fields, track and field venues, tennis courts, and outdoor basketball courts.

4. The share of the costs for maintenance, repair, restoration, and refurbishment shall not apply to classroom-based programs that operate after school hours, including, but not limited to, after school programs, tutoring programs or childcare programs, organizations retained by the school or school district to provide instruction or instructional activities to pupils during school hours.

Effective July 1, 2014, new regulations define "direct costs." Under the regulations, direct costs consist of "capital direct costs" and "operational direct costs."[474]

Capital direct costs include the estimated cost for maintenance, repair, restoration, and refurbishment, for the use of school facilities or grounds under the Civic Center Act. For purposes of estimating capital direct costs, school facilities shall be limited to non-classroom space, but may apply to specialty teaching spaces, including but not limited to, dance studios, music practice, or performance spaces and theaters. Capital direct costs do not apply to classroom-based programs that operate after school hours, including but not limited to, after school programs, tutoring programs, or child care programs. A "program" is defined as classroom based for purposes of the regulations if participants spend at least fifty percent of operational hours in the classroom. Capital direct costs do not apply to organizations retained by the school or school district to provide instruction or instructional activities to pupils during school hours.[475]

Operational direct costs include the estimated costs of supplies, utilities, janitorial services, services of school district employees and/or contracted workers, and salaries and benefits paid to school district employees directly associated with the administration of the Civic Center Act to operate and maintain school facilities or grounds.[476]

School districts electing to charge applicants for all direct costs, or either capital direct costs or operational direct costs shall do all of the following:

[474] 5 Cal.Admin. Code section 14037(b).
[475] 5 Cal.Admin. Code section 14037(b)(1).
[476] Title 5, Cal.Admin. Code section 14037(b)(2).

A. Calculate the proportionate share, as a percent, that each school facility or grounds is available for use by applicants as follows:

1. Estimate the total annual hours a facility or grounds is expected to be used by applicants.

2. Estimate the total annual hours a facility or grounds is expected to be used by anyone, including applicants in the school district.

3. Divide the number of hours in 1 by the number of hours in 2.[477]

In the alternative, school districts may elect to determine proportionate share by categorizing like facilities or grounds (e.g., all high school football fields, all gymnasiums) in performing the same calculation as outlined above.[478]

Specific to each school facility and grounds, the school district shall quantify the annual capital direct costs as follows:

1. Determine the useful life in years from the initial date of occupancy or use.

2. Estimate the expected cost to repair, restore, or refurbish the facility or grounds at the end of its useful life. Substitute the estimated cost to replace a facility or grounds when maintenance, repair, restoration, or refurbishment would not be practical or cost effective.

3. Divide the cost in 2 over the number of years in 1 to reflect the annual cost.[479]

Specific to each school facility and grounds (or like facilities and grounds), the school district shall quantify annual operation direct costs by estimating the following costs:

1. The annual costs of salaries and benefits for all school district employee labor or contracted services required to operate, clean, and maintain the facilities or grounds, which may include janitorial services, set-up, and tear-down time, and security.

[477] Title 5, Cal.Admin. Code section 14038(a).
[478] Title 5, Cal.Admin. Code section 14038(b).
[479] Title 5, Cal.Admin. Code section 14039.

2. The annual costs of supplies required to operate and maintain the facilities or grounds, including all school district equipment used by applicants.

3. The annual cost of utilities required to operate the facility or grounds, including any school district or applicant provided equipment.

4. The prorated annual salaries and benefits paid to school district employees directly associated with the administration of direct cost user fee for time spent administering such fees.[480]

When electing to charge fees pursuant to the Civic Center Act, a school district governing board shall adopt a fee schedule that includes the hourly fee for each specific facility and grounds calculated as follows:

1. If charging for capital direct costs only, multiply the capital direct costs in Section 14039(c) by the proportionate share as determined in Section 14038(a)(3). Divide the product by the total number of hours of applicant use as set forth in Section 14038(a)(1) to arrive at the hourly rate.

2. If charging for operational costs only, add the operational costs identified in Sections 14040(a)-(c) and multiply the sum by the proportionate share as determined in Section 14038(a)(3). Divide the product by the total number of hours of applicant use as set forth in Section 14038(a)(1) to arrive at an hourly rate. Add to this amount the hourly rate to administer direct cost user fees calculated by dividing the cost identified in Section 14040(d) by the total number of hours of applicant use set forth in Section 14038(a)(1).

3. If charging for all direct costs, add the hourly rates calculated in subdivisions (a)(1) and (a)(2).[481]

A school district governing board may elect to discount direct cost fees charged pursuant to the Civic Center Act based on the type or category of applicant, including but not limited to, those with tax-exempt status. All such discounts shall be contained in the adopted fee schedule.[482]

Funds collected by a school district as capital direct costs shall be deposited into a special fund that shall only be used for capital maintenance, repair, restoration, and refurbishment.[483]

[480] Title 5, Cal. Code of Regs. section 14040.
[481] Title 5, Cal. Code of Regs. section 14041(a).
[482] Title 5, Cal. Code of Regs. section 14041(b).
[483] Title 5, Cal. Code of Regs. section 14042.

Any school district authorizing the use of school facilities or grounds shall be liable for any injuries resulting from the negligence of the district in the ownership and maintenance of those facilities or grounds. Any group using school facilities or grounds shall be liable for any injuries resulting from the negligence of that group during the use of those facilities or grounds. The district and the group shall each bear the cost of insuring against its respective risks and shall each bear the costs of defending itself against claims arising from those risks. Notwithstanding any other provision of law, this requirement cannot be waived and does not limit or affect the immunity or liability of a school district under Government Code sections 810 et seq. for injuries caused by a dangerous condition of public property.[484]

Any use, by any individual, society, group or organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States or of the state by force, violence or other unlawful means shall not be permitted or suffered. Any individual, society, group of organization which engages in such conduct is guilty of a misdemeanor.[485]

No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 38135.[486] For the purpose of determining whether or not any individual, society, group or organization applying for the use of the school property intends to violate Section 38135, the governing board shall require the making and delivering to the governing board by the applicant, a written statement of information in the following form:

STATEMENT OF INFORMATION

> The undersigned states, that to the best of his or her knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States by force, violence or other unlawful means;
>
> That _____, the organization on whose behalf he or she is making application for use of school property, does not, to the best of his or her knowledge, advocate the overthrow of the government of the United States or the State of California by force, violence, or other unlawful means, and that, to the best of his or her knowledge, it is not a Communist action organization or Communist front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.
>
> _____[487]
>
> (Signature)

[484] Education Code section 38134(i).
[485] Education Code section 38135.
[486] Education Code section 38136.
[487] Education Code section 38136.

The school board may require the furnishing of additional information as it deems necessary to make the determination that the use of school property for which the application is made is being used for a proper purpose. Any person applying for the use of school property on behalf of any society, group, or organization shall be a member of the applicant group and, unless he or she is an officer of the group, must present written authorization from the applicant group to make the application. The governing board of any school district may, in its discretion, consider any statement of information or written authorization made pursuant to the requirement of this section as being continuing in effect for the purposes of this section for the period of one year from the date of the statement of information or written authorization.[488]

Written statements of information need not be under oath, but shall contain a written declaration that they are made under penalty of perjury, and any person so signing the statements who willfully states material which he or she knows to be false, is subject to the penalties prescribed for perjury in the Penal Code.[489]

STATE MANDATED COSTS

A. Constitutional Provisions

Article XIII B, Section 6, of the California Constitution states that whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse local government agencies for the costs of such program or increased level of service.

Article XIII B, Section 6 (hereinafter Section 6) was adopted as part of an initiative measure approved by the voters on November 6, 1979. Section 6 imposes on the State an obligation to reimburse local agencies for the cost of most programs and services that are required to provide pursuant to State mandate if those local agencies were not under a preexisting duty to fund the activity.[490] The purpose of Article XIII B, Section 6, is to prevent the state from transferring the cost of governmental services from the state to local agencies, particularly since the passage of Proposition 13 puts limits on the property tax revenue local agencies depended upon.[491]

B. Statutory Provisions

In 1984, the Legislature enacted legislation, Government Code sections 17500, et seq., that established a comprehensive administrative procedure for resolving claims arising out of Section 6. This statutory scheme created the Commission on State Mandates to adjudicate disputes over the existence of a state mandated program and to adopt procedures for submission and adjudication of reimbursement claims.[492] The seven member commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and

[488] Education Code section 38136.
[489] Education Code section 38137.
[490] Kimlaw v. State of California, 54 Cal.3d 326, 328 (1991).
[491] Hayes v. Commission on State Mandates, 15 Cal.Rptr.2d 547, 11 Cal.App.4th 1564 (1992); County of San Diego v. State of California, 15 Cal.4th 68 (1997).
[492] Government Code section 17553.

Research, a public member experienced in public finance and two additional members appointed by the Governor.[493]

The legislation established a "test claim" procedure to resolve disputes affecting multiple agencies, established the method of paying claims and created a reporting procedures to enable the Legislature to budget adequate funds to meet the expense of state mandates.[494]

The term "costs mandated by the State" is defined in Government Code section 17514 as follows:

> "Costs mandated by the State means any increased cost which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of [Section 6]."

The state is required to reimburse a district for all costs mandated by the State as defined in Government Code section 17514. Government Code section 17556 sets forth exceptions to the Section 6 reimbursement requirements. These exceptions include a statute or executive order implemented pursuant to a federal law or regulation and the resulting costs are mandated by the federal government unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

The Courts have held that a reimbursable state mandate does not arise merely because a local entity finds itself bearing an additional cost imposed by state law.[495] The additional cost incurred by a local agency or district arising as an incidental impact of a law which applies generally to all entities is not the type of expense the voters had in mind when they adopted Article XIII B, section 6.[496]

C. Discretionary Programs

In Department of Finance v. Commission on State Mandates,[497] the California Supreme Court held that school districts were not entitled to reimbursement for state mandates for underlying programs which were not mandated by the state. The court held that the programs were discretionary and that the mandated requirements that attach to these programs, did not meet the definition of a mandated state cost.

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[493] Government Code section 17525. See, Grossmont Union High School District v. California Department of Education, 169 Cal.App.4th 869, 86 Cal.Rptr.3d 890, 240 Ed.Law Rep. 307 (2008) (district must exhaust administrative remedies before filing lawsuit in Superior Court).

[494] Government Code sections 17553, 17554, 17562, 17600, 17612(a).

[495] County of Los Angeles v. State of California, 43 Cal.3d 46, 55-57 (1987).

[496] Lucia Mar Unified School District v. Honig, 44 Cal.3d 830, 835 (1988); County of Fresno v. State of California, 53 Cal.3d 482, 487 (1991); City of Sacramento v. State of California, 50 Cal.3d 51, 70 (1990); Department of Finance v. Commission on State Mandates, 30 Cal.4th 727, 735 (2003).

[497] 30 Cal.4th 727 (2003); see also, San Diego Unified School District v. Commission on State Mandates, 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 190 Ed.Law Rep. 636 (2004).

The California Supreme Court held that statutory requirements to post notice of meetings and agendas for meetings of school councils and advisory committees were not mandated costs, even though they were required by statute for various programs. The court held that since the underlying programs were not mandatory, the costs associated with accepting the funds for these programs were not mandated state costs. The court rejected the arguments of the school districts that the conditions on the funding, which were mandatory, should be considered mandated state costs.[498] The court stated:

> "Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstance that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render a local entity's decision whether to continue its participation in the modified program any less voluntary . . . We reject the suggestion, implicit in claimant's argument, that the state cannot legally provide school districts with funds for voluntary programs, and then effectively reduce that funding grant by requiring school districts to incur expenses in order to meet conditions of program participation."[499]

In sum, the court held that if districts are not satisfied with the funding conditions for a program, districts may decline the funds, but they may not claim a state mandate. This decision limits somewhat the circumstances under which districts may file claims for state mandated costs. However, where the program is mandatory and the district may not decline to participate or carry out the mandate, the courts will generally find a state mandate and order the state to reimburse local agencies.[500]

Paradoxically, the California Supreme Court adopted a different standard with respect to federal mandates.[501] In City of Sacramento, the California Supreme Court noted that many federal programs are not legally compelled but are enacted under the Spending Clause of the U.S. Constitution under "cooperative federalism" schemes. The court noted the proliferation of these grant programs in recent years and observed that ". . . if Article XIIIB's reference to 'federal mandates' were limited to strict legal compulsion by the federal government, it would have been largely superfluous . . ." and the state would have been faced with the dilemma of deciding whether to apply for attractive federal grant money and having to fund any shortfalls in funding as a state mandated cost.[502]

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[498] Id. at 730-31.
[499] Id. at 753-54.
[500] Id. at 754.
[501] See, City of Sacramento v. State of California; 50 Cal.3d 51, 70-76, 266 Cal.Rptr. 139 (1990).
[502] Id. at 73.

D. Suspension of Mandate

Legislation passed by the Legislature and signed by the Governor in 2010 suspended the mandate for school districts to provide scoliosis screening for the fiscal years 2010-2011, 2011-2012, and 2012-2013.[503]

Pursuant to Government Code section 17581.5, a school district is not required to implement or give effect to statutes, or a portion of the statutes identified in subdivision (c), during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if any of the following apply:

1. The statute, or a portion of the statute, has been determined by the Legislature, the Commission on State Mandates, or any court to mandate a new program or higher level of service requiring reimbursement of school districts.

2. The statute, or a portion of the statute, or the test claim number utilized by the Commission on State Mandates, specifically has been identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year. A mandate shall be considered specifically to have been identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it specifically is identified in the language of a provision of the item providing the appropriation for mandate reimbursements.

Section 17581.5(b) states that within thirty days after enactment of the Budget Act the Department of Finance shall notify school districts of any statute or executive order for which reimbursement is not provided for the fiscal year.

Section 17581.5(d) states that the following mandates are suspended for the fiscal years 2010-11, 2011-12, and 2012-13:

1. Removal of Chemicals (Ch. 1107 of the Statutes of 1984 and CSM 4211 and 4298).

2. **Scoliosis Screening (Ch. 1347 of the Statutes of 1980 and CSM 4195).**[504]

3. Pupil Residency Verification and Appeals (Ch. 309 of the Statutes of 1995 and 96-384-01).

[503] Assembly Bill No. 1610, Stats. 2010, ch. 724.
[504] Education Code section 49452.5.

4. Integrated Waste Management (Ch. 1116 of the Statutes of 1992 and 00-TC-07).

5. Law Enforcement Jurisdiction Agreements (Ch. 284 of the Statutes of 1998 and 98-TC-20).

6. Physical Education Reports (Ch. 640 of the Statutes of 1997 and 98-TC-08).[505]

On December 1, 2010, the California Department of Education (CDE) notified school districts of the suspended mandates. On page 8 of the letter, CDE identifies the suspended mandates, including scoliosis screening. As a result, school districts may exercise their discretion as to whether to provide these services since these services are no longer mandated.

E. Improper Denial of Reimbursement

In Clovis Unified School District v. Chiang,[506] the Court of Appeal held that the state controller improperly refused to reimburse districts for mandated services provided by the school districts between 198 and 2003. The court held that the state use of "underground regulations" to deny claims relating to costs of operating for state-required programs in the areas of collective bargaining, earthquake procedures, school choice, and interdistrict transfers was void.

The case involved what the state called the "contemporaneous source document rule" which the state imposed in 2003 to determine the validity of claims for work done between 1998 and 2003. Previous audits had allowed employees to tally time spent at all meetings related to the mandated program at the end of the school year, rather than documenting each meeting separately at the moment it happened. The 2003 audit rule required workers to document their work with signed declarations at the moment they performed it.[507]

The Court of Appeal agreed with plaintiffs that the contemporaneous source rule was an "underground regulation" imposed on districts by the state without the required public notice and hearings and without review by the state's Office of Administrative Law.[508]

F. Deferral of Payment

In California School Boards Association v. State of California,[509] the Court of Appeal held that the state's payment of a nominal amount for a state mandate imposed on a local school district, with an intent to defer payment of the remaining costs to an unspecified time did not comply with the California Constitution, Article XIIIB, Section 6, and implementing statutes. The Court of Appeal affirmed the trial court's grant of declaratory relief declaring the state's practice unconstitutional. However, the Court of Appeal held that injunctive relief ordering the Legislature to appropriate the funds involved was not appropriate.

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[505] Assembly Bill No. 1610, Stats. 2010, ch. 724.
[506] 188 Cal.App.4th 794, 116 Cal.Rptr.3d 33, 260 Ed.Law Rep. 877 (2010).
[507] Id. at 798-800.
[508] Id. at 809.
[509] 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696 (2011).

The Court of Appeal decision represents a partial victory for school districts. The granting of declaratory relief establishes a long-term victory for school districts by declaring that the deferral of payments for mandated costs violates the California Constitution. The Court of Appeal articulated the appropriate procedure and remedy for addressing deferrals which will assist districts in future cases.

In November 2007, the CSBA Legal Alliance and a number of school districts filed a lawsuit in the San Diego Superior Court alleging that the state refused to comply with its obligations to provide reimbursement for costs mandated by the state under the California Constitution after the Commission had determined the existence and costs of the mandates. The state filed an answer denying these claims.[510]

The school districts presented evidence showing that since 2002, the Legislature had engaged in a routine practice of appropriating $1,000 for each mandate imposed on school districts, rather than appropriating the full amount of the program costs. Specifically, for the 2007-2008 fiscal year, the Commission found 38 separate programs or services required reimbursement as unfunded mandates. In each case, the state did not appeal or the appeal was decided adversely to the state. The state then appropriated $1,000 for each of the 38 programs. These mandates included items such as annual parent notification, pupil health screening, criminal background checks, AIDS prevention instruction, immunization records, teacher incentive programs, and pupil promotion and retention. The school districts presented evidence that as compared with the $38,000 that was appropriated, the total statewide cost estimates for the programs in the 2007-2008 fiscal year exceeded $160 million. In addition, the $1,000 appropriation per program equals about $1 for each California school district for the entire school year.[511]

The Court of Appeal noted that Government Code section 17561(a) states that the state shall reimburse each local agency and school district for all costs mandated by the state. The Court of Appeal found that the state's practice of appropriating $1,000 violated the language and intent of the constitutional and statutory provisions relating to mandated costs. The Court of Appeal stated, "By attempting to pay for the new programs with a 'credit card' with no fixed date for full payment, the state is shifting the actual costs of these mandates to the local school districts."[512]

The Court of Appeal concluded:

> "We thus conclude the Legislature's practice of nominal funding of state mandates with the intention to pay the mandate in full with interest at an unspecified time does not constitute a funded mandate under the applicable constitutional and statutory provisions."[513]

[510] Id. at 779.
[511] Id. at 781-85.
[512] Id. at 789.
[513] Id. at 790.

The Court of Appeal noted that declaratory relief is an equitable remedy which is available to an interested party in a case of actual controversy relating to the legal rights and duties of the respective parties. The proper interpretation of a statute is a particularly appropriate subject for judicial resolution. Additionally, judicial economy strongly supports the use of declaratory relief to avoid duplicative actions to challenge an agency's statutory interpretation or alleged policies.[514]

The Court of Appeal noted that in this case, the remedy of declaratory relief would prevent further issues arising from the conflicting interpretations of the constitutional and statutory provisions and was an effective remedy to settle the parties' rights in the future regarding the meaning of these provisions. The Court of Appeal thus affirmed the trial court's judgment providing for declaratory relief.[515]

However, the Court of Appeal did not uphold the trial court's granting of injunctive relief. The trial court ordered the state to ensure that the costs of each mandate determined to be reimbursable by the Commission shall be included in the Governor's proposed budget unless specifically identified and suspended pursuant to Government Code section 17581.5. The state contended that the trial court had no authority to order these forms of mandamus relief because the school districts had an adequate remedy at law, the court's order concerned discretionary, rather than ministerial duties, and the court's action violated separation of powers principles. The Court of Appeal agreed with each of these arguments and reversed the trial court's granting of injunctive relief.[516]

The Court of Appeal concluded that the procedure under Section 17612(c) applies to situations in which the Legislature provides no funding, but when the Legislature provides only nominal funding for a reimbursable mandate. The Court of Appeal concluded:

> "We thus affirm our conclusion in County of San Diego, that where an appropriation is the functional equivalent of deleting funding, a local entity (including a school district) has a right to seek a declaration of the fact that under Section 17612, subdivision (c), and receive a judicial declaration that it need not comply with the mandate for one year. Because the school districts have this legal remedy, it was improper for the court to issue an injunction controlling the state's future actions in these matters."[517]

In summary, the Court of Appeal upheld declaratory relief declaring that the state's practice of deferring payments on unfunded state mandates was unconstitutional. The Court of Appeal held that the legal process taken by the school districts in this case was inappropriate, but indicated that in the future, school districts may remedy the problem of deferred payments for mandated costs by filing a legal action under Government Code section 17612(c) in Sacramento County Superior Court.

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[514] Id. at 790. See, also, Filarsky v. Superior Court, 28 Cal.4th 419, 433 (2002).
[515] Id. at 791.
[516] Id. at 791-92.
[517] Id. at 796.

Therefore, while the school districts were only partially successful in the present case, the Court of Appeal decision should be beneficial to school districts in future cases.

DEVELOPER FEES

As discussed below, the courts have upheld the imposition of developer fees.[518] The courts have held that there must be a rational connection between school facility fees or developer fees and the cost of providing service to students.[519]

Government Code section 66001 requires school districts to do all of the following to justify the imposition of a fee or increase in a fee:

1. Identify the purpose of the fee.

2. Identify the use to which the fee is to be put.

3. Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fees are imposed.

4. Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

In cases where the school district developed a reasonable school facilities needs analysis showing district growth, the courts have upheld the district's imposition of developer fees.[520] However, where the school district's analysis did not establish the relationship between the developer fees imposed and the estimated cost to provide services to students, the courts have voided the imposition of the fees.[521] In Warmington Old Town Associates, the Court of Appeal held that the school district, in its study, failed to consider the demolition of housing which might cause a decrease in enrollment.

In Cresta Bella, LP v. Poway Unified School District,[522] the Court of Appeal held that, pursuant to Education Code section 17620 et seq., school districts are authorized to charge developers a specified fee for construction within the school boundaries. However, school districts cannot charge developer fees for residential reconstruction unless districts can show the reconstruction will add to the student population.

The Court of Appeal held that since the purpose of developer fees is to address increased student populations, developers should not be charged fees unless it can be shown that the reconstruction of preexisting residential structures will increase the number of students within

[518] Garrick Development Company v. Hayward Unified School District, 4 Cal.Rptr.2d 897, 3 Cal.App.4th 320 (1992).
[519] Canyon North Company v. Conejo Valley Unified School District, 23 Cal.Rptr.2d 495, 19 Cal.App.4th 243 (1993).
[520] See, Canyon North Company v. Conejo Valley Unified School District, 19 Cal.App.4th 243, 23 Cal.Rptr.2d 495, (1993).
[521] See, Warmington Old Town Associates v. Tustin Unified School District, 101 Cal.App.4th 840, 124 Cal.Rptr.2d 744; 168 Ed.Law Rep. 875 (2002).
[522] 218 Cal.App.4th 438, 160 Cal.Rptr.3d 437, 295 Ed.Law Rep. 706 (2013).

the school district's boundaries.[523] The decision in Cresta Bella is consistent with previous case law.

A. Authority to Levy Fees

Education Code section 17620 authorizes the governing board of any school district to levy a fee against any construction within the boundaries of the district for the purpose of funding the construction or reconstruction of school facilities subject to the limitations set forth in Government Code section 65995 et seq.

Government Code section 65995 limits the amount of a fee that may be imposed under Education Code section 17620 to $2.63 per square foot of assessable space with respect to residential construction and $0.42 per square foot for commercial or industrial development.[524] Government Code section 65995(d) defines the term "construction" to mean new construction and reconstruction of existing buildings.

The fee may be applied to new commercial and industrial construction.[525] With respect to new commercial and industrial construction, the chargeable covered and enclosed space of commercial or industrial construction does not include the square footage of any structure existing on the site of that construction as of the date the first building permit is issued for any portion of that construction.

The fee may be applied to new residential construction. With respect to residential construction, the fee applies only if the resulting increase in assessable space exceeds 500 square feet. The calculation of the resulting increase in assessable space must reflect any decrease in assessable space in the same residential structure that also results from that construction. Where authorized, the fee is applicable to the total resulting increase in assessable space.[526] A district may not impose a fee against construction, regardless of the resulting increase in assessable space, if that construction qualifies for the exclusion set forth in Revenue and Taxation Code section 74.3(a) to make the dwelling more accessible to a severely and permanently disabled resident of the dwelling.

The appropriate city or county may be authorized by contract with the governing board to collect and otherwise administer any fee. In the event of any agreement authorizing a city or county to collect that fee, the certification requirement is deemed to be complied with as to any residential construction within that area upon receipt by that city or county of payment of the fee on that residential construction.[527]

Fees or other consideration collected may be expended by a district for the cost of performing any study or otherwise making the findings and determinations required under Government Code section 66001, or in preparing the school facilities needs analysis required

[523] See, Warmington Old Town Associates v. Tustin Unified School District, 101 Cal.App.4th 840 (2002).
[524] The State Allocation Board, at its January, 2006 meeting, increased the maximum level of fees pursuant to its authority under Government Code section 65995.
[525] Education Code section 17620(a)(1).
[526] Education Code section 17620(a)(1)(C).
[527] Education Code section 17620(a)(4).

under Government Code section 65995.6. An amount not to exceed, in any fiscal year, three percent of the fees collected in that fiscal year may be retained by the district for reimbursement of the administrative costs incurred in collecting the fees. When any city or county is entitled, under an agreement, to compensation in excess of the three percent fee, the payment of that excess compensation shall be made from other revenue sources available to the district.[528]

A city or county may not issue a building permit for any construction absent certification by the appropriate district that any fee, charge, dedication or requirement has been complied with or of the district's determination that the fee does not apply to that construction. The district must issue the certification immediately upon compliance with the fee.[529]

B. Adoption of a Fee

Any resolution adopting or increasing a fee for application to residential, commercial or industrial development must be enacted in accordance with Government Code section 66000 et seq.[530] The adoption, increase or imposition of any fee is not subject to the California Environmental Quality Act.[531] The adoption of or increase in the fee shall be effective no sooner than 60 days following the final action on that adoption or increase, unless adopted as an urgency measure.[532]

Without following the procedure otherwise required for adopting or increasing a fee, the governing board may adopt an urgency measure as an interim authorization for a fee or an increase in a fee, where necessary to respond to a current and immediate threat to the public health, welfare or safety. The interim authorization shall require a four-fifths vote of the governing board for adoption and shall contain findings describing the current threat to the public health, welfare or safety. The interim authorization shall have no force or effect on and after a date 30 days after its adoption. After notice and hearing, the governing board, upon a four-fifths vote of the board, may extend the interim authority for an additional 30 days. Not more than two extensions may be granted.[533]

Upon adopting or increasing a fee, the district shall transmit a copy of the resolution to each city and each county in which the district is situated, accompanied by all relevant supporting documentation and a map clearly indicating the boundaries of the area subject to the fee. The governing board shall specify in the notification whether or not the collection of the fee is subject to the restrictions set forth in Government Code section 66007(a).[534] Any party on whom a fee, charge, dedication or other requirement has been directly imposed may protest the establishment or imposition of that fee in accordance with Government Code sections 66020 and 66021.[535]

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[528] Education Code section 17620(a)(5).
[529] Education Code section 17620(b).
[530] Education Code section 17621(a).
[531] Public Resources Code section 21000 et seq.
[532] Education Code section 17621(a).
[533] Education Code section 17621(b).
[534] Education Code section 17621(c).
[535] Education Code section 17621(d).

In the case of any commercial or industrial development, the district governing board must do all of the following:

1. Make the findings on either an individual project basis or on the basis of categories of commercial or industrial development. Those categories may include, but are not limited to, the following uses: office, retail, transportation, communications and utilities, light industrial, heavy industrial, research and development, and warehouse.

2. Conduct a study to determine the impact of the increased number of employees anticipated to result from a commercial or industrial development upon the cost of providing school facilities within the district. For the purpose of making that determination, the study shall utilize employee generation estimates that are calculated on either an individual project or categorical basis. Those employee generation estimates shall be based upon commercial and industrial factors within the district, or upon, in whole or in part, the applicable employee generation estimates set forth in the January, 1990 edition of "San Diego Traffic Generators," a report of the San Diego Association of Governments.

3. The governing board shall take into account the results of that study in making the findings.[536]

In addition to any other requirements imposed by law, in the case of any development project against which a fee is to be imposed on the basis of a category of commercial or industrial development, the governing board shall provide a process that permits the party against whom the fee is to be imposed the opportunity for a hearing to appeal that imposition. The grounds for that appeal include, but are not limited to, the inaccuracy of including the project within the category pursuant to which the fee, charge, dedication or other requirement is to be imposed, or that the employee generation or pupil generation factors utilized under the applicable category are inaccurate as applied to the project. The party appealing the imposition of the fee shall bear the burden of establishing that the fee is improper.[537]

C. Levy of Fee on Greenhouses and Mobile Homes

No fee may be levied upon any greenhouse or other space that is covered or enclosed for agricultural purposes except under limited circumstances.[538] To levy a fee that the governing board must make a finding supported by substantial evidence of both of the following:

[536] Education Code section 17621(e).
[537] Education Code section 17621(e)(2).
[538] Education Code section 17622(a).

1. The amount of the proposed fees and the location of the land, if any, to be dedicated, bear a reasonable relationship and are limited to the needs of the community for elementary or high school facilities caused by the development.

2. The amount of the proposed fees does not exceed the estimated reasonable cost of providing for the construction or reconstruction of the school facilities necessitating by the development projects from which the fees or other court requirements are to be collected.[539]

In determining the amount of the fees, if any, to be levied on the development of any greenhouse or other space that is covered or enclosed for agricultural purposes, the district must consider the relationship between the proposed increase and the number of employees, if any, the size and specific use of the structure, and the cost of construction. No fee shall be applied to the development of any structure if the governing board finds either that the number of employees has not increased as a result of the development or that housing has been provided for those employees, by the employer against which a fee has been applied. In developing the finding, a governing board shall consult with the county agricultural commissioner or the county director of the cooperative extension service.[540]

If a fee is levied by two non-unified school districts having common territorial jurisdiction, in a total amount that exceeds the maximum fee under Government Code section 65995, the fee revenue for the area of common jurisdiction shall be distributed in the following manner:

1. The governing boards of the affected school districts shall enter into an agreement specifying the allocation of fee revenue and the duration of the agreement. A copy of that agreement shall be transmitted by each district and to the State Allocation Board.

2. In the event the affected school districts are unable to reach an agreement the districts shall jointly submit the dispute to a three member arbitration panel, composed of one representative chosen by each of the districts and one representative chosen jointly by both of the districts. The decision of the arbitration panel shall be final and binding upon both parties for a period of three years.[541]

Any district that has imposed a fee under Education Code section 17620 against any development project for which the building permit, including any extensions, expires on or after

[539] Education Code section 17622(b).
[540] Education Code section 17622(c).
[541] Education Code section 17623.

January 1, 1990, without the commencement of construction shall be entitled to a refund less the administrative cost incurred in collecting and repaying the fee.[542]

A district may levy a fee against any manufactured home or mobile home if all of the following conditions are met:

1. The fee is applied to the initial location, installation or occupancy of the manufactured home or mobile home within the district.

2. The manufactured home or mobile home is to be located, installed or occupied on a space or site on which no other manufactured home or mobile home was previously located, installed or occupied.

3. The manufactured home or mobile home is to be located, installed or occupied on a space, any mobile home park, or any site or any development outside of a mobile home park, on which the construction of the pad or foundation system commenced after September 1, 1986.[543]

Compliance on the part of any manufactured home or mobile home with any fee imposed by the district shall be required as a condition of the following:

1. The close of escrow, where the manufactured home or mobile home is to be located, installed or occupied on a mobile home park space, or any site or any development outside of the mobile home park.

2. The approval of the manufactured home or mobile home for occupancy in the event there is no escrow.[544]

No fee shall be applied to manufactured homes or mobile homes, installed or occupied on a space or a site on or before September 1, 1986.[545] No fee shall apply to the replacement of, or an addition to a manufactured home or mobile home on a space that was previously occupied by a manufactured home or mobile home that was destroyed or damaged by fire or any form of natural disaster or the conversion of a rental mobile home to a condominium for mobile homes.[546]

For any fee or other requirement as required as to any manufactured home or mobile home that is subsequently replaced by a permanent residential structure constructed on the same

[542] Education Code section 17624(b).
[543] Education Code section 17625(a).
[544] Education Code section 17625(b).
[545] Education Code section 17625(c).
[546] Education Code section 17625(c).

lot, the amount of that fee shall apply toward the payment of any fee applied to that permanent residential structure.[547]

A fee may not be applied to the reconstruction of any residential, commercial or industrial structure that is damaged or destroyed as a result of a disaster, except to the extent that the square footage of the reconstructed structure exceeds the square footage of the structure that was damaged or destroyed. That square footage comparison shall be made, in the case of a commercial or industrial structure, on the basis of chargeable covered and enclosed space, as defined in Government Code section 65995, or, in the case of a residential structure, on the basis of assessable space as defined in Government Code section 65955.[548]

D. Types of Facilities Subject to Fees

Construction is defined as new construction and reconstruction of existing buildings for residential, commercial or industrial purposes. Residential, commercial or industrial construction does not include any facility used exclusively for religious purposes that is thereby exempt from property taxation under the laws of the state of California, any facility used exclusively as a private full time day school or any facility that is owned and occupied by one or more agencies at the federal, state or local government. Commercial or industrial construction includes, but is not limited to, any hotel, inn, motel, tourist home or other lodging for which the maximum term for occupancy for guest does not exceed thirty days, but does not include any residential hotel.[549]

Nothing in Government Code section 65995 shall be interpreted to limit or prohibit the use of Government Code section 53311 et seq. to finance the construction or reconstruction of school facilities. However, the use of financing under Section 53311 may not be required as a condition of approval of any legislative or adjudicative act, or both, if the purpose of the community facility's district is to finance school facilities.[550]

The payment of a fee as specified in Education Code section 17620 and any amounts required under the Government Code[551] are deemed to be full and complete mitigation of the impacts of any legislative or adjudicative act on the provision of adequate school facilities.

E. Alternative Calculation of the Fees

The governing board of the school district may utilize an alternative calculation of the fee imposed on residential construction if it does all of the following:

1. Makes a timely application to the State Allocation Board for new construction funding for which it is eligible.

2. Conducts and adopts a school facilities needs analysis.

[547] Education Code section 17625(d).
[548] Education Code section 17626.
[549] Government Code section 65995(d).
[550] Government Code section 65995(f).
[551] Government Code sections 65995, 65995.5, 65995.7.

3. Satisfies various overcrowding requirements.[552]

F. School Facilities Needs Analysis

The governing board of the school district is required to draft a school facilities needs analysis to determine the need for new school facilities for unhoused pupils that are attributable to projected enrollment growth from the development of new residential units over the next five years. The school facilities needs analysis must project the number of unhoused pupils generated by new residential units, in each category of pupils enrolled in the district. The projection of unhoused pupils shall be based on the historical student generation rates of new residential units constructed during the previous five years that are of a similar type of unit to those anticipated to be constructed either in the school district or the city or county in which the school district is located and relevant planning agency information, such as multiphased development projects, that may modify the historical figures.[553]

When determining the funds necessary to meet its facility's needs, the governing board of the school district shall do each of the following:

1. Identify and consider any surplus property owned by the district that can be used as a school site or that is available for sale to finance school facilities.

2. Identify and consider the extent to which projected enrollment growth may be accommodated by excess capacity in existing facilities.

3. Identify and consider local sources other than fees imposed on residential construction available to finance the construction or reconstruction of school facilities needed to accommodate any growth and enrollment attributable to the construction of new residential units.[554]

The governing board shall adopt the school facilities needs analysis by resolution at a public hearing. The school facilities needs analysis may not be adopted until the school facilities needs analysis, in its final form, has been made available to the public for a period of not less than thirty days during which time the school facilities needs analysis shall be provided to the local agency responsible for land use planning for its review and comment. Prior to the adoption of the school facilities needs analysis, the public shall have the opportunity to review and comment on the school facilities needs analysis and the governing board shall respond to written comments it receives regarding the school facilities needs analysis.[555]

Notice of the time and place of the hearing, including the location and procedure for viewing or requesting a copy of the proposed school facilities needs analysis and any proposed

[552] Government Code section 65995.5(b).
[553] Government Code section 65995.6(a).
[554] Government Code section 65995.6(b).
[555] Government Code section 65995.6(c).

revision of the school facilities needs analysis, shall be published in at least one newspaper of general circulation within the school district no less than thirty days prior to the hearing. In addition, the governing board shall mail a copy of the school facilities needs analysis and any proposed revision to the school facilities needs analysis not less than thirty days prior to the hearing to any person who has made a written request, if the written request was made forty-five days prior to the hearing. The governing board may charge a fee reasonably related to the cost of providing these materials to those persons who request the school facilities needs analysis or revision.[556]

A fee shall be adopted by the resolution of the governing board as part of the adoption or revision of the school facilities needs analysis. It may not be effective for more than one year. The fee authorized by the resolution shall take effect immediately after the adoption of the resolution.[557]

The California Environmental Quality Act (CEQA) does not apply to the preparation, adoption or update of the school facilities needs analysis or adoption of the resolution.[558]

If state funds for new school facility construction are not available the governing board of the school district may increase the alternative fee.[559]

G. Payment of Developer Fees

The payment of developer fees under the provision of the Education Code and Government Code shall be the exclusive methods of considering and mitigating the impacts on school facilities that occur or might occur as a result of the approval by a state or local agency of the development of real property.[560] A public agency may not deny approval of a project on the basis of the adequacy of school facilities.[561] Nothing in Education Code section 17620 or the Government Code shall be interpreted to limit or prohibit the authority of a local agency to reserve or designate real property for a school site or to prohibit the ability of a local agency to mitigate the impacts of a land use approval involving, but not limited to the planning, use or development of real property other than on the need for school facilities.[562]

H. Court Decisions Involving Developer Fees

The courts have upheld the imposition of developer fees.[563] The courts have held that there must be a rational connection between school facility fees or developer fees and the cost of providing the service.[564] The fact that district enrollment had not increased as predicted, did not undermine the district's ability to charge fees based on the school district's growth plan and

[556] Government Code section 65995.6(d).
[557] Government Code section 65995.6(f).
[558] Public Resources Code section 21000 et seq.; Government Code section 65995.6(g).
[559] Government Code section 65995.7(a).
[560] Government Code section 65996(a).
[561] Government Code section 65997(b).
[562] Government Code section 65998.
[563] Garrick Development Company v. Hayward Unified School District, 4 Cal.Rptr.2d 897, 3 Cal.App.4th 320 (1992).
[564] Canyon North Company v. Conejo Valley Unified School District, 23 Cal.Rptr.2d 495, 19 Cal.App.4th 243 (1993).

enrollment forecast.[565] Justification for developer fees depends upon information available at the time the fee was imposed.[566]

In Garrick Development Company v. Hayward Unified School District,[567] the Court of Appeal reviewed the history of the legislation authorizing developer fees which took effect on January 1, 1987. The Court of Appeal noted that the Hayward Unified School District had a history of declining enrollment in prior decades but since 1984 that trend had reversed, particularly in the elementary grades. In response to increased enrollment and schools at capacity, the district was projecting still greater enrollment and the district was required to purchase or lease portable classrooms. Increased enrollment in the higher grades was expected as well.

The court in Garrick noted that in preparation for the fees resolution, the governing board of the school district in early 1987 commissioned a private consultant to do a study of projected new school needs for the school district based on the anticipated residential and commercial/industrial development expected in the school district. Public hearings were held on the report that was prepared and the developers paid the fees at issue under protest. The court reviewed the decision of the governing board of the school district to impose school facilities or developer fees to determine whether it was arbitrary, capricious or lacking in evidentiary support or whether it failed to conform to the procedures required by law. The Court of Appeal determined that the developer fee resolution, ". . . had to rest on some determination that the fees to be imposed would not exceed the reasonable (or estimated) cost of the service to be provided, and a burden was expressly cast on the district to produce evidence on point if the fee were challenged."[568] The court reasoned that if the school district could not show that the fee imposed was reasonably related to the cost of the service to be provided, it would be a "special tax" rather than a fee that must be approved by two-thirds of the voters under Proposition 13.[569]

The court held that a developer fee, ". . . is a general one applied to all new residential development and valid if supported by a reasonable relationship between the amount of the fee and estimated cost of services."[570] Under Government Code section 66001, the school district must identify the purpose of the fee and the use to which it is to be put and how there is a reasonable relationship between the use of the fees and the type of development project on which it is imposed and between the need for the public facility and the type of development project on which it is imposed.[571] The relationship for both need and use should show that new residential development would generate numbers of new students who will attend the schools. The Court of Appeal relied on the language of Government Code section 66001 which requires that the school district do all of the following to justify the imposition of a fee or the increase in a fee:

1. Identify the purpose of the fee.

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[565] Canyon North Company v. Conejo Valley Unified School District, 23 Cal.Rptr.2d 495, 19 Cal.App.4th 243 (1993).
[566] Ibid.; See, also, Warmington v. Tustin Unified School District, 101 Cal.App.4th 840, 124 Cal.Rptr.2d 744 (2002).
[567] 3 Cal.App. 4th 320, 4 Cal.Rptr.2d 897 (1992).
[568] Id. at 329.
[569] See, California Constitution, Article 13a, Section 4; Id. at 328-329.
[570] Id. at 334.
[571] Id. at 334.

2. Identify the use to which the fee is to put.

3. Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fees are imposed.

4. Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

The school district must determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.[572] The Court of Appeal stated:

> "The Legislature was apparently satisfied that a need for new school facilities based generally on projected new residential development was nexus enough as a matter of law, without need for a case-by-case adjudication, so long as fees did not exceed the prescribed maximum rate. It deemed the yearly accounting and refund mechanisms of Section 66001 . . . adequate protection against abuse, mismanagement and changed needs. … "[573]

In Canyon North Company v. Conejo Valley Unified School District,[574] the Court of Appeal affirmed the lower court's decision upholding the imposition of school facilities fees or developer fees. The Court of Appeal's decision was based on the district's growth plan which contained information necessary to impose the fee.[575] The growth plan included:

1. A housing forecast showing the number of new housing units expected to be constructed within the district.

2. An enrollment forecast showing the number of new students expected to be added due to the new housing.

3. A facilities analysis showing the nature and cost of the new facilities required to educate the new students from the new housing.[576]

The Court of Appeal stated:

> "Recent case law makes it clear that a district-wide fee is proper. . . . The fee at issue here is a general one applied to all new residential development and valid if supported by a reasonable relationship between the amount of the fee and the estimated cost

[572] Government Code section 66001(b).
[573] Id. at 336-337.
[574] 19 Cal.App.4th 243, 23 Cal.Rptr.2d 495 (1993).
[575] Id. at 251.
[576] Id. at 251.

> of services. Site specific review is neither available nor needed."[577]

In Warmington Old Town Associates v. Tustin Unified School District,[578] the Court of Appeal held that the district's fee study did not establish the relationship between the developer fees imposed and the estimated cost to provide services to students. The Court of Appeal reviewed the school district's fee study, including its analysis of historical and current enrollment and the enrollment capacity of the school district as well as a projection of the total amount of new housing expected to be built within the school district. The fee study also included a determination of how many students would be generated by the new housing and estimates of what it would cost to provide the necessary school facilities for these students.

The Court of Appeal found that the fee study failed to address the issue of redevelopment and that while the fee study evaluated the impact of a new home and the housing of a new student within the school district, the Court of Appeal concluded that, ". . . the fee study gives no thought to the extent of the impact of a tract of homes that are newly constructed in the place of older residential housing previously existing on the same site."[579] The Court of Appeal faulted the fee study for not considering whether the newly constructed replacement homes generated an additional number of students over and above those who occupied the previous homes at the site, nor did it give consideration to the fact that 56 residential units were demolished and replaced by 38.

The Court of Appeal concluded that the school district had violated the Government Code section 66001(a)(3) and (4) by failing to determine how there is a reasonable relationship between the fee's use and type of development project on which the fee is imposed and between the need for the public facility and the type of the development project on which the fee is imposed. The Court of Appeal held that the school district failed to make a determination with respect to replacement housing and its impact on the school district. The Court of Appeal held that the imposition of fees involves three elements:

1. There must be a projection of the total amount of new housing expected to be built within the district.

2. The district must determine approximately how many students will be generated by the new housing.

3. The district must estimate what it will cost to provide the necessary school facilities for that approximate number of students.[580]

The Court of Appeal held that the school district failed to meet the first prong of the test by failing to take into consideration the demolition of housing units for redevelopment and how that would affect the total amount of new housing and the school district failed to meet the

[577] Id. at 251.
[578] 101 Cal.App.4th 840, 124 Cal.Rptr.2d 744, 168 Ed.Law Rep. 875 (2002).
[579] Id. at 758.
[580] Id. at 759; See, also, Shappell Industries, Inc. v. Governing Board, 1 Cal.App.4th 218, 235 1 Cal Rptr. 818 (1991).

second prong because the fees study did not approximate the number of students to be generated by redevelopment by calculating the difference between the number of students that previously inhabited redevelopment sites and the number of students projected to subsequently inhabit those sites. The Court of Appeals stated:

> "The fee study did not address the burden created by redevelopment construction, as opposed to new residential construction that did not displace existing housing, and thus did not show the requisite connection, or 'nexus' between the amount of the fee imposed and the burden created."[581]

I. Model Developer Fee Resolution

RESOLUTION NO. _____ (_____, 20___, Regular Meeting)
A RESOLUTION OF THE GOVERNING BOARD OF THE
_____ SCHOOL DISTRICT
INCREASING SCHOOL FACILITIES FEES AS AUTHORIZED BY
GOVERNMENT CODE SECTION 65995 (b) 3

WHEREAS, Statute AB 2926 (Chapter 887/Statutes of 1986) authorizes the governing board of any school district to levy a fee, charge, dedication or other form of requirement against any development project for the reconstruction of school facilities; and,

WHEREAS, Government Code Section 65995 establishes a maximum amount of fee that may be charged against such development projects and authorizes the maximum amount set forth in said section to be adjusted for inflation every two years as set forth in the state-wide cost index for Class B construction as determined by the State Allocation Board at its January meeting; and,

WHEREAS, at its January 25, 2012, meeting, the State Allocation Board maintained the maximum fee authorized by Education Code Section 17620 to $3.20 per square foot of residential construction described in Government Code Section 65995(b)(1) and $0.51 per square foot against commercial and industrial construction described in Government Code Section 65995(b)(2); and,

WHEREAS, the purpose of this Resolution is to approve and adopt fees on residential projects in the amount of $3.20 per square foot as authorized by Education Code Section 17620; and,

WHEREAS, the purpose of this Resolution is to approve and adopt fees on commercial and industrial development projects in the amount of $0.51 per square foot as described in Government Code Section 65995(b)(2). The mini-storage category of commercial/industrial justification has less impact than the statutory $0.51 per square foot commercial/industrial justification and should be collected at the justified rate of _____ per square foot; and

[581] Id. at 759.

WHEREAS, the annual developer fee report was prepared in accordance with Government Code section 66006(b)(1); and

WHEREAS, the five-year developer fee report was prepared in accordance with Government Code section 66001(d); and

WHEREAS, the District has mailed notice at least fifteen days prior to this meeting to all interested parties who have requested notice of any meeting relative to the District's imposition of developer fees; and

WHEREAS, the Board of Education has reviewed and considered the annual and five-year developer fee reports at a duly noticed, regularly scheduled public meeting at least fifteen days after the District made this information publicly available, pursuant to Government Code section 66006(b)(2); and

NOW, THEREFORE, BE IT HEREBY RESOLVED by the Governing Board of the _____ School District as follows:

1. Procedure. This Board hereby finds that prior to the adoption of this Resolution, the Board conducted a public hearing at which oral and written presentations were made, as part of the Board's regularly scheduled _____, 2012, meeting. Notice of the time and place of the meeting, including a general explanation of the matter to be considered, has been published twice in a newspaper in accordance with Government Code Section 66016, and a notice, including a statement that the data required by Government Code Section 66016 was available, was mailed at least 14 days prior to the meeting to any interested party who had filed a written request with the District for mailed notice of the meeting on new fees or service charges within the period specified by law. Additionally, at least 10 days prior to the meeting, the District made available to the public, data indicating the amount of the cost, or estimated cost, required to provide the service for which the fee or service charge is to be adjusted pursuant to this Resolution, and the revenue sources anticipated to provide this service. By way of such public meeting, the Board received oral and written presentations by District staff which are summarized and contained in the District's Developer Fee Implementation Study dated_____, (hereinafter referred to as the "Plan") and which formed the basis for the action taken pursuant to this Resolution.

2. Findings. The Board has reviewed the Plan as it relates to proposed and potential development, the resulting school facilities needs, the cost thereof, and the available sources of revenue including the fees provided by this Resolution, and based thereon and upon all other written and oral presentations to the Board, hereby makes the following findings:

   A. Additional development projects within the District, whether new residential construction or residential reconstruction involving increases in assessable area greater than 500 square feet, or new commercial or industrial construction will increase the need for reconstruction of school facilities.

B. Without reconstruction of present school facilities, any further residential development projects or commercial or industrial development projects within the District will result in a significant decrease in the quality of education presently offered by the District;

C. The fees proposed in the Plan and the fees implemented pursuant to this Resolution are for the purposes of providing adequate school facilities to maintain the quality of education offered by the District;

D. The fees proposed in the Plan and implemented pursuant to this Resolution will be used for the reconstruction of school facilities as identified in the Plan;

E. The uses of the fees proposed in the Plan and implemented pursuant to this Resolution are reasonably related to the types of development projects on which the fees are imposed;

F. The fees proposed in the Plan and implemented pursuant to this Resolution bear a reasonable relationship to the need for reconstructed school facilities created by the types of development projects on which the fees are imposed;

G. The fees proposed in the Plan and implemented pursuant to this Resolution do not exceed the estimated amount required to provide funding for the reconstruction of school facilities for which the fees are levied; and in making this finding, the Board declares that it has considered the availability of revenue sources anticipated to provide such facilities, including general fund revenues;

H. The fees imposed on commercial or industrial development bear a reasonable relationship and are limited to the needs of the community for schools and are reasonably related and limited to the need for reconstructed school facilities caused by the development;

I. The fees will be collected for school facilities for which an account has been established and funds appropriated and for which the district has adopted a reconstruction schedule and/or to reimburse the District for expenditures previously made.

3. Fee. Based upon the foregoing findings, the Board hereby increases the previously levied fee to the amount of $3.20 per square foot for assessable space for new residential construction and for residential reconstruction to the extent of the resulting increase in assessable areas; and to the amount of $0.51 per square foot for new commercial or industrial construction. The mini-storage category of commercial/industrial justification has less impact than the statutory $0.51 per square foot commercial/industrial justification and should be collected at the justified rate of _____ per square foot.

4. Fee Adjustments and Limitation. The fees adjusted herewith shall be subject to the following:

A. The amount of the District's fees as authorized by Education Code Section 17620 shall be reviewed every two years to determine if a fee increase according to the adjustment for inflation set forth in the statewide cost index for Class B construction as determined by the State Allocation Board is justified.

B. Any development project for which a final map was approved and construction had commenced on or before September 1, 1986, is subject only to the fee, charge, dedication or other form of requirement in existence on that date and applicable to the project.

C. The term "development project" as used herein is as defined by Section 65928 of the Government Code.

5. Additional Mitigation Methods. The policies set forth in this Resolution are not exclusive and the Board reserves the authority to undertake other or additional methods to finance school facilities including but not limited to the Mello-Roos Community Facilities Act of 1982 (Government Code Section 53311, et seq.) and such other funding mechanisms. This Board reserves the authority to substitute the dedication of land or other property or other form of requirement in lieu of the fees levied by way of this Resolution at its discretion, so long as the reasonable value of land to be dedicated does not exceed the maximum fee amounts contained herein or modified pursuant hereto.

6. Implementation. The annual and five-year developer fee reports have been made available to the public within 180 days after the last day of the fiscal year pursuant to Government Code sections 66001(d) and 66006(b). The District made the annual and five-year developer fee reports available for public review at least fifteen days prior to the Board's consideration of these reports. The District mailed notice of the time and place of the Board meeting in which the annual and five-year developer fee reports would be considered, as well as the location where the reports could be reviewed, at least fifteen days before the meeting, to each individual who had filed a written request for such notice. For residential, commercial or industrial projects within the District, the Superintendent, or the Superintendent's designee, is authorized to issue Certificates of Compliance upon the payment of any fee levied under the authority of this Resolution.

7. California Environmental Quality Act. The Board hereby finds that the implementation of Developer Fees is exempt from the California Environmental Quality Act (CEQA).

8. Commencement Date. The effective date of this Resolution shall be _____ which is 60 days following its adoption by the Board.

9. Notification of Local Agencies. The Secretary of the Board is hereby directed to forward copies of this Resolution and a Map of the District to the Planning Commission and Board of Supervisors of _____ County and to the Planning Commission and City Council of the City of _____.

10. Severability. If any portion of this Resolution is found by a Court of competent jurisdiction to be invalid, such finding shall not affect the validity of the remaining portions of this Resolution. The Board hereby declares its intent to adopt this Resolution irrespective of the fact that one or more of its provisions may be declared invalid subsequent hereto.

APPROVED, PASSED and ADOPTED by the Governing Board of the _____ School District this _____ day of _____, 20___, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

_____
President, Governing Board
_____ School District

ATTEST:

_____
Secretary, Governing Board
_____ School District

SALE OF REAL PROPERTY

A. Advisory Committee

Under Education Code sections 17387, 17388, 17389, and 17390, once a school district is considering which school to close, then an advisory or "7/11" Committee, pursuant to Section 17389, should be formed. The purpose of the advisory committee is to provide for community input before decisions are made about school closure or the use of surplus space.[582] A school district advisory committee must consist of not less than seven and no more than eleven members and shall be representative of each of the following:

1. The ethnic, age group, and socioeconomic composition of the district.

2. The business community, such as store owners, managers, or supervisors.

3. Landowners or renters, with preference to be given to representatives of neighborhood associations.

4. Teachers.

5. Administrators.

6. Parents of students.

7. Persons with expertise in environmental impact, legal contracts, building codes, and land use planning, including but not limited to, knowledge of the zoning and other land use restrictions of the cities and counties in which surplus space and real property is located.[583]

The school district advisory committee shall do all of the following:

1. Review the projected school enrollment and other data as provided by the district to determine the amount of surplus space in real property.

2. Establish a priority list of use of surplus space and real property which will be acceptable to the community.

3. Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the committee on

[582] Education Code section 17387.
[583] Education Code section 17389.

acceptable uses of space and real property, including the sale or lease of surplus real property for child care development.

4. Make a final determination of limits of tolerance of use of space and real property.

5. Forward to the district governing board a report recommending uses of surplus space and real property.[584]

B. Offer to Sell Surplus Property to Specified Agencies

Education Code section 17455 authorizes the governing board of any school district to sell real property belonging to the school district which will not be needed by the district for school classroom buildings without first taking a vote of the electors of the district. Education Code section 17456 states that the sale of real property by the governing board of the school district, shall not be subject to the provisions of Education Code section 17485 et seq. and Government Code section 54220 et seq. if all of the following conditions are met:

1. The property is sold or leased to another governmental agency, or to a non-profit corporation that is organized for the purpose of assisting one or more local governmental agencies in obtaining financing.

2. In the case of the sale of school district property pursuant to this section, the school district, as part of that same sales transaction, simultaneously repurchases the same property that is a subject of the transaction, or in the case of the lease of school district property, simultaneously leases back the same property that is the subject of the transaction.

3. The financing proceeds obtained by the school district pursuant to the transaction, are expended solely for capital outlay purposes, including the acquisition of real property for intended use as a school site, and the construction, reconstruction and renovation of school facilities.

Education Code section 17458 states that the governing board of any school district seeking to sell or lease any real property it deems to be surplus property may first offer that property for sale or lease to any contracting agency, as defined in Section 8208 of the Education Code for child care purposes. In addition, pursuant to Section 17459, the sale of real property is subject to the provisions of Government Code section 54220. Government Code sections 54220 and 54222 require a school district, prior to disposing of surplus real property, to send a written offer to sell or lease the property as follows:

[584] Education Code section 17390.

1. A written offer to sell or lease for the purpose of developing low and moderate income housing shall be sent to any local public entity within whose jurisdiction the surplus land is located.

2. A written offer to sell or lease for park and recreational purposes or open space purposes shall be sent to any park or recreation department of any city, county, regional park authority or state resources agency within which the land is situated.

3. A written offer to sell or lease land suitable for school facilities construction or use by a school district for open space purposes, shall be sent to any school district in whose jurisdiction the land is located.

4. A written offer to sell or lease for enterprise zone purposes, any surplus property in an area designated as an enterprise zone to the non-profit neighborhood enterprise association corporation in that zone.

5. A written offer to sell or lease for the purpose of developing property located within an infill opportunity zone, or within an area covered by a transit village plan shall be sent to any county, city, community redevelopment agency, public transportation agency or housing in authority within whose jurisdiction the surplus land is located.

The entity or association desiring to purchase or lease the surplus land for any of the purposes authorized must notify the school district in writing of its intent to purchase or lease the land within 60 days after receipt of the agency's notification of intent to sell the land.

In addition, Education Code section 17464 states that after first offering the property to other agencies pursuant to Government Code section 54220 et seq., the school district must offer the property for sale or lease at fair market value to the Director of General Services, the Regents of the University of California, the Trustees of the California State University, the county and city in which the property is situated and to any public housing authority in the county in which the property is situated. Also, by public notice, the property must be offered to any public district, public authority, public agency, political subdivision of the state, and to the federal government and non-profit charitable corporations.

Under Section 17465, if the governing board of the school district adopts a resolution of intent to lease vacant classrooms, the governing board must first offer to lease the classrooms for special education programs that have provided by either other districts in the SELPA or to the county office of education.

C. Adoption of Resolution and Receipt of Proposals

Education Code section 17466 states that before ordering the sale or lease of any property the governing board, in a regular open meeting, by a 2/3 vote of all of its members shall adopt a resolution, declaring its intention to sell or lease the property. The resolution must describe the property proposed to be sold or leased and shall specify the minimum price or rental and the terms upon which it will be sold or leased and the commission, if any, which the board will pay to a licensed real estate broker out of the minimum price or rental. The resolution shall fix a time not less than three weeks thereafter for a public meeting of the governing board to be held at its regular place of meeting, at which sealed proposals to purchase or lease would be received and considered.

Education Code section 17472 states that the time and place fixed in the resolution for the meeting for the governing board, all sealed proposals which have been received shall, in public session, be opened, examined and declared by the board. Of the proposals submitted which conform to all terms and conditions specified in the resolution of intention to sell or lease and which are made by responsible bidders, the proposal which is the highest, after deducting the commission, if any, to be paid to a licensed real estate broker, shall be finally accepted, unless a higher oral bid is accepted or the board rejects all bids.

Education Code section 17473 states that before accepting any written proposal, the board shall call for oral bids. If upon the call for oral bidding, any responsible person offers to purchase the property or lease the property, as the case may be, upon the terms and conditions specified in the resolution, for a price or rental exceeding by at least 5 percent, the highest written proposal, after deducting the commission, if any, then the oral bid which is the highest after deducting any commission shall be finally accepted. Final acceptance shall not be made, however, until the oral bid is reduced to writing and signed by the offeror. Section 17475 states that the final acceptance by the governing board may be made either at the same session or at any adjourned session of the same meeting held within 10 days. Section 17476 states that the governing board may reject all bids, either written or oral, and withdraw the property from the sale or lease.

D. School Playgrounds

If the surplus property consists of land used for school playground or other outdoor recreational purposes, Education Code section 17489 requires the governing board of the school district to first offer to sell or lease that portion of the school site used for recreational purposes to a city in which the land is situated, to any park or recreation district within which the land may be situated, to any regional park authority or to the county. Section 17490 allows the governing board to retain any part of the school site containing structures or buildings, together with such land adjacent to the buildings to avoid reducing the value of that part of the school site containing such structures or buildings to less than 50 percent of market value.

E. Charter Schools

With respect to charter schools, Education Code section 47614 requires that each school district make available to each charter school operating in the school district, facilities sufficient

for the charter school to accommodate all of the charter schools in district students, in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district. Facilities provided shall be contiguous, furnished, and equipped, and shall remain the property of the school district. The school district shall make reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate, and shall not move the charter school unnecessarily. The school district may charge the charter school a pro rata share of those school district facilities costs which the school district pays for with unrestricted general fund revenues to rent, buy, or lease facilities for charter school students.

F. Use of Funds from the Sale of Real Property

Under Education Code section 17462, the funds derived from the sale of surplus property must be used for capital outlay or for costs of maintenance of school district property, that the governing board determines will not recur within a five year period. Proceeds from the sale of surplus property may be deposited into the District's general fund for any general fund purpose if the District and the State Allocation Board have determined that the District has no anticipated need for additional sites or building construction for the ten year period following the sale of the property and that the district has no major deferred maintenance requirements. However, the proceeds from the sale may not be used for ongoing expenditures such as salaries or other general operating expenses. These restrictions have been in place since at least 1996.

The proceeds may also be deposited into a special reserve fund for capital outlay, for costs of maintenance of school district property, that the governing board determines will not recur within a five year period or for the future maintenance and renovation of schoolsites if the governing board and the State Allocation Board have determined that the district has no anticipated need for schoolsites or building construction or major deferred maintenance projects for a ten year period following the sale of the property. Proceeds deposited in the special reserve fund are not available for general operating expenses.

Education Code section 17462 does not address the issue in terms of depositing funds in the general fund for a five year period but rather requires State Allocation Board approval to place the proceeds in the general fund only if the State Allocation Board determines that the district has no anticipated need for additional sites or building construction for the next ten years. In addition, if the funds are deposited into the general fund with State Allocation Board approval, the proceeds from the sale may not be used for ongoing expenditures such as salaries or other general operating expenses.

Under Education Code section 33050(a)(7)(C), the provisions of section 17462 cannot be waived by the State Board of Education. Therefore, the deposit of the proceeds from the sale of surplus real property would need the approval of the State Allocation Board and the governing board. Approval would only be given by the State Allocation Board if the district has no anticipated need for additional sites or building construction for a ten year period from the sale of the property.

G. Restrictions on Sale of Surplus Property

Assembly Bill 308[585] adds Education Code section 17462.3, relating to the sale of surplus property, effective January 1, 2014.

Education Code section 17462.3 states that the State Allocation Board may establish a program that requires a school district, county office of education, or charter school that sells real property that was purchased with, or modernized with, or on which improvements were constructed that were funded with, any funds from a state school facilities funding program, to return to the State Allocation Board the funds the school district, county office of education, or charter school received from the state school facilities funding program for the purchase, modernization, or construction, if all of the following conditions are met:

1. The real property is not sold to a charter school, a school district, or a county office of education, or an agency that would use the property exclusively for the delivery of child care and developmental services, pursuant to Education Code section 17457.5.

2. The proceeds from the sale of real property are not used for capital outlay.

3. The real property was purchased, or the improvements were constructed or modernized on a real property, within ten years before the real property was sold.

Education Code section 17462.3(b) states that the funds to be returned to the State Allocation Board are those received within ten years before the real property is sold. Section 17462.3(c) states that if a portion of the real property is sold, a proportion of the amount of funds received from a state school facilities program shall be returned to the State Allocation Board based on the percentage of the real properties sold.

H. Sale of Surplus Real Property – Priority Given to Charter Schools

Senate Bill 1016[586] was recently enacted as an urgency measure which took effect on June 27, 2012. The bill amends numerous sections of the Education Code.

Senate Bill 1016 amends a number of provisions relating to the sale of surplus real property by school districts. The main effect of these amendments is to give charter schools first priority for notification and acquisition of surplus real property if certain criteria are met. In general, school districts will now be required to offer surplus real property to charter schools that have requested notification of any offering of surplus real property if that real property was designed to provide direct instruction or instructional support. The charter school may then acquire or lease the property at below fair market value.

[585] Stats. 2013, ch. 496.
[586] Stats. 2012, ch. 38, also referred to as the Budget Trailer bill.

Senate Bill 1016 applies to real property identified by a school district as surplus property after July 1, 2012, and becomes inoperative on June 30, 2013. The new provisions would be repealed as of January 1, 2014, unless the provisions are extended by the Legislature by subsequent legislation.

Education Code section 17457.5 was added to the Education Code to state that notwithstanding Government Code section 54220, the governing board of a school district seeking to sell or lease real property designed to provide direct instruction or instructional support it deems to be surplus property shall first offer that property for sale or lease to any charter school that has submitted a written request to the school district to be notified of surplus property offered for sale or lease by the school district, pursuant to the following conditions:

1. The real property sold or leased shall be used by the charter school exclusively to provide direct instruction or instructional support, for a period of not less than five years from the date upon which the real property is made available to that charter school, pursuant to the sale, or, in the event of a lease, until the real property is returned to the possession of the school district, whichever occurs earlier.

2. In the event that the charter school fails to comply with the conditions set forth in paragraph 1, the charter school that purchased the real property is required to immediately offer that real property for sale and sell the property. The charter school shall comply, in that regard, with all requirements that would otherwise apply to a school district, except that a sale price computed under Section 17491(a) shall be based upon the cost of acquisition and incurred by the school district that sold the property rather than incurred by the charter school. In the event, alternatively, of the lease of real property, the failure by the charter school to comply with paragraph 1 shall constitute a breach of the lease, entitling the school district to immediate possession of the real property, in addition to any damages to which the school district may be entitled under the lease agreement.

3. The school district, and each of the entities authorized to receive offers of sale pursuant to the Education Code, has standing to force the conditions set forth and shall be entitled to the payment of reasonable attorneys' fees incurred as a prevailing party in any action or proceeding brought to enforce any of those conditions.

Education Code section 17457.5(b) states that a school district seeking to sell or lease real property designed to provide direct instruction or instructional support it deems to be surplus property shall provide a written offer to any charter school that has submitted a written request to the school district to be notified of surplus property offered for sale or lease by the school

district. A charter school desiring to purchase or lease the property shall, within 60 days after a written offer is received, notify the school district of its intent to purchase or lease the property. In the event more than one charter school notifies the school district of their intent to purchase or lease the property, the governing board of the school district may determine to which charter school to sell or lease the property.

Education Code section 17457(c) states that the price at which property described in Section 17457.5 is sold shall not exceed a school district's cost of acquisition, adjusted by a factor equivalent to the percentage increase or decrease in the cost of living from the date of purchase to the year in which the offer of sale is made, plus the cost of any school facilities construction undertaken on the property by the school district since the acquisition of land, adjusted by a factor equivalent to the increase or decrease in the statewide cost index for Class B Construction, as annually determined by the State Allocation Board pursuant to Section 17072.10, from the year the improvement is completed to the year in which the sale is made. In the event a statewide cost index for class B construction is not available, the school district shall use a factor equal to the average statewide cost index for class B construction for the preceding ten calendar years. In no event shall the price be less than twenty five percent of the fair market value of the property or less than the amount necessary to retire the share of local bonded indebtedness plus the amount of the original cost of the approved state aid applications on the property. The percentage of annual increase or decrease in the cost of living shall be the amount shown for January 1 of the applicable year by the then current Bureau of Labor Statistics Consumers Price Index for the area in which the school site is located.

Education Code section 17457.5(d) states that land that is leased pursuant to this section shall be leased at an annual rate of not more than five percent of the maximum sales price determined pursuant to Education Code section 17457.5(c), adjusted annually by a factor equivalent to the percentage increase or decrease in the cost of living for the immediate preceding year. The percentage of annual increase or decrease and the cost of living shall be the amount shown for January 1 of the applicable year by the then current Bureau of Labor Statistics Consumers Price Index for the area in which the school site is located.

Education Code section 17457.5(e) states that the sale or lease of the real property of the school district, as authorized by Section 17457.5(a) shall not occur until the school district advisory committee has held hearings pursuant to Education Code section 17390(c). Section 17457.5(f) states that Section 17457.5 shall only apply to real property identified by a school district as surplus property after July 1, 2012. Section 17457.5(g) states that Section 17457.5 shall become inoperative on June 30, 2013, and, as of January 1, 2014, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2014, deletes or extends the dates in which it becomes inoperative and is repealed.

Education Code section 17464, as amended, gives charter schools first priority for being offered for sale or lease property for the purposes of providing direct instruction or instructional support over and above parks and recreational purposes and other agencies. Education Code section 17489, as amended, gives charter schools priority over cities, park or recreation districts, regional park authorities and counties to purchase surplus real property from school districts.

School districts that are considering identifying any real property as surplus after July 1, 2012, should consult with legal counsel to discuss the ramifications of this legislation.

On August 22, 2014, Governor Brown signed Assembly Bill 1664[587] which amends Education Code sections 17462.3 and 17489 effective January 1, 2015.

Education Code section 17462.3, as amended by AB 1664, states that the State Allocation Board may establish a program that requires a school district, county office of education or charter school that sells real property that was purchased with funds from a state school facilities funding program, to return to the State Allocation Board the monies the school district, county office of education or charter school received from the state school facilities funding program for the purchase, modernization or construction if all of the following conditions are met:

1. The real property is not sold to a charter school, a school district, a county office of education, or an agency that will use the property exclusively for the delivery of child care and development services.

2. The proceeds from the sale of the real property are not used for capital outlay.

3. The real property was purchased, or the improvements were constructed or modernized on the real property, within 10 years before the real property is sold.

The funds returned to the State Allocation Board under Section 17462.3 are those received within ten years before the real property is sold.[588] If a portion of the real property is sold, a proportionate amount of funds received from a state school facilities funding program shall be returned to the State Allocation Board based on the percentage of the real property sold.[589]

Education Code section 17489 was amended by AB 1664 to give priority to other school districts, county offices of education or governmental agencies that will use the property for child care development services. Under current law, Education Code section 17489 (also known as the "Naylor Act") requires that prior to selling or leasing real property, a school district must offer any or all portions of property used for the last eight years for a school playground, playing field or other outdoor recreational purposes and open space to the following public agencies in order of priority:

1. Any city within which the land may be situated.

2. Any park or recreation district within which the land may be situated.

[587] Stats. 2014, ch. 262.
[588] Education Code section 17462.3.
[589] Education Code section 17462.3(c).

3. Any regional park authority having jurisdiction within the area in which the land is situated.

4. To any county within which the land may be situated.

As amended, Section 17489 makes the first priority offering the school site for sale or lease to a charter school that has requested notification or another school district, county office of education, or a governmental entity that provides child care and developmental services before offering to sell or lease the property to the agencies listed above.

POLITICAL ACTIVITIES BY OUTSIDERS ON SCHOOL PREMISES

A. Introduction

Whether members of the public have the right to enter school property to gather signatures for a petition is a difficult question. Members of the public may circulate petitions and solicit signatures on sidewalks on the perimeter of school facilities so long as they do not impede the flow of traffic into and out of the area. Members of the public may be prohibited from entering parking lots or interior walkways to solicit signatures from parents dropping off or picking up their children as such activity would impede the flow of traffic in and out of the parking lot. In addition, members of the public may not engage in activities that disrupt school or extracurricular activities.

B. The Education Code

California law gives school districts the authority to adopt policies regulating political activities on school property. Education Code section 7055 states:

> "The governing body of each local agency may establish rules and regulations on the following:
>
> "(a) Officers and employees engaging in political activity during working hours.
>
> "(b) Political activities on the premises of the local agency."

C. The Penal Code

In 1982, the California Legislature enacted Penal Code sections 627 through 627.10, relating to access to school premises.[590] The Legislature made specific findings that violent crimes on public school grounds were often committed by outside persons unauthorized to be on school premises.[591] The Legislature also stated, "school officials and law enforcement officers, in seeking to control these persons, have been hindered by the lack of effective legislation

[590] Stats. 1982, ch. 76.
[591] Penal Code section 627(a)(1), (2), (c).

restricting the access of unauthorized persons to school grounds and providing appropriate criminal sanctions for unauthorized entry."[592]

The Legislature stated that it was its intent to promote the safety and security of the public schools by restricting and conditioning the access of unauthorized persons to school campuses and to thereby implement the provisions of Article I, Section 28 of the California Constitution, which guarantees all students and staff the inalienable constitutional right to attend safe, secure and peaceful public schools. The Legislature further stated, "It is also the intent of the Legislature that the provisions of this chapter shall not be construed to infringe upon the legitimate exercise of constitutionally protected rights of freedom of speech and expression, which may be expressed through rallies, demonstrations, and other forms of expression which may be appropriately engaged in by students and non-students in a campus setting."[593]

Penal Code section 627.1 defines a "outsider" as any person other than:

1. A student of the school (except that a student who is currently suspended from the school shall be deemed an outsider).

2. A parent or guardian of a student at the school.

3. An officer or employee of the school district that maintains the school.

4. A public employee whose employment requires him or her to be on school grounds, or any person who is on school grounds at the request of the school.

5. A representative of a school employee organization who is engaged in activities related to the representation of school employees.

6. An elected official.

7. A person who comes within the provisions of Section 1070 of the Evidence Code (e.g., journalist) by virtue of his or her current employment or occupation.[594]

"School grounds" are defined as building and grounds of the public school.[595] "School hours" are defined as one hour before classes begin until one hour after classes end.[596] A "principal" is defined as the chief administrative officer of the public school.[597] A "designee" is a person whom the principal has authorized to register outsiders.[598] A "superintendent" is

[592] Penal Code section 627(a)(3).
[593] Penal Code section 627(c).
[594] Penal Code section 627.1(a).
[595] Penal Code section 627.1(b).
[596] Penal Code section 627.1(c).
[597] Penal Code section 627.1(d).
[598] Penal Code section 627.1(e).

defined as the superintendent of the school district who maintains the school or a person who the superintendent has authorized to conduct hearings when an individual has had access to school grounds denied or revoked requests a hearing.

The Penal Code provides that no outsider shall enter or remain on school grounds during school hours without having registered with the principal or designee, except to proceed expeditiously to the office of the principal or designee for the purpose of registering. If signs posted in accordance with Section 627.6 restrict the entrance or route the outsiders may use to reach the office of the principal or designee, an outsider must comply with such signs.[599]

In order to register, an outsider shall upon request furnish the principal or designee with the following:

1. His or her name, address, and occupation.

2. His or her age, if less than 21.

3. His or her purpose in entering school grounds.

4. Proof of identity.

5. Other information consistent with the purposes of these provisions and with other provisions of law.[600]

No person who furnishes the information and the proof of identity required by Section 627.3 shall be refused registration except as provided by Section 627.4. Section 627.4(a) states that the principal or his or her designee may refuse to register an outsider if he or she has a reasonable basis for concluding that the outsider's presence or acts would disrupt the school, its students, its teachers, or its other employees, or would result in damage to property or would result in the distribution or use of unlawful or controlled substances. The principal, or his or her designee, or school security officer may revoke an outsider's registration if he or she has a reasonable basis for concluding the outsider's presence on school grounds would interfere, or is interfering, with the peaceful conduct of the activities of the school, or would disrupt or is disrupting the school, its students, its teachers, or its other employees.[601]

Any person who is denied registration or whose registration is revoked may request a hearing before the principal or superintendent on the propriety of the denial or revocation. The request shall be in writing, shall state why the denial or revocation was improper, shall give the address to which notice of hearing is to be sent, and shall be delivered to either the principal or the superintendent within five days after the denial or revocation. The principal or superintendent shall promptly mail a written notice of the date, time, and place of the hearing to the person who requested the hearing. A hearing before the principal shall be held within seven

[599] Penal Code section 627.2.
[600] Penal Code section 627.3.
[601] Penal Code section 627.4.

days after the principal receives the request. A hearing before the superintendent shall be held within seven days after the superintendent receives the request.[602]

At each entrance to the school grounds of every public school at which these provisions are enforced, signs shall be posted specifying the hours during which registration is required, stating where the office of the principal or designee is located, and what route to take to that office, and setting forth the applicable requirements and the penalties for violation.[603] It is a misdemeanor for an outsider to fail or refuse to leave the school grounds promptly after the principal, designee, or school security officer has requested the outsider to leave, or to fail to remain off the school grounds for seven days after being requested to leave, if the outsider does any of the following:

1. Enters or remains on school grounds without having registered.

2. Enters or remains on school grounds after having been denied registration.

3. Enters or remains on school grounds after having registration revoked.[604]

The provisions of these sections shall not be utilized to impinge upon the lawful exercise of constitutionally-protected rights of freedom of speech or assembly.[605] When a person is directed to leave, the person directing him or her to leave shall inform the person that if he or she enters school grounds within seven days, he or she will be guilty of a crime.[606] Every outsider who willfully and knowingly violates these provisions after having been previously convicted of a violation committed within seven years of the date of two or more prior violations that resulted in conviction shall be punished by imprisonment in the county jail for not less than ten days or more than six months, or by both, such imprisonment and a fine not exceeding $500.[607]

The governing board of any school district may exempt the district or any school or class of schools in the district from the operation of these provisions or make exemptions for particular classes of outsiders. The governing board of any school district may authorize principals to exempt individual outsiders from the operation of the registration provisions, but any such exemption shall be in writing which is signed and dated by the principal and which specifies the person or persons exempted and the date on which the exemption will expire. The governing board may exempt, or authorize principals to exempt, designated portions of school grounds from the operations of these provisions during some or all school hours.[608]

[602] Penal Code section 627.5.
[603] Penal Code section 627.6.
[604] Penal Code section 627.7.
[605] Penal Code section 627.7(b).
[606] Penal Code section 627.7(c).
[607] Penal Code section 627.8.
[608] Penal Code section 627.9.

D. The California Constitution

Article I, Section 2(a) of the California Constitution states, "Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

The test to determine whether public property constitutes a public forum for the purposes of the California Liberty of Speech Clause was first discussed by the California Supreme Court in In Re Hoffman.[609] In In Re Hoffman, Vietnam War protesters distributed literature and discussed the war with persons using a railroad terminal. The protesters had been convicted in Los Angeles Municipal Court of violating a city ordinance restricting the right to be in a railway station. The Court overturned the conviction and stated:

> "The primary uses of municipal property can be amply protected by ordinances that prohibit activities that interfere with those uses. Similarly, the prime uses of railway stations can be amply protected by ordinances prohibiting activities that interfere with those uses. In neither case can First Amendment activities be prohibited solely because the property involved is not maintained primarily as a forum for such activities . . . In the present case, the test is not whether petitioner's use of the station was a railway use, but whether it interfered with that use. No interest of the city in the functioning of the station as a transportation terminal was infringed. It invaded no right of privacy . . ."[610]

E. Case Law

In Wilson v. Superior Court,[611] the California Supreme Court held that Article I, Section 2 of the California Constitution provides greater protection to California citizens and is more definitive and inclusive than the First Amendment of the United States Constitution.[612]

In Robins v. Pruneyard Shopping Center,[613] the California Supreme Court held that under the California Constitution, persons wishing to hand out leaflets and engage in other activity protected by Article I, Section 2(a), may do so inside privately owned shopping centers and malls. In contrast, a previous case decided by the United States Supreme Court under the First Amendment of the United States Constitution, Lloyd Corporation v. Tanner,[614] held that the owners of a shopping center were not required to allow individuals to distribute leaflets or handbills inside the shopping center.

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[609] 67 Cal.2d 845, 64 Cal.Rptr. 97 (1967).
[610] Id. at 850-851.
[611] 13 Cal.2d 652,119 Cal.Rptr. 468 (1975).
[612] Id. at 658. See, also, Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 908, 153 Cal.Rptr. 854 (1979); U.C. Nuclear Weapons Lab. Conversion Project v. Lawrence Livermore Laboratory, 154 Cal.App.3d 1157, 1164, 201 Cal.Rptr. 837 (1984); and, Prisoners Union v. California Department of Corrections, 135 Cal.App.3d 930, 185 Cal.Rptr. 634 (1982).
[613] 23 Cal.3d 899, 908, 153 Cal.Rptr. 854 (1979).
[614] 407 U.S. 551, 92 S.Ct. 2219 (1972).

In U.C. Nuclear Weapons Lab. Conversion Project,[615] the Court of Appeals upheld a lower court decision granting an injunction requiring the Lawrence Livermore Laboratory to allow plaintiffs to use the laboratory's visitor center to display literature, present slide shows and to apply to use an auditorium to present programs. The Court held that the visitor center was an enclosed place owned and operated by the government and open to the public at large. The primary purpose of the visitor center was to disseminate information. The Court rejected the idea that because the government owned the property, it alone had the right to communicate with the public. The Court then concluded that plaintiffs had the right of access to the visitor center and held that it was critically important for a government facility whose primary purpose was to describe and explain government activity or policy to accommodate a meaningful exchange of views by the public.

In Prisoners Union,[616] the issue was whether a non-profit organization concerned with the welfare of prisoners and their families could distribute information and literature to visitors of inmates in a public parking lot located on prison property but outside prison walls. The Court of Appeal held that such activities were protected by the state constitution and they could not be banned absent a showing that such activity would pose an overriding threat to prison security or to another similar state interest.

The facility involved was the Soledad correctional training facility two miles north of the town of Soledad. Two of the three facilities shared a common parking lot outside the entrance to the prison. The lot was open to members of the general public wishing to visit a prisoner or to purchase crafts in the prison hobby shop located in the entrance building. No security check or clearance was required as it was for entry into the prison itself. Organizations representing employees of the prison were permitted to use the parking lot as a forum for communicating with those employees. The Court of Appeals stated:

> "California authorities uphold the right of expression in public places on the basis of principles which are at least as protective of speech as those we have considered and in some respects more protective. To the extent that greater protection is afforded by California authorities, it is justified by Article 1, Section 5 of the California Constitution."[617]

In Carreras v. City of Anaheim,[618] the Court of Appeals held that the City of Anaheim may not constitutionally prohibit the International Society for Christian Consciousness of Laguna Beach, Inc. (ISKCON) from soliciting donations on the pedestrian walkways outside Anaheim Stadium and the exterior walkways of the Anaheim Convention Center. Both facilities were owned by the City of Anaheim. The Court of Appeals reviewed the California Constitution, applied California law and held:

> ". . . The test under California law is whether the 'communicative activity' is basically incompatible with the

[615] 154 Cal.App.3d 1157, 1164, 201 Cal.Rptr. 837 (1984).
[616] 135 Cal.App.3d 930, 185 Cal.Rptr. 634 (1982).
[617] Id. at 938.
[618] 768 F.2d 1039 (9th Cir. 1985).

> normal activity at a particular place at a particular time. In the case before us, the exterior walkways and parking areas of Anaheim Stadium and the Anaheim Convention Center are much like the parking lot at Soledad prison considered in Prisoners Union. At all three locations the public is free to come and go. At the stadium and convention center, the public travels over the parking lot and walkways to attend sporting events or exhibitions and, at Soledad, the public uses the parking lot while visiting the prison. The purposes of the three locations are very similar -- the facilitation of parking and the free flow of pedestrian and vehicular traffic. Under California law as articulated in Prisoners Union, such locations must be open to expressive activity unless the activity is basically incompatible with the intended use of the facility. We conclude that the solicitation by ISKCON is not incompatible with the intended uses of either the exterior areas of the stadium or the exterior walkways of the convention center."[619] [Emphasis added.]

In Savage v. Trammell Crow. Co.,[620] the Court of Appeal upheld a prohibition on leafletting in a shopping center parking lot. The court stated:

> "The parking lot bar on leafletting is especially appropriate in light of the fact Burn's policy does not prevent leafletting on the center's sidewalks. Thus, Savage and other leafletters are not prevented from reaching the center's patrons; rather, they are merely required to hand their leaflets out in person as opposed to placing them on cars."[621]

The court recognized the litter and traffic concerns and the potential for blocking the flow of traffic.[622] The California Supreme Court, citing Savage v. Trammell Crow Co.,[623] stated:

> ". . . A ban on distributing religious pamphlets in the parking lot of a shopping center was a valid time, place, and manner regulation. The ban on leafleting was narrowly drawn because if furthered the shopping center's 'interest in controlling litter and traffic.'"[624]

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[619] Id. at 1045.
[620] 223 Cal.App.3d 1562, 1570-76, 273 Cal.Rptr. 302 (1990).
[621] Id. at 1575.
[622] Id. at 1574.
[623] See, also, Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352, 364, 93 Cal.Rptr.2d 1 (2000) (citing the parking lot traffic concerns in Savage with approval). 223 Cal.App.3d 1562, 1571, 273 Cal.Rptr. 302 (1990).
[624] International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 48 Cal.4th 446, 457-58, 106 Cal.Rptr.3d 834 (2010).

The Court of Appeal in Reeves v. Rocklin Unified School District[625] held that outside political groups may be barred from entering a school campus to hand out literature if the principal or other school administrator believes that it will cause a disruption.

In Reeves, a member of a protest group wanted to hand out literature to students before class on the campus of Rocklin High School. The principal of the school was concerned that their presence and activities would cause a disruption to the educational process at the school and refused to let them enter the campus.[626]

The group then distributed its pamphlets on nearby public streets and traffic was backed up for nearly two miles. The group also obstructed sidewalks, causing students to walk in the street on their way to school. As a result, many students were late to class.[627]

The group then filed a lawsuit in Superior Court and, after a trial, the Superior Court judge upheld the school district's actions. The group then appealed to the Court of Appeal.[628]

The Court of Appeal reviewed Penal Code Sections 627 et seq., which regulate access by outsiders to school campuses. The Court of Appeal held that these provisions were enacted by the Legislature to promote safety and security of public schools, and to restrict the access of unauthorized persons to school campuses. The Court of Appeal found that the purpose of these statutory provisions was to implement Article I, Section 28 of the California Constitution, which guarantees all students and staff the constitutional right to attend safe, secure and peaceful public schools. These statutory provisions require outsiders to register with the principal before entering school campuses. Section 627.4(a) authorizes the principal or the principal's designee to refuse to register an outsider if he or she has a reasonable basis for concluding that the outsider's presence or acts would disrupt the school, its students, its teachers, or employees, or would result in damage to property or would result in the distribution or use of unlawful or controlled substances.[629]

Section 627.4(b) authorizes the principal or the principal's designee or school security officer to revoke an outsider's registration if he or she has a reasonable basis for concluding that the outsider's presence on school grounds would interfere or is interfering with the peaceful conduct of the activities of the school, or would disrupt the school, its students, teachers, or other employees.[630]

Penal Code Section 627.7(a) makes it a misdemeanor to enter or remain on school grounds without having registered, after being denied registration or after registration has been revoked. A person whose registration has been denied or revoked may request a hearing before the principal or superintendent pursuant to Penal Code Section 627.5. Education Code Section 32211 also authorizes a principal to request that an outsider leave public school grounds if that

[625] 109 Cal.App.4th 652, 135 Cal.Rptr.2d 213 (2003).
[626] Id. at 654-56.
[627] Id. at 655-56.
[628] Id. at 656.
[629] Id. at 656-57.
[630] Id. at 657-58.

person's continued presence would be disruptive of classes or other activities of the public school program.[631]

The Court of Appeal held that these statutory provisions were constitutional and did not violate the First Amendment of the United States Constitution. The Court of Appeal cited the United States Supreme Court's decision in Perry Education Association v. Perry Local Educational Association,[632] which held that not all public property is an open forum, and that government may limit access to government property with appropriate time, place, and manner regulations, and may reserve the public property for its intended purposes (i.e., public school).

The Court of Appeal noted that the courts have found schools to be non-public forums and may restrict access.[633] In DiLoreto v. Board of Education,[634] the Court of Appeal held that Downey High School was a non-public forum and that the school district retained the right to regulate access to the school.

The Court of Appeal noted that public high schools have a special character and function, and have a unique relationship to their students due to the compulsory character of school attendance, the expectation and reliance of parents and students on schools and staff for safe buildings and grounds, and the importance to society of the learning activity which is to take place in public schools. The Court of Appeal defined disruption in the context of school access laws as conduct or acts that would disrupt the normal activities of the school campus, and held that under the First Amendment, school administrators may reasonably regulate access to school grounds and impose conditions so as to preserve the property under their control for the use for which it was lawfully dedicated (i.e., education). The court went on to state that the First Amendment does not require school officials to wait until disruption actually occurs before they may act. The court held that school officials have a duty to prevent the occurrence of disturbances.[635]

F. Summary

Based on the above cases interpreting California law, it appears that a school district may not prohibit employees or members of the public from engaging in protected First Amendment activities on sidewalks on the perimeter of school facilities, but a school district may bar individuals from parking lots and interior walkways where the flow of traffic would be impeded since it would be disruptive to the educational process. Schools may not bar individuals from sidewalks on the perimeter of the school facilities so long as the individuals engaging in these activities are not blocking traffic, disrupting the educational process or the activities occurring in the school or school district.

Districts may prohibit members of the public from entering classrooms, auditoriums, athletic fields, staff meetings, offices and other school facilities where it would be disruptive to the educational process to allow entry.

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[631] Id. at 658.
[632] 460 U.S. 37, 44 (1983).
[633] See, Grattan v. Board of School Commissioners, 805 F.2d 1160 (4th Cir.1986), in which the court held that a school parking lot is not a public forum, and a school district may deny access.
[634] 74 Cal.App.4th 267 (1999).
[635] Reeves v. Rocklin Unified School District, 109 Cal.App.4th 652, 661-66, 135 Cal.Rptr.2d 213 (2003).

USE OF PUBLIC PROPERTY FOR POLITICAL PURPOSES

Senate Bill 594 adds Government Code sections 54964.5 and 54964.6, effective January 1, 2014.

Government Code section 54964.5(a) states that a nonprofit organization or an officer, employee, or agent of a nonprofit organization shall not use, or permit another to use, public resources received from any local agency for any campaign activity not authorized by law. Section 54964.5(b) defines a ballot measure as a state or local initiative, referendum, or recall measure certified to appear on a regular or special election ballot or other measure submitted to the voters by the Legislature or the governing body of a local agency at a regular or special election. Section 54964.5(b) defines "campaign activity" as a payment that is used for communications that expressly advocate for or against the qualification of a clearly identified ballot measure, the approval or rejection of the clearly identified ballot measure, or the election or defeat of the clearly identified candidate by the voters, or that constitutes a campaign contribution. It does not include costs of adopting a position or resolution supporting or opposing a clearly identified ballot measure or candidate, or an incidental or minimal use of public resources.

Section 54964.5(b)(7) defines "public resources" as follows:

1. Any property or asset owned by a local agency, including but not limited to, cash, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and local government compensated work time that is provided to a nonprofit organization, except funds received in exchange for consideration for goods or services.

2. Funds received by a nonprofit organization which have been generated from any activities related to conduit bond financing by those entities subject to the conduit financing and transparency and accountability provisions, whether or not those funds are received by the nonprofit in exchange for consideration of goods or services.

Government Code section 54964.5(c) states that it does not prohibit the use of public resources for providing information to the public about the possible effects of any ballot measure on the activities, operation, or policies of the state or a local agency, provided that the informational activities meet both of the following conditions:

1. The informational activities are not otherwise prohibited by the California Constitution or the laws of this state.

2. The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the ballot measure.

Government Code section 54964.5(d) states that any person who intentionally or negligently violates Section 54964.5 is liable for a civil penalty not-to-exceed $1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of public resources.

Government Code section 54964.6(a) states that a reporting nonprofit organization that engages in campaign activity, either directly or through the control of another entity, shall deposit into a separate bank account all specific source or sources of funds received and shall pay all campaign activity from that separate bank account.

It should be noted that nonprofit organizations exempt under Internal Revenue Code section 501(c)(3) are already prohibited from supporting or opposing any candidate for public office and may only engage in activities that influence legislation to a limited extent.

POSSESSION OF FIREARMS AND OTHER DANGEROUS OBJECTS ON SCHOOL PROPERTY

With respect to firearms, Penal Code section 626.9 prohibits any person from possessing a firearm in a school zone. A school zone is defined as the grounds of a public or private school providing instruction in Kindergarten through Grade 12 or within a distance of 1,000 feet from the grounds of the public or private school. Penal Code section 626.10 prohibits an individual, except a duly appointed peace officer, from bringing any dirk, dagger, ice pick, knife having a blade longer than 2-½ inches, folding knife with a blade that locks into place, razor with an unguarded blade, taser, or stun gun on to school grounds.

With respect to tear gas, Penal Code section 12403.7 authorizes adults, with certain exceptions to carry tear gas for purposes of self-defense. Districts, by policy, may decide to prohibit adults from bringing tear gas on to school property.

Pursuant to Penal Code section 626.9, schools are designated as Gun-Free zones. However, Penal Code section 626.9(l) makes an exception for persons who are designated as peace officers in California (i.e., peace officers may carry concealed weapons onto a school campus).

Penal Code sections 830-832.9 sets forth the list of individuals who may be considered peace officers in California. Section 830.6 states that whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city police officer, a reserve deputy sheriff, or reserve police officer, the person is a peace officer if the person qualifies as set forth in section 832.6. Section 832.6 sets forth the qualifications for Level I, II and II reserve officers. If an individual has met these requirements then the individual is considered a peace officer when appointed by the proper authority and that individual may carry a concealed weapon onto school property.

Pursuant to Penal Code section 626.9 schools are designated as Gun-Free zones and only peace officers may carry a firearm onto to a school. Penal Code section 626.9(e)(1) defines a school zone as the grounds of a public or private school providing K-12 instruction or within 1000 feet of the grounds of a school zone. Under this definition, the grounds here at Kalmus

would not qualify as a Gun-Free zone and an individual who may carry a concealed weapon under state law (i.e., has a concealed weapon permit) may bring a concealed firearm onto the school property.

Pursuant to Penal Code section 626.9, schools are designated as Gun-Free zones. However, Penal Code section 626.9(l) makes an exception for persons who are designated as peace officers in California (i.e., peace officers may carry concealed weapons onto a school campus).

Penal Code sections 830-832.9 sets forth the list of individuals who may be considered peace officers in California. Section 830.6 states that whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city police officer, a reserve deputy sheriff, or reserve police officer, the person is a peace officer if the person qualifies as set forth in section 832.6. Section 832.6 sets forth the qualifications for Level I, II and II reserve officers. If an individual has met these requirements then the individual is considered a peace officer when appointed by the proper authority and that individual may carry a concealed weapon onto school property.

REGISTERED SEX OFFENDERS

Penal Code section 626.81 allows registered sex offenders to come on to school grounds only if they have lawful business at the school and written permission from the chief administrative official of the school. Violation of Section 626.81 is a misdemeanor. Lawful business is defined in Penal Code section 626.8(c)(1) as a reason for being present upon school property which is not otherwise prohibited by statute, by ordinance, or by any regulation adopted pursuant to statute or ordinance.[636]

Previously, Penal Code section 626.8 contained an exception for registered sex offenders who were the parent or guardian of the child attending that school. That exception has been deleted.

Therefore, districts may place strict conditions on registered sex offenders entering school property if the registered sex offender has a child attending the school. If a school becomes aware that a registered sex offender is entering school property, the school may contact law enforcement and request that law enforcement arrest the registered sex offender. If the registered sex offender has lawful business at the school (e.g., has a child attending the school), the registered sex offender may seek written permission from the principal of the school to enter school property. If such a request is made, we would recommend developing a plan for the registered sex offender which strictly limits the registered sex offender's access to the school campus. One example would be requiring the registered sex offender to remain in his or her car when dropping off his or her own child at school if it is safe for the child.

[636] Lawful business may apply if a registered sex offender has a child attending the school.

RAFFLES AND LOTTERIES

In 2000, the Legislature added Penal Code section 320.5, which allows eligible organizations to conduct lotteries and raffles for the purpose of directly supporting beneficial or charitable purposes. An eligible organization is defined as a private nonprofit organization that has been qualified to conduct business in California for at least one year prior to conducting a raffle.

The purpose of the legislation was to make legal the activities of private nonprofit organizations.[637] These private nonprofit organizations for years had been selling tickets to raise money for sports leagues and to support public schools.

Penal Code section 319 defines "lottery" as:

> "…any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever the same may be known."

Based on Section 319, and applicable case law, it is well established that there are three elements that constitute a lottery:

1. A prize;

2. Distribution by chance; and

3. Consideration (i.e., a donation, fee, or charge).

Penal Code section 320 makes it a misdemeanor to set up a lottery, Section 321 makes it a misdemeanor to sell lottery tickets, and Section 322 makes it a misdemeanor to aid or assist in setting up a lottery. Notwithstanding the above prohibitions, the Legislature in 2000 added Penal Code section 320.5, which allows eligible organizations to conduct lotteries and raffles for the purpose of directly supporting beneficial or charitable purposes. An eligible organization is defined as a private nonprofit organization that has been qualified to conduct business in California for at least one year prior to conducting a raffle. Since the definition is limited to "private" nonprofit organizations, the authorization in Section 320.5 could extend to school-connected organizations, such as booster clubs, but would not include student organizations or schools and school districts.[638]

Penal Code section 320.5(m) also exempts raffles that satisfy all of the following requirements:

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[637] See, Stats. 2000, ch. 778 (SB 639), Letter from Senator McPherson dated August 31, 2000.
[638] Penal Code section 320.5(c).

1. General and indiscriminate distribution of the tickets;

2. The tickets are offered on the same terms and conditions as the tickets for which a donation was given; and

3. The scheme does not require any of the participants to pay for a chance to win.

Penal Code section 320.5 requires that at least 90 percent of the gross receipts generated from the sale of raffle tickets benefit or provide support for charitable purposes. An eligible organization may not conduct a raffle authorized by Section 320.5 unless it registers annually with the Department of Justice. The Department of Justice must furnish a registration form via the Internet upon request to the eligible nonprofit organization. Once registered, the eligible organization must file annually thereafter with the Department of Justice a report that includes the following:

1. The aggregate gross receipts from the operation of raffles;

2. The aggregate direct cost incurred by the eligible organization from the operation of raffles; and

3. The charitable or beneficial purposes for which proceeds of the raffles were used.

Penal Code section 320.5(m) also exempts raffles that involve general and indiscriminate distribution of the tickets and the tickets are offered on the same terms and conditions as the tickets for which a donation was given. If the raffle does not require any of the participants to pay for a chance to win, it is exempt from the prohibition on raffles.

CHARITABLE CONTRIBUTIONS

Pursuant to Section 170 of the Internal Revenue Code[639] a taxpayer may claim any charitable contribution which is made within the taxable year to an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.[640] A charitable contribution is defined as a contribution or gift and includes a gift to a political subdivision of the United States if it is made exclusively for a public purpose and is not disqualified for tax exemption purposes under Section 501(c)(3).[641]

In Publication 526 (January 25, 2011), the Internal Revenue Service also indicates at page 3 that a charitable deduction may be made to a political subdivision of a state. The publication also indicates at page 18 that a taxpayer may claim a deduction for a cash contribution of $250.00 or more only if the taxpayer has an acknowledgement of the contribution

[639] 26 U.S.C. Section 170.
[640] 26 U.S.C. Section 170(b)(1)(A)(ii).
[641] 26 U.S.C. Section 170(c).

from the qualified organization. The acknowledgment must be written, must include the amount of cash contributed and whether the qualified organization gave the taxpayer any goods or services as a result of the contribution.

COPYRIGHT LAWS AND SCHOOL DISTRICTS

A. Copyright Law in General

Copyright law protects original works of authorship fixed in any tangible medium of expression, including literary works, musical works, dramatic works and motion pictures. The purpose of the copyright law is to provide the owner of copyrighted works the exclusive right to reproduce a copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public by sale or transfer of ownership or by rental, lease or lending, to perform the copyrighted work publicly, and to display the copyrighted work publicly. Anyone who creates a work can claim a copyright.

The copyright in a work exists upon the creation of the work in a tangible form of expression. The work does not have to be published or performed publicly. The copyright holder is not required to register the copyright with the Registrar of Copyrights or place a notice of copyright on the material. However, a copyright notice is recommended to deter copyright infringement.

B. Exceptions to Copyright Law

The Doctrine of Fair Use allows the reproduction of copyrighted works based on the nature of the use. If the nature of the use is for nonprofit educational purposes, some limited fair use is allowed.

C. Guidelines for Copying

The guidelines for classroom copying should be followed. Teachers should limit the multiple copies for the classroom to the definitions of brevity and spontaneity contained in the guidelines. Teachers should follow the guidelines for off-air recording of broadcast programming for educational purposes. A limited number of copies may be produced for each off-air recording to meet the legitimate needs of teachers under the guidelines. The guidelines for educational uses of music should be followed.

D. Do's and Don'ts of Copyright

Do follow the guidelines for classroom copying, off air recording and education uses of music. **Do not** rent movies for home use and show them to the classroom or large gatherings of students at school. **Do not** make multiple copies of software after purchasing one copy. **Do not** perform plays or music other than in the classroom without permission of the copyright holder.

E. History of Copyright Law

Article I, Section 8 of the United States Constitution grants Congress the power: "To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."

Copyright law originated in England and over the years Congress has amended the copyright law a number of times. The copyright laws have been amended to keep pace with new technology such as sound recordings, motion pictures, radio, television, cable television, home video recording, and computers. In 1988, the copyright laws were amended to make U.S. law compatible with international law embodied in the Berne Convention.[642]

F. Purpose of the Copyright Law

The copyright law protects original works of authorship fixed in any tangible medium of expression including, literary works, musical works, dramatic works, and motion pictures.[643] The purpose of the copyright law is to provide the owner of copyrighted materials the exclusive right to reproduce a copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public by sale or transfer of ownership or by rental, lease or lending, to perform the copyrighted work publicly, or to display the copyrighted work publicly. Anyone who creates a work can claim a copyright.

The copyright in a work exists upon the creation of the work in a tangible form of expression. The work does not have to be published or performed publicly.

G. Securing a Copyright

Failure to place a notice of copyright on the material does not invalidate the copyright and is not required for works published after March 1, 1989. Although no longer required, a copyright notice is recommended to prevent a copyright infringer from using an "innocence" or "lack of knowledge" defense.

Notice is generally given by the symbol © or the word "copyright," followed by the year of first publication and the name of the owner of the copyright.[644] The Copyright Office also recommends that the copyright notice be placed in a location that gives reasonable notice to the public.

Registration with the Registrar of Copyrights is not required, but it is highly recommended. The Copyright Office recommends registration of the copyright for the following reasons:

1. Registration establishes a public record of the copyright;

[642] See, 17 U.S.C. Section 101 et seq.
[643] 17 U.S.C. Section 102(a).
[644] As an example, © Orange County Superintendent of Schools 2010 All Rights Reserved.

2. Registration is necessary before a lawsuit for copyright infringement may be filed in federal court;

3. If registered within five years of publication, registration will establish prima facia evidence of the validity of the copyright and the facts stated in the copyright certificate;

4. If registered within three months of publication or prior to any infringement, statutory damages and attorneys' fees will be available to the copyright owner in a court action.[645]

Registration requires that the appropriate forms and registration fee be filed with the Registrar of Copyrights in Washington, D.C. One copy of the work is required if unpublished and two copies are required if published. Copyright registration is effective on the date of receipt in the Copyright Office if all the required elements are in acceptable form.

Certain works may not be protected by copyright laws. Generally, these include works that have not been fixed in a tangible form of expression such as choreographic works which have not been recorded, improvisational speeches or performances that have not been written and recorded, titles, names, short phrases and slogans, mere listings of ingredients or contents, ideas, procedures, methods, systems, processes, concepts, principles, discoveries or devices as distinguished from a description, explanation or illustration. Also, works that consist entirely of information that is common property and contain no original authorship cannot be copyrighted. For example, standard calendars, height and weight charts, tape measures and rules, and lists of tables taken from public documents or other common sources cannot be copyrighted.

California community college districts, county boards of education, and school districts have statutory authority to secure copyrights. See, Education Code sections 1044, 1045, 35170, and 72207. Districts should follow the same procedure as other copyright holders.

For works originally copyrighted on or after January 1, 1978, the work is automatically protected from the moment of its creation and is protected for a term of the author's life plus an additional 70 years after the author's death. For works made for hire the duration of the copyright is 95 years from publication or 120 years from creation, whichever is shorter.

For works published between 1964 and 1977, the copyright extends for 95 years after the publication date. For works published between 1923 and 1963, the protection will last for 95 years from the date of publication if the author applied for a renewal of the copyright. Any work published prior to 1923 is in the public domain. Works in the public domain may be used freely without seeking copyright permission. Information may be obtained on the Internet regarding works in the public domain, including a list of musical works that have entered the public domain.[646]

[645] See, Circular 21, "Reproduction of Copyrighted Works by Educators and Librarians," United States Copyright Office (2009), available online at http://www.copyright.gov.
[646] See, P.D. Info at www.pdinfo.com.

Any transfer of copyright is not valid unless the transfer is made in writing and signed by the owner of the copyright. Transfer of a right on a nonexclusive basis does not require a written agreement. A copyright may also be conveyed by operation of law or bequeathed by will.

Protection against copyright infringement is regulated by the Berne Convention. Most of the major industrialized countries have agreed to the provisions of the Berne Convention. President Reagan signed the Berne Convention Implementation Act of 1988 on October 31, 1988, which amended U.S. copyright law to conform to international law.

H. The Fair Use Exception and Other Exceptions

The doctrine of fair use is an exception to the concept of the exclusive use or the statutory grant of a monopoly under the copyright laws. The fair use exception has been codified in 17 U.S.C. Section 107, which states in part:

> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include –
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

In determining whether the fair use exception applies, the purpose and the character of the use must be considered. For example, it must be considered whether the use is for a commercial nature or is for nonprofit educational use. The legislative history indicates that Congress did not intend to exempt educational institutions from the copyright laws but rather to use the not-for-profit education exception in weighing whether the fair use exception applies in any given circumstances. In essence, if the use is for a non-profit educational use rather than a commercial use, broader leeway will be allowed.

The nature of the copyrighted work will also be considered. Whether the materials are out of print, whether the materials are unavailable, whether it is being used for a commercial

market or for an educational purpose, and whether the distribution will serve the public interest or whether it will stifle the incentive to produce or create new works, will be considered.

Another factor is the amount and substantiality of the work used in relation to the copyrighted work as a whole. The larger the portion of the particular work that is used, the less likely fair use will be considered as a defense. The courts will also look at such factors as the length and frequency of the use.

The courts will also look at the effect upon the potential market. The courts will not only look at the potential loss of book sales, for example, but also potential sales for such things as paperback rights, movie rights, television rights, etc.

Satire and parody have been justified as fair use even when of a commercial nature. However, if the satire or parody copies the entire work, an infringement may be found.

Other factors that the courts will look at are whether the use diminishes potential sales, whether it has a negative cumulative effect on sales and whether the use of copies affected the demand for the original.

Another exception to the copyright laws involves school and public libraries. With respect to school and public libraries, the copyright owner's exclusive right to distribute his work is limited to the first sale. Thereafter, the public or school library, which owns the first copy, may freely distribute it. Libraries may also make copies of copyrighted works for themselves and the public. Section 108 allows libraries to reproduce and distribute one copy or phonorecord under the following conditions:

1. The copying or distribution is made without any direct or indirect commercial purpose;

2. The collections of the library must be open to the public or be available to researchers; and

3. The reproduction or distribution of the work carries the copyright notice.

Section 108 also authorizes a library to make a single copy of an entire unpublished work for preservation and security or for deposit in another library, provided the library currently has the item in its collection. A library may reproduce an entire published work in its collection if it is damaged, deteriorating, lost or stolen, after it has been determined that an unused replacement cannot be obtained at a fair price. Section 108 also authorizes libraries to copy articles from journals or periodicals and to use these copies in interlibrary loan transactions under certain conditions.

Section 110 exempts performance or display of a work in a classroom by instructors or pupils. If a work is performed or displayed as part of a classroom activity, there is no copyright infringement. A copyrighted article may be shown on an overhead projector in the classroom,

for example, or a play may be read or performed in the classroom. The performance must be part of instruction, and not given for the recreation or entertainment of any part of the audience. The performance may not be broadcast by either radio or television, but it may be amplified or projected within the same building or general area within a school campus or cluster of buildings, but not to an entire school system.

Section 110 also exempts performance of nondramatic literary or musical works where admission is charged if the proceeds, after deduction for costs, are used for educational, religious or charitable purposes and the performers, promoters or organizers are not paid. Salaries paid to teachers or other school employees do not defeat the exemption.

Section 110 also exempts the turning on of a T.V. or radio in a public place from copyright infringement, provided there is no further amplification. Section 110 also gives broad exemption for special performances of nondramatic works for the deaf or blind.

However, where dramatic performances are performed outside the exceptions set forth above, permission must be obtained from the copyright holder and royalties must be paid. Section 110 also contains various exceptions for public and instructional broadcasting.

Face-to-face teaching activities in a classroom fall under the category of educational fair use and are exempt from the copyright requirements concerning public performances. In classroom settings, teachers and students may engage in a number of performance activities of limited portions of work that are related to course contact, such as playing recordings of music, performing songs, and reading plays. Generally, ten percent of the copyrighted materials may be used for teaching activities and still be considered fair use. The face-to-face teaching exception does not include school assemblies, sporting events, or school plays. It only covers performances that are a regular part of the school's curriculum.[647]

The Copyright Act also contains an exemption for performances at school concerts, as long as no admission fee is charged or if there is an admission fee, the proceeds from the fee are used only for educational or charitable purposes.[648] The performance of a musical play would not fall within this exemption regardless of whether an admission fee is charged or not. In order to perform a music play, the school must seek permission from the copyright holder.[649] To obtain a license for musical works, school districts should contact the American Association of Composers, Authors and Publishers (ASCAP). ASCAP provides both blanket licenses or a per program license.[650] ASCAP licenses cover musical works, but do not cover dramatic works. If a school wishes to stage a public performance of a dramatic, nonmusical play, it must contain permission from the copyright holder and pay a royalty fee. Most publishers of plays have information about licensing for schools, including how to seek permission to cut lines from the play.

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[647] 17 U.S.C. Section 110.
[648] 17 U.S.C. Section 110(4).
[649] See, National Association for Music Education, Copyright Guidelines for SchoolTube, http://www.menc.org/resources/view/copyright-guidelines-for-schooltube.
[650] See, American Society of Composers, Authors and Publishers (ASCAP), Customer Licenses: About ASCAP Licensing, http://www.ascap.com/licensing/about.html.

Another issue that frequently arises with concerts and plays is when parents of students wish to record the concert or play. The copyright holder has exclusive rights to reproduce copyrighted works, even when the school has obtained a public performing license. Most licenses contain strict language regarding whether or not the performance can be videotaped. Schools should check the language of these licenses regarding recording rights. Generally, a music teacher may make a single recording of a student musical performance for teaching or evaluation purposes. If a school wishes to record student performances and distribute the recording within the school or the community, generally, it must first obtain a separate license to do so. Even if the school does not intend to sell copies, but give them away for free, the school must obtain a license.[651] In order to obtain permission to videotape production of a copyrighted dramatic work, the school must contact the author's agent. The agent is generally noted on the copyright page of the script.

If a parent, teacher or student posts a video of a student performance on the Internet and the music being played is not in the public domain, it constitutes an infringement of the copyright. Publishers frequently send letters to schools demanding that the posted video be removed from the Internet. In addition, there are student privacy issues if the images of other children are identifiable on the Internet in a publicly posted video and parental permission has not been obtained. As a result, some schools prohibit the videotaping of student performances.

I. Guidelines for Photocopying

In a joint letter to Congress, guidelines for classroom copying of books, periodicals and music were developed. These guidelines are not binding, but serve as a guide to the courts, copyright holders and educational institutions. A copy of these guidelines is attached.

These guidelines contain limits on single copying for teachers and making multiple copies for classroom use. An example of what can happen when these guidelines are violated is illustrated by the case of Marcus v. Rowley.[652] In Marcus v. Rowley, a lawsuit was brought by a former teacher of the San Diego Unified School District who wrote a book on cake decorating. The book was copyrighted and consisted of 35 pages, 29 pages of which were original work and 6 pages which were reproduced with the permission of the copyright holders. The former public school teacher sold the books for $2.00 each and made $1.00 profit from each book. Approximately 125 copies were sold to students in her adult education classes, but they were not sold by the bookstores.

One of the defendants, a school teacher employed by the San Diego Unified School District who taught food service classes, prepared a cake decorating learning activity package for use in her classes. The activity package was 24 pages long and 15 copies were made for her students to use. Approximately 60 students used them. Neither the teacher nor the school district derived any profit from the learning activity package; however, 11 of the 24 pages of the booklet were copies from the former teacher's book and no credit was given to the former teacher.

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[651] See, National Association for Music Education, United States Copyright Law: A Guide for Music Educators, http://www.Menc.org/resources/view/united-states-copyright-law-a-guide-for-music-educators.

[652] 695 F.2d 1171 (9th Cir. 1983).

The Court of Appeals held that a finding of nonprofit educational use does not automatically compel a finding of fair use and noted that the school district and the defendant teacher did not attempt to obtain the former teacher's permission or credit her work. The court found that the former teacher's work was both creative and informational and that nearly 50 percent of the defendant's learning activity package consisted of direct copies from the plaintiff's book.

The Court of Appeals also applied the guidelines and found that the guideline of 10 percent of the work was violated, that the guideline of spontaneity was violated, and that each copy did not include a notice of copyright. The Court of Appeals found against the San Diego Unified School District and sent the matter back to the lower court for a determination of damages based on copyright infringement.

There are also guidelines for educational uses of music, containing certain limits on copying purchased copies. Multiple copies of excerpts of works may be made if they do not exceed 10 percent of the whole work and the number of copies does not exceed one copy per pupil.

J. Off-Air Recording of Broadcast Programming

One of the most controversial legal issues of copyright law for educational institutions involves the off-air taping of television programs for classroom use. Producers of television programs were concerned about the loss of profits and their inability to sell secondary rights, such as film rights and video tapes, if the public was free to make copies of the television programs.

In Encyclopedia Britannia Educational Corporation v. Crooks,[653] the District Court held that a consortium of 19 local school districts in New York which systematically taped television broadcasts off the air from cable television programs and microwave transmissions and established a library of 500 video programs available to local school districts, was not fair use. The court enjoined the school districts' continued off-air taping practices and granted court costs and $250 in damages for each infringement.

A copy of the guidelines for off-air recording of broadcast programming for educational purposes is attached. The guidelines were developed for off-air recording by nonprofit educational institutions only. Under the guidelines, an educational institution may retain a recorded broadcast for a period not to exceed 45 calendar days and must erase or destroy the broadcast tape after that period. Off-air recordings may be used only by individual teachers in the course of relevant teaching activity and repeated once only when instruction reinforcement is necessary. Off-air recordings may only be made at the request of and used by individual teachers and may not be regularly recorded in anticipation of requests. The off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. All copies of off-air recordings must include the copyright notice of the broadcast program as recorded. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of the guidelines.

[653] 447 F.Supp. 243 (W.D.N.Y. 1978), 542 F.Supp. 1156 (W.D.N.Y. 1982), 558 F.Supp. 1247 (W.D.N.Y. 1983).

K. Guidelines for Copying Computer Software

It is technologically possible to duplicate most commercially available software for use in the classroom. Section 117 of the Copyright Act was added in 1980 and amended in 1998 and states in part:

> "Notwithstanding the provisions of Section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of the computer program provided:
>
> "(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
>
> "(2) that such new copy or adaption is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."

Under these guidelines, if a teacher, for example, loads a copyrighted software program into a personal computer terminal, thus creating a copy of that program in the computer's random access memory, there is no copyright infringement since this is an essential step in the utilization of the computer program in conjunction with a machine (e.g., hardware). A teacher may also make a backup copy or archival copy to ensure that a copy will not be destroyed or lost due to student abuse, computer failure or other events which may occur. However, the archival copy may not be used in another computer; it may only be used for backup purposes.

Legislation has been enacted to address the digital revolution, notably the Digital Millennium Copyright Act of 1998. However, the legislation failed to address educational uses of computer software. For example, the "fair use" provisions of 17 U.S.C. Section 104 are unchanged.

A Conference on Fair Use (CONFU) was convened in 1994 to study the application of fair use standards to computer usage. CONFU developed fair use guidelines for educational multimedia, distance learning, and digital images, and a statement on the use of copyrighted computer programs in libraries. In contrast to the earlier guidelines for classroom copying, educational uses of music, and off-air recordings, there was no consensus or Congressional approval of the CONFU guidelines. Therefore, although the guidelines are thoughtful and well drafted, adoption of the guidelines by a school district is no guarantee that a court would find specific educational uses to be "fair use."

As discussed above, the guidelines for classroom copying quantify types of copying that are deemed to be "fair use." It is virtually impossible to quantify fair use of computer software, because it is impracticable to use only portions of a computer software program.

Software is licensed rather than sold. Typically, software licenses limit the number of terminals or the site where the software may be used. Districts are strongly encouraged to understand and comply with the license agreements for use of software in educational settings. In some instances, it may be possible to negotiate changes in a license agreement to accommodate a district's educational needs.

Districts should adopt written rules and regulations regarding the use of copyrighted software. Teachers should be made aware of the constraints imposed by copyright law in this area. Software should be stored in a secure area, students should not be permitted to utilize computer labs without proper supervision, and districts should budget appropriate funds to purchase multiple copies of needed software or enter into multiple-use license agreements so that copies of computer software can be made.

L. Works Made for Hire

Under the "works made for hire" principle of copyright law, the copyright for works created by employees is owned by the employer. The employer is considered the author or creator of the work unless there is an agreement that the employee will own the copyright. In the educational context, this would include instructional texts, tests, answer sheets, and other types of instructional materials.

At one time, the federal courts were divided with regard to whether the works made for hire principle applies to works created by consultants or independent contractors. The United States Supreme Court finally clarified this issue in 1989 when it decided Community for Creative Non-Violence v. Reid.[654] In Reid, the court addressed whether a statue commissioned by a nonprofit organization and created by an individual artist was the property of the organization or the artist. There was no written agreement between the parties, and nothing was said about copyright ownership. The court relied on common-law agency principles for determining whether the artist was an employee or an independent contractor. After analyzing the artist's status in light of 11 criteria, the court concluded that he was not an employee but an independent contractor. Because the artist was not an employee, and because there was no agreement concerning copyright ownership, the statue was not considered a work for hire. Thus, the copyright in the work belonged to the artist, not the Community for Creative Non-Violence.

Therefore, it is strongly recommended that whenever a district contracts with a consultant to prepare any type of material, a written agreement should be entered into which states the respective rights of the parties with regard to the copyright of the materials. Attached is a copy of model contract language for consultants or independent contractors who produce materials which may be copyrighted for districts.

M. Penalties for Violations of the Copyright Laws

Under the copyright laws, copyright infringement can result in lawsuits seeking injunctive relief against further violation of the copyright laws, impoundment of materials which infringe the copyright, actual damages suffered by the plaintiff as well as statutory damages of

[654] 490 U.S. 730 (1989).

not less than $500 and not more than $20,000 per infringement and $100,000 per willful infringement, and attorneys' fees and costs.

Section 504(c)(2) limits damages that may be assessed against educational institutions where such persons or institutions infringed the copyrighted material in the honest belief that what they were doing constituted fair use. There are also criminal penalties for willful violators who infringe on a copyright for commercial advantage or private financial gain pursuant to Section 506.

N. Guidelines for Classroom Copying

1. Single Copy for Teachers. A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A chapter from a book;
- An article from a periodical or newspaper;
- A short story, short essay or short poem, whether or not from a collective work; or
- A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

2. Multiple Copies for Classroom Use. Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion provided that:

- The copying meets the tests of brevity and spontaneity as defined below; and
- Meets the cumulative effect test as defined below; and
- Each copy includes a notice of copyright.

Brevity means:

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages, or (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10 percent of the work,

whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in (i) and (ii) above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon, or picture per book or per periodical issue.

(iv) "Special" Works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph (ii) above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 percent of the words found in the text thereof, may be reproduced.

Spontaneity means:

(i) The copying is at the instance and inspiration of the individual teacher; and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect means:

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay, or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in (ii) and (iii) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

3. Prohibitions as to numbers 1 and 2 above. Notwithstanding any of the above, the following shall be prohibited:

- Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various or excerpts therefrom are accumulated or reproduced and used separately.

- There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

- Copying shall not:

    - Substitute for the purchase of books, publishers' reprints or periodicals;

    - Be directed by higher authority;

    - Be repeated with respect to the same item by the same teacher from term to term.

- No charge shall be made to the student beyond the actual cost of the photocopying.

O. Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes

In March of 1979, Congressman Robert Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties and Administration of Justice, appointed a Negotiation Committee consisting of representatives of education organizations, copyright proprietors, and creative guilds and unions. The following guidelines reflect the Negotiating Committee's consensus as to the application of "fair use" to the recording, retention and use of television broadcast programs for educational purposes. They specify periods of retention and use of such off-air recordings in classrooms and similar places devoted to instruction and for homebound instruction. The purpose of establishing these guidelines is to provide standards for both owners and users of copyrighted television programs.

1. The guidelines were developed to apply only to off-air recording by nonprofit educational institutions.

2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmission) and retained by a nonprofit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after the date of the recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.

3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary in classrooms and similar places devoted to instruction within a single building, cluster or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. "School days" are school session days – not counting weekends, holidays, vacations, examination periods, or other scheduled interruptions – within the forty-five (45) calendar day retention period.

4. Off-air recordings may be made only at the request of and used by individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.

5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

6. After the first ten (10) consecutive school days, off-air recordings may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes; i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.

7. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

8. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.

9. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

P. Guidelines for Educational Uses of Music

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in

the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

a. Permissible Uses:

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

2. (a) For academic purposes other than performance, multiple copies of excerpts of work may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.

(b) For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is, (1) confirmed by the copyright proprietor to be made out of print, or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as tape, disc or cassette) or copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

b. Prohibitions:

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching, such as workbooks, exercises, standardized tests, and answer sheets, and like material.

3. Copying for the purpose of performance, except as in a(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in a(1) and a(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

Q. Model District Software Policy

I. PURCHASING

Section 1. It shall be the policy of the _____ District to negotiate agreements with producers of software that will allow the _____ District to make copies of the purchased software for an individual school site. If the district is unable to negotiate such an agreement, the _____ District shall purchase one copy of each software program for each classroom.

Section 2. The _____ District shall seek to enter into agreements with software manufacturers who will enter into multiple computer licensing agreements or will provide the _____ District multiple copy discounts.

Section 3. Each school site shall designate an employee who will be responsible for monitoring the school's compliance with all applicable copyright laws and licensing agreements. Each employee so designated will be responsible for reviewing and becoming familiar with the applicable copyright laws. The designated employee shall be either the site principal or an employee who reports directly to the site principal.

Section 4. Unless the applicable licensing agreement allows multiple classroom or multiple school use of a single program, the district shall not make multiple copies of the computer program or software.

Section 5. Employees or students shall not be allowed to make copies of any computer program or software without the written permission of the principal or the principal's designee. Written permission shall not be given unless authorized by the licensing agreement or the copyright holder in writing.

Section 6. All _____ District computer programs or software shall be used in the _____ District computer facilities only, unless written permission is given by the principal or the designee. Such written permission shall only be granted upon reasonable assurances that the intended off campus use is authorized and no unauthorized copies will be made.

Section 7. All computer programs and software of the _____ District shall be carefully inventoried and accounted for by the principal or the principal's designee. All unauthorized copies shall be destroyed upon discovery.

Section 8. Each school site shall distribute rules and regulations to students, parents and employees summarizing this policy.

Section 9. Copies of all license agreements shall be maintained at the district office and in the principal's office.

R. Independent Contractor Agreement

This AGREEMENT is hereby entered into between the _____ District, hereinafter referred to as "DISTRICT," and _____
Name of Independent Contractor

_____
Mailing Address City State Zip Telephone Number

hereinafter referred to as "CONTRACTOR."

WHEREAS, DISTRICT is authorized by Section 53060 of the California Government Code to contract with and employ any persons for the furnishing of special services and advice in financial, economic, accounting, engineering, legal or administrative matters, if such persons are specially trained and experienced and competent to perform the special services required;

WHEREAS, DISTRICT is in need of such special services and advice; and

WHEREAS, CONTRACTOR is specially trained and experienced and competent to perform the special services required by the DISTRICT, and such services are needed on a limited basis;

NOW, THEREFORE, the parties agree as follows:

1. Services to be provided by CONTRACTOR: _____ _____ _____.

Services shall be provided by _____.
(Name of specific individual, if required)

2. Term. CONTRACTOR shall commence providing services under this AGREEMENT on _____, _____, and will diligently perform as required and complete performance by _____, _____.

3. Compensation. DISTRICT agrees to pay the CONTRACTOR for services satisfactorily rendered pursuant to this AGREEMENT a total fee not to exceed _____ Dollars ($_____). DISTRICT shall pay CONTRACTOR

according to the following terms and conditions: _____
_____.

4. Expenses. DISTRICT shall not be liable to CONTRACTOR for any costs or expenses paid or incurred by CONTRACTOR in performing services for DISTRICT, except as follows:_____
_____
_____.

5. Independent Contractor. CONTRACTOR, in the performance of this AGREEMENT, shall be and act as an independent contractor. CONTRACTOR understands and agrees that he/she and all of his/her employees shall not be considered officers, employees or agents of the DISTRICT, and are not entitled to benefits of any kind or nature normally provided employees of the DISTRICT and/or to which DISTRICT's employees are normally entitled, including, but not limited to, State Unemployment Compensation or Workers' Compensation. CONTRACTOR assumes the full responsibility for the acts and/or omissions of his/her employees or agents as they relate to the services to be provided under this AGREEMENT. CONTRACTOR shall assume full responsibility for payment of all federal, state and local taxes or contributions, including unemployment insurance, social security and income taxes with respect to CONTRACTOR's employees.

6. Materials. CONTRACTOR shall furnish, at its own expense, all labor, materials, equipment, supplies and other items necessary to complete the services to be provided pursuant to this AGREEMENT, except as follows: _____
_____
_____.

CONTRACTOR's services will be performed, findings obtained, reports and recommendations prepared in accordance with generally and currently accepted principles and practices of his/her profession.

7. Originality of Services. CONTRACTOR agrees that all technologies, formulae, procedures, processes, methods, writings, ideas, dialogue, compositions, recordings, teleplays, and/or video productions prepared for, written for, submitted to the DISTRICT and/or used in connection with this AGREEMENT, shall be wholly original to CONTRACTOR and shall not be copied in whole or in part from any other source, except that submitted to CONTRACTOR by DISTRICT as a basis for such services.

8. Copyright/Trademark/Patent: CONTRACTOR understands and agrees that all matters produced under this AGREEMENT shall become the property of DISTRICT and cannot be used without DISTRICT's express written permission. DISTRICT shall have all right, title and interest in said matters, including the right to secure and maintain the copyright, trademark and/or patent of said matter in the name of the DISTRICT. CONTRACTOR consents to use of CONTRACTOR's name in conjunction with the sale, use, performance and distribution of the matters, for any purpose and in any medium.

9. Termination. DISTRICT may, at any time, with or without reason, terminate this AGREEMENT and compensate CONTRACTOR only for services satisfactorily rendered to the date of termination. Written notice by DISTRICT shall be sufficient to stop further performance of services by CONTRACTOR. Notice shall be deemed given when received by the CONTRACTOR or no later than three days after the day of mailing, whichever is sooner.

DISTRICT may terminate this AGREEMENT upon giving of written notice of intention to terminate for cause. Cause shall include: (a) material violation of this AGREEMENT by the CONTRACTOR; or (b) any act by CONTRACTOR exposing the DISTRICT to liability to others for personal injury or property damage; or (c) CONTRACTOR is adjudged a bankrupt, CONTRACTOR makes a general assignment for the benefit of creditors or a receiver is appointed on account of CONTRACTOR's insolvency. Written notice by DISTRICT shall contain the reasons for such intention to terminate and unless within _____ (___) days after service of such notice the condition or violation shall cease, or satisfactory arrangements for the correction thereof be made, this AGREEMENT shall upon the expiration of the _____ (___) days cease and terminate. In the event of such termination, the DISTRICT may secure the required services from another contractor. If the cost to the DISTRICT exceeds the cost of providing the service pursuant to this AGREEMENT, the excess cost shall be charges to and collected from the CONTRACTOR. The foregoing provisions are in addition to and not a limitation of any other rights or remedies available to DISTRICT. Written notice by DISTRICT shall be deemed given when received by the other party, or no later than three days after the day of mailing, whichever is sooner.

10. Hold Harmless. CONTRACTOR agrees to and does hereby indemnify, hold harmless and defend the DISTRICT and its governing board, officers, employees and agents from every claim or demand made and every liability, loss, damage or expense, of any nature whatsoever, which may be incurred by reason of:

(a) Liability for damages for: (1) death or bodily injury to person; (2) injury to, loss or theft of property; or (3) any other loss, damage or expense arising out of (1) or (2) above, sustained by the CONTRACTOR or any person, firm or corporation employed by the CONTRACTOR, either directly or by independent contract, upon or in connection with the services called for in this AGREEMENT, however caused, except for liability for damages referred to above which result from the negligence or willful misconduct of the DISTRICT or its officers, employees or agents.

(b) Any injury to or death of any person(s), including the DISTRICT's officers, employees and agents, or damage to or loss of any property caused by any act, neglect, default, or omission of the CONTRACTOR, or any person, firm or corporation employed by the CONTRACTOR, either directly or by independent contract, arising out of, or in any way connected with, the services covered by this AGREEMENT, whether said injury or damage occurs either on or off DISTRICT's property, except for liability for damages which result from the sole negligence or willful misconduct of the DISTRICT or its officers, employees or agents.

(c) Any liability for damages which may arise from the furnishing or use of any copyrighted or uncopyrighted matter or patented or unpatented invention under this AGREEMENT.

11. Insurance. Pursuant to Section 10, CONTRACTOR agrees to carry a comprehensive general and automobile liability insurance with limits of _____ Dollars ($_____) per occurrence combined single limit for bodily injury and property damage in a form mutually acceptable to both parties to protect CONTRACTOR and DISTRICT against liability or claims of liability which may arise out of this AGREEMENT. In addition, CONTRACTOR agrees to provide an endorsement to this policy stating, "Such insurance as is afforded by this policy shall be primary, and any insurance carried by DISTRICT shall be excess and noncontributory." No later than _____ (__) days from execution of this AGREEMENT by the DISTRICT and CONTRACTOR, CONTRACTOR shall provide DISTRICT with certificates of insurance evidencing all coverages and endorsements required hereunder including a thirty (30) day written notice of cancellation or reduction in coverage. CONTRACTOR agrees to name DISTRICT and its governing board, officers, agents and employees as additional insureds under said policy.

12. Assignment. The obligations of the CONTRACTOR pursuant to this AGREEMENT shall not be assigned by the CONTRACTOR.

13. Compliance With Applicable Laws. The services completed herein must meet the approval of the DISTRICT and shall be subject to the DISTRICT's general right of inspection to secure the satisfactory completion thereof. CONTRACTOR agrees to comply with all federal, state and local laws, rules, regulations and ordinances that are now or may in the future become applicable to CONTRACTOR, CONTRACTOR's business, equipment and personnel engaged in services covered by this AGREEMENT or accruing out of the performance of such services.

14. Permits/Licenses. CONTRACTOR and all CONTRACTOR's employees or agents shall secure and maintain in force such permits and licenses as are required by law in connection with the furnishing of services pursuant to this AGREEMENT.

15. Employment With Public Agency. CONTRACTOR, if an employee of another public agency, agrees that CONTRACTOR will not receive salary or remuneration, other than vacation pay, as an employee of another public agency for the actual time in which services are actually being performed pursuant to this AGREEMENT.

16. Entire Agreement/Amendment. This AGREEMENT and any exhibits attached hereto constitute the entire agreement among the parties to it and supersedes any prior or contemporaneous understanding or agreement with respect to the services contemplated, and may be amended only by a written amendment executed by both parties to the AGREEMENT.

17. Nondiscrimination. CONTRACTOR agrees that it will not engage in unlawful discrimination in employment of persons because of race, ethnicity, religion, nationality, disability, gender, marital status or age of such persons.

18. Non Waiver. The failure of DISTRICT or CONTRACTOR to seek redress for violation of, or to insist upon, the strict performance of any term or condition of this

AGREEMENT, shall not be deemed a waiver by that party of such term or condition, or prevent a subsequent similar act from again constituting a violation of such term or condition.

19. Notice. All notices or demands to be given under this AGREEMENT by either party to the other, shall be in writing and given either by: (a) personal service or (b) by U.S. Mail, mailed either by registered or certified mail, return receipt requested, with postage prepaid. Service shall be considered given when received if personally served or if mailed on the third day after deposit in any U.S. Post Office. The address to which notices or demands may be given by either party may be changed by written notice given in accordance with the notice provisions of this section. At the date of this AGREEMENT, the addresses of the parties are as follows:

DISTRICT:	CONTRACTOR
_____	_____
_____	_____
_____	_____
_____	_____

20. Severability. If any term, condition or provision of this AGREEMENT is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions will nevertheless continue in full force and effect, and shall not be affected, impaired or invalidated in any way.

21. Attorney Fees/Costs. Should litigation be necessary to enforce any terms or provisions of this AGREEMENT, then each party shall bear its own litigation and collection expenses, witness fees, court costs, and attorneys' fees.

22. Governing Law. The terms and conditions of this AGREEMENT shall be governed by the laws of the State of California with venue in Orange County, California. This AGREEMENT is made in and shall be performed in Orange County, California.

23. Exhibits. This AGREEMENT incorporates by this reference, any exhibits, which are attached hereto and incorporated herein.

a. Exhibit A.

b. Exhibit B.

c. Exhibit C.

THIS AGREEMENT IS ENTERED INTO THIS ___ DAY OF ____, 20__.

_____	_____
Name of District	Contractor Name
By: _____	By: _____
_____	_____

Typed Name

Title

Typed Name

Title

Taxpayer Identification Number

**** Risk Manager should review all insurance requirements for the District.***
**** Criminal Record Check (Fingerprint), may be applicable.***

ELECTRONIC SIGNATURES

Government Code section 16.5 states that in any written communication with a public entity, in which a signature is required or used, any party to the communication may affix a signature by use of a digital signature that complies with the requirements of Section 16.5. The use of a digital signature or an electronic signature has the same force and effect as the use of a manual signature if it only embodies all of the following attributes:

1. It is unique to the person using it.
2. It is capable of verification.
3. It is under the sole control of the person using it.
4. It is linked to data in such a manner that if the data are changed, the digital signature is invalidated.
5. It conforms to regulations adopted by the Secretary of State.

The use or acceptance of a digital signature shall be at the option of the parties. Nothing in Section 16.5 shall require a public entity to use or permit the use of a digital signature. Section 16.5(d) defines "digital signature" as meaning an electronic identifier, created by a computer, intended by the party using it to have the same force or effect as the use of the manual signature.

The regulations defined "digitally signed communication" as a message that has been processed by a computer in such a manner that ties the message to the individual that signs the message. For a digital signature to be valid for use by a public entity, it must be created by a technology that is acceptable for use by the State of California."[655]

The regulations contain a list of acceptable technologies.[656] The technology known as Public Key Cryptography is an acceptable technology for use by public entities in California, provided that the digital signature is created in a manner consistent with the regulations.[657] The

[655] California Code of Regs. Title V, Section 22001.
[656] California Code of Regs. Title V, Section 22003.
[657] California Code of Regs. Title V, Section 22003(a).

technology "Signature Dynamics" is an acceptable technology for use by public entities in California provided that the signatures created are consistent with the regulations.[658]

Any individual or company may submit a written request that includes a full explanation of a proposed technology to the California Secretary of State to review the technology. If the Secretary of State determines that the technology is acceptable for use with the state, the Secretary of State shall adopt regulations which would add the proposed technology to the list of acceptable technologies in the regulations.[659] The Secretary of State has one hundred eighty calendar days from the date the request is received to review the petition and inform the petitioner, in writing, whether the technology is accepted or rejected. If the petition is rejected, the Secretary of State shall provide the petitioner with the reasons for the rejection.[660]

Prior to accepting a digital signature, public entities shall ensure that the level of security used to identify the signer of a document is sufficient for the transaction being conducted.[661] Prior to accepting a digital signature, public entities shall ensure that the level of security used to transmit the signature is sufficient for the transaction being conducted.[662] If a certificate is a required component of a digital signature transaction, public entities shall ensure that the certificate format used by the signer is sufficient for the security and interoperability needs of the public entity.[663]

The provisions for the use of electronic transactions and electronic signatures in the private sector are set forth in the Uniform Electronic Transactions Act.[664] The purpose of the Act was to establish the legitimacy of electronic records and signatures and give them the same legal status as paper writings and manually signed signatures. The Act applies only to transactions between parties where all of the parties involved have agreed to conduct the transaction by electronic means.[665]

UNCLAIMED PROPERTY

Under Government Code section 50050, unclaimed property escheats or reverts to the local agency.[666] Section 50050 states that, except as otherwise provided by law, money, excluding restitution to victims, that is not the property of a local agency that remains unclaimed in its treasury or in the official custody of its officers for three years, is the property of the local agency after notice, if not claimed, or if no verified complaint is filed and served. At any time after the expiration of the three-year period, the treasurer of the local agency may cause a notice to be published, once a week for two successive weeks, in a newspaper of general circulation published in the local agency.

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[658] California Code of Regs. Title V, Section 22003(b).
[659] California Code of Regs. Title V, Section 22004(a).
[660] California Code of Regs. Title V, Section 22004.
[661] California Code of Regs. Title V, Section 22005(a).
[662] California Code of Regs. Title V, Section 22005(b).
[663] California Code of Regs. Title V, Section 22005(c)
[664] Civil Code section 1633.1 et seq.
[665] Civil Code section 1633.5.
[666] Escheat is defined as the reversion of property to the state or a local agency.

An interested party may file a claim for unclaimed money in the treasury of a local agency. The claim must be filed before the date the money becomes the property of the local agency as designated in the notice of the unclaimed money, and it must include the claimant's name and address, the amount of the claim, the grounds on which the claim is founded, and any other information required by the treasurer.[667]

If the claim is rejected, the party who submitted the claim may file a verified complaint seeking to recover all, or a designated part, of the money in a court within the county in which the notice is published. A copy of the complaint and summons must be served on the treasurer within thirty days of receiving notice that the claim was rejected. The treasurer must withhold the release of the portion of unclaimed money for which a court action has been filed until a decision is rendered by the court.[668]

USE OF SURVEILLANCE CAMERAS IN THE WORKPLACE

Courts have examined the use of surveillance cameras in the employment context, balancing the need for security with employee privacy rights. Under the California Constitution, all individuals have a right of privacy.[669] However, the right to privacy is not absolute, and courts have established that in order to violate an employee's privacy rights, there must be a "sufficiently offensive or serious intrusion on the employee's reasonable expectation of privacy."[670]

In the Hernandez v. Hillsides, Inc. case, the employer, Hillsides Inc., operated a group home for abused children. The director of the facility was informed that after hours, an unknown person repeatedly used an office to access the Internet to view pornographic websites in violation of company policy and Hillsides' goal to provide a safe environment for children. Therefore, the director installed surveillance cameras that could be controlled remotely and used at any time of day or night in plaintiffs' office without informing plaintiff or obtaining plaintiff's consent. When plaintiffs discovered the hidden camera, they filed suit.[671] In reviewing the facts on appeal, the California Supreme Court found that although plaintiffs presented facts in support of an intrusion occurring, the facts did not rise to the level of offensiveness for the second prong of the balancing test to be satisfied. The Hernandez court noted that "a privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person."[672] In response, a defendant may show a competing interest for the intrusion that the court must balance, along with a showing that less intrusive alternatives were not reasonably available.[673]

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[667] Government Code section 50052.
[668] Government Code section 50052.
[669] Cal. Const. Art. 1, Sect. 1.
[670] Hernandez v. Hillsides, Inc., 47 Cal.4th 272 (2009).
[671] Id.
[672] Id. at 286.
[673] Id. at 287, citing to Hill v. National Collegiate Athletic Assn., 7 Cal.4th 1 (1994).

In opining that there was an insufficient basis for plaintiff's claims in Hernandez, which involves a private employer, the court did note that in the context of a governmental search, the standards may be different. If a governmental search intrudes on an enclosed office or protected workspace with covert video surveillance, there may be a limited reasonable expectation of privacy under the Fourth Amendment.[674] This distinction is important for OCDE, a public entity, to consider when determining placement of surveillance cameras.

The potential Fourth Amendment issue for employers installing surveillance cameras was addressed in Richards v. County of Los Angeles.[675] In Richards, the Ninth Circuit found that the covert use of surveillance cameras in a workplace used as a locker and break room by employees violated the employees' reasonable expectation of privacy.

The plaintiff in Richards was a dispatcher for Los Angeles County Department of Public Works ("DPW"). An anonymous tip to her supervisor alleged that plaintiff had engaged in misconduct in the dispatch room, which also served as a locker and rest and meal break room for employees. In response, DPW installed covert surveillance cameras inside a fake smoke detector and recorded video continuously, even when Richards was not working.[676]

The Richards court applied the two-prong test enunciated by a plurality of the United States Supreme Court in O'Connor v. Ortega, which involved a government employer's search of an employee.[677] The first prong of the test is a case-by-case review of the "operational realities of the workplace" to determine whether an employee has a reasonable expectation of privacy.[678] If the employee has a reasonable expectation of privacy in the workplace, the employer's intrusion on that expectation, whether for non-investigatory or investigatory work-related purposes, should be judged by the standard of reasonableness considering the circumstances.[679] For the second prong of the test, the government employer's search may be deemed reasonable if (1) it is justified at its inception, (2) the measures are reasonably related to the objectives of the search, and (3) the measures are not excessively intrusive in light of the circumstances giving rise to search.[680]

In Richards, because DWP hid the cameras, filmed the dispatch room continuously, and required employees to use the dispatch room as a locker and break room, the court found that the employees had a reasonable expectation of privacy in the dispatch room and that the measures taken to monitor the dispatch room were excessive.[681] The Richards court noted:

> "At the risk of stating the obvious, employers can investigate allegations of employee misconduct. Employers have many traditional tools available in that regard. Covert video

[674] Id. at fn. 9, citing to U.S. v. Taketa, 923 F.2d 665 (9th Cir. 1991) (disapproving admission of warrantless secret videotape made in shared office of airport) and State v. Bonnell, 856 P.2d 1265 (1993) (upholding suppression of warrantless secret videotape made in employee break room of post office).
[675] 775 F.Supp.2d 1176 (2011).
[676] Id. at 1180-1182.
[677] O'Connor v. Ortega, 480 U.S. 709 (1987).
[678] Id. at 717, 718.
[679] Id. at 725-726.
[680] Id.
[681] Richards, 775 F.Supp.2d at 1186-1188.

> surveillance is not a traditional tool. We pride ourselves on our respect for individual privacy. Outside of a strip search or a body cavity search, a covert video search is the most intrusive method of investigation a government employer could select. Secret videotaping goes against the grain of our strong anti-Orwellian traditions. Secret videotaping should be reserved for those extreme and rare circumstances involving serious transgressions where it is highly improbable that less odious techniques will be effective. The intrusiveness of the search must be commensurate with the seriousness of the suspected misconduct."[682]

With this strong statement, the Richards court concluded that DWP violated the plaintiff's Fourth Amendment rights, under the O'Connor plurality or minority tests,[683] because of the constant and non-discriminating nature of the surveillance, and because it occurred in a semi-private area where employees had to perform non-work activities.[684]

In addition to the privacy and search considerations noted above, installing surveillance cameras has a potential impact on negotiations with collective bargaining units. In National Steel Corporation v. National Labor Relations Board,[685] the Court of Appeals held that the use of cameras in the workplace is a mandatory subject of collective bargaining. The Court of Appeals affirmed an order of the NLRB that ordered the employer to bargain with unions over the use of cameras and the provision of information about such cameras.[686] More recently, in California School Employees Association v. Rio Hondo Community College District,[687] the Public Employment Relations Board (PERB) held that the community college district violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, by refusing to bargain with the California School Employees Association (CSEA) over the effects of a decision to install security cameras. Another recent PERB decision, International Brotherhood of Teamsters v. County of Sacramento, lowered the standards for a union to request to bargain the effects of a non-negotiable decision by eliminating the requirement to identify specific effects within the scope of bargaining.[688]

In National Steel Corporation, the Seventh Circuit did not find clear intent for a waiver to forego future bargaining where the union had knowledge of the employer's past use of cameras and failed to previously request bargaining over cameras. In addition, the court held that information regarding cameras was relevant to the discharge of the statutory union duties and responsibilities to union members and, thus, the NLRB could require the employer to bargain over accommodations between union information needs and the employer's justified interest in confidentiality of information. The court ruled that the use of such cameras is analogous to

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[682] Id. at 1184.

[683] The Richards court noted that Justice Scalia's concurrence test is essentially the court asking whether the government's search would be "regarded as reasonable and normal in the private-employer context." The Richards court looked to the Hernandez decision, described above, for the appropriate standard to apply under the concurrence test and found DWP violated plaintiff's rights under either test. Id. at 1185-1186.

[684] Id. at 1186.

[685] 324 F.3d 928 (7th Cir. 2003).

[686] Id.

[687] PERB Decision No. 2313 (March 21, 2013).

[688] PERB Decision No. 2315M (April 15, 2013).

physical examinations, drug and alcohol testing, and polygraph testing and is, therefore, a mandatory subject of collective bargaining.[689]

In Rio Hondo Community College District, PERB held that upon reaching a firm decision and before implementing a non-negotiable decision, an employer must give notice and bargain upon request over the reasonably foreseeable effects of that decision.[690] The employer must provide notice sufficiently in advance of implementation to permit the union a reasonable amount of time to consider demanding to bargain and to negotiate over the effects.[691] PERB held that the type of evidence an employer relies on or is permitted to use to substantiate employee performance evaluations is logically and reasonably related to evaluation procedures, which is an enumerated term and condition of employment in Government Code section 3543.2(a), as well as for imposing discipline. Using surveillance cameras to monitor employees at work and potentially using the product of that surveillance at disciplinary proceedings is logically and reasonably related to disciplinary procedures, a matter which has been held to be within the scope of representation.[692] PERB also noted that employer policies or workplace rules concerned with monitoring employee Internet usage are negotiable.[693] Therefore, PERB deemed surveillance camera monitoring of employee compliance with workplace rules presents the same concerns and may lead to disagreements over whether and how to use the video records of employee observations in evaluations or disciplinary proceedings. PERB noted that both employers and employees are interested in the types, sources, and reliability of evidence that the employer may use in evaluating and disciplining employees, as well as in the availability to the union and employees of existing records which may contradict eyewitness or other employer evidence.

Finally, with the decision in County of Sacramento, unions may put the employer on notice that they seek to bargain at least over effects without identifying specific effects within the scope of bargaining. Districts might anticipate a demand for bargaining the effects of surveillance camera installation.

The placement of video cameras in a school setting implicates the constitutional rights of employees and the public. The Fourth Amendment of the United States Constitution and Article I, Section 13 of the California Constitution, prohibit unreasonable searches and seizures. Article I, Section 1 of the California Constitution, establishes a right of privacy. The courts have characterized the videotaping of individuals as a search in some contexts. In similar circumstances, in interpreting the Fourth Amendment, the United States Supreme Court has held, for example, that individuals have a reasonable expectation of privacy in the use of public

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[689] 324 F.3d 928 (7th Cir. 2003).

[690] Mt. Diablo Unified School District, PERB Decision No. 373 (1983); Trustees of the California State University, PERB Decision No. 2287-H (2012).

[691] Victor Valley Union High School District, PERB Decision No. 565 (1986); Compton Community College District, PERB Decision No. 720 (1989).

[692] Fairfield-Suisun Unified School District, PERB Decision No. 2262 (2012); Arvin Union School District, PERB Decision No. 300 (1983); San Bernardino City Unified School District, PERB Decision No. 255 (1982).

[693] Trustees of the California State University, PERB Decision No. 1507-H (2003); State of California (Water Resources Control Board), PERB Decision No. 1337-S (1999).

telephones. The court held that the government may not place an electronic listening device on a public telephone booth without a warrant.[694]

However, in Smith v. Maryland,[695] the U.S. Supreme Court held the government's use of a pen register, a device that records the phone numbers that an individual dials, does not violate the Fourth Amendment. The court reasoned that people are aware that when they dial a phone number in a public telephone booth they are conveying the telephone number to the telephone company since it goes to the telephone company's switching equipment. Therefore, there is a diminished expectation of privacy in the phone numbers that one dials and it is not a violation of the Fourth Amendment to use a pen register.

The courts have applied similar principles to written communications. In United States v. Choate,[696] the Ninth Circuit Court of Appeals held that individuals have a reasonable expectation of privacy in their sealed letters and that the Fourth Amendment protects the warrantless opening of sealed letters and packages addressed to an individual. However, a person does not have a reasonable expectation of privacy with respect to what is written on the outside of the envelope.[697]

The courts have ruled in a similar manner with respect to e-mail. Individuals have a reasonable expectation of privacy with respect to the content of their e-mails but not in the "To/From" line of e-mails.[698] An individual may also have a reasonable expectation of privacy in the content of their text messages.[699]

Whether an employee has a reasonable expectation of privacy with respect to e-mail, text messages, the contents of their school district provided computer, or their school district provided vehicle, largely depends upon the written policies of the school district. In O'Connor v. Ortega,[700] the Supreme Court held that whether a public employee has a reasonable expectation of privacy must be determined on a case-by-case basis. The court held that an expectation of privacy in one's place of work is based upon societal expectations and the operational realities of the workplace. The court noted that some government offices may be so open to fellow employees or to the public that no expectation of privacy is reasonable. Given the variety of workplace environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

In contrast, where an employer has consistently stated that they may inspect the laptops that it has provided to employees, the employees' reasonable expectation of privacy is diminished. In Muick v. Glenayre Electronics,[701] the Court of Appeals held that Muick had no right of privacy in the computer that the employer had provided him for use in the workplace because the employer had warned employees that it could inspect the laptops without prior notification. The court held that the employer's clear warning defeated any reasonable

[694] Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967).
[695] 442 U.S. 735, 742, 99 S.Ct. 25, 77 (1979).
[696] 576 F.2d 165, 174 (9th Cir. 1978); United States v. Jacobsen, 466 U.S. 109, 114, 104 S.Ct. 1652 (1984).
[697] See, United States v. Hernandez, 313 F.3d 1206, 1209-10 (9th Cir. 2002).
[698] See, United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008).
[699] See, Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 905 (9th Cir. 2008).
[700] 480 U.S. 709, 719, 107 S.Ct. 1492 (1987).
[701] Muick v. Glenayre Electronics, 280 F.3d 741, 743 (7th Cir. 2002).

expectation of privacy that Muick might have. The court noted that the laptops were the employer's property and that the employer could attach whatever conditions to their use it wished. The court noted that abuse of workplace computers is so common that an employer reserving the right to inspect employer provided computers was reasonable.[702] However, where an employee is given exclusive use of an office area, the employee may have a reasonable expectation of privacy unless the employer puts the employee on notice that the employer reserves the right to inspect the office.[703]

In City of Ontario v. Quon,[704] the United States Supreme Court held that the city's review of a police officer's text messages on a city-issued pager was reasonable and did not violate the Fourth Amendment. The Supreme Court held the search was for a work-related purpose and was reasonable in scope.

Based on these cases, it is our opinion that the use of a video camera in public places where employees and members of the public do not have a reasonable expectation of privacy is permissible. The posting of a sign advising employees and the members of the public of the video cameras will diminish their reasonable expectation of privacy and is strongly recommended. However, cameras should not be posted in private places, such as restrooms and private offices. Also, the cameras should not include audio recording. Penal Code section 632 prohibits eavesdropping and electronic recording of confidential communications. "Confidential communications" are defined as any communication carried on in circumstances that reasonably indicate that any party to the communications desires the conversation to be confined to the parties involved in the conversation. The use of cameras with audio capability may record private conversations between two individuals which they believe to be confidential and could lead to a violation of Penal Code section 632. Therefore, we would strongly recommend that the video cameras do not include audio capability.

In addition, the use of cameras in the workplace falls within the scope of bargaining.[705] Government Code section 3543.2 defines the scope of bargaining as including wages, hours of employment, health and welfare benefits, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluations of employees, and other terms and conditions of employment. In San Mateo City School District v. Public Employment Relations Board,[706] the California Supreme Court held that a subject is negotiable, even though not specifically enumerated in the Education Employment Relations Act (EERA), if it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment.

In summary, a school district may place video cameras without audio capability in public places. The school district should post signs advising employees and members of the public of the presence of video cameras. If the employee unions request to negotiate, the district will be required to negotiate in good faith with the employee unions.

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[702] Id. at 743.
[703] Schowengerdt v. General Dynamics Corporation, 823 F.2d 1328, 1335 (9th Cir. 1987).
[704] 130 S.Ct. 2619 (2010).
[705] See, National Steel Corp. v. National Labor Relations Board, 324 F.3d 928 (7th Cir. 2003).
[706] 33 Cal.3d 850, 191 Cal.Rptr. 800 (1983).

SECURITY BREACHES AND PRIVACY OF PERSONAL INFORMATION

Assembly Bill 1149[707] and Senate Bill 46[708] amend Civil Code sections 1798.29 and 1789.82, effective January 1, 2014.

Civil Code section 1798.29(k), as amended, extends the requirements of current state law regarding information privacy breaches to local public agencies, including school districts, and expands the scope of personal information that prompts the disclosure of a security breach. Current California law requires state agencies and businesses to notify residents when the security of their personal information has been breached. The disclosure must be made as quickly as possible and without unreasonable delay.

Civil Code section 1798.29(k), as amended, expands current disclosure requirements to apply to a breach of computerized data that is owned, licensed, or maintained by any county, city, school district, municipal corporation, special district, or other local public agency. Section 1798.29(g)(2) and section 1798.82(h)(2) expand the scope of personal information subject to security breach disclosure requirements to include a user name or e-mail address, in combination with a password or security question and answer that permits access to an online account.

Civil Code section 1798.29(a) states that any agency that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose encrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system. Section 1798.29(d) requires that the security breach notification meet all of the following requirements:

1. The security breach notification shall be written in plain language.

2. The security breach notification shall include: (a) the name and contact information of the reporting agency; (b) a list of the types of personal information that were, or were reasonably believed to, have been the subject of the breach; (c) if the information is possible to determine at the time the notice is provided, the date of the breach, the estimated date of the breach, or the date range in which the breach occurred; (d) whether the notification was delayed as a result of a law enforcement investigation; (e) a general description of the breach incident; (f) the toll-free number and addresses of the major credit reporting agencies, if the

[707] Stats. 2013, ch. 395.
[708] Stats. 2013, ch. 396.

breach exposed a social security number or a driver's license, or a California identification card number.

3. At the discretion of the agency, the security breach notification may also include information about what the agency has done to protect individuals whose information has been breached, and advice on steps that the person whose information has been breached may take to protect himself or herself.

4. The agency may comply by providing the security breach notification in electronic or other form that directs the person whose personal information has been breached to promptly change his or her password and security question or answer, or to take other steps appropriate to protect the online account with the agency.

5. Other types of notice when breach of the security system involves personal information.

Civil Code section 1798.29(g) defines "personal information" as either of the following:

1. An individual's first name or first initial and last name in combination with any one or more of the following data elements when either the name or the data elements are not encrypted: (a) Social Security number; (b) driver's license number or California identification card number; (c) account number, credit or debit card number, in combination with any required security code, access code or password that would permit access to an individual's financial account; (d) medical information; or (e) health insurance information.

2. A user name or e-mail address, in combination with a password or security question or answer that would permit access to an online account.

Civil Code section 1798.82 applies to any person or business that conducts business in California and that owns or licenses computerized data that includes personal information. Section 1798.82 defines "personal information" in the same manner as Section 1798.29.

Districts will now need to establish a procedure in order to respond in a timely manner in the event of a data breach. These new requirements may constitute a state mandate and districts may want to consider filing a test claim with the Commission on State Mandates to determine whether the mandatory notification requirements constitute a state reimbursable mandate. If the Commission on State Mandates determines that all or part of the notification requirements are unfunded state mandates, then districts may apply to the Legislature for reimbursement of costs associated with these new requirements.

COMMUNITY RECREATION PROGRAMS

A. Purpose and Definitions

The Education Code authorizes school districts and other public agencies to operate community recreation programs.[709] The purpose of these programs is to promote and preserve the health and general welfare of the people of the state and to cultivate the development of good citizenship by provision for adequate programs of community recreation. Education Code section 10900(b) authorizes school districts to organize, promote and conduct programs of community recreation for the attainment of general educational and recreational objectives for children and adults.

Education Code section 10901 defines a governing body for purposes of establishing community recreation programs as a city, city council, municipal council, board of supervisors, the governing board of a public corporation or district, or the governing board of a school district. Section 10901(c) defines recreation as any activity, voluntarily engaged in, which contributes to the physical, mental, or moral development of the individual or group participating in the activity, and includes any activity in the fields of visual and performing arts, handicraft, science, literature, nature study, aquatic sports and athletics, and any informal play incorporating such activity. Section 10901(d) defines "community recreation" and "public recreation" as meaning that the recreation may be engaged in under direct control of the public authority. Section 10901(f) defines "recreation center" as a place, structure, area, or other facility under the jurisdiction of a governing body of a public authority used for community recreation, whether or not it may be used primarily for other purposes, including playgrounds, playing fields, swimming pools, gymnasiums, auditoriums, libraries, parks adjacent to school sites, recreational community gardens, rooms for arts and crafts, and meeting places.

Cities, counties, special districts, for profit and non-profit organizations, school districts, and joint powers agencies may operate community recreation programs. These community recreation programs may include the classes and programs that the district currently operates. Whether these recreation programs may charge student fees when operated by a school district is an unanswered question.

B. Governance of Community Recreation Programs

Education Code section 10902 states that the governing body of every public authority may do all of the following:

1. Organize, promote, and conduct programs of community recreation.

2. Establish systems of playgrounds and recreation.

[709] Education Code section 10900 et seq.

3. Acquire, construct, improve, maintain and operate recreation centers within or without the territorial limits of the public authority.

Education Code section 10902 states, "No events for which an admission price is charged shall be held pursuant to this chapter, except amateur athletic contests, demonstrations, or exhibits and other educational events." Section 10904 states that a public authority may permit the use of a recreation center or facility by a parent cooperative nursery group on a nonexclusive and nondiscriminatory basis, when such use does not unreasonably impair or interfere with the right of the public to use the center or facility.

Education Code section 10905 states that the governing body of any public authority may cooperate with the governing bodies of any two or more public authorities, or with the federal government or any department thereof, to carry out the purposes of community recreation programs. The governing bodies of the public agencies may enter into agreements with each other and may do any and all things necessary or convenient to aid and cooperate in carrying out the purposes of community recreation programs, or to establish, improve, or maintain recreational facilities. The governing bodies of any two or more public authorities having jurisdiction over any of the same territory, or over contiguous territories, may jointly establish a system or systems of recreation, and may jointly do any act which either is authorized to do.

Education Code section 10907 states that the governing body of any public authority, other than a school district, may designate any already existing board, officer, or employee of the public authority, to exercise the powers granted by this chapter to carry out the purposes of this chapter or may provide for the appointment of a board of recreation commissioners to exercise these powers. A school district may appoint one or more members of the board of trustees, officers or employees, to represent the district on a board of recreation commissioners. The board of recreation commissioners shall consist of either five members or seven members, as determined by the governing body or bodies providing for its appointment, who shall serve with or without compensation at the discretion of the governing body.[710] The board of recreation commissioners, or the board, officer, or employee of the authority designated to exercise the powers, shall exercise such powers and perform such duties, pursuant to this chapter, as the governing body of the public authority may prescribe.[711]

C. Use of Facilities

The governing body and any school district may use the buildings, grounds, and equipment of the district, or any of them, to carry out the purposes of this chapter, or may grant the use of any building, grounds, or equipment of the district to any other public authority for the purposes, whenever the use of the buildings, grounds, or equipment for community recreation purposes will not interfere with the use of the buildings, grounds, and equipment for any other purpose of the public school system.[712] The governing body of a school district may require persons, other than students, or organizations desiring to use the recreational facilities on school

[710] Education Code section 10908.
[711] Education Code section 10909.
[712] Education Code section 10910.

grounds, or belonging to a school or the facilities provided by the district at a community recreation center maintained solely by the district to pay fees for the use as the governing body may prescribe.[713]

The governing body of a school district may require persons or organizations desiring to use school buses belonging to a school to pay fees for the use as the governing body may prescribe.[714] All necessary expenses incurred by the governing body of any school district in carrying out the purposes of this chapter are a charge against the funds of the district from whatever source the funds have been received. All the expenditures shall be made in the same manner as funds are expended for other school purposes. Nothing in this chapter shall be construed to change in any way, existing laws regarding the use of school grounds or school buildings by governing boards of school districts, except as specifically provided in this chapter.[715]

All funds for the community recreation programs, from whatever source such funds are received, shall be placed in the appropriate account and all authorized community recreation expenses shall be paid therefrom. The governing board of the district shall designate an employee or employees of the district to have custody of the account or accounts, who shall be responsible for the payment into the accounts of all monies required to be paid into the account or accounts, and for all expenditures therefrom, subject to such regulations as the governing board prescribes.[716]

D. Operation of Programs by Other Agencies

Generally, cities have the authority to establish programs to promote public recreation. These programs are regarded as within the legitimate domain of public purposes.[717]

In addition, cities and counties are empowered by statute to provide for parks and other public recreational facilities.[718] County boards of supervisors and county boards of education are also authorized to establish recreational programs.[719]

Joint projects between cities and school districts are also permissible. For example, in a 1944 opinion, the Attorney General stated that a city and a school district may jointly contribute funds to build and maintain a swimming pool. The Attorney General stated that both agencies were authorized to contribute to the plan and such contributions would not constitute a gift of public funds, since the expenditure would serve a public purpose.[720] In a 1957 opinion, the Attorney General stated that, "A school district may furnish school facilities to a recreation

[713] Education Code section 10912.
[714] Education Code section 10913.
[715] Education Code section 10914.
[716] Education Code section 10914.5.
[717] 45 Cal.Jur 3d, Municipalities section 220, pp. 366-67; Egan v. City and County of San Francisco, 165 Cal. 576 (1913); Spires v. City of Los Angeles, 150 Cal. 64 (1906).
[718] Public Resources Code section 5013.
[719] Public Resources Code section 5157, Education Code section 10903.
[720] 4 Ops.Cal.Atty.Gen. 368, 370 (1944).

district for community recreation programs and may do so with or without charge to the recreation district.[721]

In a 2008 opinion, the Attorney General stated that a county may enter into a joint use agreement with a school district under which the county would lease a portion of a county park (a baseball field) to the district for its exclusive recreational use during nonschool hours for three months of the year, four hours each day. The Attorney General noted that under the Public Park Preservation Act of 1971,[722] a county may enter into a joint agreement with a school district to lease the baseball field portion of a public park to a school district.[723]

E. Student Fees

The question then becomes whether a school district may charge fees to students when the school district operates the community recreation program, rather than the city, county, or special district. As discussed in our letter of November 2, 2012, Assembly Bill 1575 enacted Education Code sections 49010 through 49013, which state that school districts may not charge fees to students for educational activities. Education Code section 49010(a) defines "educational activity" as any activity offered by a school district that constitutes an integral fundamental part of elementary and secondary education, including, but not limited to, curricular and extracurricular activities. The language of Section 49010(a) comes from the California Supreme Court case of Hartzell v. Connell.[724] In Hartzell v. Connell, the California Supreme Court stated, "Educational activities are to be distinguished from activities which are purely recreational in character. Examples of the latter might include attending weekend dances or athletic events."[725]

In Howard Jarvis Taxpayers Association v. Whittier Union High School District,[726] the Court of Appeal held that school districts qualify as special districts within the meaning of the Landscaping and Lighting Act of 1972 for the purpose of establishing an assessment district to levy special assessments to maintain facilities for recreational purposes. The court noted that heavy community use of the facilities and grounds during nonschool hours have led to deterioration of the facilities, and the facilities are now in need of improvements. The court held that the formation of the recreation improvement and maintenance district was consistent with the general authority of school districts and consistent with the Civic Center Act to make school buildings centers of free public assembly insofar as such assembly does not encroach upon the educational activities of the school. The court also found that the school district's formation of a recreation improvement and maintenance district was consistent with the Education Code, which authorizes school districts to operate community recreation programs.[727] The Court of Appeal stated:

> "In addition, the assessments are being levied not for educational purposes, but to finance recreational improvements to

[721] 30 Ops.Cal.Atty.Gen. 291 (1957).
[722] Public Resources Code section 5400 et seq.
[723] 91 Ops.Cal.Atty.Gen. 61 (2008).
[724] 35 Cal.3d 899, 913-917, 201 Cal.Rptr. 601 (1984).
[725] Id. at 910, note 14.
[726] 15 Cal.App.4th 730, 19 Cal.Rptr.2d 109 (1993).
[727] See, Education Code section 10900 et seq.

> certain school facilities and grounds used for community recreational purposes during nonschool hours. Respondents calculated the percentage of total facilities usage attributable to community activities in order to determine what percentage of the total improvement costs would be financed by the special assessments. Those facilities costs associated with school usage are not being financed by the assessment funds. . . .
>
> "Neither is there a basis for concluding there has been a violation of the free school guarantee (Cal. Const., art. IX, sec. 5). The special assessments respondents seek to levy are statutorily authorized and are more in the nature of 'noneducational, supplemental services'. . . than activities which constitute 'an integral fundamental part of education or a necessary element of any school's activity . . .'"[728]

F. Summary

In summary, the school district has several options in operating community recreational programs and classes. The school district may operate the program itself, the school district may operate the program in conjunction with the cities in the area, the district may seek to form a special district for community recreation purposes, the school district may seek to jointly operate the programs in conjunction with the city or county or the recreation programs may be operated by an independent non-profit organization. In operating the programs in conjunction with a city, county or special district, the issue of charging fees to students and community members is less likely to be challenged.

However, if the school district operates the program and classes solely under its own authority, it is more likely that the ability of the school district to charge fees to students will be challenged. At this time, it is unclear whether it would be permissible for the school district to charge fees to students for community recreation programs in light of the passage of A.B. 1575 which takes effect January 1, 2013.

In addition, independent organizations, for profit and non-profit organizations may operate recreation programs and apply for the use of school facilities under the Civic Center Act. These organizations may charge fees if they are independent of the school district and the programs are open to the community.

Therefore, we would recommend that the school district consider operating recreation programs in conjunction with a city, the County of Orange, form a special district with the cities or allow independent organizations to use school facilities under the Civic Center Act, so that the issue of charging fees to students is less likely to be challenged.

[728] Id. at 737.

LOCAL CONTROL AND ACCOUNTABILITY PLANS

A. Brief Overview of the Adopted State Budget for 2013-2014

In June 2013, the Legislature enacted and Governor Brown signed a 2013-2014 State Budget and a new formula for the allocation of funds to school districts and county offices of education known as the Local Control Funding Formula.[729] The enactment of the Local Control Funding Formula ("LCFF") is a fundamental change in the way school districts, county offices, and charter schools are funded. A district's annual LCFF entitlement will be determined by any available appropriations which gives broad discretion to the Legislature.[730] The key elements in the LCFF entitlement are the demographics of a district's student population, specifically the percentage of students who qualify for supplemental and concentration grants.[731]

Numerous fiscal inequities could arise during the implementation phase of the LCFF and the state can reduce appropriations in future years. There is no statutory guarantee that revenue increases will actually be appropriated to schools. A downturn could occur in the next eight years, which would reduce funding. If there is a recession, the school districts that have high levels of eligible students for supplemental grants and concentration grants may suffer the largest decrease in revenue. Each district's situation will be different based on the number of students that make the school district eligible for supplemental and concentration grant funding.

B. Local Control Funding Formula

In January 2013, the Governor proposed full flexibility for local school districts. The Legislature revised the accountability provisions of the Governor's proposal and gave direction to the State Board of Education to adopt regulations on local school district accountability. Under LCFF, districts will receive a base grant (which is similar to revenue limits) and supplemental and concentration grants (which are similar to categorical programs). The LCFF will fund every student at the same base rate, but districts will receive varying amounts of supplemental and concentration grants, depending on the student demographics of the school district.

The LCFF replaces most categorical programs with two weighting factors applied against the LCFF base grant:

1. Twenty percent of the base grant on behalf of each eligible student (Supplemental Grant).

2. An additional fifty percent of the base grant for the eligible students exceeding fifty-five percent of total enrollment (Concentration Grant).

[729] Assembly Bill 97, Stats. 2013, ch. 47, effective July 1, 2013. On September 26, 2013, Governor Brown signed Senate Bill 97 and vetoed Senate Bill 344, which made changes to the Local Control Funding Formula and the Local Control and Accountability Plan.
[730] Education Code section 42238.03(b)(3).
[731] Education Code sections 42238 through 42238.15.

Eligible students are low income (pupils eligible for free and reduced-price meals programs), English Language Learners, and foster youth. The funding is largely unrestricted, but will be subject to comprehensive accountability requirements. The supplemental grant and concentration grants will be based on the number of English Language Learners, pupils eligible for free and reduced price meal programs, and foster youth. The number of unduplicated pupils enrolled in each school district as a percentage of total enrollment will constitute the unduplicated count. In 2013-14, one year of data will be used, in 2014-15, the average of two years data will be used, in 2015-16 and future years, three years of data will be used, from the California Longitudinal Pupil Achievement Data System (CALPADS).

C. One Time Funds for Common Core State Standards

The state budget provides $1.25 billion statewide in one-time funds for the implementation of the Common Core State Standards. That amount is estimated to be about $200 per student. The money is one-time money to be spent in 2013-14 and 2014-15.

As a condition of receipt of the funds, each local educational agency must develop and adopt an expenditure plan detailing how the funds will be spent. The plan must be adopted and a public hearing must be held on the plan. On or before July 1, 2015, a report must be filed with the California Department of Education and include the specific purchases made and the number of teachers, administrators and paraprofessional educators who received professional development. The money is expected to be used for professional development, instructional materials, supplemental instructional materials aligned to the Common Core State Standards, and technology.

D. Adoption of the Local Control and Accountability Plan

On or before July 1, 2014, the governing board of each school district is required to adopt a Local Control and Accountability Plan using a template adopted by the State Board of Education.[732] The Local Control and Accountability Plan (LCAP) is defined as the plan created by the local educational agency pursuant to Education Code sections 47606.5, 52060, or 52066, and completed in conformance with the LCAP and Annual Update template set forth in the regulations.[733] A local educational agency (LEA) is defined as a school district, county office of education, or charter school.[734] The term "prior year" is defined as one fiscal year immediately preceding the fiscal year for which an LCAP is approved.[735]

The regulations define "services" as services associated with the delivery of instruction, administration, facilities, pupil support services, technology, and other general infrastructure necessary to operate and deliver educational instruction and related services.[736] The regulations define "state priority areas" as priorities identified in Education Code sections 52060 and 52066. For charter schools, "state priority areas" is defined as priorities identified in Education Code

[732] Education Code section 52060(a). Stats. 2013, ch. 47, section 103, effective July 1, 2013. A copy of the template is attached as Appendix II.
[733] Title 5, California Code of Regulations, Section 15495(a).
[734] Title 5, California Code of Regulations, Section 15495.
[735] Title 5, California Code of Regulations, Section 15495(c).
[736] Title 5, California Code of Regulations, Section 15495(d).

section 52060 that apply for the grade level served or the nature of the program operated by the charter school.[737] The regulations define the phrase "to improve services" as meaning to grow services in quality.[738] The phrase "to increase services" is defined as meaning to grow services in quantity.[739] The phrase "unduplicated pupil" means any of those pupils to whom one or more of the definitions included in Education Code section 42238.01 apply, including pupils eligible for free or reduced-priced meals, foster youth, and English learners.[740]

School districts will be required to describe in the LCAP how districtwide and schoolwide services are principally directed towards and are effective in, meeting the districts goals for its unduplicated pupils in the state and any local priority areas. Previously, the regulations simply stated that school districts were required to describe how services were directed toward meeting the districts goals for its unduplicated pupils in the state priority areas.

For school districts that have enrollment of unduplicated pupils that have less than fifty-five percent or less than forty percent unduplicated pupils school districts are required to describe how districtwide or schoolwide services are the most effective use of the funds to meet the district's goals for its unduplicated pupils in the state or any local priority areas. The final regulations added language that requires school districts to describe the basis for this determination, including, but not limited to, any alternatives considered in any supporting research, experience or educational theory that support the determination.[741]

A Local Control and Accountability Plan adopted by a governing board of a school district shall be effective for a period of three years and shall be updated on or before July 1 of each year.[742] The Local Control and Accountability Plan adopted by a governing board of a school district must include, for the school district and each school within the school district, a description of both of the following:

> 1. The annual goals, for all pupils and each subgroup of pupils identified pursuant to Section 52052 (ethnic subgroups, socioeconomically disadvantaged pupils, English learners, and pupils with disabilities), to be achieved for each of the state priorities and for any additional local priorities identified by the governing board of the school district. For purposes of this article, a subgroup of pupils identified pursuant to Section 52052 shall be a numerically significant pupil subgroup as specified in paragraphs (2) and (3) of subdivision (a) of Section 52052 (at least 30 pupils each of whom has a valid test score and the subgroup constitutes at least fifteen percent of the total population of pupils at a school who have valid test scores; if a subgroup does not constitute fifteen percent of the total population of pupils at

[737] Title 5, California Code of Regulations, Section 15495(e).
[738] Title 5, California Code of Regulations, Section 15495(f).
[739] Title 5, California Code of Regulations, Section 15495(g).
[740] Title 5, California Code of Regulations, Section 15495(h).
[741] See pages 6-7 of the workbook.
[742] Education Code section 52060(b).

a school who have valid test scores, the subgroup may constitute a numerically significant pupil subgroup if it has at least 100 valid test scores).

2. The specific actions the school district will take during each year of the Local Control and Accountability Plan to achieve the goals, including the enumeration of any specific actions necessary for that year to correct any deficiencies in regard to the state priorities. The specific actions shall not supersede the provisions of an existing collective bargaining agreement.[743]

Education Code section 52060(d) lists the following as state priorities with respect to the Local Control and Accountability Plan:

1. The degree to which the teachers of the school district are appropriately assigned, and fully credentialed in the subject areas, and, for the pupils they are teaching, every pupil in the school district has sufficient access to the standards-aligned instructional materials and school facilities are maintained in good repair.

2. Implementation of the academic content and performance standards adopted by the State Board of Education, including how the programs and services will enable English learners to access the common core academic content standards and the English language development standards for purposes of gaining academic content knowledge and English language proficiency.

3. Parental involvement, including efforts the school district makes to seek parent input in making decisions for the school district and each individual schoolsite, and including how the school district will promote parental participation in programs for unduplicated pupils and individuals with exceptional needs.

4. Pupil achievement, as measured by all of the following, as applicable:

   A. Statewide assessments or any subsequent assessment, as certified by the State Board of Education.

   B. The Academic Performance Index.

[743] Education Code section 52060(c).

C. The percentage of pupils who have successfully completed courses that satisfy the requirements for entrance to the University of California and the California State University, or career technical education sequences or clusters of courses that satisfy state requirements and align with state board-approved career technical education standards and frameworks.

D. The percentage of English learner pupils who make progress toward English proficiency as measured by the California English Language Development Test or any subsequent assessment of English proficiency, as certified by the State Board of Education.

E. The English learner reclassification rate.

F. The percentage of pupils who have passed an advanced placement examination with a score of 3 or higher.

G. The percentage of pupils who participate in, and demonstrate college preparedness pursuant to the Early Assessment Program or any subsequent assessment of college preparedness.

5. Pupil engagement, as measured by all of the following, as applicable:

A. School attendance rates.

B. Chronic absenteeism rates.

C. Middle school dropout rates.

D. High school dropout rates.

E. High school graduation rates.

6. School climate, as measured by all of the following, as applicable:

A. Pupil suspension rates.

B. Pupil expulsion rates.

C. Other local measures, including surveys of pupils, parents, and teachers on the sense of safety and school connectedness.

7. The extent to which pupils have access to, and are enrolled in, a broad course of study that includes all of the subject areas described in Section 51210 and subdivisions (a) to (i), inclusive, of Section 51220, as applicable, including the programs and services developed and provided to unduplicated pupils and individuals with exceptional needs, and the program and services that are provided to benefit these pupils as a result of the funding received.

8. Pupil outcomes, if available, in the subject areas described in Section 51210 (course of study) and subdivisions (a) to (i), inclusive, of Section 51220 (course of study), as applicable.[744]

For purposes of describing the Local Control and Accountability Plan, a governing board of a school district may consider qualitative information, including, but not limited to, findings that result from the school quality reviews conducted pursuant to Education Code section 52052(a)(4)(J) (Academic Performance Index or API) or any other reviews.[745] To the extent practicable, data reported in a Local Control and Accountability Plan shall be reported in a manner consistent with how information is reported on a school accountability report card.[746] A governing board of a school district shall consult with teachers, principals, administrators, other school personnel, parents, and pupils in developing a Local Control and Accountability Plan.[747] A school district may identify local priorities, goals in regard to the local priorities, and the method for measuring the school district's progress toward achieving those goals.[748]

The regulations require school districts to provide evidence in their LCAP to demonstrate how funding apportioned on the basis of the number and concentration of unduplicated pupils is used to support the unduplicated pupils. The supplemental grant and concentration grant funding must be used to increase or improve services for unduplicated pupils as compared to the services provided to all pupils in proportion to the increase in funds apportioned on the basis of the number and concentration of unduplicated pupils.

Each school district must include in its LCAP an explanation of how expenditures of such funding meet the school district's goals for its unduplicated pupils in the state priority areas. Each school district shall determine the percentage by which services for unduplicated pupils

[744] Education Code section 52060(d).
[745] Education Code section 52060(e).
[746] Education Code section 52060(f).
[747] Education Code section 52060(g).
[748] Education Code section 52060(h).

must be increased or improved above those services provided to all pupils in the fiscal year based on the formula set forth in the regulations.[749]

A school district may demonstrate it has increased or improved services for unduplicated pupils by using funds to upgrade the entire education program of a schoolsite, a school district, a charter school, or a county office of education as follows:

1. A school district that has an enrollment of unduplicated pupils in excess of 55% of the district's total enrollment in the fiscal year for which an LCAP is adopted or in the prior year may expend supplemental and concentration grant funds on a districtwide basis. A school district expending funds on a districtwide basis shall do all of the following:

    a. Identify in the LCAP those services that are being provided on a districtwide basis.

    b. Describe in the LCAP how such services are directed toward meeting the district's goals for its unduplicated pupils in the state priority areas.[750]

2. A school district that has an enrollment of unduplicated pupils in excess of 55% of the district's total enrollment in the fiscal year for which an LCAP is adopted or in the prior year may expend supplemental grant funds on a districtwide basis. A school district expending funds on a districtwide basis shall do all of the following:

    a. Identify in the LCAP those services that are being provided on a districtwide basis.

    b. Describe in the LCAP how such services are directed toward meeting the district's goals for its unduplicated pupils in the state priority areas.

    c. Describe how these services are the most effective use of the funds to meet the district's goals for its unduplicated pupils in the state priority areas.[751]

3. A school district that has an enrollment of unduplicated pupils at a school that is in excess of 40% of the school's total enrollment in the fiscal year for which an LCAP is adopted or in the prior year may expend supplemental and

[749] Title 5, California Code of Regulations, Section 15496.
[750] Title 5, California Code of Regulations, Section 15496(b)(1).
[751] Title 5, California Code of Regulations, Section 15496(b)(2).

concentration grant funds on a schoolwide basis. A school district expending funds on a schoolwide basis shall do all of the following:

a. Identify in the LCAP those services that are being provided on a schoolwide basis.

b. Describe in the LCAP how such services are directed toward meeting the district's goals for its unduplicated pupils in the state priority areas.[752]

4. A school district that has an enrollment of unduplicated pupils that is less than 40% of the schoolsite's total enrollment in the fiscal year for which an LCAP is adopted or in the prior year may expend supplemental and concentration grant funds on a schoolwide basis. A school district expending funds on a districtwide basis shall do all of the following:

a. Identify in the LCAP those services that are being provided on a schoolwide basis.

b. Describe in the LCAP how such services are directed toward meeting the district's goals for its unduplicated pupils in the state priority areas.

c. Describe how these services are the most effective use of the funds to meet the district's goals for its unduplicated pupils in the state priority areas.[753]

In making the determination of proportionality compliant, the county superintendent of schools shall review any descriptions provided by the school district when determining whether the school district has fully demonstrated that it will increase or improve services for unduplicated pupils. If the county superintendent of schools does not approve an LCAP because the school district has failed to meet its proportionality requirement, it shall provide technical assistance to the school district in meeting that requirement pursuant to Education Code section 52071.[754]

E. Updating the Local Control and Accountability Plan

On or before July 1, 2015, and each year thereafter, a school district shall update the Local Control and Accountability Plan. The annual update shall be developed using a template

[752] Title 5, California Code of Regulations, Section 15496(b)(3).
[753] Title 5, California Code of Regulations, Section 15496(b)(4).
[754] Title 5, California Code of Regulations, Section 15496(c).

developed the State Board of Education pursuant to Education Code section 52064 and shall include all of the following:

1. A review of any changes in the applicability of the goals in the Local Control and Accountability Plan.

2. A review of the progress toward the goals included in the existing Local Control and Accountability Plan, an assessment of the effectiveness of the specific actions described in the existing Local Control and Accountability Plan toward achieving the goals, and a description of changes to the specific actions the school district will make as a result of the review and assessment.

3. A listing and description of the expenditures for the fiscal year implementing the specific actions included in the Local Control and Accountability Plan as a result of the reviews and assessment required by Section 52061.

4. A listing and description of expenditures for the fiscal year that will serve the pupils to whom one or more of the definitions in Section 42238.01 (pupils eligible for free or reduced-priced meals, foster youth, or pupils of limited English proficiency) apply and pupils redesignated as fluent English proficient.[755]

F. Requirements for Adopting a Local Control and Accountability Plan

Before the governing board of a school district considers the adoption of a Local Control and Accountability Plan or an annual update to the Local Control and Accountability Plan, all of the following shall occur:

1. The superintendent of the school district shall present the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan to the parent advisory committee for review and comment. The superintendent of the school district shall respond, in writing, to comments received from the parent advisory committee.

2. The superintendent of the school district shall present the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan to the English learner parent advisory committee, if applicable, for review

[755] Education Code section 52061(a). The expenditures identified shall be classified using the California School Accounting Manual.

and comment. The superintendent of the school district shall respond, in writing, to comments received from the English learner parent advisory committee.

3. The superintendent of the school district shall notify members of the public of the opportunity to submit written comments regarding the specific actions and expenditures proposed to be included in the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan, using the most efficient method of notification possible. This provision shall not require a school district to produce printed notices or to send notices by mail. All written notifications shall be in the primary language of pupils if fifteen percent or more of the pupils enrolled in a public school in the district speak a single primary language other than English.[756]

4. The superintendent of the school district shall review school plans for categorical programs submitted pursuant to Section 64001 for schools within the school district and ensure that the specific actions included in the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan are consistent with strategies included in the school plans for categorical programs submitted pursuant to Section 64001.[757]

A governing board of a school district shall hold at least one public hearing to solicit the recommendations and comments of members of the public regarding the specific actions and expenditures proposed to be included in the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan. The agenda for the hearing shall be posted at least 72 hours before the public hearing and shall include the location where the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan will be available for public inspection. The public hearing shall be held at the same meeting as the public hearing for the adoption of the district's budget for the subsequent fiscal year required under Education Code section 42127(a)(1).[758]

A governing board of a school district shall adopt a Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan in a public meeting. This meeting shall be held after, but not on the same day as, the public hearing on the Local Control and Accountability Plan. This meeting shall be the same meeting in which the governing board of the school district adopts a budget for the subsequent fiscal year pursuant to Education Code section 42127(a)(2).[759]

[756] See, Education Code section 48985.
[757] Education Code section 52062(a).
[758] Education Code section 52062(b)(1).
[759] Education Code section 52062(b)(2).

A governing board of a school district may adopt revisions to a Local Control and Accountability Plan during the period the Local Control and Accountability Plan is in effect. A governing board of a school district may only adopt a revision to a Local Control and Accountability Plan if it follows the process to adopt a Local Control and Accountability Plan pursuant to Section 52062 and the revisions are adopted in a public meeting.[760]

G. Parent Advisory Committees

A governing board of a school district shall establish a parent advisory committee to provide advice to the governing board of the school district and the superintendent of the school district regarding the requirements for adopting a Local Control and Accountability Plan.[761] A parent advisory committee shall include parents or legal guardians of pupils eligible for free or reduced-price meals, foster youth, and pupils of limited English proficiency.[762] This requirement shall not require the governing board of the school district to establish a new parent advisory committee if the governing board of the school district already has established a parent advisory committee that meets the requirements of this subdivision, including any committee established to meet the requirements of the No Child Left Behind Act.[763]

The governing board of a school district shall establish an English learner parent advisory committee if the enrollment of the school district includes at least fifteen percent English learners and the school district enrolls at least fifty pupils who are English learners. The governing board is not required to establish a new English learner parent committee if the governing board of the school district has already established such a committee.[764]

H. State Board of Education Templates and Evaluation Rubrics

On or before January 31, 2014, the State Board of Education must adopt regulations for the use of supplemental and concentration grant funds under LCFF. These regulations will impact the development of the templates for the Local Control and Accountability Plans. The regulations governing supplemental and concentration grants must allow expenditures for schoolwide purposes. The regulations adopted by the State Board of Education for schoolwide, districtwide, or countywide purposes must not be more restrictive than the restrictions provided for in Title I of the No Child Left Behind Act.

On or before March 31, 2014, the State Board of Education shall adopt templates for school districts, county superintendent of schools, and charter schools for adopting the Local Control and Accountability Plan.[765] The templates developed by the State Board of Education shall allow a school district, county superintendent of schools or charter schools to complete a single Local Control and Accountability Plan to meet the requirements of state law and the No Child Left Behind Act related to local educational agency plans. The State Board of Education shall also take steps to minimize duplication of effort at the local level to the greatest extent

[760] Education Code section 52062(c).
[761] Education Code section 52063(a)(1).
[762] Education Code section 52063(a)(2).
[763] Education Code section 52063(a)(3).
[764] Education Code section 52063(b).
[765] Education Code section 52064(a).

possible.[766] The template must include guidance by school districts, county superintendents, and charter schools to report both of the following:

1. A listing and description of expenditures for the 2014-15 fiscal year, and each fiscal year thereafter, implementing the specific actions included in the Local Control and Accountability Plan.

2. A listing and description of expenditures for the 2014-15 fiscal year, and each fiscal year thereafter, that will serve the pupils to whom one or more of the definitions in Section 42238.01 apply and pupils designated as fluent English proficient.[767]

The reference to Section 42238.01 refers to pupils who are eligible for free or reduced-price meals, foster youth, and pupils of limited English proficiency.

The State Board of Education shall adopt the templates pursuant to the Administrative Procedures Act.[768] The State Board of Education may adopt emergency regulations. In subsequent years, revisions to a template or evaluation rubric shall be approved by the State Board of Education by January 31, before the fiscal year during which the template or evaluation rubric is to be used by the school district, county superintendent of schools or charter school.[769] The adoption of a template or evaluation rubric by the State Board of Education shall not create a requirement for the governing board of a school district to submit a Local Control and Accountability Plan to the State Board of Education unless otherwise required by federal law.[770] On or before October 1, 2015, the State Board of Education shall adopt evaluation rubrics for all of the following purposes:

1. To assist a school district, county office of education, or charter school in evaluating its strengths, weaknesses, and areas that require improvement.

2. To assist a county superintendent of schools in identifying school districts and charter schools in need of technical assistance pursuant to Section 52071 (i.e., when the county superintendent of schools does not approve a school district's Local Control and Accountability Plan) or 47607.3 (i.e., when charter school fails to improve pupil outcomes) and the specific priorities upon which the technical assistance should be focused.

[766] Education Code section 52064(b).
[767] Education Code section 52064(b).
[768] Education Code section 52064(d). The Administrative Procedures Act requires public input before final regulations are adopted.
[769] Education Code section 52064(e).
[770] Education Code section 52064(f).

3. To assist the Superintendent in identifying school districts for which intervention pursuant to Section 52072 is warranted.[771]

The evaluation rubrics shall reflect a holistic multidimensional assessment of school district and individual schoolsite performance and shall include all of the state priorities in Section 52060(d).[772] As part of the evaluation rubrics, the State Board of Education shall adopt standards for school district and individual schoolsite performance and expectations for improvement in regard to each of the state priorities.[773]

I. Posting of Local Control and Accountability Plans

The superintendent of a school district shall post on the Internet Web site of the school district any Local Control and Accountability Plan approved by the governing board of the school district, and any updates or revisions to a Local Control and Accountability Plan approved by the governing board of the school district.[774] The county superintendent of schools shall do all of the following:

1. Post on the Internet Web site of the county office of education any Local Control and Accountability Plan approved by the county board of education, and any updates or revisions to a Local Control and Accountability Plan approved by the county board of education.

2. Post all Local Control and Accountability Plans submitted by school districts, or links to those plans, on the Internet Web site of the county office of education.

3. Transmit or otherwise make available to the State Superintendent of Public Instruction all Local Control and Accountability Plans submitted to the county superintendent of schools by school districts and the Local Control and Accountability Plan approved by the county board of education.[775]

The State Superintendent of Public Instruction shall post links to all Local Control and Accountability Plans approved by the governing boards of school districts and county boards of education on the Internet Web site of the California Department of Education.[776]

[771] Education Code section 52064.5(a).
[772] Education Code section 52064.5(b).
[773] Education Code section 52064.5(c).
[774] Education Code section 52065(a).
[775] Education Code section 52065(b).
[776] Education Code section 52065(c).

J. Filing the Plan with the County Superintendent of Schools

Not later than five days after the adoption of a Local Control and Accountability Plan or annual update to a Local Control and Accountability Plan, the governing board of a school district shall file the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan with the county superintendent of schools.[777]

On or before August 15 of each year, the county superintendent of schools may seek clarification, in writing, from the governing board of a school district about the contents of the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan. Within fifteen days, the governing board of a school district shall respond, in writing, to the request for clarification.[778]

Within fifteen days of receiving the response from the governing board of the school district, the county superintendent of schools may submit recommendations, in writing, for amendments to the Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan. The governing board of the school district shall consider the recommendations submitted by the county superintendent of schools at a public meeting within fifteen days of receiving the recommendations.[779]

The county superintendent of schools shall approve a Local Control and Accountability Plan or annual update to a Local Control and Accountability Plan on or before October 8, if he or she determines both of the following:

1. The Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan adheres to the template adopted by the State Board of Education.

2. The budget for the applicable fiscal year adopted by the governing board of the school district includes expenditures sufficient to implement its specific actions and strategies included in the Local Control and Accountability Plan adopted by the governing board of the school district, based on the projections of the costs included in the plan.

3. The Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan adheres 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 Section 42238.07 for funds apportioned on the

[777] Education Code section 52070(a).
[778] Education Code section 52070(b).
[779] Education Code section 52070(c).

basis of the number and concentration of unduplicated pupils pursuant to Sections 42238.02 and 42238.03.[780]

This language refers to the review by the county superintendent of schools of the school district's Local Control and Accountability Plan. The reference to Section 42238.07 refers to state regulations which must be adopted by the State Board of Education by January 31, 2014. Section 42238.07 requires that any regulations adopted by the State Board of Education regarding the expenditure of supplemental and concentration grant money shall be no more restrictive than the restrictions provided for in Title I of the federal No Child Left Behind Act (NCLB) and that the supplemental and concentration grant funds shall be apportioned on a districtwide basis for school districts and a countywide basis for county offices of education. A summary of the requirements for schoolwide programs under the NCLB is set forth in the Appendix to this workbook.

Education Code section 42127(a)(2) states for the 2014-15 fiscal year, and each fiscal year thereafter, the governing board of the school district shall not adopt a budget before the governing board of the school district adopts an LCAP or annual update to the LCAP. The governing board of a school district shall not adopt a budget that does not include the expenditures necessary to implement the LCAP or the annual update to the LCAP that is effective during the subsequent fiscal year.

Education Code section 42127(d)(2) states that notwithstanding any other provisions, for the 2014-15 fiscal year, and each fiscal year thereafter, the budget of the school district shall not be adopted or approved by the county superintendent of schools before an LCAP or update to an existing LCAP for the budget year is approved. Section 42127(g)(2) states that notwithstanding any other law, for the 2014-15 fiscal year, and each fiscal year thereafter, that if the county superintendent of schools disapproves the school district's budget for the sole reason that the county superintendent of schools has not approved an LCAP or an annual update to the LCAP filed by the school district pursuant to Section 52061, the county superintendent of schools shall not call for the formation of a budget review committee pursuant to Section 42127.1.

In summary, the LCAP and the district's budget are linked together. The governing board of the school district must approve both the LCAP and the budget.

K. Review of the Local Plan by the County Superintendent of Schools

If a county superintendent of schools does not approve a Local Control and Accountability Plan or annual update to the Local Control and Accountability Plan approved by a governing board of a school district, or if a governing board of a school district requests technical assistance, the county superintendent of schools shall provide technical assistance, including, among other things, any of the following:

1. Identification of the school district's strengths and weaknesses in regard to the state priorities. This

[780] Education Code section 52070(d).

identification shall include a review of effective, evidence-based programs that apply to the school district's goals.

2. Assignment of an academic expert or team of academic experts to assist the school district in identifying and implementing effective programs that are designed to improve the outcomes for all pupil subgroups. The county superintendent of schools may also solicit another school district within the county to act as a partner to the school district in need of technical assistance.

3. Request that the State Superintendent of Public Instruction assign the California Collaborative for Educational Excellence to provide advice and assistance to the school district.[781]

Using an evaluation rubric adopted by the State Board of Education, pursuant to Education Code section 52064.5, the county superintendent of schools shall provide the technical assistance to any school district that fails to improve pupil achievement across more than one state priority for one or more pupil subgroups.[782] Technical assistance provided by the county superintendent of schools at the request of a school district shall be paid for by the school district requesting the assistance.[783]

L. School Districts in Need of Intervention

The county superintendent of schools may, with the approval of the State Board of Education, identify school districts in need of intervention.[784] The State Superintendent of Public Instruction shall only intervene in a school district that meets both of the following criteria:

1. The school district did not improve the outcomes for three or more pupil subgroups or, if the school district has less than three pupil subgroups, all of the school district's pupil subgroups, in regard to more than one state or local priority in three out of four consecutive school years.

2. The California Collaborative for Educational Excellence has provided advice and assistance to the school district and submits either of the following findings to the Superintendent:

[781] Education Code section 52071(a).
[782] Education Code section 52071(b).
[783] Education Code section 52071(c).
[784] Education Code section 52072(a).

A. That the school district has failed, or is unable, to implement the recommendations of the California Collaborative for Educational Excellence.

B. That the inadequate performance of the school district, based upon an evaluation rubric, is either so persistent or acute as to require intervention by the State Superintendent of Public Instruction.[785]

For school districts identified as being in need of intervention, the State Superintendent of Public Instruction may, with the approval of the State Board of Education do one or more of the following:

1. Make changes to the Local Control and Accountability Plan adopted by the governing board of the school district.

2. Develop and impose a budget revision, in conjunction with revisions to the Local Control and Accountability Plan that the State Superintendent of Public Instruction determines would allow the school district to improve the outcomes for all pupil subgroups identified in regard to state and local priorities.

3. Stay or rescind an action, if that action is not required by a local collective bargaining agreement that would prevent the school district from improving outcomes for all pupil subgroups in regard to state or local priorities.

4. Appoint an academic trustee to exercise the powers and authority specified in this section on his or her behalf.[786]

The Superintendent of Public Instruction shall notify the county superintendent of schools, the county board of education, the superintendent of the school district, and the governing board of the school district of any action by the State Board of Education to direct the State Superintendent of Public Instruction to exercise any of the powers and authorities specified in Section 52072.[787]

M. The California Collaborative for Educational Excellence

Education Code section 52074 establishes the California Collaborative for Educational Excellence. The purpose of the California Collaborative for Educational Excellence is to advise

[785] Education Code section 52072(b).
[786] Education Code section 52072(c).
[787] Education Code section 52072(d).

and assist school districts, county superintendents of schools, and charter schools in achieving the goals set forth in a Local Control and Accountability Plan.[788]

The Superintendent of Public Instruction shall, with the approval of the State Board of Education, contract with a local education agency, or a consortium of local education agencies, to serve as the fiscal agent for the California Collaborative for Educational Excellence. The Superintendent of Public Instruction shall apportion funds appropriated for the California Collaborative for Educational Excellence to the fiscal agent.[789]

The California Collaborative for Educational Excellence shall be governed by a board consisting of the following five members:

1. The Superintendent of Public Instruction or his or her designee.

2. The president of the State Board of Education or his or her designee.

3. A county superintendent of schools appointed by the Senate Committee on Rules.

4. A teacher appointed by the Speaker of the Assembly.

5. A superintendent of a school district appointed by the Governor.[790]

At the discretion of the governing board of the California Collaborative for Educational Excellence, the fiscal agent shall contract with individuals, local educational agencies or organizations, with the expertise, experience, and a record of success to carry out the purposes of this legislation.[791] The areas of expertise, experience, and record of success shall include, but are not limited to, all of the following:

1. State priorities.

2. Improving the quality of teaching.

3. Improving the quality of school district and schoolsite leadership.

4. Successfully addressing the needs of special pupil populations, including, but not limited to, English learners, pupils eligible to receive a free or reduced-price meal,

[788] Education Code section 52074(b).
[789] Education Code section 52074(c).
[790] Education Code section 52074(d).
[791] Education Code section 52074(e).

pupils in foster care, and individuals with exceptional needs.[792]

This added language establishes a governing board for the California Collaborative for Educational Excellence. This added language also establishes the areas of expertise for the California Collaborative for Educational Excellence.

The State Superintendent of Public Instruction may direct the California Collaborative for Educational Excellence to advise and assist a school district, county superintendent of schools, or charter school in any of the following circumstances:

1. If the governing board of a school district, county board of education, or governing body or a charter school requests the advice and assistance of the California Collaborative for Educational Excellence.

2. If the county superintendent of schools of the county in which the school district or charter school is located determines, following the provision of technical assistance pursuant to Section 52071 or 47607.3 as applicable, that the advice and assistance of the California Collaborative for Educational Excellence is necessary to help the school district or charter school accomplish the goals described in the Local Control and Accountability Plan.

3. If the Superintendent determines that the advice and assistance of the California Collaborative for Educational Excellence is necessary to help the school district, county superintendent of schools, or charter school accomplish the goals set forth in the Local Control and Accountability Plan.[793]

N. Uniform Complaint Procedure

A complaint that a school district, a county superintendent of schools, or charter school has not complied with the requirements for the Local Control and Accountability Plans or Sections 47606.5 (charter school annual goals and actions) and 47607.3 (charter school failing to improve pupil outcomes), as applicable, may be filed with a school district, county superintendent of schools, or charter school pursuant to the Uniform Complaint procedures set forth in the California Code of Regulations.[794] A complaint may be filed anonymously if the complaint provides evidence or information leading to evidence to support an allegation of noncompliance with the requirements of a Local Control and Accountability Plan.[795] A

[792] Education Code section 52074(e).
[793] Education Code section 52074(f).
[794] Education Code section 52075(a).
[795] Education Code section 52075(b).

complainant not satisfied with the decision of a school district, county superintendent of schools, or charter school may appeal the decision to the Superintendent of Public Instruction and shall receive a written appeal decision within 60 days of the State Superintendent of Public Instruction's receipt of the appeal.[796]

If a school district, county superintendent of schools, or charter school finds merit in the complaint, or the Superintendent of Public Instruction finds merit in the appeal, the school district, county superintendent of schools, or charter school shall provide a remedy to all affected pupils, parents, and guardians.[797] Information regarding the requirements for a Local Control and Accountability Plan shall be included in the Annual Notification distributed to pupils, parents and guardians, employees, and other interested parties.[798] School districts, county superintendents of schools, and charter schools shall establish local policies and procedures to implement a complete complaint procedure with respect to Local Control and Accountability Plans on or before June 30, 2014.[799]

We would recommend that the following language be added to your existing policy:

> "In addition, pursuant to Education Code section 52075, individuals may file a complaint under the district's Uniform Complaint Procedure alleging that the school district has not complied with the LCAP requirements in the Education Code. The complaint may be filed anonymously. If the complainant is not satisfied with the decision of the school district, the individual may appeal the decision to the State Superintendent of Public Instruction. The State Superintendent of Public Instruction is required to issue a decision on the appeal within 60 days of the Superintendent of Public Instructions' receipt of the appeal.
>
> "If the school district finds merit in the complaint or the Superintendent of Public Instruction finds merit in an appeal, the school district will provide a remedy to all affected pupils, parents, and guardians."

O. Waivers

Notwithstanding any other law, the provisions relating to Local Control and Accountability Plans shall not be subject to waiver by the State Board of Education or by the Superintendent of Public Instruction.[800] If any activities related to Local Control and Accountability Plans are found to be a state reimbursable mandate pursuant to Article XIIIB, Section 6 of the California Constitution, funding provided for school districts and county offices

[796] Education Code section 52075(c).
[797] Education Code section 52075(d).
[798] Education Code section 52075(e).
[799] Education Code section 52075(f).
[800] Education Code section 52076.

of education pursuant to Education Code sections 2574, 2575, 42238.02, and 42238.03 shall be used to directly offset any mandated costs.[801]

P. Timetable for Implementation

January 31, 2014 The State Board of Education must adopt regulations for use of supplemental and concentration grant funds.

March 31, 2014 The State Board of Education must adopt the Local Control and Accountability Plan template.

July 1, 2014 School districts must adopt their Local Control and Accountability Plans for 2014-2015.

October 8, 2014 County offices of education must approve or disapprove school district Local Control and Accountability Plans.

July 1, 2015 School districts must adopt their Local Control and Accountability Plan annual update.

October 1, 2015 The State Board of Education must adopt an evaluation rubric for Local Control and Accountability Plans.

July 1, 2016 School districts must adopt their Local Control and Accountability Plan annual update.

Q. Summary

In summary, under the requirements for Local Control and Accountability Plans, school districts are required to:

- Adopt Local Control and Accountability Plans that include annual goals for all pupils, incorporate state priorities, and are updated each year.
- Present the Local Control and Accountability Plan to the parent advisory committee and English learner parent advisory committee for review, and provide the public an opportunity to comment on the plan.

[801] Education Code section 52077.

- Use the template adopted by the State Board of Education to develop the school district's Local Control and Accountability Plan and post it on the school district's Internet Web site.

- File the Local Control and Accountability Plan with the county superintendent of schools for review and approval.

R. Local Control and Accountability Plan and Annual Update Template

§ 15497. Local Control and Accountability Plan and Annual Update Template.

Introduction:

LEA: _____ Contact (Name, Title, Email, Phone Number):_____ LCAP Year:_____

Local Control and Accountability Plan and Annual Update Template

The Local Control and Accountability Plan (LCAP) and annual update template shall be used to provide details regarding local educational agencies' (LEAs) actions and expenditures to support pupil outcomes and overall performance pursuant to Education Code sections 52060, 52066, 47605, 47605.5, and 47606.5.

For school districts, pursuant to Education Code section 52060, the LCAP must describe, for the school district and each school within the district, goals and specific actions to achieve those goals for all pupils and each subgroup of pupils identified in Education Code section 52052, including pupils with disabilities, for each of the state priorities and any locally identified priorities.

For county offices of education, pursuant to Education Code section 52066, the LCAP must describe, for each county office of education-operated school and program, goals and specific actions to achieve those goals for all pupils and each subgroup of pupils identified in Education Code section 52052, including pupils with disabilities, who are funded through the county office of education Local Control Funding Formula as identified in Education Code section 2574 (pupils attending juvenile court schools, on probation or parole, or mandatorily expelled) for each of the state priorities and any locally identified priorities. School districts and county offices of education may additionally coordinate and describe in their LCAPs services provided to pupils funded by a school district but attending county-operated schools and programs, including special education programs.

Charter schools, pursuant to Education Code sections 47605, 47605.5, and 47606.5, must describe goals and specific actions to achieve those goals for all pupils and each subgroup of pupils identified in Education Code section 52052, including pupils with disabilities, for each of the state priorities as applicable and any locally identified priorities. For charter schools, the inclusion and description of goals for state priorities in the LCAP may be modified to meet the grade levels served and the nature of the programs provided, including modifications to reflect only the statutory requirements explicitly applicable to charter schools in the Education Code.

The LCAP is intended to be a comprehensive planning tool. LEAs may reference and describe actions and expenditures in other plans and funded by a variety of other fund sources when detailing goals, actions, and expenditures related to the state and local priorities. LCAPs must be

consistent with school plans submitted pursuant to Education Code section 64001. The information contained in the LCAP, or annual update, may be supplemented by information contained in other plans (including the LEA plan pursuant to Section 1112 of Subpart 1 of Part A of Title I of Public Law 107-110) that are incorporated or referenced as relevant in this document.

For each section of the template, LEAs should comply with instructions and use the guiding questions as prompts (but not limits) for completing the information as required by statute. Guiding questions do not require separate narrative responses. Data referenced in the LCAP must be consistent with the school accountability report card where appropriate. LEAs may resize pages or attach additional pages as necessary to facilitate completion of the LCAP.

State Priorities

The state priorities listed in Education Code sections 52060 and 52066 can be categorized as specified below for planning purposes, however, school districts and county offices of education must address each of the state priorities in their LCAP. Charter schools must address the priorities in Education Code section 52060(d) that apply to the grade levels served, or the nature of the program operated, by the charter school.

A. Conditions of Learning:

***Basic**: degree to which teachers are appropriately assigned pursuant to Education Code section 44258.9, and fully credentialed in the subject areas and for the pupils they are teaching; pupils have access to standards-aligned instructional materials pursuant to Education Code section 60119; and school facilities are maintained in good repair pursuant to Education Code section 17002(d). (Priority 1)*

***Implementation of State Standards**: implementation of academic content and performance standards adopted by the state board for all pupils, including English learners. (Priority 2)*

***Course access:** pupil enrollment in a broad course of study that includes all of the subject areas described in Education Code section 51210 and subdivisions (a) to (i), inclusive, of Section 51220, as applicable. (Priority 7)*

***Expelled pupils (for county offices of education only)**: coordination of instruction of expelled pupils pursuant to Education Code section 48926. (Priority 9)*

***Foster youth (for county offices of education only)**: coordination of services, including working with the county child welfare agency to share information, responding to the needs of the juvenile court system, and ensuring transfer of health and education records. (Priority 10)*

B. Pupil Outcomes:

***Pupil achievement**: performance on standardized tests, score on Academic Performance Index, share of pupils that are college and career ready, share of English learners that become English proficient, English learner reclassification rate, share of pupils that pass Advanced Placement*

exams with 3 or higher, share of pupils determined prepared for college by the Early Assessment Program. (Priority 4)

***Other pupil outcomes**: pupil outcomes in the subject areas described in Education Code section 51210 and subdivisions (a) to (i), inclusive, of Education Code section 51220, as applicable. (Priority 8)*

C. Engagement:

***Parent involvement**: efforts to seek parent input in decision making, promotion of parent participation in programs for unduplicated pupils and special need subgroups. (Priority 3)*

***Pupil engagement**: school attendance rates, chronic absenteeism rates, middle school dropout rates, high school dropout rates, high school graduations rates. (Priority 5)*

***School climate**: pupil suspension rates, pupil expulsion rates, other local measures including surveys of pupils, parents and teachers on the sense of safety and school connectedness. (Priority 6)*

Section 1: Stakeholder Engagement

Meaningful engagement of parents, pupils, and other stakeholders, including those representing the subgroups identified in Education Code section 52052, is critical to the LCAP and budget process. Education Code sections 52062 and 52063 specify the minimum requirements for school districts; Education Code sections 52068 and 52069 specify the minimum requirements for county offices of education, and Education Code section 47606.5 specifies the minimum requirements for charter schools. In addition, Education Code section 48985 specifies the requirements for translation of documents.

Instructions: Describe the process used to engage parents, pupils, and the community and how this engagement contributed to development of the LCAP or annual update. Note that the LEA's goals related to the state priority of parental involvement are to be described separately in Section 2, and the related actions and expenditures are to be described in Section 3.

Guiding Questions:

1) How have parents, community members, pupils, local bargaining units, and other stakeholders (e.g., LEA personnel, county child welfare agencies, county office of education foster youth services programs, court-appointed special advocates, foster youth, foster parents, education rights holders and other foster youth stakeholders, English learner parents, community organizations representing English learners, and others as appropriate) been engaged and involved in developing, reviewing, and supporting implementation of the LCAP?
2) How have stakeholders been included in the LEA's process in a timely manner to allow for engagement in the development of the LCAP?

3) What information (e.g., quantitative and qualitative data/metrics) was made available to stakeholders related to the state priorities and used by the LEA to inform the LCAP goal setting process?
4) What changes, if any, were made in the LCAP prior to adoption as a result of written comments or other feedback received by the LEA through any of the LEA's engagement processes?
5) What specific actions were taken to meet statutory requirements for stakeholder engagement pursuant to Education Code sections 52062, 52068, and 47606.5, including engagement with representative parents of pupils identified in Education Code section 42238.01?
6) In the annual update, how has the involvement of these stakeholders supported improved outcomes for pupils related to the state priorities?

Involvement Process	**Impact on LCAP**

Section 2: Goals and Progress Indicators

*For school districts, Education Code sections 52060 and 52061, for county offices of education, Education Code sections 52066 and 52067, and for charter schools, Education Code section 47606.5 require(s) the LCAP to include a description of the annual goals, for all pupils and each subgroup of pupils, for **each** state priority and any local priorities and require the annual update to include a review of progress towards the goals and describe any changes to the goals.*

Instructions: Describe annual goals and expected and actual progress toward meeting goals. This section must include specifics projected for the applicable term of the LCAP, and in each annual update year, a review of progress made in the past fiscal year based on an identified metric. Charter schools may adjust the chart below to align with the term of the charter school's budget that is submitted to the school's authorizer pursuant to Education Code section 47604.33. The metrics may be quantitative or qualitative, although LEAs must, at minimum, use the specific metrics that statute explicitly references as required elements for measuring progress within a particular state priority area. Goals must address each of the state priorities and any additional local priorities; however, one goal may address multiple priorities. The LEA may identify which

school sites and subgroups have the same goals, and group and describe those goals together. The LEA may also indicate those goals that are not applicable to a specific subgroup or school site. The goals must reflect outcomes for all pupils and include specific goals for school sites and specific subgroups, including pupils with disabilities, both at the LEA level and, where applicable, at the school site level. To facilitate alignment between the LCAP and school plans, the LCAP shall identify and incorporate school-specific goals related to the state and local priorities from the school plans submitted pursuant to Education Code section 64001. Furthermore, the LCAP should be shared with, and input requested from, school site-level advisory groups (e.g., school site councils, English Learner Advisory Councils, pupil advisory groups, etc.) to facilitate alignment between school-site and district-level goals and actions. An LEA may incorporate or reference actions described in other plans that are being undertaken to meet the goal.

Guiding Questions:

1) What are the LEA's goal(s) to address state priorities related to "Conditions of Learning"?
2) What are the LEA's goal(s) to address state priorities related to "Pupil Outcomes"?
3) What are the LEA's goal(s) to address state priorities related to "Engagement" (e.g., pupil and parent)?
4) What are the LEA's goal(s) to address locally-identified priorities?
5) How have the unique needs of individual school sites been evaluated to inform the development of meaningful district and/or individual school site goals (e.g., input from site level advisory groups, staff, parents, community, pupils; review of school level plans; in-depth school level data analysis, etc.)?
6) What are the unique goals for subgroups as defined in Education Code sections 42238.01 and 52052 that are different from the LEA's goals for all pupils?
7) What are the specific predicted outcomes/metrics/noticeable changes associated with each of the goals annually and over the term of the LCAP?
8) What information (e.g., quantitative and qualitative data/metrics) was considered/reviewed to develop goals to address each state or local priority and/or to review progress toward goals in the annual update?
9) What information was considered/reviewed for individual school sites?
10) What information was considered/reviewed for subgroups identified in Education Code section 52052?
11) In the annual update, what changes/progress have been realized and how do these compare to changes/progress predicted? What modifications are being made to the LCAP as a result of this comparison?

Identified Need and Metric (What needs have been identified and what metrics are used to measure progress?)	Goals			Annual Update: Analysis of Progress	What will be different/improved for students? (based on identified metric)			Related State and Local Priorities (Identify specific state priority. For districts and COEs, all priorities in statute must be included and identified; each goal may be linked to more than one priority if appropriate.)
	Description of Goal	Applicable Pupil Subgroups (Identify applicable subgroups (as defined in EC 52052) or indicate "all" for all pupils.)	School(s) Affected (Indicate "all" if the goal applies to all schools in the LEA, or alternatively, all high schools, for example.)		LCAP YEAR Year 1: 20XX-XX	Year 2: 20XX-XX	Year 3: 20XX-XX	

Section 3: Actions, Services, and Expenditures

For school districts, Education Code sections 52060 and 52061, for county offices of education, Education Code sections 52066 and 52067, and for charter schools, Education Code section 47606.5 require the LCAP to include a description of the specific actions an LEA will take to meet the goals identified. Additionally Education Code section 52604 requires a listing and description of the expenditures required to implement the specific actions.

Instructions: Identify annual actions to be performed to meet the goals described in Section 2, and describe expenditures to implement each action, and where these expenditures can be found in the LEA's budget. Actions may describe a group of services that are implemented to achieve identified goals. The actions and expenditures must reflect details within a goal for the specific subgroups identified in Education Code

section 52052, including pupils with disabilities, and for specific school sites as applicable. In describing the actions and expenditures that will serve low-income, English learner, and/or foster youth pupils as defined in Education Code section 42238.01, the LEA must identify whether supplemental and concentration funds are used in a districtwide, schoolwide, countywide, or charterwide manner. In the annual update, the LEA must describe any changes to actions as a result of a review of progress. The LEA must reference all fund sources used to support actions and services. Expenditures must be classified using the California School Accounting Manual as required by Education Code sections 52061, 52067, and 47606.5.

Guiding Questions:

1) What actions/services will be provided to all pupils, to subgroups of pupils identified pursuant to Education Code section 52052, to specific school sites, to English learners, to low-income pupils, and/or to foster youth to achieve goals identified in the LCAP?
2) How do these actions/services link to identified goals and performance indicators?
3) What expenditures support changes to actions/services as a result of the goal identified? Where can these expenditures be found in the LEA's budget?
4) In the annual update, how have the actions/services addressed the needs of all pupils and did the provisions of those services result in the desired outcomes?
5) In the annual update, how have the actions/services addressed the needs of all subgroups of pupils identified pursuant to Education Code section 52052, including, but not limited to, English learners, low-income pupils, and foster youth; and did the provision of those actions/services result in the desired outcomes?
6) In the annual update, how have the actions/services addressed the identified needs and goals of specific school sites and did the provision of those actions/services result in the desired outcomes?
7) In the annual update, what changes in actions, services, and expenditures have been made as a result of reviewing past progress and/or changes to goals?

What annual actions, and the LEA may include any services that support these actions, are to be performed to meet the goals described in Section 2 for ALL pupils and the goals specifically for subgroups of pupils identified in Education Code section 52052 but not listed in Table 3B below (e.g., Ethnic subgroups and pupils with disabilities)? List and describe expenditures for each fiscal year implementing these actions, including where these expenditures can be found in the LEA's budget.

Goal (Include and identify all goals from Section 2)	Related State and Local Priorities (from Section 2)	Actions and Services	Level of Service (Indicate if school-wide or LEA-wide)	Annual Update: Review of actions/ services	What actions are performed or services provided in each year (and are projected to be provided in years 2 and 3)? What are the anticipated expenditures for each action (including funding source)?		
					LCAP YEAR Year 1: 20XX-XX	Year 2: 20XX-XX	Year 3: 20XX-XX

A. Identify additional annual actions, and the LEA may include any services that support these actions, above what is provided for all pupils that will serve low-income, English learner, and/or foster youth pupils as defined in Education Code section 42238.01 and pupils redesignated as fluent English proficient. The identified actions must include, but are not limited to, those actions that are to be performed to meet the targeted goals described in Section 2 for low-income pupils, English learners, foster youth and/or pupils redesignated as fluent English proficient (e.g., not listed in Table 3A above). List and describe expenditures for each fiscal year implementing these actions, including where those expenditures can be found in the LEA's budget.

Goal (Include and identify all goals from Section 2, if applicable)	Related State and Local Priorities (from Section 2)	Actions and Services	Level of Service (Indicate if school-wide or LEA-wide)	Annual Update: Review of actions/ services	What actions are performed or services provided in each year (and are projected to be provided in years 2 and 3)? What are the anticipated expenditures for each action (including funding source)?		
					LCAP YEAR Year 1: 20XX-XX	Year 2: 20XX-XX	Year 3: 20XX-XX
		For low income pupils:					
		For English learners:					
		For foster youth:					
		For redesignated fluent English proficient pupils:					

B. Describe the LEA's increase in funds in the LCAP year calculated on the basis of the number and concentration of low income, foster youth, and English learner pupils as determined pursuant to 5 CCR 15496(a)(5). Describe how the LEA is expending these funds in the LCAP year. Include a description of, and justification for, the use of any funds in a districtwide, schoolwide, countywide, or charterwide manner as specified in 5 CCR 15496. For school districts with below 55 percent of enrollment of unduplicated pupils in the district or below 40 percent of enrollment of unduplicated pupils at a school site in the LCAP year, when using supplemental and concentration funds in a districtwide or schoolwide manner, the school district must additionally describe how the services provided are the most effective use of funds to meet the district's goals for unduplicated pupils in the state priority areas. (See 5 CCR 15496(b) for guidance.)

C. Consistent with the requirements of 5 CCR 15496, demonstrate how the services provided in the LCAP year for low income pupils, foster youth, and English learners provide for increased or improved services for these pupils in proportion to the increase in funding provided for such pupils in that year as calculated pursuant to 5 CCR 15496(a)(7). Identify the percentage by which services for unduplicated pupils must be increased or improved as compared to the services provided to all pupils in the LCAP year as calculated pursuant to 5 CCR 15496(a). An LEA shall describe how the proportionality percentage is met using a quantitative and/or qualitative description of the increased and/or improved services for unduplicated pupils as compared to the services provided to all pupils.

NOTE: Authority cited: Sections 42238.07 and 52064, Education Code. Reference: Sections 2574, 2575, 42238.01, 42238.02, 42238.03, 42238.07, 47605, 47605.5, 47606.5, 48926, 52052, 52060-52077, and 64001, Education Code; 20 U.S.C. Section 6312.

DATA BREACH NOTIFICATION REQUIREMENTS

A. Notification Requirements

In October 2015, Governor Brown signed Senate Bill 570[802] and Assembly Bill 964,[803] effective January 1, 2016. This legislation amends Civil Code section 1798.29, and adds new data breach notification requirements that local government agencies must follow.

Civil Code section 1798.29(a) states that any agency that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.[804]

Any agency that maintains computerized data that includes personal information that the agency does not own shall notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.[805] The notification required by Section 1798.29 of the Civil Code may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation. The notification required by Section 1798.29 shall be made after the law enforcement agency determines that it will not compromise the investigation.[806]

B. Contents of Notice of Security Breach

Civil Code section 1798.29(d), as amended, requires local agencies to issue security breach notification that meets all of the following requirements:

1. The security breach notification shall be written in plain language, shall be titled "Notice of Data Breach," and shall present the information under the following headings: "What Happened," "What Information Was Involved," "What We Are Doing," "What You Can Do," and "For More Information." Additional information may be provided as a supplement to the notice.

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802 Stats. 2015, ch. 543.

803 Stats. 2015, ch. 522.

804 While the definition of agency contained in Civil Code § 1798.3(b)(4) does not include a local agency, Civil Code § 1798.29(k) specifically includes local government agencies within the definition of "agency," and therefore § 1798.29 applies to all local agencies, including community college districts, school districts, and county offices of education.

805 Cal. Civ. Code § 1798.29(b).

806 Cal. Civ. Code § 1798.29(c).

2. The format of the notice shall be designed to call attention to the nature and significance of the information it contains.

3. The title and headings in the notice shall be clearly and conspicuously displayed.

4. The text of the notice and any other notice provided pursuant to Section 1798.29 shall be no smaller than 10-point type.

5. For written notice, use of the model security breach notification form prescribed by Section 1798.29 may be used (see copy attached).

6. For an electronic notice, use of the headings described in the paragraph with the information described written in plain language shall be deemed to be compliance with Section 1798.29.

The security breach notification shall include at a minimum the following information:

1. The name and contact information of the reporting agency subject to Section 1798.29.
2. A list of the types of personal information that were or are reasonably believed to have been the subject of a breach.

3. If the information is possible to determine at the time the notice is provided, then any of the following: (i) the date of the breach, (ii) the estimated date of the breach, or (iii) the date range within which the breach occurred. The notification shall also include the date of the notice.

4. Whether the notification was delayed as a result of a law enforcement investigation, if that information is possible to determine at the time the notice is provided.

5. A general description of the breach incident, if that information is possible to determine at the time the notice is provided.

6. The toll-free telephone numbers and addresses of the major credit reporting agencies, if the breach exposed a social

security number or a driver's license or California identification card number.[807]

At the discretion of the agency, the security breach notification may also include any of the following: Information about what the agency has done to protect individuals whose information has been breached, and advice on steps that the person whose information has been breached may take to protect himself or herself.[808] Any local government agency that is required to issue a security breach notification pursuant to Section 1798.29 to more than 500 California residents as a result of a single breach of the security system shall electronically submit a single sample copy of that security breach notification, excluding any personally identifiable information, to the California Attorney General. A single sample copy of a security breach notification shall not be deemed to be exempt from the California Public Records Act under Government Code section 6254(f).[809]

C. Definition of Breach of Security

For purposes of Civil Code section 1798.29, "breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the local government agency. Good faith acquisition of personal information by an employee or agent of the agency for the purposes of the agency is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure.[810] For purposes of Section 1798.29, "personal information" means any of the following: An individual's first name or first initial and last name in combination with their Social Security number, driver's license number or California Identification Card number, account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account, medical information, health insurance information, information or data collected through the use or operation of an automated license plate recognition system.[811]

For purposes of Civil Code section 1798.29, "personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.[812] "Medical information" is defined as any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional.[813] "Health insurance information" is defined as an individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's

[807] Cal. Civ. Code § 1798.29(d)(2).
[808] Cal. Civ. Code § 1798.29(d)(3).
[809] Cal. Civ. Code § 1798.29(e).
[810] Cal. Civ. Code § 1798.29(f).
[811] Cal. Civ. Code § 1798.29(g).
[812] Cal. Civ. Code § 1798.29(h)(1).
[813] Cal. Civ. Code § 1798.29(h)(2).

application and claims history, including any appeals records.[814] "Encrypted" is defined as rendering unusable, unreadable, or indecipherable to an unauthorized person through a security technology or methodology generally accepted in the field of information security.[815]

Notice may be given under Civil Code section 1798.29 by providing written notice, electronic notice, or substitute notice. Substitute notice may be used if cost of providing notice would exceed $250,000, or that the affected class of subject persons to be notified exceeds 500,000, or the agency does not have sufficient contact information. Substitute notice would include e-mail notice when the agency has an e-mail address for the subject persons. Conspicuous posting for a minimum of 30 days of the notice on the agency's Internet Web site would also be substitute notice, as well as notification to major statewide media.[816]

ALCOHOLIC BEVERAGES ON EDUCATIONAL FACILITIES

On August 21, 2014, Governor Brown signed Assembly Bill 2073, which amended Business and Professions Code section 25608, effective January 1, 2015.[817] Assembly Bill 2073 added a subparagraph 17 to Section 25608 which allows an exception for alcoholic beverages for special events at educational facilities.

Business and Professions Code section 25608 makes it a misdemeanor for a person to possess, consume, sell, give, or deliver to any other person any alcoholic beverage in or on any public schoolhouse, or any of the grounds of the schoolhouse, except when:

1. The alcoholic beverage possessed, consumed, or sold, pursuant to a license obtained is wine that is produced by a bonded winery owned or operated as part of an instructional program in viticulture and enology.

2. The alcoholic beverage is acquired, possessed, or used in connection with a course of instruction given at the school and the person has been authorized to acquire, possess, or use it by the governing body or other administrative head of the school.

3. The public schoolhouse is surplus school property and the grounds of the schoolhouse are leased to a lessee that is a general law city with a population of less than 50,000, or the public schoolhouse is surplus school property and the grounds of the schoolhouse are located in an unincorporated area and are leased to a lessee that is a civic

[814] Cal. Civ. Code § 1798.29(h)(3).
[815] Cal. Civ. Code § 1798.29(h)(4).
[816] Cal. Civ. Code § 1798.29(i).
[817] Stats. 2014, ch. 235.

organization, and the property is to be used for community center purposes and no public school education is to be conducted on the property by either the lessor or the lessee and the property is not being used by persons under the age of 21 years for recreational purposes at any time during which alcoholic beverages are being sold or consumed on the premises.

4. The alcoholic beverages are acquired, possessed, or used during events at a college-owned or college-operated veterans stadium with a capacity of over 12,000 people, located in a county with a population of over 6,000,000 people. As used in this paragraph, "events" mean football games sponsored by a college, other than a public community college, or other events sponsored by noncollege groups.

5. The alcoholic beverages are acquired, possessed, or used during an event not sponsored by any college at a performing arts facility built on property owned by a community college district and leased to a nonprofit organization that is a public benefit corporation formed under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code. As used in this paragraph, "performing arts facility" means an auditorium with more than 300 permanent seats.

6. The alcoholic beverage is wine for sacramental or other religious purposes and is used only during authorized religious services held on or before January 1, 1995.

7. The alcoholic beverages are acquired, possessed, or used during an event at a community center owned by a community services district or a city and the event is not held at a time when students are attending a public school-sponsored activity at the center.

8. The alcoholic beverage is wine that is acquired, possessed, or used during an event sponsored by a community college district or an organization operated for the benefit of the community college district where the college district maintains both an instructional program in viticulture on no less than five acres of land owned by the district and an

instructional program in enology, which includes sales and marketing.

9. The alcoholic beverage is acquired, possessed, or used at a professional minor league baseball game conducted at a stadium of a community college located in a county with a population of less than 250,000 inhabitants, and the baseball game is conducted pursuant to a contract between the community college district and a professional sports organization.

10. The alcoholic beverages are acquired, possessed, or used during events at a college-owned or college-operated stadium or other facility. As used in this paragraph, "events" means fundraisers held to benefit a nonprofit corporation that has obtained a license pursuant to this division for the event. "Events" does not include football games or other athletic contests sponsored by any college or public community college. This paragraph shall not apply to any public education facility in which any grade from kindergarten to grade 12, inclusive, is schooled.

11. The alcoholic beverages are possessed, consumed, or sold, pursuant to a license, permit, or authorization obtained under this division, for an event held at an overnight retreat facility owned and operated by a county office of education or a school district at times when pupils are not on the grounds.

12. The grounds of the public schoolhouse on which the alcoholic beverage is acquired, possessed, used, or consumed is property that has been developed and is used for residential facilities or housing that is offered for rent, lease, or sale exclusively to faculty or staff of a public school or community college.

13. The grounds of a public schoolhouse on which the alcoholic beverage is acquired, possessed, used, or consumed is property of a community college that is leased, licensed, or otherwise provided for use as a water conservation demonstration garden and community passive recreation resource by a joint powers agency comprised of public agencies, including the community college, and the event at which the alcoholic beverage is acquired,

possessed, used, or consumed is conducted pursuant to a written policy adopted by the governing body of the joint powers agency and no public funds are used for the purchase or provision of the alcoholic beverage.

14. The alcoholic beverage is beer or wine acquired, possessed, used, sold, or consumed only in connection with a course of instruction, sponsored dinner, or meal demonstration given as part of a culinary arts program at a campus of a California community college and the person has been authorized to acquire, possess, use, sell, or consume the beer or wine by the governing body or other administrative head of the school.

15. The alcoholic beverages are possessed, consumed, or sold, pursuant to a license or permit obtained under this division for special events held at the facilities of a public community college during the special event. As used in this paragraph, "special event" means events that are held with the permission of the governing board of the community college district that are festivals, shows, private parties, concerts, theatrical productions, and other events held on the premises of the public community college and for which the principal attendees are members of the general public or invited guests and not students of the public community college.

16. The alcoholic beverages are acquired, possessed, or used during an event at a community college-owned facility in which any grade from kindergarten to grade 12, inclusive, is schooled, if the event is held at a time when students in any grades from kindergarten to grade 12, inclusive, are not present at the facility. As used in this paragraph, "events" include fundraisers held to benefit a nonprofit corporation that has obtained a license pursuant to this division for the event.

17. The alcoholic beverages are acquired, possessed, used, or consumed pursuant to a license or permit obtained under this division for special events held at facilities owned and operated by an educational agency, a county office of education, superintendent of schools, school district, or community college district at a time when pupils are not on the grounds. As used in this paragraph, "facilities"

includes, but are not limited to, office complexes, conference centers, or retreat facilities.[818]

Assembly Bill 2073 added subparagraph (17) which allows an exception for alcoholic beverages that are acquired, possessed, used, or consumed pursuant to a license or permit for special events held at facilities owned and operated by an educational agency, a county office of education, superintendent of schools, school district, or community college district, at a time when pupils are not on the grounds. "Facilities" includes, but is not limited to, office complexes, conference centers, or retreat facilities. Assembly Bill 2073 will give school districts and community college districts added flexibility in leasing out facilities for social event.

[818] Subsection 17 takes effect January 1, 2015.