NO. A120667

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT - DIVISION 5

COACHELLA VALLEY UNIFIED SCHOOL DISTRICT, CHULA VISTA ELEMENTARY SCHOOL DISTRICT, ALISAL UNION ELEMENTARY SCHOOL DISTRICT, TERRA BELLA UNION ELEMENTARY SCHOOL DISTRICT, PAJARO VALLEY UNIFIED SCHOOL DISTRICT, OXNARD ELEMENTARY SCHOOL DISTRICT, SWEETWATER UNION HIGH SCHOOL DISTRICT, SALINAS UNION HIGH SCHOOL DISTRICT and SAN YSIDRO SCHOOL DISTRICT,

Plaintiffs-Appellants,

vs.

STATE OF CALIFORNIA, ARNOLD SCHWARZENEGGER in his official capacity as Governor of the State of California, CALIFORNIA STATE BOARD OF EDUCATION, RUTH E. GREEN, ALAN BERSIN, RUTH BLOOM, YVONNE CHAN, DONALD G. FISHER, KENNETH NOONAN, JOHNATHAN WILLIAMS, DAVID LOPEZ, JAMES D. ASCHWANDEN, THEODORE R. MITCHELL and MONICA LIU, in their official capacities as Members of the State Board of Education, JACK O'CONNELL, in his official capacity as State Superintendent of Public Instruction, CALIFORNIA DEPARTMENT OF EDUCATION and DOES 1 through 30, inclusive,

Defendants-Respondents.

ON APPEAL FROM SAN FRANCISCO SUPERIOR COURT
CASE NO. CPF-05-505334
HONORABLE RICHARD A. KRAMER

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The No Child Left Behind Act of 2001, 20 U.S.C. §6301 et seq. ("NCLB"), is a federal grant statute aimed at increasing student achievement. California, like other states, accepts funds under this statute and is thereby obligated to comply with its strict requirements, including demonstrable, rigorous student academic growth. To ensure such growth, NCLB requires states, including California, to meet mandatory standards for student testing and school, school district and state accountability.

California faces unique testing challenges. Nearly 1.6 million California school children, approximately 25% of the total school population, speak a native language other than English and are classified as "limited English proficient" (also referred to herein as "English Learners" or "ELs").[1] The language of 85% of these children is Spanish. Because these children are by definition not yet proficient in English, tests designed for native English speakers are inherently incapable of accurately measuring what they know and can do in academic content areas such as mathematics, science or even reading. For these children a test in English is a test of English.

The problem of how to measure the academic achievement of English Learners while they are gaining English language proficiency is well-covered in NCLB. English Learners are to be tested separately on both how fast they are learning the English language and how well they are learning academics while gaining English proficiency.

NCLB requires that ELs be tested differently than native English speakers not only to ensure the accuracy and validity of test scores used to mark their academic achievement but also because student academic achievement scores form the basis of evaluating school and district performance on a yearly basis. Schools and districts which fail to demonstrate adequate yearly academic progress for specified subgroups, including English Learners, are subjected to an ever-increasing barrage of "corrective

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[1] Federal law refers to these children as "limited English proficient" (20 U.S.C. §7801(25)). California's statutes and State Plan refer to them as "English Learners." The parties agree the terms are synonymous.

actions" and sanctions leading ultimately to districts being placed in trusteeship and/or dismantled. 20 U.S.C. §6316(c).

Under NCLB, states have the circumscribed discretion to select or create assessments for use in NCLB accountability determinations. Limiting this discretion, NCLB sets forth clear testing standards to ensure that students, including ELs, are assessed accurately and schools and districts are fairly evaluated.

NCLB requires that (1) states assess academic knowledge in defined content areas including mathematics, reading or language arts and science, knowable in any language; (2) that the testing be "valid" and "reliable"[2] for all students generally and specifically for English Learners; and (3) that ELs be provided those reasonable, practicable accommodations in the language and form most likely to yield accurate data on what they know and can do in academics until they attain English language proficiency. 20 U.S.C. §6311(b)(3)(C).

Despite these clear, mandatory directives, Respondents (referred to collectively herein as "the State") have elected to satisfy NCLB requirements by testing all students, including ELs, with academic tests in English designed for native English speakers. These tests are the Standardized Testing and Reporting ("STAR") tests including the California Standards Tests ("CSTs") and the California High School Exit Exam ("CAHSEE"). These tests are not valid and reliable for ELs because they do not accurately measure the extent to which ELs know the underlying academics such as math, science or reading. For ELs, one simply does not know whether a wrong answer means the student does not understand English sufficiently, does not know the academic issue being tested, or both. The State refuses to adopt and implement appropriate accommodations which are readily available and practicable. It is undisputed that over 95% of English Learners tested in California use no accommodations whatsoever on state assessments. By contrast, at least nine states, all with fewer numbers and percentages of ELs than California, incorporate primary language tests (usually

[2] "Valid" and "reliable" are psychometric terms discussed *infra*.

Spanish) and multiple other meaningful accommodations into their accountability system.

Appellants are nine California school districts with significant percentages of ELs (referred to collectively as "the Districts"). Each of the Districts unjustly faces sanctions because the State's tests undervalue the academic knowledge of their EL students, driving the Districts and schools into "program improvement" status. The Districts, and schools and districts like them, are punished based on demographics not competence. Sanctions resulting from unfair placement into "program improvement" status have caused misdirection and waste of resources, low teacher and administrator morale and misguided restructuring. More significantly, educators are forced to compromise or eliminate instructional programs which they believe would best address the academic needs of the very students Congress intended to help through NCLB.

The instant petition for writ of mandate is quite limited. It requires the State to adhere to mandatory requirements under NCLB and to exercise its discretion consistently with those mandates. The mandatory duties are clear, present and incumbent upon the State and therefore ministerial.

II. QUESTIONS PRESENTED

(a) Did the trial court err by deciding that NCLB does not, as a matter of law, state ministerial duties for the State enforceable by a writ of mandate under CCP §1085, including mandates that the State:

(1) test English Learners in a "valid and reliable manner" on state assessments; and

(2) provide those reasonable practicable accommodations on state assessments most likely to yield accurate data on what ELs know and can do in academic content areas?

(b) Did the trial court err by determining that the State has properly exercised its discretion in complying with its duties concerning EL academic testing

as a matter of law and without consideration of any evidence submitted by any party?

(c) Does substantial evidence establish that the State failed to comply with its mandatory and/or discretionary duties concerning EL academic testing required by NCLB?

(d) Did the trial court err by dismissing the Governor and the State of California as parties and dismissing the Districts' declaratory relief cause of action?

III. STATEMENT OF THE CASE

A. Nature of the Action

The Districts appeal the denial of their petition for writ of mandate under CCP §1085, the dismissal of their cause of action for declaratory relief under CCP §1060 and dismissal of the Governor and State of California as defendants (JA 6010).[3] In the First Amended Verified Petition for Writ of Mandate and Complaint, the Districts claimed that NCLB establishes mandatory duties governing state academic assessments of ELs which the State has failed to meet, that the Districts are beneficially interested and that they, through their teachers, administrators and students, have suffered injury (JA 47-77). In their declaratory relief cause of action,[4] the Districts sought a determination that the State has not complied with the pertinent NCLB provisions and injunctive relief (JA 5178-5214).

B. Relief Sought in the Trial Court

The Districts sought a peremptory writ of mandate directing the State to implement testing for NCLB accountability purposes that is valid and reliable for ELs, including those reasonable practicable accommodations in the language and form most likely to yield accurate results of what ELs know and can do in academic content areas including consideration of proven, identified accommodations (JA 807-8).

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[3] JA refers to the Joint Appendix.

[4] Second Amended Verified Petition for Writ of Mandate and Complaint, Fourth Cause of Action.

Alternatively, the Districts sought a declaratory judgment that the State's testing violated the State's obligations under NCLB and sought corresponding injunctive relief (JA 5214-5216).

C. Judgment and Orders Appealed From

The Districts appealed from the judgment entered on February 1, 2008 in Department 304 of the San Francisco Superior Court and from all orders, decisions and determinations upon which the judgment is based including the Decision Denying Motion For Writ Of Mandate filed on May 25, 2007, the Order Regarding Judgment In Favor of Respondents on Petition for Writ of Mandate filed June 20, 2007, the Order Granting Application For Reconsideration; Granting In Part And Denying In Part Motion For Judgment On The Pleadings filed September 28, 2007 and the Order Granting Defendants' And Respondents' Motion To Dismiss Governor and State filed December 7, 2007 (JA 6010).

D. Procedural History

On June 1, 2005, petitioners and plaintiffs Coachella Valley Unified School District, along with nine other school districts, three state-wide organizations and two individuals filed their Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("the Complaint") (JA 1-46). The Complaint asserted a petition for writ of mandate brought by all plaintiffs (First Cause of Action); and causes of action for an illegal expenditure of taxpayer funds brought by all plaintiffs except for the school districts (Second Cause of Action); violation of the California Constitution brought by all plaintiffs except for the school districts (Third Cause of Action); and a cause of action for Declaratory Relief brought by all plaintiffs (Fourth Cause of Action). Respondents/defendants were the State of California, Arnold Schwarzenegger, in his official capacity as Governor, Jack O'Connell, in his official capacity as State Superintendent of Public Instruction, the California Department of Education ("CDE") and the California State Board of Education ("SBE").

SBE filed a motion for judgment on the pleadings on August 25, 2005 which was joined by all Defendants and denied in its entirety. SBE petitioned the Court of Appeal, First Appellate District, for a writ of mandate overturning the trial court's denial of the motion and on December 30, 2005, the Court of Appeal summarily denied the petition. Appeal Case No. A112405.

On or about March 2, 2006, petitioners/plaintiffs Coachella Valley Unified, Chula Vista Elementary, Alisal Union, Terra Bella Union Elementary, Pajaro Valley Unified, Oxnard Elementary, Sweetwater Union High, Salinas Union High and San Ysidro school districts (the Districts) and California Association for Bilingual Education, Californians Together, California League of United Latin American Citizens, Melissa Zavala and Jamilet Ochoa (collectively "plaintiffs") filed their First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("First Amended Complaint") (JA 47-87), the operative pleading for the writ determination which is the subject of this appeal. Respondents/defendants remained the same. The First Amended Complaint contained the same four causes of action as the Complaint with the Districts asserting claims under the First and Fourth Causes of Action.

This action was designated complex and transferred on November 15, 2006 to the Complex Litigation Unit of San Francisco Superior Court, the Honorable Richard A. Kramer, for all purposes. On January 3, 2007, Plaintiffs filed their moving papers in support of the petition for writ of mandate contained in the First Cause of Action (JA 114-831). Plaintiffs requested a court trial with live testimony and an evidentiary hearing (JA 4739-4752).

On May 3, 2007, the court set a bifurcated court trial (JA 5111-2). In phase one the court would consider solely whether it had the legal authority to issue the requested writ of mandate. If so, the Court would consider whether it should issue the writ of mandate following an evidentiary hearing to be held commencing May 21, 2007 (*Id.)* At the May 3, 2007 hearing the court heard argument on phase one (JA 5112).

Thereafter the court issued a Decision Denying Motion for Writ of Mandate (JA 5137-5163) in which the court determined that the State's assessments did not violate any ministerial duty created by NCLB nor, as a matter of law, did these assessments constitute any abuse of discretion (JA 5163). The court declared the second phase of the trial moot (JA 5138).

The remaining issues between the Districts and the State concerned the Districts' Fourth Cause of Action for Declaratory Relief and whether or not the Governor and State of California should be dismissed as parties. Plaintiffs filed a Second Amended Verified Petition for Writ of Mandate ("Second Amended Complaint") on July 19, 2007 (JA 5178-5221).

By order filed September 28, 2007, the trial court granted the State's Application for Reconsideration and granted in part and denied in part the State's Motion for Judgment on The Pleadings which dismissed the Districts' cause of action for declaratory and injunctive relief (JA 5755-6). By order filed December 7, 2007, the court granted the State's Motion To Dismiss Governor and the State of California as defendants (JA 5976-8). Judgment of Dismissal in Favor of the State and against the Districts was filed February 1, 2008 (JA 5985) and Notice of Entry of Judgment of Dismissal was served by the Districts on February 4, 2008 (JA 5997A-B).

The lawsuit remains pending in San Francisco Superior Court, Department 304, as to the state constitutional violations alleged by the three statewide organizations and individual student.[5] By stipulation of the parties and order of the trial court, lower court proceedings are stayed pending this appeal.

E. The Trial Court Decision Denying Petition

The trial court determined it lacked the legal basis to issue the writ for several reasons. First, the court determined that NCLB was a voluntary program such that states choose whether or not to participate. If a state participates, all it must do is submit a State Plan acceptable to the United States Department of Education ("USDE"). If a state

[5] Melissa Zavala dismissed her claims on July 6, 2006.

fails to submit an acceptable State Plan or fails to comply with ongoing requirements, the only consequence is a loss of federal funding (JA 5150-1).

The trial court then assumed *arguendo* that once a state chose to participate in NCLB, the requirements of NCLB are binding and mandatory on the state. Nonetheless, even when viewed this way, the court found no ministerial duties subject to a writ of mandamus (JA 5151). The court reasoned that approval of the State Plan by the Secretary of the USDE left the states with "great discretion and flexibility as to how the assessment, reporting, accountability and remediation characteristics of the program are accomplished." Accordingly the State's duties under NCLB are not specific enough to be enforced through a writ of mandate (*Id*.)

The court next concluded that "valid" and "reliable" testing for English Learners was a "generalized goal," not a specific directive capable of enforcement under CCP §1085 (JA 5153). Nothing in the Decision Denying Motion for Writ of Mandate indicates the court considered the technical and scientific meaning of the terms "valid" and "reliable," nor the briefing by either side on what these terms mean, nor the "Standards for Educational and Psychological Testing" which was submitted on judicial notice by SBE and stipulated by the parties as admissible (JA 3906, 3911-44, 5108).

The trial court next concluded that the requirement to provide those reasonable practicable accommodations most likely to yield accurate test data did not amount to a mandatory duty. The terms "reasonable accommodation," "to the extent practicable," "language and form," and "most likely to yield accurate data" were "replete with components as to which judgments must be made and therefore discretionary" (JA 5155). Accordingly the trial court found no sufficiently specific statutory language to create a ministerial duty (JA 5157).

Having found no ministerial duty, the court next considered whether California's assessments could nonetheless, as a matter of law, constitute an abuse of discretion (JA 5157). The court concluded that the process used by the State to determine the testing was not procedurally unfair; that if the assessments were not accurately measuring EL

academic achievement, this would show up as a problem under 20 U.S.C. §6316 and that, given the passage of Proposition 227 (Education Code §300 et seq.), the decision to test ELs only in English for NCLB purposes was not arbitrary or capricious (JA 5157-60). The court considered no evidence in reaching these conclusions (JA 5137-5163).

IV. APPEALABILITY

A denial of a petition for writ of mandate is immediately appealable. *Knoll vs. Davidson*, 12 Cal. 3d 335, 343 (1974). However, there is no right to appeal where related issues are still pending between the parties. *Griset vs. Fair Public Practices Commission*, 25 Cal. 4th 688, 697 (2001); *Nerhan vs. Stensen Beach County Water District*, 27 Cal. App. 4th 536, 540 (1994); *Morehart vs. County of Santa Barbara*, 7 Cal. 4th 725, 741-4 (1994).

In the instant case, the denial of the petition for writ of mandate was not immediately appealable because the Districts' declaratory relief cause of action remained pending as did the issue of dismissal of the State of California and Governor on both the petition and complaint causes of action. These issues were decided by the court on September 28, 2007 when the court granted in part and denied in part the State's motion for judgment on the pleadings which disposed of the Districts' declaratory relief action (JA 5755-6) and on December 7, 2007 when the court dismissed the Governor and State of California (JA 5976-8).

Normally only a final judgment, which is a judgment that disposes of all issues between all parties, is appealable. However, a "piecemeal" judgment or order that leaves no issue remaining to be determined as to one of the parties is considered final as to that party and thus appealable. *Justus vs. Atchison*, 19 Cal. 3d 564, 567-68 (1977) (disapproved on other grounds in *Ochoa vs. Superior Court (Santa Clara County)*), 39 Cal. 3d 159, 171 (1985); *Nguyen vs. Calhoun*, 105 Cal. App. 4th 428, 437 (2003). The court's Order Granting Defendants' and Respondents' Motion to Dismiss Governor and State was the final determination of issues between the State and the Districts. Upon the

filing and entry of the Judgment of Dismissal in favor of the State and against the Districts on February 1, 2007, the Districts' claims were appealable.

V. STANDARD OF REVIEW

The trial court determined that it lacked the legal authority to issue a writ of mandate because the State's duties under NCLB were discretionary and not ministerial and the State did not, as a matter of law, abuse its discretion (JA 5163). The trial court stated that its determination was based purely on statutory construction and issues of law. These are reviewable *de novo*. *California Teachers Association vs. San Diego Community College*, 28 Cal. 3d 692, 699 (1981). Appellate review gives no weight to the trial court's conclusions. *Carrancho vs. California Air Resources Board*, 111 Cal. App. 4th 1255, 1266 (2003); *Rodriguez vs. Soliz,* 1 Cal. App. 4th 495, 502 (1981). Likewise the court's dismissal of the Districts' claim for declaratory and injunctive relief and the Governor and State of California as defendants are issues of law reviewable *de novo*.

As described herein, the Districts' petition for writ of mandate requires court review of the State's interpretation and implementation of NCLB. The standard of judicial review of an agency interpretation of law is the independent judgment of the court, "giving deference to the determination of the agency appropriate to the circumstances of the agency action." *Yamaha Corp. of America vs. State Bd. Of Equalization,* 19 Cal. 4th 1, 8 (1998). *infra* at pp. 38-39. To the extent the court resolves factual issues, it utilizes the substantial evidence standard of review. *Scates vs. Rydingsword,* 229 Cal. App. 3d 1085, 1101 (1991); *Alford vs. County of San Diego,* 151 Cal. App. 4th 16, 18-19 (2007).

VI. SIGNIFICANT FACTS

A. NCLB Framework

NCLB is a federal grant statute enacted under Congress' power under Article I, Section 8, Clause I of the United States Constitution, the so-called "Spending Clause." Under this provision, Congress "may attach conditions on the receipt of federal funds,

and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *State of Connecticut, et al. vs. Spellings*, 453 F. Supp. 2d 459, 469 (D. C. Conn. 2006) citing *South Dakota vs. Dole*, 483 U. S. 203, 206-08 (1987) (internal quotations and citations omitted).

The primary purpose of NCLB is to "'ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education.' 20 U.S.C. §6301. 'Academic accountability lies at the core of [NCLB] which seeks to improve educational attainment by ensuring that 'high quality academic assessments … are aligned with challenging State academic standards.' 20 U.S.C. §6301(1)." *State of Conn., supra* at 468-9.

States may choose whether or not to participate in NCLB but as a condition of receiving federal funds, they are bound to comply with all statutory requirements. 20 U.S.C. §6311(a)(1). In this regard, "Congress imposed on states a comprehensive regime of educational assessments and accountability measures." *State of Conn., supra* at 468-9.

The cornerstone of NCLB is its focus on assessment and accountability. Under NCLB districts must provide equal access for English Learners to the same high academic standards as their peers. NCLB requires that states and school districts affirmatively help English Learners make progress each year in two key areas: meeting challenging State academic content standards and learning English.[6]

NCLB requires each State to create a statewide accountability system for all students, under which schools and districts are evaluated yearly for academic progress in specific academic areas called "adequate yearly progress" or AYP. AYP is an annual goal established by fixing the percentage of students that must attain proficiency in specified academic subjects. 20 U.S.C. §6311(b). States must measure and report the AYP of schools and districts for specific subgroups, including economically

[6] 20 U.S.C. §6311(b) and §6312(g)(1)(A)(v).

disadvantaged students, students from major racial and ethnic groups, students with disabilities and limited English proficient students.[7]

NCLB also requires states to identify districts as "improvement districts" or "PI Districts" when they do not meet their AYP benchmarks for two consecutive years. PI Districts face increasingly harsh sanctions ranging from reduced funding, replacement of personnel "relevant to the failure to make adequate yearly progress," removal of schools from its jurisdiction, replacement of their superintendent or school board, or ultimately complete abolishment of the districts. 20 U.S.C. §6316(c).

Under NCLB, limited English proficient students are defined as those whose native language is a language other than English and "whose difficulties with speaking, reading, writing or understanding the English language, may be sufficient to deny the individual …. the ability to meet the State's proficiency level of achievement on State [academic] assessments."[8] NCLB specifically requires states to include ELs as a subgroup in the State's testing and accountability system, 20 U.S.C. §6311(b)(3)(C)(ix) (I & III), and requires that states test ELs.

With respect to students having limited proficiency in English, NCLB provides that English Learners "shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments . . . including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas until such students have achieved English language proficiency" 20 U.S.C. §6311(b)(3)(C)(ix)(III) (emphasis added). States are provided with a specific mechanism for ensuring that testing will yield accurate data for English Learners; they are encouraged to test students in their own languages, and may do so for up to three years. However, once a student has attended school in the United States for three years, the statutory default becomes assessment in English. Native language testing, though, may be extended for an additional two years

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7 20 U.S.C. §6316(b)(2)(C)(v).

8 20 U.S.C.§7801(25).

on a case-by-case basis. 20 U.S.C. §6311(b)(3)(C)(x). Thus NCLB expressly allows children to demonstrate their academic competence in any language and only requires children to take tests of their reading and writing skills in English after they have been given three to five years to develop sufficient English language skills to be able to demonstrate their academic competence in those skill areas. This comports with educational research that it takes ELs, on average, four to seven years to acquire sufficient English to meet various proficiency standards (JA 778, 4314).

NCLB mandates that states establish a meaningful assessment system that will yield accurate data for all students including English Learners. It then provides states with alternative testing approaches which may be used in order to ensure accurate results for English Learners when testing for academic competence. States must consider these alternatives when developing their assessment system, and must implement the system that is most likely to yield accurate data for English Learners. A state does NOT have the discretion to implement a system that will produce less accurate data if it is practicable to do otherwise. States may choose the assessments by which they measure proficiency, but those assessments must be aligned with the state's academic standards and must be "consistent with relevant, nationally recognized professional and technical standards," 20 U.S.C. §6311(b)(3)(C)(iii) and (xiv).

To facilitate the development of this type of inclusive system, NCLB requires that states "identify the languages other than English that are present in participating student populations and indicate the languages for which yearly student academic assessments are not available and are needed," and requires that states "make every effort to develop such assessments."[9]

[9] 20 U.S.C. §6311(b)(6) (emphasis added).

B. California's Assessment System

Prior to NCLB, California adopted its STAR program,[10] Public Schools Accountability Act ("PSAA")[11] and legislation requiring a high school exit exam,[12] which collectively form the basis for California's statewide system of assessments and accountability. The PSAA includes an Academic Performance Index ("API") designed to measure the academic growth of students, schools and districts over time. Although the STAR legislation required the development of academic assessments in Spanish,[13] the API is based upon designated tests that are administered in English only and designed for native speakers only.[14]

For purposes of the federal accountability system required under NCLB, SBE chose, through the State Plan submitted to the USDE, to simply use the academic assessments used under the API.[15] California uses the CSTs for grades 2-8, and the CAHSEE for high school, both of which are administered in English only.

California offers some minimal accommodations to ELs taking the CSTs and CAHSEE.[16] Most of these (e.g., flexible settings, flexible schedule and flexible time) are borrowed from accommodations offered to special education students and do not address the main problem faced by English Learners - the language barrier (JA 708-9). The two accommodations authorized by the SBE that are specific to EL needs, translated test directions and word glossaries, are problematic for three reasons. First, the State has not created standardized glossaries or translated test directions for state-wide application. Each district must find or create its own. Second, these accommodations are permissible only to the extent they are regularly used in the

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10 Education Code ("Ed Code") § 60640 et seq.
11 Ed Code § 52050 et seq.
12 Ed Code § 60850 et seq.
13 Ed Code §60640(f).
14 Ed Code §52052(b).
15 JA 120-124.
16 Title 5, California Code of Regulations, Sections 853.5(f)(CSTs) and 1217 (CAHSEE).

students' classrooms or for assessments in that district (5 CCR §853.5(f) (JA 776-7)). Third, very little research is available on the effectiveness of these accommodations (JA 708-9). The result is striking. 95% of ELs taking the CSTs and CAHSEE, do not use any of the authorized accommodations (*infra* at pp. 38-9). Despite protests here of practicability, the State has already developed tests in Spanish that measure whether students are meeting California's reading/language arts and mathematics standards. These Standards-Based Tests in Spanish ("STS") are ready for administration at most grade levels (JA 381-2)[17] but California refuses, for political and policy reasons, to use them to measure the academic progress of ELs under NCLB and has refused other meaningful accommodations (*infra* at pp. 39-40).

C. The Standards for Educational and Psychological Testing

All parties agreed that the accepted scientific and technical standards for educational testing are set out in the "Standards for Educational and Psychological Testing" (1999), a joint publication of the American Educational Research Association, American Psychological Association and the National Council on Measurement in Education ("the Standards"). SBE submitted the Standards to the court as a matter of judicial notice (JA 3906, 3911-44), plaintiffs' experts referred to them and attached excerpts (JA 719A-739 and 4264-73) and the parties stipulated to their admissibility for purposes of the writ proceedings (JA 5108). The Standards provide the authoritative consensus guidance on what the terms "validity," "reliability" and "accommodations" mean in educational testing and constitute the national professional standards by which testing is judged (JA 703, 1969, 1982, 4227).

VII. ARGUMENT

A. THE STATE HAS MANDATORY DUTIES UNDER NCLB

The trial court's analysis is flawed in several respects. First, the decision to participate in NCLB obligates a state to comply with all requirements of NCLB.

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[17] The deposition covering the STS development was taken July 28, 2006. The forecast that the STS would be ready for administration to most grades in 2007 and 2008 has occurred. These facts are not disputed.

Second, states have an obligation not just to submit a State Plan which satisfies NCLB requirements, but to implement such a plan consistent with statutory requirements. Third, NCLB requirements are clear, technical and specific notwithstanding state discretion as to how to satisfy the requirements. Fourth, even if the State received approval by the USDE for its State Plan, such approval does not preclude judicial review. The court has the independent obligation to determine statutory meaning and, if legislative or administrative action runs counter, to require compliance.

1. Participation in NCLB Is Voluntary But the State, Having Elected to Accept Funds, Must Meet Statutory Requirements

As noted above, under NCLB's statutory framework, states are free to decline to participate in NCLB. If they do participate they are bound to comply with all NCLB requirements. 20 U.S.C. §6311(a)(1); 20 U.S.C. §7846(a)(1). Two recent federal cases deserve discussion here. Both observed that NCLB mandates are binding on the states. *School District of the City of Pontiac vs. Secretary, U. S. Dept. of Education*, 512 F. 3d 252, 269 (6th Cir. 2008) (rehearing enbanc granted May 1, 2008). Indeed the point in *State of Connecticut, supra* is that NCLB contains unfunded mandates. *Id.,* at 474-5. The State of Connecticut argued that it should be allowed to waive EL testing for three years because of low English proficiency but the court upheld the Secretary's denial of the waiver explicitly referring to NCLB's EL testing requirements. See *State of Connecticut vs. Spellings*, 2008 U.S. Dist. LEXIS 34434 (April 28, 2008 at 41-44).

While no California court has ruled specifically on NCLB, it is well established under California law that while a state exercises discretion over whether or not to participate in a federal grant program, once it has decided to do so, it must adhere to the imperatives of the statute. *Olszewski vs. Scripps Health*, 30 Cal. 4th 798, 804, 809-10 (2003). *Doctor's Medical Laboratory, Inc. vs. Connell*, 69 Cal. App. 4th 891, 896-7 (1999) (by accepting federal money, state forfeited its right to exercise discretion in a manner inconsistent with the federal legislation). State action in furtherance of the statute "must be consistent not in conflict with the statutes and reasonably necessary to

effectuate its purpose." *Mooney vs. Pickett,* 4 Cal. 3d 669, 679 (1971). This applies fully to state or local administration of federal statute. *Gillum vs. Johnson*, 7 Cal. 2d 744 (1936); *White vs. Davis*, 30 Cal. 4th 528, 577-78 (2003) (writs in both based, in part, on FLSA); *Los Angeles Unified School Dist. vs. Livingston*, 125 Cal. App. 3d 942, 946 (1981) (federal Unemployment Insurance regulations provide mandatory duty for writ); *King vs. Martin*, 21 Cal. App. 3d 791, 794 (1971) (federal statutory and regulatory language requiring timelines for welfare hearings is mandatory and adequate basis for writ); *Morales vs. McMahon*, 223 Cal. App. 3d 184, 189 (1990) (same).

2. Submission of a State Plan Acceptable to the USDE Is Not the State's Only Mandatory Duty Under NCLB

Once a state has elected to participate, it must comply with the substantive provisions of NCLB. Congressional mandates enacted pursuant to the Constitution's "Spending Clause" are binding on the states which by choice or necessity accept federal funds. These laws are the supreme law of the land. United States Constitution, Article VI, Clause 2. State law which conflicts with such federal law is without effect. *Olszewski, supra* at 814.

In a challenge to the state's compliance with a federal statute, the court's obligation is "to examine the federal statute as a whole and identify its purpose and intended effects." *Olszewski, supra* at 815 citing *Crosby vs. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Next the court determines if state implementing action is consistent with the statute. Where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' (*English vs. General Electric Co.*, 496 U.S. 72, 79 (1990))," courts are bound to invalidate the errant action and enforce the federal law. *County of San Diego vs. State of California,* 15 Cal. 4th 68, 100 (1997), *Olszewski, supra* at 813-815.

In *Olszewski*, the Supreme Court considered whether California's Medicaid recovery statute was enforceable. Like the statutory scheme here, states including California created their State Plans and implementing legislation in response to the federal "Spending Clause" statute. Plaintiffs challenged whether California's Welfare and Institutions Code which permitted a lien for medical services against the beneficiary's personal injury claims violated Medicaid, the underlying federal statute.

California submitted a State Plan to the Secretary of Health, Education and Welfare ("HEW") who apparently approved it. California advanced the same argument here - - that the Secretary's approval of the State Plan *ipso facto* determined compliance. The Supreme Court disagreed, reaching the underlying issue and finding California failed to comply with Medicaid's statutory directives, regardless of any arguable approval of the State Plan. As a matter of law such approval neither determines whether state conduct complies with law nor precludes the court from fulfilling its function as the final authority on statutory interpretation. *Id.,* at 825-826; *Robbins vs. Superior Court*, 38 Cal. 3d 199, 212 (1985); *County of San Diego, supra* at 100.

3. NCLB Must Be Construed to Require That States Provide Valid and Reliable Academic Testing of ELs in Core Academic Subjects and Those Reasonable Accommodations Most Likely to Yield Accurate Data

The primary purpose of statutory construction is for the courts to determine and effectuate the purposes of the law as enacted. *California Teachers Association vs. Governing Board of Rialto Unified School District*, 14 Cal. 4th 627, 633 (1997). The court fulfills this function by attempting to ascertain the intent of the legislature through an examination of the statutory language. The court's role is limited: it must interpret the law to give effect to the legislature's intended purpose, viewing the

legislation as a whole. *California Teachers Association vs. San Diego Community College District, supra* at 698.

California courts construe a federal statute under the principles of statutory construction applied by federal courts. *RCJ Medical Services, Inc. vs. Bonta*, 91 Cal.App.4th 986, 1006 (2001). Interpretation begins with its plain language. *Lewis vs. Hegstrom*, 767 F.2d 1371, 1376 (9th Cir. 1985); *Lynch vs. Rank*, 747 F.2d 528, 531 (9th Cir. 1984); *Donovan vs. Southern California Gas Co*., 715 F.2d 1405, 1407 (9th Cir. 1983). The court should not hinge its interpretation of a statute upon a single word or phrase but rather look to the statute as a whole, as well as its objectives and policies. *Richards vs. United States*, 369 U.S. 1, 11 (1962) (must examine provisions of the whole law, not single sentence or word); *Green vs. Commissioner*, 707 F.2d 404, 405 (9th Cir. 1983) (court should strive to interpret one section of a statute consistently with the language of other sections and the statute as a whole).

Courts are free to use extrinsic aids to help them determine the meaning of statutory terms. *California Teachers etc. vs. San Diego, etc., supra* at 698. Technical terms in statutes are generally read according to their technical meaning "as used by persons in the profession or business to which they relate, unless clearly used in a different sense." *Kiessig vs. County of San Diego*, 51 Cal. App. 2d 47, 49, 54 (1942). Attaching the scientific and technical meaning of the statutory language aids the court's purpose in promoting rather than defeating the statute's general purpose and avoiding an interpretation that would lead to "absurd and unintended consequences." *People vs. Carter*, 48 Cal. App. 4th 1536, 1540 (1990).

a. The State's Academic Testing Must Objectively Measure Student Achievement in NCLB Defined Core Academic Subjects

NCLB requires states to adopt challenging academic standards in specific content areas. Section 6311(b)(3)(A) provides:

> Each state shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the state and each local educational agency.

(Emphasis added)

NCLB requires that academic testing of ELs objectively measure achievement in core subjects. Nowhere in the testing provisions are the words "mathematics," "language arts" or "science" preceded by the word "English." Rather, NCLB expressly requires states to measure academic achievement of ELs in a language other than English where it is practicable and would yield more accurate data. These academic testing provisions of NCLB demonstrate that the purpose or use of the statewide academic assessments is measuring academic content mastery regardless of English language proficiency (JA 701, 776, 4224:18-4225:10).

b. The Testing Must Be Technically Valid and Reliable For English Learners

NCLB requires that assessments of proficiency in core academic areas must "objectively measure academic achievement, knowledge and skills" in those academic content areas.[18] Thus, for English Learners, the academic assessments must not simply be another measure of the student's proficiency in English. Specifically, §6311(b)(3)(C) requires:

> Such assessments shall … (ii) be aligned with the State's challenging content and student academic achievement standards and provide coherent information about student attainment of such standards; (iii) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards; … (ix) provide for … (III) the inclusion of limited English proficient students, who shall

[18] 20 U.S.C. §6311(b)(3)(C)(v)(I) and 20 U.S.C. §6311(b)(3)(C)(xiv).

> be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency …
> (xiv) be consistent with widely accepted professional testing standards, [and] objectively measure academic achievement, knowledge and skills.

(Emphasis added.)

"Shall is normally construed as a mandatory term in statutes." *Beverly vs. Anderson*, 76 Cal. App. 4th 480, 485 (1999); *People vs. Hardacre*, 90 Cal. App. 4th 1392, 1398 (2001); see also *Walker vs. County of Los Angeles*, 55 Cal. 2d 626, 634 (1961) ("'shall' has a compulsory or mandatory meaning"); *Unnamed Physician vs. Bd. of Trustees of Saint Agnes Medical Center*, 93 Cal. App. 4th 607, 622 (2001) (statutory use of "shall" means "mandatory," and leaves no discretion to the enforcing agency).

At the trial court level, all parties agreed that "valid" and "reliable" are technical psychometric terms which have specific scientific and technical meanings. Both sides submitted extensive documentation from experts on whether or not California's testing meets those standards (JA 701-708, 766-772, 776-778, 1970-2012, 4226-4233, 4237-4238 and 4304-4314). Test validity and reliability are so well understood by the State, that each year its test contractor Educational Testing Service ("ETS") publishes an extensive technical report detailing *inter alia* whether California's STAR tests meet established standards for validity and reliability (JA 1265, 1268-1630 (note in particular 1346-1351 and 1561-1591)). The trial court should have interpreted the statute to give these terms a technical meaning.

c. The State Must Adopt Those Reasonable Practicable Accommodations for ELs Most Likely to Yield Accurate Data

It is obvious, construing NCLB as a whole, that the point of EL testing provisions is to ensure that EL testing accurately measures what ELs know and can do in academic subjects given their limited English proficiency. While the State has the discretion to select which measures are best suited in California to achieve this result, the State is not free to decline proven effective measures that are practicable or, as the State did here, to decline to adopt any meaningful uniform accommodations and instead leave the districts responsible for creating their own.

NCLB requires that ELs begin to take reading/language arts tests written in English after they have been enrolled in U.S. schools for a period of three consecutive years, but allows an additional two-year exemption from testing in English for any student who "has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests (written in English) of reading or language arts" 20 U.S.C. §6311(b)(3)(C)(x). This statutory provision is an explicit recognition by Congress that the most valid and reliable measure of language arts abilities of non-English proficient students will often be a non-English language test. Had Congress intended to allow states blanket authority to test students for academics using English tests, Congress would not have included this subsection nor would it have directed states to use, where practicable, "academic assessments in the language or form most likely to yield accurate data on what such students know and can do." It necessarily follows that, when designing and implementing plans for testing English Learners, states, and specifically California, MUST consider whether use of a non-English language test is a necessary component of accurate testing of English Learners. If it is, and if such testing is practicable, states including California must utilize such tests.

B. THE STATE'S DUTIES ARE CLEAR, PRESENT AND MINISTERIAL

1. Mandatory Duties Which Circumscribe the Exercise of Discretion Are Ministerial

Mandamus is the appropriate relief "where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take." *Terminal Plaza Corporation vs. City and County of San Francisco*, 186 Cal. App. 3d 814, 835-6 (1986). In such case, the course of conduct is mandatory and eliminates any element of discretion. *Id*. The functions of the governmental bodies become ministerial notwithstanding the exercise of discretion as to how to fulfill the mandate. *Id.* "While mandamus will not lie to control the exercise of discretion, the writ is available to correct abuse of discretion." *Pacific, etc. Conference of United Methodist Church vs. Superior Court*, 82 Cal. App. 3d 72, 81 (1978).

The trial court here correctly noted that NCLB dictates to states what must be accomplished in student assessments.

> [T]hese provisions do not direct a specific manner or course of conduct. They instead specify the result that must ensue i.e. that the assessments be valid and reliable, that they be aligned with the state's challenging content and that they be consistent with professional testing standards ... It is left to the states to exercise judgment as to how to achieve those results.

JA 5151-2.

The Districts agree with this statement. Numerous California courts have dealt with mandamus in exactly this scenario - where government is required to perform a specific act in obedience to a statutory directive and has the discretion how to accomplish the result but not whether or not to do so.

That a duty may be complex or general does not determine its ministerial character. The hallmark is its mandatory nature. In numerous cases, courts have found

mandatory and therefore ministerial duties even where the statutory duty required broad discretion in implementation.

In *Knopf vs. City and County of San Francisco*, 1 Cal. App. 3d 184 (1969), petitioners brought a mandamus action against the county assessor for alleged failure to comply with constitutional and statutory duties to fix an assessment rate and apply it uniformly. *Id*., at 191-192. They sought a writ to compel compliance with statutory requirements that the assessor "(1) assess all property in his jurisdiction; and (2) do so on a uniform basis."[19] *Id*., at 195. Despite acknowledging the significant amount of discretion vested in the assessor, the court of appeal held that a writ of mandamus was properly issued to correct the inequities. *Id*., at 194-195.

While the court in *Knopf* acknowledged that mandamus does not lie to "control" the exercise of administrative discretion, the writ remedy was appropriate because it did not mandate any particular result. Rather, it merely compelled public officials to create a uniform assessment system as required by statute. See also *Venice Town Council, Inc. vs. City of Los Angeles*, 47 Cal. App. 4th 1547, 1557-62 (1996) (mandatory duty that city require replacement housing notwithstanding exercise of discretion as to statutory terms "feasibility," "coastal related," and "coastal dependent."), *Manjares v. Newton*, 64 Cal.2d 365 (1966) (school board exercise of discretion as to whether to provide bus transportation to rural students held to be an abuse of discretion – mandate issued); *Terminal Plaza, supra* (exercise of discretion by city planner in construction of 12-foot walkway held violation of mandatory

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[19] The statutory provisions upon which the court relied in imposing and enforcing a mandatory duty deserve review here, as they too contained language which vested considerable discretion in the officials. The Board had "the duty to supervise the official conduct of the Assessor to the extent of requiring him faithfully to discharge his duties under the law." *Id*., at 196. The assessor was found to have a statutory duty "not to allow anyone to escape a just and equal assessment." *Id*.

condition); *County of San Diego, supra* at 104-5 (duty to provide medical care to indigents "promptly and humanely … at a level which does not lead to unnecessary suffering or endanger life and health …").

2. "Valid" and "Reliable" Test Requirements Are Technical Measurable Psychometric Terms, Not a "Generalized Goal"

The court's conclusion that valid and reliable testing was a "generalized goal" was unsupported by the parties' briefing, the Standards and NCLB. Construing NCLB to avoid the objective psychometric requirements of validity and reliability renders nugatory the several provisions directed at ensuring accurate EL testing. "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Terminal Plaza, supra* at 882-3.

Congress has explicitly said that state academic testing must provide coherent information about student attainment of academic standards (20 U.S.C. §6311(b)(3)(C)(ii)); be valid and reliable for English Learners (and all students) (20 U.S.C. §6311(b)(3)(C)(iii) and (ix)(III)); be consistent with relevant, nationally recognized professional and technical standards (20 U.S.C. §6311(b)(3)(C)(iii)) and objectively measure academic achievement (20 U.S.C. §6311(b)(3)(C)(xiv)). These provisions cannot be read except to require that states provide academic assessments of ELs that are technically valid and reliable as measures of academic knowledge.

3. The Terms "Reasonable," "Practicable" and "Most Likely to Yield Accurate Data" Define the Extent of the State's Duties and Are Capable of Ascertainment and Enforcement

The State argued and the court held that terms like "reasonable" and "to the extent practicable" were so vague and subject to discretion that no mandatory duty arose. Numerous courts have found mandatory duties notwithstanding such terms. The

leading case where state agencies have abused this discretion by not adhering to mandatory statutory language is *Morris v. Williams,* 67 Cal.2d 733 (1967). In *Morris*, the federal law at issue authorized release of funds to the State provided that the State's programs met the requirements of the federal law. As here, the federal law in question was a complex system of incentives, mandating certain basic guarantees while allowing each state to create its own individualized plan. *Id*., at 738-40. In response, California passed legislation creating the Health and Welfare Agency ("HWA"), which in turn created regulations authorizing the HWA Administrator "to prescribe … the scope of the services to be provided and to adopt regulations 'not inconsistent' with the purpose of the Act." *Id*., at 754. California's Health and Welfare Code §14103.7 required that any reduction in services be proportionate "to the extent feasible." The HWA Administrator eliminated some services altogether. At issue was whether the discretion exercised by the HWA Administrator exceeded the mandate of state and, by implication, federal law. The court found that the HWA's Administrator, by eliminating some services, had violated the statutory mandate.

> Section 14103.7, by requiring proportionate reductions *to the extent feasible* [italics in original], confers no discretion upon the Administrator to decline to follow its mandate if proportionate reductions are "feasible" *to some extent*. [italics in original] The Administrator must therefore use every 'feasible' means of curtailing expenditures in an effort to reduce the deficit so that no service need be eliminated.
>
> ……
>
> He has no discretion to decline to adopt an economy measure, not specifically proscribed by law, on grounds unrelated to curtailment of expenditures. "Feasible," in short, means capable of being done and capable of producing a saving in a manner not otherwise barred by the statute.

Id., at 757.

The instant case is structurally the same as those cases where states and subordinate entities are given great flexibility to create plans which comply with federal and state health and welfare laws. In *Alford, supra*, the court considered a petition for writ of mandate to direct the County of San Diego to comply with Welfare and Institutions Code §17000 which requires that: "[e]very county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Under the statutory scheme, each county was required to develop a plan to provide medically necessary care to indigents and "to adopt standards of aid and care for the indigent and dependent poor." *Id.* Exactly like the instant case, counties were given "broad discretion 'to determine eligibility for, the type and amount of, and conditions to be attached to indigent relief.'" But that discretion is not unlimited – the ultimate plan must conform to the legislative mandate. *Id*., at 28. In *Alford*, the court voided the County's eligibility standard, holding that the county's fixed dollar standard failed to consider statutorily mandated factors.

The principle articulated in *Alford et al.,* that subordinate bodies must adhere to the legislative mandates, fully applies in the instant case. Legislative or administrative acts contrary to the controlling legislation "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." *Morris, supra* at 737. "Courts, which have 'final responsibility for interpretation of the law' must strike them down." *Alford* at 20.

C. THE STATE'S TESTING DOES NOT AS A MATTER OF LAW SATISFY EL TESTING REQUIREMENTS

The trial court, assuming *arguendo* that NCLB created mandatory duties for the state, found that the state had complied with any such duties as a matter of law. Without taking evidence the court concluded that California's assessments are reasonable given the passage of Proposition 227, that USDE approval of the State Plan *ipso facto* determined its legality and that any defects in EL testing would appear as a problem under 20 U.S.C. §6316 and presumably be remedied. These determinations were erroneous.

1. Congress, Not the State, Determines the Use and Purpose of NCLB Testing

The State justified its refusal to even consider non-English testing or other accommodation by arguing it, not Congress, determines the use and purpose of testing used for NCLB accountability.[20] California's STAR testing was established for a different purpose[21] that predates NCLB. The STAR testing was designed to hold districts accountable based on a growth model: evaluating whether districts were improving from year to year compared to similar districts (JA 4225). NCLB uses a uniform target model where each school and district is expected to meet an absolute target for all students and each subgroup, including English Learners (JA 4226).

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[20] In the words of the State and its expert, "[T]he purpose of the California CSTs and CAHSEE, as used for NCLB accountability, is established by California policymakers and supported by the NCLB Act and California statutes"(JA 1970) (emphasis added). "Validity and reliability are expressly tied to purpose and use as determined by federal, state and local entities" (JA 4192:6-7) (emphasis added).

[21] The Districts do not dispute the State's right to make policy decisions on how to test English Learners for purposes of state testing.

The State argued in the trial court that because California has policy objectives of measuring academic growth only in English and emphasizing English instruction over all else, embodied in Proposition 227 and elsewhere, that its decision to use English only tests created for native English speakers satisfies NCLB. The State's argument turns on the premise that NCLB can be construed as requiring ELs to demonstrate their academic achievement in English. Such a proposition is directly contrary to the express language of the statute, its core purpose and fundamental psychometric principles (JA 4224-4233, 4305-6, 4388-4389).

California's policy choice does not trump NCLB. Under a conflict preemption analysis, courts must enforce the federal legislation as the supreme law of the land, giving full effect to the enunciated federal purpose. *County of San Diego vs. State, supra* at 100; *Ontario Community Foundation, Inc. vs. State Board of Equalization*, 35 Cal. 3d 811, 816 (1984); *Mooney, supra* at 683.

2. The State's Test Purpose and Use Are Utterly Incompatible With NCLB and Inherently Invalid for ELs

Clearly the State has its own different stated use and purpose for the STAR tests -- to measure what English Learners know to the extent they can express that knowledge in English.[22] On its face, this purpose does not meet the NCLB mandate that assessments be designed to provide the most accurate data practicable to evaluate academic knowledge regardless of English proficiency. The State has not even attempted to produce evidence that a test which purports to measure EL academic knowledge in English can, at the same time, measure what they know regardless of English proficiency.

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[22] Even for this purpose the State has no technical data showing that the CSTs and CAHSEE are psychometrically valid and reliable.

This distinction is paramount because unless the State redefines the purpose of the testing, to what ELs know in academic subjects in English, it can make no showing of test validity. As the State correctly observed, validity is "inextricably linked to purpose and use" (JA 4200:8). Because for ELs the STAR tests inextricably marry two distinct constructs – English language proficiency and academic knowledge – the tests cannot provide accurate results of the academic knowledge of ELs (JA 704-705, 778, 4226-4233).

3. The Court Erred By Determining the State Properly Exercised Discretion Without Taking Evidence

As a petition under CCP §1085, there is no administrative record as in a 1094.5 petition. Without a factual record, the court simply had no basis to evaluate whether the State's testing system met any applicable standards for validity or reliability or whether its test accommodations were effective in the least. As an initial matter the court needed to determine the meaning of the terms "valid" and "reliable" either through judicial notice interpreting statutory meaning or as a matter of fact reviewing the parties' expert opinions. Had it done either, it would have necessarily found that "valid" and "reliable" are psychometric terms with technical meanings. See the Standards at JA 4265-4273 and 3915-38.

Furthermore, while Proposition 227 requires instruction in English as the default curriculum unless parents choose alternative bilingual programs, it says nothing about assessments and, even if it did, federal law would preempt any testing requirement in conflict with NCLB. *Doctor's Medical Laboratory, Inc.*, supra at 897. *Olszewski, supra* at 814-26. The trial court's leap of faith that, because teaching is mostly in English, the State's testing in English is perforce not an abuse of discretion, neither

follows as a matter of law or fact. Such a conclusion simply begs the question at stake here: does such testing accurately measure EL academic achievement?

4. The State's Interpretation of NCLB Is Entitled To No Deference

It is now well established that a "state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes …." *Orthopedic Hospitals vs. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997); *MCI Telecommunications Corp. vs. Bell Atlantic*, 271 F.3d 491 (3rd Cir. 2001); *U.S. West Communications vs. MFS Internet Inc*., 193 F.3d 1112 (9th Cir. 1999).

Even if the SBE or CDE were interpreting a California statute, the amount of deference owed to such interpretation under California law is even less than that given under federal law. Where a state statute is found to be ambiguous and some deference to the agency's adjudicative function is warranted, California courts have followed a weaker deference standard than announced in *Chevron U.S.A. vs. NRDC, Inc*., 467 U.S. 837 (1984); *Spanish Speaking Citizens ' Foundation vs. Low*, 85 Cal. App. 4th 1179, 1216 (2000) (discussing cases). As the California Supreme Court explained in *Yamaha*, *supra* at 11: "It would not be enough for us simply to determine that the statute is ambiguous and that the Department's interpretation is reasonable; we would still be required to independently assess whether the Department's construction is lawful and whether it is deserving of deference under the circumstances." *Id*., at 11 fn. 4 ("even quasi-legislative rules are reviewed independently for consistency with controlling law").

This *de novo* review springs from the well-established principle that "[i]t is the duty of this court, when such a question of law is properly presented, to state the true meaning of the statute finally and conclusively … [Citations] The ultimate

interpretation of a statute is an exercise of judicial power. [Citations.]" *Bodingson Mfg. Co. vs. California E. Com*., 17 Cal. 2d 321, 325-326 (1941); *McClung vs. Employment Development Dept*., 34 Cal.4th 467, 472 (2004).

The State does not even assert that the testing scheme ultimately adopted by the SBE was the result of any quasi-legislative process and there is no evidence in the record of compliance with California's Administrative Procedure Act. Gov't Code §11340 *et seq*. As opposed to quasi-legislative acts of a state agency, which comply with the APA, non-legislative interpretations of the law by state agencies are entitled to even less deference by the courts. *Sara M. vs. Superior Court*, 36 Cal. 4th 998 (2005).

5. USDE's Position Relative to the State Plan Is Neither Dispositive Nor Entitled to Deference

The State argued that the USDE "officially approved California's assessment and accountability system," in a June 28, 2006 letter, thereby disposing of the question of whether the State's testing system for English Learners meets the requirements of NCLB (JA 4195).

The California Supreme Court in *Olszewski, supra*, rejected the State's argument here, that approval by the Secretary of the appropriate federal agency determines whether the State Plan complies with federal law. The Court held that the Secretary's approval of California's State Plan was only entitled to deference to the extent it was "not arbitrary, capricious, an abuse of discretion, or in conflict with governing law." *Id*., at 825-6 citing *RCJ Medical Service, supra* at 1011. Where the statute is clear, agency or administration pronouncements to the contrary are entitled to no weight. *Id.* In *Olszewski*, the Court found the state statutory provisions at issue conflicted with the plain language of the federal statute. Thus the approval of the State Plan by the Secretary of HEW did not control. *Id*., at 826.

D. THE STATE HAS FAILED TO FULFILL ITS MANDATORY DUTIES AS A MATTER OF FACT

1. The State's Academic Testing Does Not Validly Measure EL Academic Achievement

California's use of the CSTs and CAHSEE to measure academic knowledge of ELs under NCLB violates established professional, technical and ethical testing standards including the Standards (JA 778, 4226-4233). "Valid" means the test measures what it is intended to measure. It is the "degree to which evidence and theory support the interpretations of test scores entailed by proposed uses of tests." The Standards at Standard 1.1 (JA 1978). For fluent English speakers, the fact that the CSTs and CAHSEE are in English designed for native speakers poses little if any interference with their expression of academic knowledge. For these students, the CSTs and CAHSEE measure one construct – the academics. English Learners, challenged by both the language of the test and the academics, are confronted with two simultaneous constructs. English, for them, interferes with or confounds the attempt to get at their academic knowledge (JA 704-5, 4226-33).

At the trial level, the State had no substantial evidence that the STAR tests are valid and reliable for English Learners, either as measures of academic achievement in reading, language arts or mathematics, or as evidence of what ELs know and can do in California's content standards in English. Neither of the two sources for psychometric validity and reliability offered by the State, Dr. Jennifer Dean and Dr. George Powell (JA 4199:14 and 4200:26-4202:4), are psychometricians and neither felt qualified or able at their depositions to attest to the validity or reliability of the STAR tests (JA 4403-4404, 4408-4412). The psychometrician in charge of the STAR testing, Dr. Robert Smith, stated that ETS had not been hired to perform a validity analysis, lacked

the data to do so and did not know if the STAR tests were valid for English Learners (JA 161-172, JA 4232:1-10).

The State answered with a tautology. Because California requires demonstration of academic knowledge in English and because English is a necessary construct of English language arts and "English" math, measuring English proficiency along with the content areas is construct-relevant. See e.g. JA 1993-4, 4200:16-24. Using its logic, the State could conclusively prove that Albert Einstein did not understand physics. Such a result illustrates the psychometric absurdity of the State's position.[23]

a. Neither the State Nor the Test Contractor Has Established the Validity of the CSTs and CAHSEE for ELs

The State's employees repeatedly said in deposition that determining the validity of the CSTs and CAHSEE is the responsibility of ETS and the State relied upon ETS for demonstration of test validity (JA 210:9-25, 214-215, 236:10-242:23). But neither the CSTs nor the CAHSEE technical reports contain evidence that the tests are valid for English Learners as measures of academic content knowledge (JA 705-706) and ETS denied responsibility for substantiating the tests' validity for ELs. Dr. Robert Smith, who has been the lead psychometrician for the STAR testing at ETS for the past two years, testified that in about August 2005, CDE asked ETS to create a chapter in the STAR technical manual on test validity "to satisfy NCLB requirements" (JA 161:18-165:22). Dr. Smith and ETS declined, stating that ETS did not have the responsibility as the test contractor to determine the validity of the STAR tests, had not to date done so and lacked sufficient test data to do a validity analysis (JA 161:24-172).

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[23] The State's position that the CSTs and CAHSEE must measure mathematics performance "in English" is also inaccurate in addition to being ridiculous. Nothing in California's mathematics standards or framework requires or even refers to mathematics performance "in English"(JA 4232-3).

b. The USDE Peer Review Found California Lacked Evidence of the Validity of EL Testing and the Effectiveness of Accommodations for ELs

Under NCLB, states are required to undergo a "Peer Review" of their assessments by the USDE. The Peer Review team examined the State's academic content standards and standards-aligned assessments and supporting documentation to determine if "critical elements" of NCLB compliance had been met and made recommendations to the State on what needs to be done. California had its Peer Review May 10-12, 2006.[24]

The Peer Review found California failed to demonstrate compliance with critical elements of validity of the tests and effectiveness of EL accommodations. Specifically the reviewers found insufficient documentation that California's assessment system:

- permits accommodations to be used that allow for valid inferences about student knowledge and skills for ELs. (Peer Review Notes §4 – Technical Quality p. 20; recommendation 3) (JA 285);
- takes action to monitor the implementation of accommodations during testing (Peer Review Notes §4.6e p. 19) (JA 284);
- makes available assessments in languages other than English (Peer Review Notes §6: Inclusion pp. 27-28) (JA 292-3).

[24] The publicly available published notes of the Peer Review Notes for California are found at JA 266-296.

2. Current Accommodations Are Minimal and Ineffective

a. State Regulations Place Severe Limits on Use of Accommodations and State Failure to Provide Uniform Glossaries or Translations Leaves Districts to Invent Their Own

Instead of approving and implementing statewide EL accommodations, the State created a list of possible accommodations for English Learners that is severely limited in scope. Their use is severely circumscribed because none of the accommodations listed in the State's regulations may be used unless they are regularly used in the classroom or for assessments. See 5 CCR Sections 853.5(f) and 1217 (JA 4282:12-4283:7, 4428).

The only accommodations related to the language barrier are glossaries and translated directions. Given that the tests are developed by the State and that test questions are strictly confidential and not available to districts, the State is in the best position to develop appropriate, standardized glossaries and translated directions for use with these tests. The State has made no attempt to do either. Districts receive no assistance from the State and face resource and technical challenges in creating their own translated test directions and glossaries (JA 4282-3, 4373, 20-4374:5, 4428).

b. Less Than 5% of ELs Tested Use Any Accommodations

The 2005 STAR Technical Report (JA 299-366) as well as the Final Audit Report of the Office of Inspector General of the USDE published in October 2005 entitled "California's Inclusion of Migrant and Limited English Proficient Students in the State-wide Assessment and Accountability System" (JA 473-506), both show that more than 95% of EL students taking the CSTs and the CAHSEE do not use any accommodations at all (JA 485, 299-366). Even as to those students using the accommodations, no one knows the extent to which any of the accommodations make

any difference whatsoever in the test results because neither the State nor ETS evaluates that outcome (JA 172:18-175:16). As a practical matter, California's current accommodations have no discernable impact on testing for ELs (JA 4316:12-22).

3. The Evidence Before the Trial Court Proved That ELs Are Making Academic Gains Comparable to their English Only Counterparts Which the CSTs and CAHSEE Cannot Show

a. CELDT to CST Comparison

A comparison of the results of the California English Language Development Test ("CELDT") used by the State to measure English language proficiency and the CSTs show a strong correlation between English language ability and achievement on the CSTs. Students with more English language proficiency score higher on the CSTs (JA 515-6, 543-545, 615-617, 683-4, 768-772). In Coachella, for example, removing the CST scores of students at the lowest CELDT levels transforms the district from most schools and the district failing to make AYP in 2005 and 2006 to most schools and the district making AYP for both years (JA 619, 622-3).

b. Math to ELA Comparison

Conversely, less English proficiency results in lower EL academic scores on both the CSTs and the CAHSEE. In subject areas where the language load is less, for example, math compared to English language arts, ELs do demonstrably better (JA 542:22-545:23, 615:11-617:10, 663:1-16, 668-75, 683:1-684:17, 702:5-24).

c. RFEPs Outperform English Only Students

When ELs acquire enough English to compete academically, they are reclassified as Redesignated Fluent English Proficient ("RFEPs"). The RFEPs outperform the English - Only students on the CSTs and CAHSEE statewide and in

petitioner school districts (JA 516:5-12, 548:1-549:7, 663:1-6, 687:16-688:25, 668-75).

d. Local Assessments

Over 100,000 ELs are enrolled in bilingual programs which include primary language instruction during part of the school day (JA 626:9-16, 631-3). Many districts with these instructional settings do their own local assessments of ELs for internal evaluation "to determine whether or not students are at grade level (in meeting) state academic standards" (JA 517:7-13, 546:6-547:3, 662:19-27, 685:4-28). These local assessments include primary language tests to assess what English Learners know and can do in academics irrespective of language (*Id.)*

In Chula Vista and Alisal, for example, students are taught language arts using the Houghton-Mifflin program, offered in both English and Spanish. Both the English and Spanish materials and benchmark assessments used in this program are aligned to California's English language arts standards. Students are assessed every six to eight weeks to determine their level of proficiency on reading skills at their grade level (JA 546:22-547:3, 685:14-28). Students instructed at least partially in Spanish are tested with end of the year assessments aligned to California's language arts standards in both English and Spanish. Not surprisingly, when tested in Spanish, ELs score proficient at or above the rates for English-Only students (JA 547:4-28, 686:1-687:14). Yet these same students at the same time show a dramatic achievement gap on the CSTs, with ELs far behind (*Id*.) The disconnect between performance of ELs on the Spanish tests and the CSTs is "due almost entirely to the California Standards Tests English only format" (JA 549:8-17; 689:1-9).

4. The State Has Failed to Adopt Those Practicable and Reasonable Accommodations Most Likely to Yield Accurate Data for ELs

While the court lacks the authority to direct or control how the State exercises its discretion in fulfilling mandatory duties, plaintiffs put substantial evidence before the trial court of feasible options which could satisfy the mandates.

a. Primary Language Testing Yields More Accurate Results For ELs Instructed or Literate in Spanish

For ELs currently instructed in Spanish and for those who arrive in the U.S. already educated and literate in Spanish, a Spanish language test far more accurately demonstrates their academic knowledge (JA 706:27-707:6, 204:8-207:2, 4234:1-4237:15).

The State cannot complain that a Spanish test aligned to California's academic standards is not practicable – such a test for most grades is complete. In 2005 SBE contracted with ETS to develop the STS for grades 2 through 4. These tests were field-tested in Fall 2006 and operational in Spring 2007. Tests for grades 5, 6 and 7 were field-tested in 2007 and are being administered now (JA 381:9-382:6 and fn 17 *supra*).

Nor can the State claim that primary language testing is not a practicable accommodation under NCLB. At least nine states with far fewer ELs than California currently use primary language testing in their NCLB accountability systems. These states include (1) **Colorado** (EL population: 112,271; Assessment languages: English, Spanish); (2) **Delaware** (EL population: 4,254; Assessment languages: English, Spanish); (3) **New Mexico** (EL population: 54,528; Assessment languages: English, Spanish); (4) **New York** (EL population: 191,992; Assessment languages: Chinese, English, Haitian-Creole, Korean, Russian and Spanish); (5) **Oregon** (EL population: 60,564; Assessment languages: English, Russian and Spanish); (6) **Pennsylvania** (EL population: 42,802; Assessment languages: English, Spanish); and (7) **Texas** (EL population: 711,737; Assessment languages: English, Spanish) (JA 556:14-557:6, 573-

576). Of these states, Delaware's system has been fully approved by USDE, including express approval of its primary language testing (JA 558:18-559:13). Assessments in Spanish at a minimum are practicable for California, which has a larger EL population than all of the above listed states *combined*, and would unquestionably yield more accurate results of what Spanish speaking ELs, instructed or literate in their native language, know and can do in academic content areas.

b. For All Other ELs, Appropriate Modification of the Tests to Reduce or Eliminate Unnecessary Linguistic Complexity Yields More Accurate Test Results

For ELs instructed in English, research has shown that eliminating unnecessary linguistic complexity in test items without compromising the rigor and substance of the particular items is the most effective accommodation and yields more accurate test results (JA 707:8-708:13). This requires a comprehensive and systematic review of test items directed at those factors affecting ELs (*Id*.)

In 2002, the CDE and SBE jointly convened an expert panel to consider accommodations for ELs on statewide testing under NCLB. Following the expert panel, CDE made recommendations to SBE designed to "provid[e] the best opportunity for English Learners to show what they learned, what they know, and to reduce the impact of language on the student that's (sic) taking the assessment" (JA 219:14-20). CDE's recommended changes included:

> **6. Reduced Language Complexity**
>
> **Recommendation**: Test questions and directions should be developed to reduce unnecessary language complexity. Research suggests that reducing unnecessary language complexity helps to narrow the performance gap between native English speaking students and ELs. Simplification would not be designed to make the questions easier, however.

(JA 233)

Phil Spears, then Director of Assessment, testified at his deposition that the purpose of Recommendation No. 6 was "to reduce the interference of language for English Learners taking state assessments" (JA 218:25-219:5). According to Spears, this Recommendation was necessary because it was not already the job of the test contractor (ETS) to reduce unnecessary language complexity on the STAR (JA 222:21-223:1). CDE noted that while "content review panels routinely examine test questions to ensure that items are worded as simply as possible" (JA 110), CDE's recommendation was "an added feature that would have been different from what the test contractor was already doing" (JA 223:2-5).

The SBE never adopted Recommendation 6 (JA 224:23-25). ETS does not by design or practice reduce unnecessary linguistic complexity on test items affecting ELs in a comprehensive and systematic way (JA 369:6-378:24). It is not in their contract to do so (JA 4392:1-10).

E. THE DISTRICTS ARE INJURED BY THE UNFAIR TESTING

1. The Districts are Beneficially Interested

The Districts all have a significant enrollment of ELs (JA 4379). More than 60% of the students in the Coachella Valley Unified School District, for example, are identified as ELs (JA 4379). More than 40% of Coachella's EL students score at the lowest two levels of English language proficiency (JA 614-615, 4379).

2. Sanctions Injure The Districts and Similar Districts and Schools Statewide

Schools that receive Title I funding and do not meet AYP criteria for two consecutive years face restrictions on use of funds and increasingly harsh sanctions as they move from PI Year 1 to PI Year 5 (JA 384-7). Test scores of ELs on the CSTs have resulted in a significant number of schools statewide failing to meet AYP goals

(JA 511:1-6). During the 2005-2006 school year, 86 schools were labelled as PI just within the Districts, including approximately 11 schools in PI Year 1, approximately 16 schools in PI Year 2, approximately 21 in PI Year 3, approximately 25 in PI Year 4 and approximately 13 schools in PI Year 5 (JA 626-7, 638-651, 653). Approximately 95% of these schools were identified as PI schools on the basis of the scores of their EL students (JA 627:9-24). Seven of the nine Districts have been identified as PI Districts as a result of the scores of their EL students (JA 627:19-24).

a. Unnecessary and Wasteful "Restructuring"

Because California's testing does not identify real academic failure, sanctions resulting from the testing are unjust, unlawful and wasteful. Schools falling deeper into PI status are forced to "restructure" regardless of whether their students are making significant and marked academic progress. Both Alisal Union and Coachella Valley Unified School Districts, for example, achieved more growth over time in academic achievement than all or nearly all other school districts in their respective counties. Yet both districts are deemed "underperforming" due to their EL scores (JA 689:10-13, 619:1-7). Likewise, schools in Sweetwater received recognition at county and national levels and achieved a growth rate two to three times higher than their API target growth rates, but were nonetheless labelled "failing" under California's system (JA 663:17-664:8).

b. Compromising EL Education

Educators are being forced to make "survival mode decisions to capture surface levels of English" sufficient to stave off further sanctions. This drive has led districts to sacrifice what they know to be best educational practices for these children and to limit access to broader educationally enriching opportunities in order to expend more time preparing for tests that will be administered to them in a language they do not fully understand (JA 516-7, 538-539, 549-550, 620, 666).

c. Curtailment or Elimination of Beneficial Programs and Services

Because PI status requires districts to redirect Title I funds, districts have had to reduce other services provided at both the district and school levels (JA 511:7-17, 537:25-538:16, 665). In Alisal, for example, the district had to reduce funding for reading and math coaches, after school programs, parental involvement, leadership training and technology training (JA 537-8). More troubling has been the impact at the school site level. Despite long waiting lists, Alisal shut down one of its two pre-schools due to the redirection of funds to meet PI requirements (JA 538). Sweetwater experienced "bright flight," where a significant number of high achieving students opted to transfer out of Castle Park Middle School because of its PI status (JA 664:8-20). Pajaro Valley was forced to pay over $800,000 to outside contractors for services that it would have otherwise provided itself but for its PI status (JA 516:13-20).

F. THE DISTRICTS' DECLARATORY RELIEF CLAIMS SHOULD NOT HAVE BEEN DISMISSED

The court's dismissal of the Fourth Cause of Action was error for at least two reasons. First, the determination that NCLB imposed no duties on the State was erroneous. To the extent that conclusion supported dismissal of the declaratory relief action, the court erred. Second, resolution of the mandamus petition has no bearing on the appropriateness of declaratory relief under §1060. Unlike the petition for writ of mandamus, which required the court to find a clear present ministerial duty, a claim for declaratory relief under §1060 requires only an assessment of whether the state action at issue violates the language and intent of a federal statute. See *e.g. Morris, supra* at 754-755.

The Districts were entitled to a determination on the merits as to whether or not California's conduct violates their rights under NCLB under CCP §1060. The court

would have had to take evidence to reach that conclusion. The fact that the court found no mandatable duty did not decide whether plaintiffs have a right to valid and reliable testing which accurately measures their academic progress and, if so, whether the State's testing meets this standard.

Case law is clear that a court can grant declaratory relief in the case of any state statute, administrative regulation or policy which violates a federal or state statute. *Olszewski supra* at 820; *Morris*, *supra* 757-58. In *Baxter Healthcare vs. Denton*, 120 Cal. App. 4th 333 (2004), plaintiff Baxter Healthcare sought declaratory relief and issuance of a writ of mandate directing the Office of Environmental Health Hazard Assessment (OEHHA) "to promulgate a regulation finding there is insufficient evidence that exposure to DEHP [a chemical used by Baxter] poses a significant risk of cancer in humans." The court denied the petition for writ of mandate but granted the declaratory relief. OEHHA challenged the trial court's ruling, complaining that "Baxter simply changed the name of its petition for writ of mandamus to a claim of declaratory relief" thus effecting an end run around the trial court's writ determination and resulting in "an inconsistent order which 'fail[ed] to defer to OEHHA's [administrative] decision that the current data are insufficient to conclude that DEHP cannot cause cancer in humans.'" The court found that although the writ petition was properly denied for lack of a ministerial duty, the administrative agency had not found substantial evidence to support its determination and the court ordered declaratory relief. *Id*., at 354.

In the same way, the resolution of the writ petition did not resolve the substantive issue of whether the State's implementation of NCLB violates plaintiffs' rights to valid, reliable and accurate testing required by NCLB.

G. THE GOVERNOR AND STATE OF CALIFORNIA SHOULD NOT HAVE BEEN DISMISSED AS RESPONDENTS/DEFENDANTS

The State has demonstrated that the testing system at issue is "in English by statute" (JA 4189:28-4190:2). Accordingly, if this court determines that the Districts are entitled to writ relief, the way to meaningfully remedy the statewide testing defects, by defendants' admissions, would be through legislation which must be signed by the Governor. In fact, over the last two years, two bills which would have largely corrected the defects in statewide testing alleged by petitioners, SB 385 and SB 1580, have been passed by the Legislature and vetoed by the Governor (JA 5775-5803). This is precisely why the court must maintain jurisdiction – to ensure that relief is effected.

On the face of the allegations and defenses, the State of California and Governor are proper parties given their role effecting legislation necessary for relief. Moreover, CCP §1085(a) provides that "[a] writ of mandate may be issued by any court to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office …" It is long settled that the Governor is subject to a petition for writ of mandamus under CCP §1085. *Harpending vs. Haight*, 39 Cal. 189 (1870); *Hollman vs. Warren*, 32 Cal. 2d 351, 354 (1948).

In addition to the State and Governor's role in a remedy, the State bears the ultimate responsibility under the California Constitution for ensuring equal access to education and equal protection for all children.

In *Butt vs. State of California*, 4 Cal. 4th 668 (1992) the State contended that its obligation was limited to providing funds on an equalized statewide revenue base. If a school district mismanaged the funds causing schools to shut down early, the State argued it had no Constitutional responsibility to ensure students could finish the school year at the same level as their peers.

The Supreme Court found for plaintiffs and directed the State, Superintendent of Public Instruction and the Controller to ensure "by whatever means they deem appropriate" that Richmond school district students receive their educational rights. *Id*., at 694. The court found that under California's Constitution public education is an obligation which the State assumed by the adoption of the Constitution (*Id*., at 680); the State bears the ultimate and non-delegable responsibility for public education (*Id*., at 681); the State itself has broad responsibility to ensure basic educational equality (*Ibid*); and that the State has an affirmative duty to intervene to prevent unconstitutional discrimination (*Id.,* at 688). It therefore follows that the State of California is a proper party.

CCP §379 authorizes permissive joinder of defendants where there is (a) a right to relief asserted against them jointly, severally or in the alternative; and (b) the right to relief arises out of the same transaction or series of transactions; and (c) there is at least one question of law or fact common to all parties joined. In this case, plaintiffs alleged that the State has plenary responsibility to ensure that all California school children receive a public school education consistent with the Constitutional imperatives of equal educational access and equal protection (JA 5185:2-9). Governor Schwarzenegger is named in his official capacity based on his requirement as chief administrator of the State to adhere to the State Constitution and to sign legislation (JA 5186:9-14). Among the relief requested is the requirement to create academic assessments that are valid and reliable "for all testing used for English Learners to compute compliance with No Child Left Behind" (JA 5216:16-25). Plaintiffs' pleading established that the State and Governor are proper party defendants.

CONCLUSION

For all the foregoing reasons, the trial court should be reversed and the writ issued or remanded for further proceeding.

Dated: May 8, 2008

Respectfully submitted,

LAW OFFICES OF MARC COLEMAN
HADSELL, STORMER, KEENY, RICHARDSON & RENICK, LLP
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By /s/ MARC COLEMAN
Marc Coleman, Attorneys for
Plaintiffs-Appellants

DECLARATION OF MARC COLEMAN

I, MARC COLEMAN, state and declare as follows:

1. I am an attorney at law, duly licensed to practice before all the courts in the State of California, and an attorney of record for plaintiffs/appellants in this matter. I have personal knowledge of the facts stated in this declaration or they are based upon my review of the files maintained by my office related to this case, and if called and sworn as a witness, could and would competently so testify.

2. I am one of the appellate attorneys principally responsible for the preparation of the Opening Brief in this case.

3. The Opening Brief was produced on a computer, using the word processing program Microsoft Word.

4. According to the Word Count feature of Microsoft Word, the Opening Brief on Appeal contains 13,885 words, including footnotes, but not including the table of contents, table of authorities and this Certification.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on May 8, 2008 at Long Beach, California.

__/s/ MARC COLEMAN_____
Marc Coleman

PROOF OF SERVICE

I, the undersigned, say: I am employed with the Law Offices of Marc Coleman, whose address is 211 East Ocean Boulevard, Suite 420, Long Beach, California 90802; I am not a party to the within cause; I am over the age of eighteen years.

I further declare that on May 8, 2008, I served a copy of

APPELLANTS' OPENING BRIEF

On the person(s) indicated below, by placing true copies thereof enclosed in a sealed envelope overnight mail to the addressee addressed as follows:

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350 McAllister Street
San Francisco, California 94102

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Ronald Reagan Building
300 South Spring Street, Floor 2
Los Angeles, CA 90013-1233

Clerk to the Honorable Richard A. Kramer **(1 copy)**
San Francisco Superior Court
Civic Center Courthouse, Department 304
400 McAllister Street
San Francisco, California 94102

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 8, 2008, at Long Beach, California

__/s/ EMMA M. DORSEY_____

Emma M. Dorsey

Declarant

PROOF OF SERVICE BY MAIL

(CRC 8.25; CCP § 1012)

I, the undersigned, say: I am employed with the Law Offices of Marc Coleman, whose address is 211 East Ocean Boulevard, Suite 40, Long Beach, California 90802; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Law Offices of Marc Coleman's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Law Offices of Marc Coleman's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Law Offices of Marc Coleman with postage thereon fully prepaid for collection and mailing.

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On the person(s) indicated below, by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Long Beach, California, addressed as follows:

Elizabeth Leavengood Deputy General Counsel California State Board of Education 1430 N. Street, Room 5316 Sacramento, California 92514 Telephone: (916) 319-08 Facsimile: (916) 319-0155	**(1 copy)** **Attorneys for Respondents California Department of Education and State Superintendent of Public Instruction**
Jennifer Bunshoft . Deputy Attorney General Department of Justice 455 Golden Gate Avenue, Suite 1100 San Francisco, California 94102- Telephone: (415) 703-5507 Facsimile: (415) 703-5507	**(1 copy)** **Attorney for Respondents and Defendants State Board Of Education, State of California and Governor Arnold Schwarzenegger**

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 8, 2008, at Long Beach, California.

__/s/ EMMA M. DORSEY_____
Emma M. Dorsey
Declarant