SUPERIOR COURT OF THE STATE OF CALIFORNIA
CONTRA COSTA COUNTY

JANE DOE 1, JANE DOE 2, CYNTHIA CRUTCHFIELD, KATHERING CZUJKO, and STEVE TRAYLOR, Petitioners and Plaintiffs V. ANTIOCH UNIFIED SCHOOL DISTRICT, et al., Respondents and Defendants	Case No. MSN15-1127 OPINION AND ORDER

I. Introduction

Petitioners and plaintiffs ("Petitioners") sue thirteen school districts ("Respondents") in a pleading that contains both a petition for a writ of mandate and a complaint, each of which seeks essentially the same relief. The parties agreed that the entire matter would be heard based on the papers filed in support of and in opposition to the writ petition.

Accordingly, when the case came on for argument and trial on July 29, 2016 the Court held a full day of oral argument. No testimony was offered. This Opinion and Order is, therefore, based on a limited, written factual record.

II. The Parties

Petitioners are Jane Doe 1, Jane Doe 2, John Doe, Cynthia Crutchfield, Katherine Czujko, and Steve Traylor.

Respondent school districts are: Antioch Unified School District, Chaffey Joint Union High School District, Chino Valley Unified School District, El Monte Unified School District, Fairfield-Suisun Unified School District, Fremont Union High School District, Inglewood Unified School District, Ontario-Montclair School District, Pittsburg Unified School District, Saddleback Valley Unified School District, San Ramon Valley Unified School District, Upland School District, and Victor Elementary School District (collectively, the "School Districts"). [1]

III. The Issue

Stated as simply as possible, Petitioners seek an order compelling Respondents to implement the Stull Act (Education Code § 44660 et seq.) by formally evaluating each teacher (in certain grades and of certain subjects) based, in part, on how well that teacher's students perform on the standardized tests given by the State in those grades and subjects. Those evaluations must be "summative" and must have consequences.[2]

That is something of an oversimplification, as will become clear. However, it states the gravamen of the case. A more formal statement of the relief sought is found on pages 1-2 of

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[1] Many school district trustees and other individuals acting in their official capacity were named in the Petition for Writ of Mandate and Complaint. In October 2015 the parties stipulated to the dismissal of these individuals. See Stipulation and Order, filed October 21, 2015.

[2] All citations to a statute refer to the Education Code unless otherwise noted.

Petitioner's December 16, 2015 Notice of Motion and Motion for Writ of Mandate and Other Appropriate Relief.[3]

IV. Two Preliminary Matters: Standing and Mootness

A. Standing

Respondents argue that Petitioners do not have standing to bring this case. Joint Opposition to Motion for Writ of Mandate ("JO"), Section II.A, 3:1-5:14.) They argue that Petitioners are not "beneficially interested" since most have no specific connection to any of the school district respondents. ("[N]o Petitioner has any connection whatsoever, even by residence, to nine of the thirteen Respondents in this proceeding." JO 3:16-18.)

However, as Petitioners assert, there is a public interest exception to the general "beneficial interest" rule. *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 (*Save the Plastic Bag*).

> Nevertheless, "'where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.' " (*Bd. of Soc. Welfare v. County of L. A.* (1945) 27 Cal.2d 98, 100–101 [162 P.2d 627].) This "'public right/public duty' exception to the requirement of beneficial interest for a writ of mandate" "promotes the policy of guaranteeing

[3] In this Opinion and Order Petitioners' "Notice of Motion and Motion for Writ of Mandate or Other Appropriate Relief; Memorandum of Points and Authorities In Support Thereof" (filed December 16, 2015) is referred to as "POB." That pleading contains both a "Notice of Motion" and a "Memorandum of Points and Authorities." Each document starts with page number 1. This citation to pages 1-2 refers to the "Notice of Motion." All other references to a page number in "POB" refers to the memorandum of points and authorities which begins with the *second* page number one.

> citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Green v. Obledo, supra*, 29 Cal.3d at pp. 145, 144; see also *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479 [80 Cal. Rptr. 3d 28, 187 P.3d 888].) We refer to this variety of standing as "public interest standing." (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 453 [279 Cal. Rptr. 834, 807 P.2d 1063].)
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> *Save the Plastic Bag*, 52 Cal 4th at 166.

The public interest exception does not require a special interest in the matter, simply an interest in having the law enforced. *Id*. For example, in *Hector F. v. El Centro Elementary School Dist*. (2014) 227 Cal.App.4th 331 the Court of Appeal held,

> [a]s a citizen and taxpayer Hector has standing to seek enforcement of laws in which there is an identified public as well as private interest. The statutory provisions asserted by Hector articulate a well identified public interest in maintaining a system of taxpayer-funded public education which is free of the destructive influence of discrimination, harassment and bullying. *Hector F. at* 334.[4]

Hector F. also noted that "the public interest exception to the rule requiring litigants seeking mandate have a beneficial interest in the relief they seek has been applied with respect to duties imposed by the Legislature on schools and school districts." *Id.* at 339.

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[4] *Hector F.* observed that countervailing considerations may cabin the reach of this principle. But Respondents have established no such considerations here.

It cited *Doe v. Albany Unified School District* (2010) 190 Cal. App. 4th 668 which somewhat equated the "beneficial interest" standard with the public interest exception in cases such as this:

> The beneficial interest standard is so broad, even citizen or taxpayer standing may be sufficient to obtain relief in mandamus. '[W]here a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty,' a citizen is beneficially interested within the meaning of Code of Civil Procedure section 1086 if 'he is interested in having the public duty enforced.' [Citation.]" (*Mission Hospital Regional Medical Center v. Shewry, supra,* 168 Cal.App.4th at p. 480.) This public interest exception "'promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.' " (*Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513, 1518 [14 Cal.Rptr.2d 908].)
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> *Doe v. Albany Unified School District* at 685.

Under these rules, Petitioners have standing to bring this action.

B. Mootness

Respondents assert the case is moot. They argue that the Petition focused on the language contained in the collective bargaining agreements between the School Districts and their local teachers unions. Some of the Respondents amended their collective bargaining agreements after the litigation was filed – in some cases, removing the challenged language. Thus, they say, the case is moot.

Petitioners disagree. They say the changes to the language do not necessarily effect a change in the School Districts' practices. More fundamentally, they say that the revisions do not

address the fundamental concern raised by the petition. And, in any event, since this a question of public interest that is likely to recur, it is not moot. Reply in Support of Motion for Writ of Mandate or Other Appropriate Relief ("PRB") at 26-17.

As the School Districts have modified their collective bargaining agreements, they have submitted them into evidence. Thus, the question of whether certain districts are now in compliance can be examined – at least facially. But at bottom, the controversy has not been quelled, even by the amendments. And to the extent that an amendment to a collective bargaining agreement (in the face of Petitioners' writ and complaint) might seek to dispose of the matter, it is easy to see that the agreement could again be amended in ways that would resuscitate the issue. Moreover, as discussed below, the core issue is one of statutory interpretation.

The case is not legally moot.

V. The First Question: What Does the Statute Mean?

Petitioners argue that § 44662 creates a mandatory duty and that Respondents' practices do not comport with the Stull Act. Respondents dispute Petitioners' reading of the Stull Act, argue that the statute gives them discretion to make certain choices, and assert that their practices comply with the law.

Since the principal dispute requires a determination of the meaning of §44662, the Court turns to the issue of statutory construction first.

A. Rules of Statutory Construction

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.] [To that end,] '[w]e begin by examining the statutory language, giving the words their usual and ordinary meaning.' [Citations.] If the terms of the statute are

> unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.] If [the statute] is ambig[uous], however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] … [W]e ‘“‘select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.”’” *Estate of Griswold* (2001) 25 Cal.4th 904, 910–911.

A more detailed statement of these rules is found in *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal. App. 4th 1076, 1082-1084. The "first step" is to look at the language of the statue itself, examining the words in context, "keeping in mind the statutory purpose." *Id.* at 1083. If that does not yield an answer, then the "second step" is to turn to rules or maxims of construction, as well as "a number extrinsic aids, including the statute's legislative history" and "other statutes dealing with the same subject matter." *Id.* at 1083-1084. If ambiguity remains, then the "cautious" "third step" is an application of "reason, practicality, and common sense to the language at hand." *Id.* at 1084. This may include consideration of "context, the object in view, the evils to be remedied, the history of the times and of legislation on the same subject, public policy and contemporaneous construction." *Id.* All of this, of course, is in an attempt to determine the Legislature's intent.

The first step, then, is to see if the words of the statute are "clear and unambiguous." *Id.* at 1082.

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B. The First Step: The Words of the Statute and How the Parties Understand Them.

Section 44662 says, in relevant part,

> (a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.
>
> (b) The governing board of each school district shall evaluate and assess certificated employee performance as it reasonably relates to:
>
> (1) The progress of pupils toward the standards established pursuant to subdivision (a) and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.
>
> (2) The instructional techniques and strategies used by the employee.
>
> (3) The employee's adherence to curricular objectives.
>
> (4) The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

Petitioners argue that the second clause of (b)(1) ("and, if applicable…") can only be read to require the school district to evaluate a teacher's performance by including an assessment of how well her students perform on the state's system of standardized tests – the California Assessment of Student Performance and Progress ("CAASPP"). They say this must be part of the formal "Stull evaluation" required by § 44663. They refer to this as a "summative evaluation" and insist it must have "consequences." POB 18:8. Petitioners say that (b)(1) is focused on *outcomes* – how well the students are learning, rather than *inputs* – how well the teacher is teaching.

Respondents argue that the second clause of (b)(1) requires a school district to evaluate a *teacher's performance* as it *reasonably relates* to, *if applicable,* the progress of her pupils towards state adopted academic content standards as measured by the CAASPP. They say the

italicized words are critical to an understanding of the statute. The focus must be on the performance of the teacher (not the pupils on a standardized test), and that the school districts have discretion to determine how that performance *reasonably relates* to the pupils' progress on those tests. In addition, the school districts have to exercise discretion to determine the extent to which the progress of her pupils on the tests is *applicable* to a given teacher's evaluation.

The statutory language is not crystalline. It does not say (as Petitioners might prefer) "each school district shall assess each teacher, in part, based on the scores his or her pupils achieve on state adopted criterion referenced assessments." Nor does it say (as Respondents might prefer) "each school district shall assess each teacher, in part, based on how he or she uses the scores of his or her pupils on state adopted criterion referenced assessments."

The Court finds that the statute is not "clear and unambiguous." The words do not sufficiently describe the Legislature's intent with respect to the specific, narrow (but important) question raised by this litigation. Thus, the Court takes a second step.

VI. The Second Step: The Evolution of the Statute

In turning to the "second step" it is important to note that the parties have provided very little legislative history. The record lacks the usual committee and floor analyses. That may be, in significant part, because there is little in those documents that illuminates the issue raised by this case.

However, the Court examines all that is available to it to consider the evolution of the statute, the context in which the Legislature has placed the language in question, and certain related statutes. In addition, it has before it some evidence that helps it to understand more fully, what the phrases "reasonably relates" and "if applicable" might mean.

A. The Original Stull Act

The "Stull Act" was originally enacted in 1971 and chaptered as Section 13403 et seq. of the Education Code. (Stat. 1971, ch.361.) Today, those provisions, as subsequently amended, are found in §§ 44660 et seq.

The key provision – in dispute here - was added in 1999. This Opinion and Order focuses principally on that. However, the past is both prologue and context. So the Court begins with a review of the history of the statute.

The 1971 Stull Act had forty sections. Most of those sections either (i) specified the grounds and procedures for the suspension or dismissal of a teacher or (ii) repealed certain sections of the Education Code. Section 40 (Article 5.5) implemented the "intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certificated personnel within each school district in the state." (Stat. 1971, ch. 361, § 13485.) Section 40 was the origin of the statute at issue today.

Petitioners have submitted a "Report and Analysis" from the Legislative Intent Service. However, they did not include any of the exhibits that appear to have been attached to that "Report and Analysis." So the Court has only the scant conclusions of the attorney who wrote that report. It does not have any of the legislative history itself. Declaration of Joshua S. Lipshutz In Support of Petitioners' Motion for Writ of Mandate or Other Appropriate Relief, ("Lipshutz Declaration"), Ex. 3.

B. The 1975 Amendments

In 1975 § 44662 was amended to read much as it does now: "(a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study. (b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to: (1) The progress of students

toward the established standards…" Stats.1976, c. 1010, (SB 777). Again, the parties have provided virtually no legislative history to elucidate this.[5]

The 1975 amendments did not discuss "state adopted academic content standards as measured by state adopted criterion referenced assessments" – *i.e.* standardized tests.

C. The 1983 Amendments

In 1983 other changes were made to § 44662. They seem largely irrelevant to this case. Deering's California Codes Annotated describes those changes as:

> (1) Substituted "pupil" for "student" in subd (a); and (2) amended subd (b) by (a) substituting "standards established pursuant to subdivision (a)" for "established standards" in subd (b)(1); (b) substituting subd (b)(2) for former subd (b)(2) which read: "(2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and"; (c) adding subd (b)(3); and (d) redesignating former subd (b)(3) to be subd (b)(4).

D. The 1995 Amendments

In 1995 the Legislature modified § 44662 by replacing the concept of "competence" with "performance." Stats. 1995, c. 392, § 1 (AB 729). That served purposes largely irrelevant to this dispute.

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[5] Petitioners have included only a letter from Senator Stull to Governor Brown. Lipshutz Declaration, Ex. 4. It makes reference to the importance of "pupil progress" and to a "more detailed analysis of SB 777's provisions," however the latter is not attached to the Lipshutz Declaration.

E. The 1999 Amendments

In 1999 the Legislature made the final change -- and the one with which this case is principally concerned. It added to § 44662(b) the phrase, "and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments."

It is important to note that the bulk of the 1999 legislation (AB 1X) dealt with a different subject. It replaced the "California Mentor Teacher Program" with the California Peer Assistance and Review Program for Teachers." Indeed, the expression of legislative intent contained in Section 1 of AB 1X said, in its entirety,

> It is the intent of the Legislature to establish a teacher peer assistance and review system as a critical feedback mechanism that allows exemplary teachers to assist veteran teachers in need of development in subject matter knowledge or teaching strategies, or both.
>
> It is further the intent of the Legislature that a school district that operates a program pursuant to Article 4.5 (commencing with Section 44500) of Chapter 3 of Part 25 of the Education Code coordinate its employment policies and procedures for that program with its activities for professional staff development, the Beginning Teacher Support and Assessment Program, and the biennial evaluations of certificated employees required pursuant to Section 44664.
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> Stats. 1999 First Extraordinary Session, Ch. 4X (AB 1X).

Again, the parties have not provided any legislative history that might shed light on the meaning of the second clause of § 44662(b)(1). However, Respondents say, "*there is no statement* or analysis in the legislative history, from either the legislative committee's review of the 1999 legislation or from the executive branch, on the addition of this language." JO 11:14-16. Petitioners do not dispute that.

That is something of a "dog that did not bark." If the Legislature were to have changed, so dramatically, the rules for the evaluation of teachers (as Petitioners argue), then the committee or floor analyses would likely have apprised members of that. Indeed, given the controversy over standardized tests, one would expect there to have been considerable debate and public discussion of such a change. This is explored further, below.

F. The Stull Act Today

As a result, Section 44662 now says, in relevant part,

> (a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.
>
> (b) The governing board of each school district shall evaluate and assess certificated employee performance as it reasonably relates to:
>
> (1) The progress of pupils toward the standards established pursuant to subdivision (a) and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments….

The parties agree that "state adopted criterion referenced assessments" refer to the tests given by the state. Originally, those were the STAR tests.[6] In 2013 the Legislature replaced the

[6] Strictly speaking, the California Standards Tests ("CST") were the tests given as a part of the Standardized Testing and Reporting ("STAR") assessments. But the terms "CST" and "STAR tests" have been used somewhat loosely as interchangeable references. Both usages are found in the material quoted below.

STAR tests with the CAASPP tests. Stats 2013 ch 489 (AB 484).[7] The parties often refer to them as "standardized tests" and the Court uses that term as well.

VII. The Second Step: The Context of the Statute

"'…[W]e do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814 as quoted in *People v. Pieters* (1991) 52 Cal. 3d 894, 899.

The statutes governing testing of students and the evaluation of teachers are detailed and arcane. But they do provide the context for § 44662 and shed light on the statutory interpretation issue.

A. Section 44661.5

Part of the context here is § 44661.5. It says that in establishing "a uniform system of evaluation and assessment of the performance of all certificated personnel" (§ 44660) a school district and the relevant union may "include any objective standards from … the California Standards for the Teaching Profession if the standards to be included are consistent with this article." § 44661.5.

The California Standards for the Teaching Profession ("CSTP") are developed by California's Commission on Teacher Credentialing. JO 12:3-4. The Commission is established by §44210 et seq. and consists of fifteen voting members, comprising a cross-section of participants in elementary and secondary education plus four members of the public and a

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[7] The CAASPP is a "system" of assessments that includes Smarter Balanced Assessments, which in turn includes "Summative Assessments." The last of those is the actual test. POB 8:11-18. For ease of reference, the Court adopts the parties' sometimes usage and writes of the "CAASPP tests."

college or university faculty member. Its duties are spelled out in § 44225 and include the "establish[ment of] professional standards, assessments, and examinations for entry and advancement in the education profession." §44225(a).

Each of the Respondents uses the CSTP in evaluating their teachers. POB 14:27-15:6. A copy of the 2009 edition of the CSTP is Exhibit 12 to the Lipshutz Declaration. Petitioners describe the CSTP, quoting liberally from Exhibit 12, as follows:

> The CSTP are a set of teacher evaluation standards designed "to serve and support professional educators."…The CSTP standards "are not set forth as regulations to control the specific actions of teachers, but rather to guide teachers as they develop, refine and extend their practice"…."Since their inception in the 1990's, the CSTP have been widely influential in California policy and practice." POB 15:7-11.

Standard 5 of the CSTP addresses "Assessing Student Learning." It does not evaluate teachers based on how their students score on standardized tests. Rather, it focuses on how the teachers use the test (and other) data to "inform instruction" and "monitor student learning." See, POB 16:20-26.

Petitioners argue that the CSTP are not "consistent with this article." PRB 12-13. But Respondents note that § 44661.5 was adopted only five months after the 1999 amendments to § 44662.[8] Presumably, the same committees in the Legislature worked on both § 44661.5 and §44662. Indeed, the bill analysis for the Senate Committee on Education described Section 44661.5 in this way,

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[8] Section 44662 was enacted as AB1X and approved by the Governor on April 4, 1999. Section 44661.5 was enacted as AB 292 and approved by the Governor on August 31, 1999.

> Current law (commonly referred to as the 'Stull Act') requires that the governing board of a school district evaluate certificated employee performance as it reasonably relates to, among other things, pupil progress…
>
> This bill:…Authorizes the governing board of a school district to adopt teacher evaluation standards that are consistent with the…California Standards for the Teaching Profession, for use in the biennial teacher evaluation (the 'Stull Act' evaluation.) Declaration of Mark R. Bresee in Support of Joint Request for Judicial Notice ("Bresee Decl."), Exhibit B.

The identical statement was contained in the Senate Floor Analysis. Bresee Decl. Ex. C. Both analyses also advised the legislators: "Purpose: The author proposes to allow the creation of *a unified assessment system* for beginning and experienced teachers by integrating the California Standards for the Teaching Profession and the National Board for Professional Teaching Standards." Bresee Decl. Ex. B and C. (Emphasis added.)

At the very least, § 44661.5 shows the Legislature is well aware of and supports the work of the Commission on Teacher Credentialing.

It is also of some interest that the California Teachers Association and the California Federation of Teachers are listed as supporters of that legislation. *Id.* This is discussed further, below.

The Superintendent of Public Instruction has also endorsed the use of the CSTP for the evaluation of teachers. "Greatness by Design: A Report by State Superintendent of Public Instruction Tom Torlakson's Task Force on Educator Excellence" September 2012 recommends,

"Standards-based evaluations of practice for both initial entry and later personnel decisions should be based upon the California Standards for the Teaching Profession."[9]

So, thirteen years after the 1999 amendments to the Stull Act, the Superintendent of Public Instruction recommended using the CSTP – the standards with which Petitioners take issue here. As discussed below, each of the Respondent school district follows the Superintendent's recommendation and uses the CSTP.

There is no evidence that the Legislature has revised (or sought to revise) § 44661.5 in any manner that suggests disapproval of the California Standards for the Teaching Profession as adopted by the Commission on Teacher Credentialing and as supported by the Superintendent of Public Instruction.

B. AB 484

Until 2013, the standardized test administered to students was the STAR test – which was aligned with the federal No Child Left Behind Act. JO 21:16-20; POB 8:4-7. On October 2, 2013 the Governor signed AB 484 which replaced the STAR test with the CAASPP test. That is aligned with the Common Core State Standards. JO 21:16-20.

Petitioners have pointed to nothing in AB 484 that suggests the CAASPP is intended to be used in Stull evaluations in the manner they assert. To the contrary, § 60602.5 describes the legislative intent, with a focus on providing a system of assessments that,

> …where applicable and valid, will produce scores that can be aggregated and disaggregated for the purpose of holding schools and local educational agencies

[9] See page 60 of Exhibit 7 to the Lipshutz Declaration.

accountable for the achievement of all their pupils in learning the California academic content standards… § 60602.5(a)

(2) Provide information and resources to schools and local educational agencies to assist with the selection of local benchmark assessments, diagnostic assessments, and formative tools aligned with the state-adopted California academic content standards. The Legislature recognizes the importance of local tools and assessments used by schools and local educational agencies to monitor pupil achievement and to identify individual pupil strengths and weaknesses. The Legislature further recognizes the role the state may play in leveraging resources to provide schools and local educational agencies with information and tools for use at their discretion… § 60602.5(a)(2).

(4) Provide information to pupils, parents and guardians, teachers, schools, and local educational agencies on a timely basis so the information can be used to further the development of the pupil or to improve the educational program. The Legislature recognizes that the majority of the assessments in the system will generate individual pupil scores that will provide information on pupil achievement to pupils, their parents or guardians, teachers, schools, and local educational agencies. The Legislature further recognizes that some assessments in the system may solely generate results at the school, school district, county, or state level for purposes of improving the education program and promoting the teaching and learning of the full curriculum. § 60602.5(a)(4).

The Legislature does not say that the standardized test will be used to evaluate individual teachers. It does not tie the adoption of these test back to the Stull evaluation.

Rather, it speaks of using the tests to evaluate pupils, to give tools to schools and local education agencies ("to monitor pupil achievement and to identify pupil strengths and weaknesses"), to give schools and local education agencies information and tools "for use at their discretion," and to provide information to pupils, parents and guardians, teachers, schools and local educational agencies.

Section 60602.5 speaks generally of "improv[ing] the educational program" (§60602.5(a)(4)) and of "improving teaching and learning" (§ 60602.5(a)). But it does not make a link between these standardized tests and the Stull evaluation that Petitioners argue is the clear intent of § 44662.[10]

C. Position of the Teachers Unions

In considering the legislative history, it is somewhat instructive to note that (to the extent we have such information in the record) a major teachers association appears to have supported the 1999 legislation that added the second clause of § 44662(b)(1). No teachers union opposed it. See, Bresee Decl., Ex. B. (California Teachers Association listed as supporter; no unions listed as opposed.)

Yet, Petitioners claim that teachers unions generally oppose efforts to require the use of test scores in the evaluation of individual teachers. For example, paragraph 21 of the Verified

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[10] Section 60602.5(a) speaks of "promoting high-quality teaching and learning using a variety of assessment approaches and item types." But the next sentence says these assessments "where applicable and valid" will help to hold schools and local educational agencies accountable for the achievement of all their pupils. It does not say they will help to hold individual teachers accountable.

Petition for Writ of Mandate states that "local teachers unions oppose efforts to enforce the Stull Act's requirement that student achievement on standardized tests be taken into account in evaluating the performance of certificated employees." Paragraph 118 alleges that "Respondents and their local bargaining partners have decided to explicitly prevent such consideration in their collective bargaining agreements." Paragraphs 124 through 166 describe the collective bargaining agreements that, in Petitioners view, proscribe compliance with the Stull Act. At least one of those agreements has, as a party the California Teachers Association, which supported the 1999 amendments to the Stull Act. (Verified Petition, ¶157.)

Similarly, the Verified Petition attaches as Exhibit C the decision of the Los Angeles Superior Court in the case of *Doe v. Deasy*, in which a teachers union (United Teachers Los Angeles) and a school administrators union (Associated Administrators of Los Angeles) were joined as parties adverse to petitioners.[11]

Standardized tests and their use are controversial matters. Had the 1999 amendments to the Stull act required school districts to evaluate each teacher in a "summative evaluation with consequences" based on the test scores of her pupils, it is entirely likely that one or more teachers unions would have opposed that legislation vigorously. The fact that no union is listed in opposition, while not conclusive, is relevant to an understanding of the meaning of the 1999 addition to the law. See, *e.g. Smith v. Fair Employment & Housing Commission* (1996) 12 Cal. 4th 1143, 1228 (Court looks to organizations supporting Religious Freedom Restoration Act re: legislative intent).

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[11] The order noted, "UTLA [United Teachers Los Angeles] has expressed hostility toward incorporating student test data in teacher evaluations." (p.10)

D. The Educational Employee Relations Act

Government Code § 3540 et seq. authorizes collective bargaining of certain issues related to the employment of school teachers and administrators. Gov't Code § 3543.2(a)(1) says the scope of such collective bargaining shall include "terms and conditions of employment [including] procedures to be used for the evaluation of employees."

It is certainly true, as Petitioners say, that a school board and a teachers union may not collectively bargain an illegal agreement. However, it is of some relevance that the Legislature has expressly permitted bargaining on the subject at issue here. At the very least it suggests there is some discretion in how the law is to be implemented. While not a dispositive "step two" factor, it has some relevance. It also bears on "step three" discussed below.

E. Other State Statutes

Petitioners argue – by way of public policy – that the trend is for other states to require that teacher evaluations include a component based on their students' performance on standardized tests. See Lipshutz Declaration, Ex. 50.[12]

However, Respondents point to the clarity of the statutes in other states that impose such a requirement. For example,

Florida:

(a) A performance evaluation must be conducted for each employee at least once a year… The performance evaluation must be based upon sound educational principles

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[12] Although the parties' arguments sometimes veer into questions of public policy that is not what is before the Court. This is not a decision about what policy best serves the public education system and the students who attend its schools. It is a question of what the Legislature has required of school districts. The Court does not indulge in a determination of what policy *it* would set. It seeks, instead, to determine what policy the *Legislature* has set.

and contemporary research in effective educational practices. The evaluation criteria must include:

> 1. Performance of students. — At least one-third of a performance evaluation must be based upon data and indicators of student performance in accordance with subsection (7).[13]
>
> This portion of the evaluation must include growth or achievement data of the teacher's students …The proportion of growth or achievement data may be determined by instructional assignment.
>
> Fla. Stat. Ann. § 1012.34(3)(a)(1)

Michigan:

> (2) The board of a school district or intermediate school district or board of directors of a public school academy shall ensure that the performance evaluation system for teachers meets all of the following:
>
> > (a) The performance evaluation system shall include at least an annual year-end evaluation for all teachers. Beginning with the 2015-2016 school year, an annual year-end evaluation shall meet all of the following:
> >
> > > (i) For the 2015-2016, 2016-2017, and 2017-2018 school years, 25% of the annual year-end evaluation shall be based on student growth and assessment data. Beginning with the 2018-2019 school year, 40% of the annual year-end evaluation shall be based on student growth and assessment data….

[13] Subsection (7) refers to "a formula to measure individual student learning growth on the statewide, standardized assessments in English Language Arts and mathematics."

Mich. Comp. Laws Serv. 380.1249(2)(1)(i).[14]

Respondents have a point. If a legislature chooses to require that student test scores be used in the evaluation of teachers, then it may legislate that result clearly.

Here, the Stull Act lacks that clarity. Indeed, the relevant provision of the Stull Act has been on the books for more than fifteen years, and – despite the widespread practice of school districts (including the largest, the Los Angeles Unified School District) not to use test scores in teachers' "summative evaluations" – the California legislature has not sought to "clarify" the law as Petitioners read it.

F. Summary of the Context of the Legislation

Petitioners argue vigorously that the quality of education would be improved if a school district were required to evaluate a teacher in a "summative assessment with consequences" based on her pupil's performance on standardized tests. But that does not answer the question of whether the Legislature wrote that policy into law. The analysis in Sections VI and VII leads to the conclusion that it did not.

Section 44662 is placed in the Education Code immediately adjacent to a statute (§ 44661.5) that encourages the use of the California Standards for the Teaching Profession evaluation factors. Section 44661.5 was enacted only six months after the change to the Stull Act at issue here. And since that time, the Superintendent of Public Instruction has endorsed the use of the CSTP as *the* means of evaluating teachers. Indeed, the 2012 report containing that endorsement casts serious doubt about the viability of the use of standardized tests for the purpose Petitioners urge. (See below.)

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[14] See also N.Y. CLS Educ. § 3012-d(4)(a)(1); and compare Nevada Administrative Regulation 391.571(1)(c) (evaluation of administrators).

The Education Code also requires the administration of standardized tests. The Legislature endorses many uses of those tests, including evaluating pupils, entire schools and local educational agencies. But it does not say the results should be used to evaluate individual teachers. That omission is relevant.

Indeed, the legislative history of the 1999 amendments is silent on the issue here. If those amendments made the major change in teacher evaluations urged by Petitioners, one would expect the legislative history to have discussed that. Instead, the statute passed with the support of one major teachers union and the opposition of none. That too, is relevant.

In addition, examples from other states show that it is possible to draft a statute more precisely when a legislature wishes to direct school districts to use standardized test results in the evaluation of its teachers.

VIII. The Second Step: Conclusion

Based on all of this, the Court concludes that the Stull Act does not bear the construction Petitioners seek to place on it. The Stull Act does not require a school district to evaluate each teacher in a "summative evaluation with consequences" no later than thirty days before the end of the school year based on the scores of her individual pupils on the state's standardized tests. It does not create the mandatory duty asserted by Petitioners. The writ of mandate is denied on that ground.[15]

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[15] Petitioners do not seem to argue that a writ should be granted even if the Court rejects their reading of the statute. However, in the event their argument might be so construed, the following sections explain why such an argument must fail.

IX. The "Third Step": "Reasonably Relates" and "If Applicable"

There is a further ground for denying the writ of mandate Even if the "second step" analysis were not conclusive, Respondents make important arguments relevant to a "third step" analysis that fortify the conclusion that the writ should be denied.

"Statutes must be interpreted, if possible, to give each word some operative effect." (*Walters v. Metropolitan Ed. Enterprises, Inc*. (1997) 519 U.S. 202, 209 [136 L. Ed. 2d 644, 117 S. Ct. 660].) 'We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous.' (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 [276 Cal. Rptr. 303, 801 P.2d 1054].)" *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.

Although Petitioners say the meaning of the Stull Act is "plain," (PRB" 6:3), they do not really come to grips with the phrase "reasonably relates." But since the statute says the school district shall evaluate a teacher's performance "as it reasonably relates to (1) the progress of pupils toward…, if applicable," standardized tests, any determination of Respondents compliance with the statute must examine that phrase.

Respondents contend they comply with the Stull Act by the proper exercise of their discretion. They provide evidence and argument on a number of points that bear on the practical application of the statute to the real world of elementary and secondary education.

A. Lack of a baseline

As noted above, until 2013, the standardized test administered to students was the STAR test – which was aligned with the federal No Child Left Behind Act. (JO 21:16-20.) On October 2, 2013 the Governor signed AB 484 which replaced the STAR test with the CAASPP – which is aligned with the Common Core State Standards. *Id*.

AB 484 said that the "transition to new standards-based assessments compromises comparability of results across schools or school districts." § 52052(e)(2)(F). In effect, the results of one standardized test could not simply be compared to the results of another.

The difficulty in using the new CAASPP is well described in the Declaration of Maribel Garcia, Ed. D. Lipshutz Declaration, Exhibit 23. Dr. Garcia describes the transition from the STAR test to the CAASPP. She observes that,

> "State assessment of pupil progress and performance has changed under CAASPP. The District has been informed by the California Department of Education that in light of the significant change in what students must learn under the Common Core State Standards, the state testing has also significantly changed. *Id.* ¶6."

More important, Dr. Garcia states,

> "The District was informed by the California State Superintendent of Public Instruction that because 2015 is the first year of the new [CAASPP] tests and because they are substantially different from previous tests, the results will serve as a baseline from which to measure future progress and are not to be compared to CST [STAR] results." *Id.* ¶7.

There seems little disagreement that, to the extent one considers standardized test results, the key criterion is not a student's score on a test, but how the teacher has helped to change that student's score from prior years. The criterion is the delta; the difference that teacher has made.

Since the State has changed the standardized test and said that the STAR test cannot be compared to the CAASPP, there appears to be no baseline from which to measure the delta.

This, Respondents say, bears significantly on the statutory phrase "reasonably related." If one cannot measure the delta, then a CAASPP score, standing alone, is not "reasonably

related" to a teacher's performance. Respondent school districts did not violate the Stull Act by failing to use a datum (a 2015 test score) that allows only incomplete analysis.[16]

B. Lack of a regression tool

Respondents make another point. Many factors affect a student's performance on a test. As just noted, the key criterion is the delta – the difference a given teacher makes. A standardized test score does not, by itself, isolate that delta. It is a summation of many factors that affects a student's performance. That may include the quality of the teachers the student had in prior years, what social stresses are affecting his performance, whether language difficulties affect his ability to learn or to complete the test and so on.

The Assistant Superintendent of Secondary Education of the Upland Unified School District, Alex Ruvalcaba, addressed this, in part, in his declaration,

> 10. Upland knows of no effective and reliable method to directly use student achievement on criterion-referenced assessments in evaluating teacher performance in part[] because the State provides no statistical method to disaggregate teacher effectiveness from other internal and external factors affecting student achievement. In addition, Upland knows of no statistical method to determine which certificated staff during a student's career, has negatively or positively influenced a particular achievement score.
>
> 11. For example, in mathematics, test results provided to Upland do not allow the District to disaggregate weaknesses at the course level. Thus, for eleventh grade students, it would not be possible to determine whether any strengths or

[16] As of the time of trial, the 2016 test scores were not yet available.

> weaknesses were attributable to that student's ninth, tenth or eleventh grade math course.
>
> 12. As a further example, for English-Language Arts, students are assessed on understanding of several types of texts. Thus, if a particular assessment includes a non-fiction text on the Revolutionary War which assesses that student's understanding of the text, Upland has no tools to determine whether a favorable or unfavorable test result is attributable to that student's English or History courses. Lipshutz Declaration, Ex. 44.

Educators speak of "value added" by a school. "Value added models" try to isolate how much (or little) that school is contributing to a cohort's education. These are regression models that try to factor out extraneous variables and give proper weight to relevant variables.

Petitioners insist the Court look to the *Doe v. Deasy* case. That case raised a similar issue with respect to the Los Angeles Unified School District ("LAUSD"). But there, as described in *Los Angeles Unified School District v. Superior Court* (2012) 228 Cal. App. 4th 222, the LAUSD was developing a regression model, called "Academic Growth Over Time" or "AGT."

> Working with a research center at the University of Wisconsin-Madison, and after obtaining input from various other experts and interested parties, the District has developed the AGT metric in an attempt to measure the effect of its teachers on student standardized test (i.e., CST) performance. The AGT scores are based on a "value-added" methodology and are derived by comparing students' *predicted* CST scores with their *actual* scores. The predicted score is based on students' past performance on the CST, as well as on a host of sociodemographic and other factors, such as gender, race, English language learner status, and special education status. An AGT score is assigned using a five-point scale reflecting student performance: (1) far below predicted, (2) below predicted, (3) within the

predicted range, (4) above predicted, and (5) far above predicted. *Los Angeles Unified School District*, 228 Cal. App. 4th at 232.

Petitioners say that such a tool could be used to isolate the value added by a teacher and then bring Respondents into compliance with the Stull Act.[17] But even after *Doe v. Deasy*, the LAUSD still does not use the AGT in the way Petitioners urge here. The Court of Appeal said,

> In November 2012, the District and UTLA concluded an agreement regarding the use of AGT scores and other matters relating to the evaluation of teachers. The agreement provides that "[i]ndividual AGT scores (as distinguished from the school-level AGT results) are to be used solely to give perspective and to assist in reviewing the past CST results of the teacher, and shall neither form the basis for any performance objectives/strategies nor be used in the final evaluation. *Los Angeles Unified School District*, 228 Cal. App. 4th at 233 (emphasis added).[18]

So even a very large school district – with the resources to develop and deploy a regression model – does not use it in the "final evaluation" of a teacher.

Indeed, Petitioners themselves submitted a report by the Superintendent of Public Instruction that contained these cautions:

> There are many ways to measure student achievement and progress. Prominent among the approaches being discussed are value-added models (VAM) – statistical methods for examining change in students' test scores over time. When linked to individual teachers, they are often described as measuring teacher

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[17] Petitioners do not take the position this is the only way that compliance can be attained. That, they say, is within the discretion of each Respondent.

[18] The Supplement to the collective bargaining agreement between the Los Angeles USD and the UTLA is Exhibit F to the January 25, 2016 Declaration of Mark Bresee. The passage cited by the Court of Appeal is found at page 3, ¶e.

> 'effectiveness.' These methods have been helpful in large-scale studies to evaluate the effects of various kinds of interventions and programs and for validating teacher observation systems and performance assessments….However many studies show that VAM measures are very unreliable and often inaccurate at the individual teacher level…For these reasons and others, research has found that teacher ratings based on value-added models are highly unstable…As a consequence, leading research organizations have counseled against the use of VAM for high-stakes decisions about teachers. The National Research Council's Board on Testing and Assessment concluded that 'VAM estimates of teacher effectiveness…should not be used to make operational decisions because such estimates are far too unstable to be considered fair or reliable."[19]

That is echoed in Respondents' brief which quotes (without objection) the American Educators Research Council's June 2015 "Statement on Use of Value-Added Models (VAM) for the Evaluation of Educators and Educator Preparation Programs,"

> There are considerable risks of misclassification and misinterpretation in the use of VAM to inform…evaluations. JO 20, n19.

This quotation was expanded in the Separate Opposition Brief of Victor Elementary Unified School District and Upland Unified School District, at 5:23-25:

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[19] Lipshutz Declaration, Ex. 7, *Greatness by Design*: *A Report by State Superintendent of Public Instruction Tom Torlakson's Task Force on Educator Excellence*, September 2012, p.61-62 (discussed in Petitioners' brief, see e.g. POB 21:28). Respondents objected to this report being taken into evidence in its entirety and the Court sustained that objection. Thus, the Court does not rely on this as evidentiary fact. However, it is relevant to the notice given to school districts about whether it is able to use the results of the tests in an unquestioned manner.

> The standards of practice in statistics and testing set a high technical bar for properly aggregating student assessment results for any purpose, especially those related to drawing inferences about teacher…effectiveness.

In short, there are serious questions about whether and the extent to which a pupil's standardized test score is "reasonably related" and "applicable" to the performance of a given teacher.

C. The timing problem

Respondents note one additional problem. The Stull Act requires that each teacher be given her "Stull evaluation" "no later than 30 days before the last schoolday scheduled on the school calendar…" § 44663. So, for example, the collective bargaining agreement for the Chaffey Joint Union High School District states,

> A final evaluation conference between the unit member and evaluator shall be held no later than thirty (30) days prior to the end of the school year to discuss the content of the final evaluation. Declaration of Lynne Ditfuth, Ex. 1, ¶ 15.1.8 (attached to Lipshutz Declaration as Exhibit 17).

But the results of the standardized tests are not provided to the school district until "August, for the school year that ended the previous spring." *Id*. Ditfurth Decl.at ¶5. Thus, the results of the standardized tests are not available by the time the Stull evaluation must be given.

Petitioners say that the school districts can use the results of the standardized tests from year one in evaluating a teacher in year two. Perhaps. But the question is whether those results "reasonably relate" or are "applicable" to the teacher's work in year two. That seems a matter of some discretion, which the statute lodges in the school district.

D. What the school districts actually do

There are thirteen respondent school districts. Each has put in some evidence of how it evaluates its teachers. Some have explained that in more detail than others.

As noted above, all use the CSTP to evaluate their teachers in the end-of-year, "summative" (*i.e.* "Stull") evaluation.

Standard 5 of the CSTP is entitled "Assessing Student Learning." Under that standard, each school district assesses its teachers based on their skills in,

> 5.1 Applying knowledge of purposes, characteristics, and uses of different types of assessments
>
> 5.2 Collecting and analyzing assessment data from a variety of sources to inform instruction
>
> 5.3 Reviewing data, both individually and with colleagues, to monitor student learning
>
> 5.4 Using assessment data to establish learning goals and to plan, differentiate and modify instruction…
>
> Lipshutz Declaration, Ex. 12, p. 13-14.

Respondents argue that meets the test of § 44662(b) insofar as the school district assesses the performance of the teacher as it reasonably relates to the progress of her pupils, including on state standardized tests. In other words, the school district monitors how the teacher is using information about the progress of her students toward various academic goals. As noted above, the Legislature and the Superintendent of Public Instruction have endorsed the use of the CSTP.

But the evidence shows that at least some of the thirteen school districts do much more.

Take, for example, the Ontario-Montclair School District. Its teacher evaluation procedures are described in the declaration of Hector Macias. Lipshutz Declaration, Ex. 35. Mr. Macias describes a process which is "highly individualized, [and is] an on-going interactive

process between the evaluating administrator and the teacher." *Id.* at ¶3. He explains that the preliminary results from the state's standardized test are received in August. The district aggregates those scores by school, grade level and District average. Information for a school is given to the principal who use it in a variety of ways.

> Then, principals have individual conversations with teachers about prior results, and the results of their current students in the prior year (taught by a different teacher). In addition to reviewing summative test results, principals facilitate the administration and data collection of a variety of formative assessments which are also used to track and monitor student progress. Principals meet on a regular basis with teachers to review these results and plan action for student improvement. *Id.* (Macias Declaration, Exhibit 2.)

Or consider the El Monte City School District. Dr. Maribel Garcia's declaration describes a very detailed computerized system (Educator's Assessment Data Management System ["EADMS"]) by which test scores and other data are made available throughout the school system. She discusses how the EADMS information is used by administrators, principals, "professional lead teachers," and individual teachers. Declaration, Ex. 23.

> 14. …Individual teachers receive data for students who were in their class in the previous school year as well as for incoming students.
>
> 15. Individual teacher performance is also evaluated and assessed in the District as it reasonably relates to the state standardized test results in accordance with Education Code section 44662. The District holds what are referred to as "Compelling Conversations" during which the principal meets with the teacher to review test results with a focus on what is going well and what areas are weak or identify a need for improvement. This information is included in the teacher evaluation. *Id.*

Not every school district has presented identical evidence. However, some have presented evidence that the standardized tests are used in what the parties have called "formative" evaluations of teachers. See, *e.g.* Chaffey Joint Union High School District (§ 15.1.12.4 of the Collective Bargaining Agreement, as amended, Declaration, Ex. 16, last page; see also Ditfurth Decl. *supra*,); Fairfield-Suisun Unified School District (Supplemental Declaration of Robert Martinez, filed January 26, 2016 with Amended Opposition, ¶6 and Exhibit C ¶ 10.3.e).

Some districts had collective bargaining agreements that expressly prohibited the use of standardized tests in formal evaluations, but have since modified them to delete that provision. See, *e.g*. Chino Valley Unified School District. Compare Lipshutz Declaration, Ex.18, ¶ 8.6.1.1 with Declaration of Mark R. Bresee Submitting Modifications to Collective Bargaining Agreements (filed July 18, 2016), Ex. B, ¶ 8.6.1.1.[20]

It is difficult to rely simply on the collective bargaining agreements put in evidence by Petitioners. Many have expired, and the Court has only spotty evidence with respect to whether there is a more recent agreement. More important, as argued in the Supplemental Brief of Chaffey Joint Union High School District et al. (filed January 25, 2016) the *practice* under a collective bargaining agreement is, in effect, part of the contract. Thus, the cold words of collective bargaining agreement are hardly dispositive of the practice (and therefore the agreement) that obtains in a given school district. And as noted at the beginning of this Opinion, there was no live testimony to supplement the paper record which is itself, in places, scant.

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[20] Others that have modified their collective bargaining agreements include El Monte City School District, Fairfield-Suisun Unified School District, Fremont Union High School District, Inglewood Unified School District, Saddleback Valley Unified School District, and Victor Elementary Unified School District.

At least one district has put in evidence that it uses the tests, despite contrary language in a collective bargaining agreement. Petitioners supplied an agreement between the Antioch Unified School and the Antioch Education Association/CTA/NEA which covered the period from July 1, 2012 to June 30, 2015. (No current agreement is in evidence.) The old agreement said that "no bargaining unit member shall be evaluated or informally (sic) on the basis of the scores of his/her students on standardized or norm-referenced tests" (Lipshutz Declaration, Ex. 14, p.77). However, the declaration of the Interim Superintendent of that school district described the evaluation process in the following way. "Although summative/final evaluations and ratings of teachers are not directly based on results of state adopted criterion referenced assessments, evaluators are aware of and consider the results of criterion referenced assessments administered to students while providing on-going feedback and assessment of teachers." Lipshutz Declaration, Ex. 15, Exhibit A1.

Similarly, the declaration of Grace Park, Ed. D, (Chino Valley's Assistant Superintendent of Human Resources) explains how the state standardized tests have been used by the Chino Valley district, which only recently deleted a collective bargaining provision that excluded the use of test scores. She says, for example,

> …principals review the information…and discuss …[it] with classroom teachers by grade level and by individual teacher. Principals typically engage in individual conversations with teachers related to student progress and potential interventions with students. Additionally, teachers at grade levels establish goals, based on the test score data from the prior year (how their current students did, in the previous year) and in current year based on District adopted assessments….*This receipt and review of assessment data by the administrators and teachers is indirectly involved in the classroom teacher evaluation process*, but it is not directly

involved." Lipshutz Declaration, Ex. 20, which is the Park Declaration, Ex. 2 (emphasis supplied.)

The Court has reviewed all of the evidence that has been submitted. No district appears to ignore the standardized test results of any particular teacher's pupils. Rather, each uses those test results in a way it judges to be reasonably appropriate given the problems with the data described above.

X. The Rules of Decision

A. Respondents' Emphasis

The parties emphasize different rules of decision. Respondents focus substantially on the familiar rules that govern review under Code of Civil Procedure § 1085. So, for example, they cite *Weinstein v. County of Los Angeles* (2015) 237 Cal. App. 4th 944, which (quoting liberally from *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal. App. 4th 643, 653-654) summarized the law:

> A trial court must determine whether the agency had a ministerial duty capable of direct enforcement or a quasi-legislative duty entitled to a considerable degree of deference. This question is generally subject to de novo review because it is one of statutory interpretation, a question of law for the trial court. [Citations.] [¶] A ministerial duty is one which is required by statute. 'A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment.' [Citations.] [¶]

> Normally, mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner. *Weinstein,* 237 Cal. App. 4th at 965.

Respondents also cite *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal. App. 4th 693, 700 and *Pich v. Lightbourne* (2013) 221 Cal. App. 4th 480:

> To be enforceable by writ of mandate, a statutory duty must "'be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. [Citation.]' [Citations.]" (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 633 [39 Cal. Rptr. 3d 62], original italics.) *Pich*, 221 Cal. App. 4th at 493.

They also rely on *Mooney v. Garcia* (2012) 207 Cal. App. 4th 229:

> "Mandate will not issue if the duty is not plain or is mixed with discretionary power or the exercise of judgment." (*Los Angeles County Prof. Peace Officers' Assn. v. County of Los Angeles* (2004) 115 Cal.App.4th 866, 869 [9 Cal. Rptr. 3d 615], italics added (*LACPPOA*).) "Even if mandatory language appears in the statute creating a duty, the duty is discretionary if the [entity] must exercise significant discretion to perform the duty. [Citation.] We examine the entire statutory scheme to determine whether the [entity] must exercise significant discretion to perform a duty." (*Sonoma Ag Art v. Department of Food &*

Agriculture (2004) 125 Cal.App.4th 122, 127 [22 Cal. Rptr. 3d 468].) *Mooney*, 207 Cal. App. 4th at 233.

B. Petitioners' Emphasis

Petitioners do not dispute the law as just stated. But they add two points.

1. Mandate can require that Respondents exercise discretion in cases in which they have an obligation to make a decision but fail to do so

Petitioners argue, in places, that Respondents have simply failed to exercise their discretion, and they may be compelled to do so. They say the Court may not tell Respondents *how* to exercise their discretion; but that the Court may tell Respondents to exercise *some* discretion.

They cite *Sego v. Santa Monica Rent Control Board* (1997) 57 Cal. App. 4th 250. There a rent control board refused to issue a "certificate of permissible rent levels." Petitioners sought a writ of mandamus to compel the board to issue a certificate. It did not seek to have the court determine the permissible rent level; it simply sought to force the board to make a decision. The Court of Appeal found mandamus would properly issue.

> "While mandamus will not lie to compel governmental officials to exercise their discretionary powers in a particular manner, it will lie to compel them to exercise them in some manner. . . ." (*Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal. App. 3d 1, 8 [108 Cal. Rptr. 625], citation omitted.) *Sego, supra* at 255,

Here, Petitioners argue that Respondents had a duty to

> conduct summative evaluations of teachers using applicable state testing data. Respondents may have some discretion to determine the degree to which 'state

adopted criterion referenced assessments' factor into the final, summative evaluations of certificated employees, but they have no discretion to determine whether 'state adopted criterion referenced assessments' are used in summative evaluation in the first place. PRB 19:21-25.

2. Mandate can restrain Respondents from acting in violation of the Stull Act

Petitioners' other argument is that Respondents have no discretion to violate the law. They note that "Respondents lack the authority to negotiate [collective bargaining] contracts that violate the Education Code." POB 12:24.

In effect, both principles are applicable only if Respondents' statutory construction argument is correct; *i.e*. if the statute clearly commands the performance of an obligation then the public official has a ministerial duty to comply and mandate will lie.

C. Applying the Rules of Decision

The Court finds that the exceptions to the general rule noted in Section X.B above, do not apply. Respondents have not failed to exercise their discretion. They have exercised it, albeit in a way that Petitioners dispute. Nor have Respondents exercised their discretion in violation of the law for the reasons stated above in Sections VII, VIII and IX.

The Stull Act says that school districts shall evaluate a teacher's performance as it "reasonably relates to the progress of pupils towards…., if applicable, the state adopted academic content standards as measured by [standardized tests]." The phrase "reasonably relates" gives the school districts discretion to determine what is reasonable in this complex situation. This is not a "ministerial duty" that lends itself to the issuance of a writ of mandate. Here, a school district official is not "required to perform in a prescribed manner…without regard to his own

judgment or opinion concerning the act's propriety or impropriety, when a given state of facts exist." *Weinstein,* 237 Cal. App. 4th at 965.

Mandamus does not lie to control the exercise of discretion, or where a duty is mixed with discretionary power or the exercise of judgment. *AIDS Healthcare Foundation,* 197 Cal. App. 4th at 701. In *AIDS Healthcare Foundation* the public health officer was required, by law, to take "all measures reasonably necessary to prevent the transmission of infection." *Id.* at 701. Here, school officials are required to evaluate teachers' performance as it "reasonably relates" to certain factors. In both cases, the law affords discretion to the official to determine what is reasonable under the circumstances. In neither may mandamus be used to control the official's discretion.

The evidence in this case discloses many complicated factors that bear on whether and how student test scores might reasonably relate to a teacher's performance. It is for Respondents to weigh those complex factors and (in bargaining with their districts' unions) determine what is reasonable.

XI. Conclusion

For all these reasons, the petition for writ of mandate is denied. Respondents shall also have judgment on the complaint. Respondents shall submit a proposed form of judgment to the complex litigation e-mail box after seeking approval as to form.

Date: September 19, 2016

Hon. Barry Goode
cn=Hon. Barry Goode, o, ou, email=cxlit@contracosta.courts.ca.gov, c=US
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Barry P. Goode
Judge, Superior Court