

**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.

1 II. The Parties

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

4 Respondent school districts are: Antioch Unified School District, Chaffey Joint Union  
5 High School District, Chino Valley Unified School District, El Monte Unified School District,  
6 Fairfield-Suisun Unified School District, Fremont Union High School District, Inglewood  
7 Unified School District, Ontario-Montclair School District, Pittsburg Unified School District,  
8 Saddleback Valley Unified School District, San Ramon Valley Unified School District, Upland  
9 School District, and Victor Elementary School District (collectively, the “School Districts”).<sup>1</sup>

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11 III. The Issue

12 Stated as simply as possible, Petitioners seek an order compelling Respondents to  
13 implement the Stull Act (Education Code § 44660 et seq.) by formally evaluating each teacher  
14 (in certain grades and of certain subjects) based, in part, on how well that teacher’s students  
15 perform on the standardized tests given by the State in those grades and subjects. Those  
16 evaluations must be “summative” and must have consequences.<sup>2</sup>

17 That is something of an oversimplification, as will become clear. However, it states the  
18 gravamen of the case. A more formal statement of the relief sought is found on pages 1-2 of  
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23 <sup>1</sup> Many school district trustees and other individuals acting in their official capacity were named in the Petition for  
24 Writ of Mandate and Complaint. In October 2015 the parties stipulated to the dismissal of these individuals. See  
25 Stipulation and Order, filed October 21, 2015.

<sup>2</sup> All citations to a statute refer to the Education Code unless otherwise noted.

1 Petitioner’s December 16, 2015 Notice of Motion and Motion for Writ of Mandate and Other  
2 Appropriate Relief.<sup>3</sup>

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4 IV. Two Preliminary Matters: Standing and Mootness

5 A. Standing

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

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

14 Nevertheless, ““where the question is one of public right and the object of the  
15 mandamus is to procure the enforcement of a public duty, the [petitioner] need not  
16 show that he has any legal or special interest in the result, since it is sufficient that  
17 he is interested as a citizen in having the laws executed and the duty in question  
18 enforced.’ ” (*Bd. of Soc. Welfare v. County of L. A.* (1945) 27 Cal.2d 98, 100–101  
19 [162 P.2d 627].) This “‘public right/public duty’ exception to the requirement of  
20 beneficial interest for a writ of mandate” “promotes the policy of guaranteeing

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23 <sup>3</sup> In this Opinion and Order Petitioners’ “Notice of Motion and Motion for Writ of Mandate or Other Appropriate  
24 Relief; Memorandum of Points and Authorities In Support Thereof” (filed December 16, 2015) is referred to as  
25 “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.

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

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

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

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

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25 <sup>4</sup> *Hector F.* observed that countervailing considerations may cabin the reach of this principle. But Respondents have established no such considerations here.

1           It cited *Doe v. Albany Unified School District* (2010) 190 Cal. App. 4<sup>th</sup> 668 which  
2 somewhat equated the “beneficial interest” standard with the public interest exception in cases  
3 such as this:

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

15           *Doe v. Albany Unified School District* at 685.

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

17           B.     Mootness

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

23           Petitioners disagree. They say the changes to the language do not necessarily effect a  
24 change in the School Districts’ practices. More fundamentally, they say that the revisions do not  
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1 address the fundamental concern raised by the petition. And, in any event, since this a question  
2 of public interest that is likely to recur, it is not moot. Reply in Support of Motion for Writ of  
3 Mandate or Other Appropriate Relief (“PRB”) at 26-17.

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

11 The case is not legally moot.

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

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

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

### 19 A. Rules of Statutory Construction

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21 In statutory construction cases, our fundamental task is to ascertain the intent of  
22 the lawmakers so as to effectuate the purpose of the statute. [Citation.] [To that  
23 end,] ‘[w]e begin by examining the statutory language, giving the words their  
24 usual and ordinary meaning.’ [Citations.] If the terms of the statute are  
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1 unambiguous, we presume the lawmakers meant what they said, and the plain  
2 meaning of the language governs. [Citations.] If [the statute] is ambig[uous],  
3 however, we may then look to extrinsic sources, including the ostensible objects  
4 to be achieved and the legislative history. [Citation.] ... [W]e ““select the  
5 construction that comports most closely with the apparent intent of the  
6 Legislature, with a view to promoting rather than defeating the general purpose of  
7 the statute, and avoid an interpretation that would lead to absurd consequences.””  
8 *Estate of Griswold* (2001) 25 Cal.4th 904, 910–911.

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

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

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

2 Section 44662 says, in relevant part,

3 (a) The governing board of each school district shall establish standards of  
4 expected pupil achievement at each grade level in each area of study.

5 (b) The governing board of each school district shall evaluate and assess  
6 certificated employee performance as it reasonably relates to:

7 (1) The progress of pupils toward the standards established pursuant to  
8 subdivision (a) and, if applicable, the state adopted academic content  
9 standards as measured by state adopted criterion referenced assessments.

10 (2) The instructional techniques and strategies used by the employee.

11 (3) The employee's adherence to curricular objectives.

12 (4) The establishment and maintenance of a suitable learning  
13 environment, within the scope of the employee's responsibilities.

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

22 Respondents argue that the second clause of (b)(1) requires a school district to evaluate a  
23 *teacher’s performance* as it *reasonably relates to, if applicable*, the progress of her pupils  
24 towards state adopted academic content standards as measured by the CAASPP. They say the  
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1 italicized words are critical to an understanding of the statute. The focus must be on the  
2 performance of the teacher (not the pupils on a standardized test), and that the school districts  
3 have discretion to determine how that performance *reasonably relates* to the pupils' progress on  
4 those tests. In addition, the school districts have to exercise discretion to determine the extent to  
5 which the progress of her pupils on the tests is *applicable* to a given teacher's evaluation.

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

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

#### 14 VI. The Second Step: The Evolution of the Statute

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

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

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

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

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

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

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21           B. The 1975 Amendments

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

1 toward the established standards...” Stats.1976, c. 1010, (SB 777). Again, the parties have  
2 provided virtually no legislative history to elucidate this.<sup>5</sup>

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

### 5 C. The 1983 Amendments

6 In 1983 other changes were made to § 44662. They seem largely irrelevant to this case.  
7 Deering’s California Codes Annotated describes those changes as:  
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9 (1) Substituted "pupil" for "student" in subd (a); and (2) amended subd (b) by (a)  
10 substituting "standards established pursuant to subdivision (a)" for "established  
11 standards" in subd (b)(1); (b) substituting subd (b)(2) for former subd (b)(2)  
12 which read: "(2) the performance of those noninstructional duties and  
13 responsibilities, including supervisory and advisory duties, as may be prescribed  
14 by the board, and"; (c) adding subd (b)(3); and (d) redesignating former subd  
15 (b)(3) to be subd (b)(4).

### 16 D. The 1995 Amendments

17 In 1995 the Legislature modified § 44662 by replacing the concept of “competence” with  
18 “performance.” Stats. 1995, c. 392, § 1 (AB 729). That served purposes largely irrelevant to this  
19 dispute.  
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24 <sup>5</sup> Petitioners have included only a letter from Senator Stull to Governor Brown. Lipshutz Declaration, Ex. 4. It  
25 makes reference to the importance of “pupil progress” and to a “more detailed analysis of SB 777’s provisions,”  
however the letter is not attached to the Lipshutz Declaration.

1 E. The 1999 Amendments

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

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

9 It is the intent of the Legislature to establish a teacher peer assistance and review  
10 system as a critical feedback mechanism that allows exemplary teachers to assist  
11 veteran teachers in need of development in subject matter knowledge or teaching  
12 strategies, or both.

13 It is further the intent of the Legislature that a school district that operates a  
14 program pursuant to Article 4.5 (commencing with Section 44500) of Chapter 3  
15 of Part 25 of the Education Code coordinate its employment policies and  
16 procedures for that program with its activities for professional staff development,  
17 the Beginning Teacher Support and Assessment Program, and the biennial  
18 evaluations of certificated employees required pursuant to Section 44664.

19 Stats. 1999 First Extraordinary Session, Ch. 4X (AB 1X).

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

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

6 F. The Stull Act Today

7 As a result, Section 44662 now says, in relevant part,  
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9 (a) The governing board of each school district shall establish standards of  
10 expected pupil achievement at each grade level in each area of study.

11 (b) The governing board of each school district shall evaluate and assess  
12 certificated employee performance as it reasonably relates to:

13 (1) The progress of pupils toward the standards established  
14 pursuant to subdivision (a) and, if applicable, the state adopted  
15 academic content standards as measured by state adopted criterion  
16 referenced assessments....

17 The parties agree that “state adopted criterion referenced assessments” refer to the tests  
18 given by the state. Originally, those were the STAR tests.<sup>6</sup> In 2013 the Legislature replaced the  
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24 <sup>6</sup> Strictly speaking, the California Standards Tests (“CST”) were the tests given as a part of the Standardized Testing  
25 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.

1 STAR tests with the CAASPP tests. Stats 2013 ch 489 (AB 484).<sup>7</sup> The parties often refer to  
2 them as “standardized tests” and the Court uses that term as well.

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4 VII. The Second Step: The Context of the Statute

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

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

12 A. Section 44661.5

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

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

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24 <sup>7</sup> The CAASPP is a “system” of assessments that includes Smarter Balanced Assessments, which in turn includes  
25 “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.”

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

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

7 The CSTP are a set of teacher evaluation standards designed “to serve and support  
8 professional educators.”...The CSTP standards “are not set forth as regulations to  
9 control the specific actions of teachers, but rather to guide teachers as they  
10 develop, refine and extend their practice”....“Since their inception in the 1990’s,  
11 the CSTP have been widely influential in California policy and practice.” POB  
12 15:7-11.

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

17 Petitioners argue that the CSTP are not “consistent with this article.” PRB 12-13. But  
18 Respondents note that § 44661.5 was adopted only five months after the 1999 amendments to  
19 § 44662.<sup>8</sup> Presumably, the same committees in the Legislature worked on both § 44661.5 and  
20 §44662. Indeed, the bill analysis for the Senate Committee on Education described Section  
21 44661.5 in this way,

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25 <sup>8</sup> 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.

1 Current law (commonly referred to as the ‘Stull Act’) requires that the governing  
2 board of a school district evaluate certificated employee performance as it  
3 reasonably relates to, among other things, pupil progress...

4 This bill:...Authorizes the governing board of a school district to adopt teacher  
5 evaluation standards that are consistent with the...California Standards for the  
6 Teaching Profession, for use in the biennial teacher evaluation (the ‘Stull Act’  
7 evaluation.) Declaration of Mark R. Bresee in Support of Joint Request for  
8 Judicial Notice (“Bresee Decl.”), Exhibit B.

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

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

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

19 The Superintendent of Public Instruction has also endorsed the use of the CSTP for the  
20 evaluation of teachers. “Greatness by Design: A Report by State Superintendent of Public  
21 Instruction Tom Torlakson’s Task Force on Educator Excellence” September 2012 recommends,  
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1 “Standards-based evaluations of practice for both initial entry and later personnel decisions  
2 should be based upon the California Standards for the Teaching Profession.”<sup>9</sup>

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

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

11 B. AB 484

12 Until 2013, the standardized test administered to students was the STAR test – which was  
13 aligned with the federal No Child Left Behind Act. JO 21:16-20; POB 8:4-7. On October 2,  
14 2013 the Governor signed AB 484 which replaced the STAR test with the CAASPP test. That is  
15 aligned with the Common Core State Standards. JO 21:16-20.

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

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

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25 <sup>9</sup> See page 60 of Exhibit 7 to the Lipshutz Declaration.

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

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

13  
14 (4) Provide information to pupils, parents and guardians, teachers, schools, and  
15 local educational agencies on a timely basis so the information can be used to  
16 further the development of the pupil or to improve the educational program. The  
17 Legislature recognizes that the majority of the assessments in the system will  
18 generate individual pupil scores that will provide information on pupil  
19 achievement to pupils, their parents or guardians, teachers, schools, and local  
20 educational agencies. The Legislature further recognizes that some assessments in  
21 the system may solely generate results at the school, school district, county, or  
22 state level for purposes of improving the education program and promoting the  
23 teaching and learning of the full curriculum. § 60602.5(a)(4).

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

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

8 Section 60602.5 speaks generally of “improv[ing] the educational program”  
9 (§60602.5(a)(4)) and of “improving teaching and learning” (§ 60602.5(a)). But it does not make  
10 a link between these standardized tests and the Stull evaluation that Petitioners argue is the clear  
11 intent of § 44662.<sup>10</sup>

### 12 C. Position of the Teachers Unions

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

18 Yet, Petitioners claim that teachers unions generally oppose efforts to require the use of  
19 test scores in the evaluation of individual teachers. For example, paragraph 21 of the Verified  
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23 <sup>10</sup> Section 60602.5(a) speaks of “promoting high-quality teaching and learning using a variety of assessment  
24 approaches and item types.” But the next sentence says these assessments “where applicable and valid” will help to  
25 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.

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

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

13 Standardized tests and their use are controversial matters. Had the 1999 amendments to  
14 the Stull act required school districts to evaluate each teacher in a “summative evaluation with  
15 consequences” based on the test scores of her pupils, it is entirely likely that one or more  
16 teachers unions would have opposed that legislation vigorously. The fact that no union is listed  
17 in opposition, while not conclusive, is relevant to an understanding of the meaning of the 1999  
18 addition to the law. See, e.g. *Smith v. Fair Employment & Housing Commission* (1996) 12 Cal.  
19 4<sup>th</sup> 1143, 1228 (Court looks to organizations supporting Religious Freedom Restoration Act re:  
20 legislative intent).

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24 <sup>11</sup> The order noted, “UTLA [United Teachers Los Angeles] has expressed hostility toward incorporating student test  
25 data in teacher evaluations.” (p.10)

1 D. The Educational Employee Relations Act

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

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

11 E. Other State Statutes

12 Petitioners argue – by way of public policy – that the trend is for other states to require  
13 that teacher evaluations include a component based on their students’ performance on  
14 standardized tests. See Lipshutz Declaration, Ex. 50.<sup>12</sup>

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

17 *Florida:*

18 (a) A performance evaluation must be conducted for each employee at least once a  
19 year... The performance evaluation must be based upon sound educational principles  
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23 <sup>12</sup> Although the parties’ arguments sometimes veer into questions of public policy that is not what is before the  
24 Court. This is not a decision about what policy best serves the public education system and the students who attend  
25 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.

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

3 1. Performance of students. — At least one-third of a performance evaluation  
4 must be based upon data and indicators of student performance in accordance  
5 with subsection (7).<sup>13</sup>

6 This portion of the evaluation must include growth or achievement data of the  
7 teacher's students ... The proportion of growth or achievement data may be  
8 determined by instructional assignment.

9 Fla. Stat. Ann. § 1012.34(3)(a)(1)

10 *Michigan:*

11 (2) The board of a school district or intermediate school district or board of  
12 directors of a public school academy shall ensure that the performance evaluation  
13 system for teachers meets all of the following:

14 (a) The performance evaluation system shall include at least an annual  
15 year-end evaluation for all teachers. Beginning with the 2015-2016 school  
16 year, an annual year-end evaluation shall meet all of the following:

17 (i) For the 2015-2016, 2016-2017, and 2017-2018 school years,  
18 25% of the annual year-end evaluation shall be based on student  
19 growth and assessment data. Beginning with the 2018-2019 school  
20 year, 40% of the annual year-end evaluation shall be based on  
21 student growth and assessment data....

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24 <sup>13</sup> Subsection (7) refers to “a formula to measure individual student learning growth on the statewide, standardized  
25 assessments in English Language Arts and mathematics.”

1 Mich. Comp. Laws Serv. 380.1249(2)(1)(i).<sup>14</sup>

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

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

9  
10 F. Summary of the Context of the Legislation

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

16 Section 44662 is placed in the Education Code immediately adjacent to a statute  
17 (§ 44661.5) that encourages the use of the California Standards for the Teaching Profession  
18 evaluation factors. Section 44661.5 was enacted only six months after the change to the Stull  
19 Act at issue here. And since that time, the Superintendent of Public Instruction has endorsed the  
20 use of the CSTP as *the* means of evaluating teachers. Indeed, the 2012 report containing that  
21 endorsement casts serious doubt about the viability of the use of standardized tests for the  
22 purpose Petitioners urge. (See below.)

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

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

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

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

#### 12 VIII. The Second Step: Conclusion

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

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



1 IX. The “Third Step”: “Reasonably Relates” and “If Applicable”

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

5 “Statutes must be interpreted, if possible, to give each word some operative effect.”  
6 (*Walters v. Metropolitan Ed. Enterprises, Inc.* (1997) 519 U.S. 202, 209 [136 L. Ed. 2d 644, 117  
7 S. Ct. 660].) ‘We do not presume that the Legislature performs idle acts, nor do we construe  
8 statutory provisions so as to render them superfluous.’ (*Shoemaker v. Myers* (1990) 52 Cal.3d 1,  
9 22 [276 Cal. Rptr. 303, 801 P.2d 1054].)” *Imperial Merchant Services, Inc. v. Hunt* (2009) 47  
10 Cal.4th 381, 390.

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

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

19  
20 A. Lack of a baseline

21 As noted above, until 2013, the standardized test administered to students was the STAR  
22 test – which was aligned with the federal No Child Left Behind Act. (JO 21:16-20.) On October  
23 2, 2013 the Governor signed AB 484 which replaced the STAR test with the CAASPP – which is  
24 aligned with the Common Core State Standards. *Id.*

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

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

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

12 More important, Dr. Garcia states,

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

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

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

23 This, Respondents say, bears significantly on the statutory phrase “reasonably related.”  
24 If one cannot measure the delta, then a CAASPP score, standing alone, is not “reasonably  
25

1 related” to a teacher’s performance. Respondent school districts did not violate the Stull Act by  
2 failing to use a datum (a 2015 test score) that allows only incomplete analysis.<sup>16</sup>

3  
4 **B. Lack of a regression tool**

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

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

13 10. Upland knows of no effective and reliable method to directly use student  
14 achievement on criterion-referenced assessments in evaluating teacher  
15 performance in part[] because the State provides no statistical method to  
16 disaggregate teacher effectiveness from other internal and external factors  
17 affecting student achievement. In addition, Upland knows of no statistical  
18 method to determine which certificated staff during a student’s career, has  
19 negatively or positively influenced a particular achievement score.

20 11. For example, in mathematics, test results provided to Upland do not allow the  
21 District to disaggregate weaknesses at the course level. Thus, for eleventh grade  
22 students, it would not be possible to determine whether any strengths or

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25 <sup>16</sup> As of the time of trial, the 2016 test scores were not yet available.

1 weaknesses were attributable to that student's ninth, tenth or eleventh grade math  
2 course.

3 12. As a further example, for English-Language Arts, students are assessed on  
4 understanding of several types of texts. Thus, if a particular assessment includes  
5 a non-fiction text on the Revolutionary War which assesses that student's  
6 understanding of the text, Upland has no tools to determine whether a favorable or  
7 unfavorable test result is attributable to that student's English or History courses.  
8 Lipshutz Declaration, Ex. 44.

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

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

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

1 predicted range, (4) above predicted, and (5) far above predicted. *Los Angeles*  
2 *Unified School District*, 228 Cal. App. 4<sup>th</sup> at 232.

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

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

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

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

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

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23 <sup>17</sup> 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.

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

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

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

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

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

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23 <sup>19</sup> Lipshutz Declaration, Ex. 7, *Greatness by Design: A Report by State Superintendent of Public Instruction Tom*  
24 *Torlakson's Task Force on Educator Excellence*, September 2012, p.61-62 (discussed in Petitioners' brief, see e.g.  
25 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.

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

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

7 C. The timing problem

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

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

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

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

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

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

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

8 5.1 Applying knowledge of purposes, characteristics, and uses of different types  
9 of assessments

10 5.2 Collecting and analyzing assessment data from a variety of sources to inform  
11 instruction

12 5.3 Reviewing data, both individually and with colleagues, to monitor student  
13 learning

14 5.4 Using assessment data to establish learning goals and to plan, differentiate and  
15 modify instruction...

16 Lipshutz Declaration, Ex. 12, p. 13-14.

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

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

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



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

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

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

17 14. ...Individual teachers receive data for students who were in their class in the  
18 previous school year as well as for incoming students.

19 15. Individual teacher performance is also evaluated and assessed in the District  
20 as it reasonably relates to the state standardized test results in accordance with  
21 Education Code section 44662. The District holds what are referred to as  
22 “Compelling Conversations” during which the principal meets with the teacher to  
23 review test results with a focus on what is going well and what areas are weak or  
24 identify a need for improvement. This information is included in the teacher  
25 evaluation. *Id.*

1 Not every school district has presented identical evidence. However, some have  
2 presented evidence that the standardized tests are used in what the parties have called  
3 “formative” evaluations of teachers. See, *e.g.* Chaffey Joint Union High School District (§  
4 15.1.12.4 of the Collective Bargaining Agreement, as amended, Declaration, Ex. 16, last page;  
5 see also Ditfurth Decl. *supra.*); Fairfield-Suisun Unified School District (Supplemental  
6 Declaration of Robert Martinez, filed January 26, 2016 with Amended Opposition, ¶6 and  
7 Exhibit C ¶ 10.3.e).

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

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

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24 <sup>20</sup> Others that have modified their collective bargaining agreements include El Monte City School District, Fairfield-  
25 Suisun Unified School District, Fremont Union High School District, Inglewood Unified School District,  
Saddleback Valley Unified School District, and Victor Elementary Unified School District.

1 At least one district has put in evidence that it uses the tests, despite contrary language in  
2 a collective bargaining agreement. Petitioners supplied an agreement between the Antioch  
3 Unified School and the Antioch Education Association/CTA/NEA which covered the period  
4 from July 1, 2012 to June 30, 2015. (No current agreement is in evidence.) The old agreement  
5 said that “no bargaining unit member shall be evaluated or informally (sic) on the basis of the  
6 scores of his/her students on standardized or norm-referenced tests” (Lipshutz Declaration, Ex.  
7 14, p.77). However, the declaration of the Interim Superintendent of that school district  
8 described the evaluation process in the following way. “Although summative/final evaluations  
9 and ratings of teachers are not directly based on results of state adopted criterion referenced  
10 assessments, evaluators are aware of and consider the results of criterion referenced assessments  
11 administered to students while providing on-going feedback and assessment of teachers.”  
12 Lipshutz Declaration, Ex. 15, Exhibit A1.

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

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

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

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

7 X. The Rules of Decision

8  
9 A. Respondents’ Emphasis

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

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

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

4 Respondents also cite *AIDS Healthcare Foundation v. Los Angeles County Dept. of*  
5 *Public Health* (2011) 197 Cal. App. 4th 693, 700 and *Pich v. Lightbourne* (2013) 221 Cal. App.  
6 4<sup>th</sup> 480:

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

15 They also rely on *Mooney v. Garcia* (2012) 207 Cal. App. 4<sup>th</sup> 229:

16 “Mandate will not issue if the duty is not plain or is mixed with discretionary  
17 power or the exercise of judgment.” (*Los Angeles County Prof. Peace Officers’*  
18 *Assn. v. County of Los Angeles* (2004) 115 Cal.App.4th 866, 869 [9 Cal. Rptr. 3d  
19 615], italics added (*LACPPOA*)). “Even if mandatory language appears in the  
20 statute creating a duty, the duty is discretionary if the [entity] must exercise  
21 significant discretion to perform the duty. [Citation.] We examine the entire  
22 statutory scheme to determine whether the [entity] must exercise significant  
23 discretion to perform a duty.” (*Sonoma Ag Art v. Department of Food &*  
24  
25

1                    *Agriculture* (2004) 125 Cal.App.4th 122, 127 [22 Cal. Rptr. 3d 468].) *Mooney*,  
2                    207 Cal. App. 4<sup>th</sup> at 233.

3  
4                    B. Petitioners' Emphasis

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

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

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

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

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

22                    Here, Petitioners argue that Respondents had a duty to

23                    conduct summative evaluations of teachers using applicable state testing data.

24                    Respondents may have some discretion to determine the degree to which 'state  
25

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

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

6 Petitioners’ other argument is that Respondents have no discretion to violate the law.  
7 They note that “Respondents lack the authority to negotiate [collective bargaining] contracts that  
8 violate the Education Code.” POB 12:24.  
9

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

13 C. Applying the Rules of Decision

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

18 The Stull Act says that school districts shall evaluate a teacher’s performance as it  
19 “reasonably relates to the progress of pupils towards...., if applicable, the state adopted academic  
20 content standards as measured by [standardized tests].” The phrase “reasonably relates” gives  
21 the school districts discretion to determine what is reasonable in this complex situation. This is  
22 not a “ministerial duty” that lends itself to the issuance of a writ of mandate. Here, a school  
23 district official is not “required to perform in a prescribed manner...without regard to his own  
24  
25

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

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

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

15 **XI. Conclusion**

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

19 Date: September 19, 2016



Hon. Barry Goode  
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24 Barry P. Goode  
Judge, Superior Court