

Petitioners D.J., by guardian ad litem, E.A.; E.A.; S.M., by guardian ad litem M.R.; A.M., by guardian ad litem, M.R.; M.R.; and Walt Dunlop ("Dunlop"), apply for a writ of mandate.

The court has read and considered the moving papers,<sup>1</sup> opposition, and reply, and the Statement of Interest and Response,<sup>2</sup> and renders the following tentative decision.

**A. Statement of the Case**

The petition in this proceeding was filed on April 24, 2013. The First Amended Petition ("FAP") was filed on May 28, 2014 and is the operative pleading.

Petitioners are three public school students, their mothers, and a retired public school teacher. The student and parent Petitioners are identified pursuant to their initials by leave of court. Respondents are the State of California, the California Department of Education ("CDE"), the State Board of Education ("SBE"), and Tom Torlkason in his capacity as the State Superintendent of Public Instruction ("SPI").

The FAP asserts five causes of action, all of which allege that Respondents have failed to adequately respond to reports that Local Education Agencies (hereinafter "school districts")<sup>3</sup> are not providing English Learner ("EL") services to more than 20,000 EL students (sometimes "ELs") in California. The first three causes of action seek a writ of traditional mandamus for violations of the Equal Protection Clauses of the California Constitution (Art. I, §7(a), Art. IV, § 16(a), Article IX, sections 1 and 5), and the federal Equal Education Opportunities Act of 1974 (20 USC § 1700 *et seq.*). The fourth cause of action alleges a statutory violation of Govt. Code section 11135; and the fifth cause of action is a taxpayer action (CCP §526a) for the illegal expenditure of taxpayer funds.

Petitioners are three minor students presently enrolled in the Compton Unified School District ("CUSD") and their guardians ad litem, and a California citizen resident and taxpayer. Petitioner students are from economically disadvantaged families who are struggling to learn English and have experienced long-term academic failure. Petitioners allege that Respondents have abrogated their responsibility to provide EL education for students lacking oral and written proficiency in English, as mandated by 1998 Proposition 227 (Ed. Code §§ 300 *et al.*), the federal

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<sup>1</sup>Petitioners' moving and reply papers violate CRC 2.104 in that the type is not 12 point. The court has exercised its discretion to overlook this violation.

<sup>2</sup>The United States Department of Justice ("DOJ") filed a Statement of Interest without attempting to intervene and in violation of the page limits of CRC 3.1113(d). The court has chosen to read and consider the Statement of Interest ("U.S. Br.") as an *amicus* brief, as well as Respondents' Response to it.

<sup>3</sup>LEAs include, but are not limited to school districts. For convenience, the court shall refer to them as school districts.

Equal Education Opportunities Act of 1974 (“EEOA”) (20 USC § 1700 *et seq.*), and California constitutional authority.

The first cause of action alleges that Respondents have a clear and present state-mandated duty to ensure that EL students receive equal protection of the laws and Respondents have violated this duty by failing to provide EL students with basic education opportunities equal to those of other students. Pet., ¶¶108-09.

The second cause of action alleges that Respondents have a state-mandated duty to ensure that EL students receive access to an education, including by ensuring the delivery of language instructional services to EL students so that no such student is effectively foreclosed from a meaningful education, and Respondents have violated this duty by failing to act and instead simply accepting “no services reports” from school districts, thereby perpetuating the denial of services. Pet., ¶¶114-15.

The third cause of action alleges that Respondents have a mandatory federal duty to ensure equal educational opportunity to any person. Under the EEOA, the State is enjoined to take appropriate action to overcome language barriers that impede the equal participation of its students in its instructional programs, thereby ensuring that school districts do not discriminate against EL students by failing to take action to address EL language barriers. Respondents have violated this duty by failing to guarantee that EL students receive some sort of language instructional services. Pet., ¶¶ 121-22.

The fourth cause of action is for injunctive relief for violation of Govt. Code section 11135, which prohibits unlawful discrimination in providing program benefits administered by a state agency. The absence of EL services denies access to the benefits of a public education disproportionately to EL students, who are mostly racial minorities. Respondents’ failure to guarantee language instructional services allows a method of administration of the EL program that has the effect of substantially impairing the accomplishment of the objectives of the State’s system of common schools with respect to EL students, and denying EL students the opportunity to obtain the education received by other students in the school system. Respondents have intentionally engaged in activity having the effect of unlawfully discriminating on the basis of race and national origin in the administration of education, a State program. Pet., ¶¶129-35.

The fifth cause of action seeks taxpayer relief based on Respondents’ receipt of federal and state money and subsequent failure to implement adequate monitoring and oversight of the EL programs and otherwise failing to take steps to ensure equal educational access for all EL students, and unlawful diversion of money intended for monitoring and oversight to other uses in violation of State and federal law. Pet., ¶139-46.

Petitioners seek a writ of mandate directing Respondents to perform ministerial acts required by law to: (1) cease doing nothing in response to reports from districts that nothing has been done to serve EL students; and (2) establish policies and procedures to effectively ensure that all EL students in California public schools receive required English language instructional services. Petitioners also seek injunctive relief enjoining Respondents from permitting its school districts to deny EL instruction to students identified as EL students, and declaratory relief that Respondents’ conduct has violated the law.

The court overruled Respondents’ demurrer on September 26, 2013.

### **C. Standard of Review**

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for traditional mandamus is appropriate in all actions “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station....” CCP §1085.

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers’ Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance.” *Id.* at 584 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

Where a duty is not ministerial and the agency has discretion, mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus will not lie to compel the exercise of a public agency’s discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. *Id.* at 371. A agency decision is an abuse of discretion only if it is “arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.” Kahn v. Los Angeles City Employees’ Retirement System, (2010) 187 Cal.App.4th 98, 106. A writ will lie where the agency’s discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

No administrative record is required for traditional mandamus to compel performance of a ministerial duty or as an abuse of discretion.

### **D. Statement of Facts**<sup>4</sup>

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<sup>4</sup>The court rules on Respondents’ objections as follows: (1) McDonough Decl., Ex. O (Gandara Decl.): sustained as to ¶s 17, 23, 24; (2) McDonough Decl., Ex. H (entire Calderon Depo.): sustained; (3) McDonough Decl., Ex. K (Mendoza Depo.): overruled as to pages 14, 21, 36, and Ex.3, ¶6; (4) Echevarria Decl.: overruled as to ¶s 17, 19, and 37, and sustained as to ¶s 47, 48, and 49; and (5) Petitioners Request for Judicial Notice: overruled as to Exs. 10, 11, 13, and 14. Consequently, the requests for judicial notice by both sides are granted.

Respondents’ objections to the entirety of the declarations of Christopher Hunter, Melissa Reyes, John E. Deasy, the supplemental declaration of Dunlop, and the declaration of A.R. are sustained as improper reply evidence. *See Jay v. Mahaffey*, (20130) 218 Cal.App.4th 1522, 1537-38. Respondents’ objections to the reply declarations of Dunlop and Bryn McDonough are

### **1. English Learners and Title III**

One in four public school students in California is an EL student, defined as a “child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English.” Ed. Code §306(a). California school districts are required to “assess the English language development of each pupil in order to determine the [pupil’s] level of proficiency. . .” Ed. Code §313(a).

The federal government’s Title III program is designed to promote and support English language acquisition and academic achievement of EL students. 20 U.S.C. §6812(9). To receive funds under Title III, Respondents must ensure that EL students receive instructional services. 20 U.S.C. §6823(b)(6) (states must submit plan to federal government for how its districts will teach ELs “using a language instruction curriculum that is tied to scientifically based research on teaching limited English proficient children and that has been demonstrated to be effective”).

To ensure that EL students receive instructional services to overcome their language barriers, California law mandates an instructional program for all EL students, with limited exceptions. Ed. Code §300 *et seq.* California regulations require that EL students continue to receive EL instructional services until they are formally reclassified as English proficient. Ed. Code §§ 305, 310-11. School districts must submit a plan to CDE “describing how language instruction education programs carried out under the subgrant will ensure that limited-English-proficient pupils being served by the programs develop English proficiency.” Ed. Code §443(b)(6); *see also* Ed. Code §440(a) (school districts “shall provide instructional services” to ELs in conformity with federal Title III requirements).

State law tasks Respondents with supervising some aspect of California’s services to EL students. The State is responsible for enforcing the State Constitution, including its guarantee to provide education to all children as a state-granted fundamental right. *See* Cal. Const., art. IX, § 5. SBE sets policy, including promulgating rules and regulations, for the supervision and administration of all elementary and secondary districts. Ed. Code §§ 33030-32. The SPI is charged with the supervision of all elementary and secondary educational programs. Ed. Code §§ 33112(a), 64001(b). CDE is the state education agency tasked with administering and enforcing public elementary and secondary education laws. *See, e.g.*, Ed. Code §§ 313, 33308, 52177, 60605.87(a), 60605.87(g)(1). CDE is required to monitor school districts’ provision of EL services. Ed. Code § 64001(b). So that CDE has the information it needs to meet its state and federal obligations to EL students, state law requires school districts to report to CDE regarding their provision of instructional services to EL students. Ed. Code §§ 52164, 60900©, 60900(d)(1).

### **2. EL Instructional Services**

There are several widely recognized and research-tested instructional methods used to teach EL students.

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overruled. In this regard, the question is not whether the deposition transcripts attached as exhibits to the McDonough declaration are from depositions taken before Petitioners filed their moving papers, but whether the reply evidence properly responds to an issue raised in the opposition. Respondents have not shown the evidence to be improper.

Structured English Immersion (sometimes "SEI") is an instructional setting for EL students who do not have reasonable fluency in, or a good working knowledge of, English. 1 JA 412. Nearly all classroom instruction is in English, but the curriculum and presentation are designed for children learning the language. Id. SEI instruction couples explicit English Language Development ("ELD") instruction with Specially Designated Academic Instruction in English ("SDAIE") strategies for teaching academic content. SEI lessons include both content and language acquisition objectives. Language objectives focus on specific aspects of language to advance an EL student's language development. Content objectives are the same for all students, but the teacher must provide appropriate instructional supports to individual ELs as needed. 1 JA 335 (Echevarria Decl.). An EL student who achieves a level of reasonable fluency in English, but still requires additional EL services, may be taught in a mainstream class. 1 JA 412.

ELD is a program to develop proficiency in English and designed to promote listening, speaking, reading and writing skills in English. 1 JA 392. Students are grouped appropriately by proficiency levels to ensure language acquisition. Instruction is tailored to each group's listening, speaking, reading, and writing abilities. Academic English, which is distinct from conversational English, is a major component of ELD instruction because of its importance across all curricular areas. 1 JA 335 (Echevarria Decl.).<sup>5</sup>

All EL students must receive ELD instruction until they are reclassified. 1 JA 413. The State uses the California English Language Development Test ("CELDT") to determine the English proficiency of all students whose primary language is not English. Ed. Code §11510. Students who do not achieve a passing score on the CELDT are designated as EL students. Ed. Code §313(c). ELs must continue to take the CELDT each year until they achieve a passing score and, based on that score and other indicia of English language proficiency, are re-designated or reclassified as English proficient. Id.

SDAIE is an instructional approach in English used to teach academic courses, such as mathematics and social science, to EL students in a manner which increases the comprehensibility of the teaching. 1 JA 397. SDAIE uses teaching strategies and instructional supports, and teachers in SDAIE courses make adjustments to the curriculum and instructional methods so that ELs are able to learn rigorous core material while developing English proficiency. EL students who have achieved a reasonable level of English proficiency may still benefit from SDAIE in core curriculum courses. 1 JA 413; 1 JA 334 (Echevarria Decl.).

To effectively teach SDAIE courses, teachers must provide the appropriate amount of support ("scaffolding") to each student, depending on his/her English proficiency level. More scaffolding is required for ELs with lower levels of proficiency. Adequate implementation of SDAIE is critical because research shows that EL student performance is related to SDAIE implementation levels. The more effectively a teacher uses SDAIE strategies and techniques, the better students perform academically. 1 JA 335 (Echevarria Decl.). The implementation of

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<sup>5</sup>Conversational language can be acquired because the exposure to conversation provides the listener with sufficient clues for the meaning of terms. The academic language used by teachers in all curricular areas is more complex, involving more sophisticated vocabulary, sentence structure, and form. Id.

SDAIE needs to be tailored to the specific EL student; one size does not fit all. 1 JA 334 (Echevarria Decl.). Examples of SDAIE strategies and techniques that have been shown to support EL student learning include: (1) language objectives that show the focus of the lesson; (2) visual representations of language; (3) teacher demonstrations; (4) EL student collaboration with peers; (5) templates, sentence frames, and guided notes; (6) modulated speech; and (7) additional time to complete lessons. 1 JA 335 (Echevarria Decl.).

Primary language instruction involves developing EL students' literacy and academic knowledge in their native language. Developing literacy in the student's native language leads to greater achievement in English literacy. EL students who have competence in certain areas of their native language, such as phonological awareness, subsequently achieve greater levels of English literacy than they otherwise would have. Learning content in the EL student's native language reduces his or her cognitive and linguistic load, enabling the student to learn new material in a language they understand. 1 JA 413; 1 JA 336 (Echevarria Decl.).

### **3. The Harm from Limited EL Services**

On average, it takes four to six years for ELs to achieve intermediate English proficiency. During this period, it is critical that ELs receive consistent and differentiated instruction in order to advance their English language proficiency and comprehension of all core curriculum subjects. 1 JA 334 (Echevarria Decl.).

In California, many EL students were born in the United States, or entered its schools in kindergarten, yet remain EL students through secondary school (grades 6-12), meaning that they do not know sufficient English to be reclassified and become mainstream students. 1 JA 333 (Echevarria Decl.). A growing number of EL students continue to lack academic proficiency in English even after five, six, or more years in United States schools. These students are referred to as "long-term ELs." Without appropriate instructional services these students are at-risk for school failure. They typically have oral proficiency in conversational English, but lack English reading and writing skills in the content areas and struggle academically. Many ELs plateau at the intermediate level, in part because they are exited prematurely from EL instructional programs, but also because they do not have teachers who continue to develop language while teaching content. 1 JA 333 (Echevarria Decl.).

The quality and coherence of the instructional program across grade levels greatly impacts students' long-term academic outcomes. ELs cannot meet rigorous academic standards if teaching is incomprehensible to them and no adjustments are made by teachers to help them understand. Further, the students risk remaining classified as ELs their entire educational careers. 1 JA 338 (Echevarria Decl.).

ELs have difficulty in school when program designs, instructional goals, and human and material resources do not match their needs. It is unrealistic to believe that ELs will pick up the sophisticated skills required by state standards simply by sitting in a class. Without appropriate instructional supports and ELD services, ELs do not have meaningful access to their curriculum and instruction. 1 JA 338-39 (Echevarria Decl.).

### **4. The Necessity of Classroom Instructional Services**

Classroom instructional services are necessary for ELs to achieve academic results. ELs

are harmed when they do not receive EL instructional services, including inferior learning and poor grades and testing, assignment to lower-performing tracks and exclusion from accelerated learning tracks, reduced graduation rates and diminished opportunities for higher education, and feelings of isolation, frustration, and disengagement. 1 JA 339 (Echevarria Decl.); 1 JA 319-20 (Gandara Decl., ¶6(a), (b)). Anecdotal evidence from California educators corroborates the fact that classroom instructional services are necessary for ELs. 1 JA 150 (Reyes-Castillo Depo.); 1 JA 167 (Cordova Depo.) (some ELs have struggled in mainstream classes with no SDAIE), 1 JA 164-65 (SDAIE “helps students comprehend better”). ELs who do not receive instructional services may have difficulty maintaining interest in academics and motivation for participation, and end up dropping out altogether. 1 JA 240 (Calderon Depo.); 1 JA 252-53 (Kaplan Depo.); 1 JA 168 (Cordova Depo.). CDE has stated the failure of ELs to receive ELD instruction is a common problem. 1 JA 448.

A teacher’s Crosscultural, Language, and Academic Development (“CLAD”) certification also is not sufficient by itself to meet the needs of ELs. Depending on the situation, CLAD certified teachers may have a basic working knowledge of the issues regarding educating ELs, but certification alone does not guarantee that the teachers actually are providing EL students with appropriate instructional services. Uneven implementation of necessary EL instruction is common in many mainstream classes, and CLAD certification is only a starting point for providing instructional services. It does not guarantee the teacher’s delivery of quality EL instruction. 1 JA 337 (Echevarria Decl.).

Most teachers, particularly novice teachers who lack extensive classroom experience, cannot be expected to fully understand, absorb, and implement advanced teaching practices such as ELD instruction and SDAIE without ongoing support. Even veteran teachers with CLAD certification benefit from continuing professional development focused on how to provide appropriate instructional services to ELs. One study found that more than half of California teachers with 26-50% of their students designated as ELs had either zero or one in-service training session devoted to the instruction of EL students over a period of five years. 1 JA 338 (Echevarria Decl.). Administrators also lack knowledge of appropriate instructional services in order to document the CLAD certified teacher’s efforts. *Id.*

CDE has agreed that possession of the appropriate credential, without more, does not ensure the delivery of instructional services. 3 JA 1868-69 (Ashley Depo.). DOJ also advised CDE that “[t]he mere fact that the ELs had teachers who were authorized to teach ELD does not mean the ELs were receiving ELD instruction.” 1 JA 459. Educators and administrators have similarly testified that assignment to a classroom taught by a credentialed teacher is insufficient to ensure that ELs actually receive appropriate instructional services; the teacher may not even know the student is an EL. 1 JA 264 (Johnson Depo.); 1 JA 279-80 (Mendoza Depo.).

## **5. Whether Non-Instructional Services Qualify as EL Services**

While the parties agree that classroom instructional services are necessary for EL students, they disagree over the significance of non-instructional services.

### **a. Petitioners’ Evidence**

Petitioners present evidence that classroom instructional services for EL students cannot

be replaced by other services.

CDE has repeatedly advised districts: "All EL students must receive ELD instruction until they are reclassified." 1 JA 413 (Instructions for the Spring Language Census). This statement has been included in instructions for completing the Language Census since at least 2007. 3 JA 1866-67.

Academic services, such as after-school tutoring and after-school English language programs, may be helpful supplemental services, but cannot make up for the time lost as students languish all day in a mainstream classroom unable to access the content taught. Other services, such as English language counseling, family counseling, health care, and psychological counseling, are unrelated to academics and do not adequately support EL students' acquisition of academic English and access to the core curriculum. 1 JA 336 (Echevarria Decl.).<sup>6</sup> The professional development of EL teachers is essential for enhancing their knowledge of the appropriate EL instruction, but is not an instructional service and cannot substitute for in-class instructional services. 1 JA 336-37 (Echevarria Decl.).

#### **b. Respondents' Evidence**

Respondents present evidence that EL services are not limited to instructional services.

EL services must be tailored to the individual EL student's needs, and the provision of such services is complex due to each student's different language development levels and needs. 3 JA 1579 (Fajardo Decl.). EL students should be provided appropriate language development services, but non-instructional services may also be appropriate. Non-instructional EL services include after-school tutoring or English language programs, English language counseling, parent literacy, and community services. EL services may also include indirect services such as professional development for teachers who serve EL students or assisting parents in helping their children meet academic goals. 3 JA 1578 (Fajardo Decl.).

Non-instructional service may be the very service necessary to overcome the roadblock preventing the EL student from achieving academically in the core curriculum subjects.<sup>7</sup> There is no dispute that non-instructional supports are not a substitute for instructional services, if instructional services are needed to overcome language barriers and meet the state's academic

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<sup>6</sup>Respondents criticize Petitioners' expert, Jana Echevarria ("Echevarria") as failing to demonstrate (1) that she has any knowledge about the quality or accuracy of Language Census reporting by school districts or effective monitoring techniques for CDE to implement and (2) how use of the Language Census data would be more effective than CDE's current monitoring system.

<sup>7</sup>Elena Fajardo ("Fajardo"), a CDE administrator at its Language Policy and Leadership Office, criticizes Echevarria's opinion for assuming that the English language is always the barrier to an EL student's access to the core curriculum. 2 JA 1579 (Fajardo Decl.). She contends that a focus on instructional service diverts from the fact that supplemental services, professional development of EL teachers, and CLAD certification of teachers also are all important components of successful EL programs. Each of these elements must be reviewed to determine district compliance with federal and State requirements for EL services. *Id.*



and content standards. But, depending on the English language proficiency of the student, the appropriate focus may no longer be on English language development, but rather on achieving grade level academic and content proficiency. In such instances, a focused after-school tutoring program for the EL student on that particular subject may be the appropriate service. *Id.*

## **6. The Language Census**

Since 1979, the State has required its school districts to collect and report district- and school-level information about ELs on a Language Census Form ("Language Census" or the "Census Form"), including whether instructional services are provided. *See, e.g.*, 1 JA 387. The SPI described the purpose of this data collection as "provid[ing] local educational agencies and governmental organizations with critical information on which to base their funding, research, program planning, and policy decisions" and "giv[ing] the public valuable facts about English learners and instruction in California's public schools." 1 JA 466.

The Language Census was established in response to California's Chacone-Moscone Bilingual-Bicultural Education Act of 1976 ("Chacone-Moscone"). Education Code section 52164 census data be collected used to plan the number of bilingual classrooms for the following school year. From its inception, the purpose of this collection was not a compliance tool to monitor the instructional placement of each EL student. Rather, the purpose was to plan for the number of bilingual classrooms and teachers needed for the following school year. Education Code section 52163 defined the various bilingual programs that were required. Over time, the categories on the census were defined to allow school districts discretion in categorizing the instructional services of their EL students. 2 JA 1675 (Ashley Decl.).

Chacone-Moscone sunset in 1987 and Proposition 227 was passed in 1998, virtually eliminating bilingual education in California. With the sunset of bilingual education, the educational setting for EL students changed to the current system of Structured English Immersion and English language mainstream. The Language Census categories were modified to reflect these changes. The data in the Language Census provides, in part, information about the instructional settings of EL students within a district, whether certain courses are taught by certificated teachers as well as general data for funding. 2 JA 1675 (Ashley Decl.). The categories were designed to allow school districts discretion in categorizing the instructional services of their EL students. 2 JA 1675 (Ashley Decl.).

The Language Census Form states that the total school-wide counts of ELs will be collected in Part. 2 ("English Learners' Instructional Information"). 1 JA 396. In Part 2, Section A ("Structured English Immersion Instructional Setting"), ELs are reported in an English immersion instructional setting for the purpose of learning the language. 1 JA 395, 397. In Section B ("English Learners Receiving Instructional Services"), districts specify the types of mandated instructional services the ELs receive. 1 JA 397. The form provides six options for instructional services: ELD, ELD and SDAIE, ELD and SDAIE with Primary Language Support, ELD and Academic Subjects Through Primary Language Instruction, and Other Instructional Services. *Id.* "Other Instructional Services" should be used only for ELs "receiving some type of instructional service that, while specifically designed for ELs, is an instructional service that does **not** correspond exactly to the program descriptions [for the other four categories of instructional services]." *Id.*, (emphasis in original). School districts could also report ELs in a sixth category:

“ELs not Receiving any EL Instructional Services.” CDE instructed school districts to: “count all the remaining ELs who have not been counted previously in rows 4-8. These ELs are not receiving any specialized instructional services. . . .” 1 JA 398. School districts were required to certify that the data submitted are correct. 3 JA 1863 (Ashley Depo.).

**7. The Language Census Was Not Designed, and CDE Did Not Use It, to Monitor EL Services**

The Language Census was not designed to monitor district compliance with federal and state obligations to EL students, or to provide a comprehensive picture of the English language instructional services provided by a district to EL students. Prior to CALPADS (*post*), the Language Census simply was one mechanism used by CDE’s Educational Data Management Division to collect data from school districts. 2 JA 1475 (Kazanis Decl.).<sup>8</sup> The Language Census was a self-reported data collection, and the authorizing statute never required that it be used to monitor whether EL students were receiving instructional services. 2 JA 1675 (Ashley Decl.). CDE also was not required to, and did not, report the Language Census data to the federal government. 2 JA 1578 (Ashley Decl.).<sup>9</sup>

Because it was not designed for this purpose, the Language Census did not provide a comprehensive or accurate picture of the services being provided to EL students. 2 JA 1475 (Kazanis Decl.); 2 JA 1577 (Fajardo Decl.). The complex history of the Language Census and its different forms over time also may account for the inaccuracies. 2 JA 1577 (Fajardo Decl.). Districts have reported that the data provided in the Language Census frequently contained errors caused by data entry problems, confusion regarding instructions, and other human errors. *See* 2 JA 1476-78 (Kazanis Decl.).

More important, the Language Census did not necessarily reflect the actual EL instructional services provided by a district. 2 JA 1577 (Fajardo Decl.), 1676. For example, the Language Census may have indicated that 12 students were not receiving EL instructional services, but a review at the district then showed that SDAIE teaching strategies were being employed in all of the EL student’s classrooms or that the class used a pull-out method at the elementary level where an EL student met with a different teacher to work on ELD. The teacher had simply not identified the teaching strategy as an EL service because it was provided to all of the students in that classroom. *Id.* Some districts, including some notorious for failing to even submit certain data, reported that no EL students were receiving instructional services. However, a review through the monitoring process demonstrated that the EL students in fact were receiving

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<sup>8</sup>CDE Director of Educational Data Management Cindy Kazanis (“Kazanis”) supervises the collection of student information. 2 JA 1475 (Kazanis Decl.). Petitioners criticize Kansanis because she is an administrator with no background as an educator. 1 JA 38 (Kazanis Depo.). She did not know the definitions of “instructional services”, CLAD, ELD, or SDAIE. 1 JA 38-39, 55 (Kazanis Depo.). She also only spent five minutes reviewing the Language Census Form prior to this litigation. 1 JA 39-40 (Kazanis Depo.).

<sup>9</sup>CDE has provided EL counts to the federal government, but they come from other data and not the Language Census. 2 JA 1859 (Ashley Depo.).

services. The converse also was true: a district reported that all EL students were receiving instructional service but observations showed they were not receiving appropriate services. Id.

The timing of census data also meant that the Language Census was not an effective source to determine whether a district was providing appropriate EL Services. Traditionally, the Language Census was collected during March and April and was intended to be a snapshot of the EL counts, services and teachers as of March 1. CDE compliance reviews are typically conducted in October through May, and only the Language Census data from the previous school year would have been available to CDE for a compliance review. CDE decided it would be more meaningful to obtain current information from the school district at the time of the actual review. 2 JA 1676-77 (Ashley Decl.).

For these reasons, CDE did not use the Language Census to monitor district compliance with EL service requirements. The Census simply did not provide a comprehensive picture and cannot account for the different services a district was providing to address students' needs related to overcoming language barriers. 2 JA 1577 (Fajardo Decl.). Different definitions and protocols as well as additional resources would have been necessary in order to use this information for monitoring purposes. 2 JA 1578 (Fajardo Decl.).

## **8. CALPADS**

The Language Census was last used in 2011. Education Code section 60900 provided for the development and implementation of a new system, the California Longitudinal Pupil Achievement Data System ("CALPADS"), which completely changed the way this data is collected and reported. 2 JA 1577 (Fajardo Decl.); 2 JA 1870-71 (Ashley Depo.); 2 JA 1485 (Kazanis Decl.). Like the Language Census, CALPADS was not developed with compliance monitoring as one of its intended goals. 2 JA 1678 (Ashley Decl.).

CALPADS was launched in 2009 and began collecting student enrollment data from school districts. Since then, different data collections have been added to the system. In the 2011-12 school year, CALPADS began collecting certain data regarding the instructional settings and services provided to ELs. 2 JA 1677 (Ashley Decl.).

CALPADS data collection for ELs is performed in a different manner than the Language Census Form. Instead of reporting aggregate counts of different types of instructional services and affirmatively representing in which categories students fall, school districts now report individual student-level records in a file that identifies the status of the student as an EL. Districts also submit an electronic file of the courses being taught and an electronic file of the teachers assigned to teach those courses. Instructional settings and/or services are then tagged for the courses. The districts may identify their course anyway they want, but CALPADS asks them to assign one of four EL instructional codes to each course: (1) ELD only, (2) SDAIE only,<sup>10</sup> (3) ELD and SDAIE but not primary language instruction, and (4) primary language instruction with ELD and/or SDAIE. 2 JA 1872-73 (Ashley Depo.), 2 JA 1677 (Ashley Decl.). CALPADS then combines the data for each EL student and automatically determines to which of the four categories an EL student belongs. 2 JA 1874 (Ashley Depo.).

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<sup>10</sup>The category of "SDAIE only" was new. It permits a district to code a course as meeting the definition of SDAIE if a credential teacher was assigned to the class.

The transition to CALPADS has been extremely complicated and work intensive. CALPADS holds an enormous amount of data regarding various demographics, program participation and enrollment data. CALPADS collects data regarding various demographics, program participation and enrollment data so that it can satisfy the requirements set forth in Education Code section 60900. From more than 1000 school districts and more than 600 charter schools, CALPADS now has over 11.4 million student records, 6.2 million student records for currently enrolled students, 300,000 current teacher records, and 800,000 course records. 2 JA 1678 (Ashley Decl.).<sup>11</sup>

#### **9. The Language Census Reports of “No Instructional Services”**

For the 2010-11 school year, CDE publicly stated that out of more than 1.4 million EL students statewide, “a total of 20,318 English learners do not receive any instructional services required for English learners.” 1 JA 443.

CDE’s statement that 20,318 ELs did not receive instructional services was a result of a count of the school districts’ report of “no instructional services” on the Language Census. There are multiple reasons why a school district might report an EL in the “no instructional services” category, and it does not mean the student necessarily was being “denied services.” For example, an EL student may be in the process of being redesignated or reclassified. The Language Census also does not reflect all EL services offered by a school district, only instructional services. The definition of EL services has changed over time, and a school district may report ELs as not receiving instructional services when the EL was still receiving EL services. 2 JA 1676 (Ashley Decl.). The districts also knew the Census information was not used for monitoring compliance issues, and may not have felt it necessary to properly identify its EL instructional services.

Therefore, it is inaccurate to assume or interpret a “not receiving any instructional services” designation on the Language Census as a failure to provide any EL services to EL students in that category. 2 JA 1577 (Fajardo Decl.); 2 JA 1676 (Ashley Decl.);<sup>12</sup>

#### **10. The February 15, 2013 Letter**

On January 23, 2013, the American Civil Liberties Union of Southern California (“ACLU”) sent Respondents a letter asking them to take action to address the Language Census

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<sup>11</sup>With the passage of Assembly Bill 97 in July 2013, Local Control Funding Formula (“LCFF”) became the law. LCFF requires school districts to create new local accountability plans, which may lead to different reporting than the current reporting in CALPADS regarding instructional settings and services provided to ELs. Depending on the plans, census data collected in CALPADS may no longer exist or be applicable in future CALPADS collections. 2 JA 1678 (Ashley Decl.).

<sup>12</sup>Kazanis’ predecessor, Keric Ashley (“Ashley”), is currently Director of CDE’s Analysis, Measurement and Accountability Reporting Division. He did not know whether CDE made any use of Language Census data showing that ELs did not receive instructional services, and was not aware of any effort by CDE to validate any of the data collected from districts. 2 JA 1860-62 (Ashley Depo.).

data showing that at least 20,000 EL students in 251 California school districts were not receiving any EL instructional services. Pet. RJN, Ex. 3.

CDE responded by issuing a press release stating: "School districts -- which are responsible for providing instruction to students and appropriate services to [ELs] -- currently report that more than 98 percent of the state's 1.4 million [ELs] are receiving services" and that "[CDE] and the State Superintendent ha[ve] fulfilled their obligations related to onsite monitoring of English learners." 2 JA 977.

CDE then attempted to gather information as to why 251 school districts had reported EL students in the "not receiving any EL Instructional Services" category of the Language Census for the 2010-11 school year. 2 JA 1475 (Kazanis Decl.).

On February 15, 2013, Kazanis, CDE's Educational Data Management Division Director, sent a letter to the 251 school districts which explained that during 2010-11 the district reported one or more EL students as not receiving any EL instructional services. The purpose of the letter was to identify whether school district's were accurately reporting data regarding instructional services for Els. 2 JA 1478 (Kazanis Decl.). The inquiry was "not a mandatory collection" and the districts did not have to respond. 1 JA 44 (Kazanis Depo.). Instead, it was a snapshot to gauge the general feeling on the issue. 1 JA 51-52 (Kazanis Depo.). The letter did not direct the districts to ensure that all of their EL students receive EL instructional services. Nor did it require the districts to produce evidence that they were providing such services. Instead, Kazanis explained that the CDE "would like" further information on the data to assist in responding to allegations that these students did not receive any instructional services. 1 JA 376; 1 JA 43 (Kazanis Depo.).

### **11. The District Responses**

One hundred and ten (40%) of the 251 school districts responded to Kazanis's letter to explain why they reported EL students in the "not receiving any EL Instructional Services" category. 1 JA 44 (Kazanis Depo.).<sup>13</sup>

#### **a. Reporting Errors**

The most common district response was that the category was marked erroneously, or that EL students were receiving EL instructional services but did not fall into the categories identified by the Language Census. 2 JA 1476 (Kazanis Decl.).

Anderson Union High School District ("Anderson") responded that the data it reported was incorrect and the information should have been marked as "other" because EL students receive Structured English Immersion in the regular classroom from CLAD-certified teachers. Id.

Whittier Union High School District ("Whittier") responded that the 51 EL students reported as not receiving EL instruction was inaccurate. The students had not been coded correctly and should have been "ELs receiving ELD and Specially Designated Instruction in English (SDAIE)" because all of its EL students receive services. Id.

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<sup>13</sup>CDE did not keep track of which districts failed to respond. 1 JA 42-43 (Kazanis Depo.).

Lompoc School District ("Lompoc") reported that the majority of EL students reported as not receiving EL services were high school students at a CELDT level 4 or 5. One student was homebound and another chose independent study and no teacher was available to provide services at home. The district could not obtain data on other students, but all EL students in 2010-11 received EL services in prior years. EL services do not show up in courses for severely handicapped students, although they are provided. 2 JA 1480 (Kazanis Decl.).

Julian Union School District ("Julian") responded that its report of 14 EL students not receiving instruction was inaccurate. All students receive instruction, are carefully tracked through assessments, all teachers in the district are properly credentialed to instruct EL students, and the CELDT each year confirms students are making progress. 2 JA 1477 (Kazanis Decl.).

Lowell Joint School District ("Lowell") responded that the data entered in 2010-11 was inaccurate, and all English language learners received services, primarily ELD and SDAIE. The district's student information system did not "tag" the students correctly, resulting in inaccurate data entry. Id.

Torrance Unified School District ("Torrance") responded that two of the seven students reported as not receiving services were in special education in a non-public school -- one did not require staff approval and the other was not an EL student. The remaining five students enrolled in the district's schools and either refused to attend school, did not have a class schedule because they were graduating, were taking electives only, or were in a "Special Day class." 2 JA 1477 (Kazanis Decl.).

Windsor Unified School District ("Windsor") responded that the entry of 95 students not receiving EL services was due to coding errors. 3 JA 1478 (Kazanis Decl.).

Newark Unified School District ("Newark") reported that it provides EL services to all ELs, but occasionally makes mistakes in student placements. 2 JA 1479 (Kazanis Decl.); 1 JA 60 (Kazanis Depo.).

Blochman Union School District ("Blochman") reported that the four students indicated on the 2010-11 report were classified as EL students, but were performing well enough in the regular classroom so as not to require any additional EL Services. 2 JA 1480 (Kazanis Decl.); 1 JA 83 (Kazanis Depo.).

West Sonoma County Union High School District ("West Sonoma") explained that one EL student not receiving EL instruction was a transfer who was not receiving services in his prior school. This student scored highly on the CELDT and was reclassified in 2012. 1 JA 85.

McKinleyville Union School District ("McKinleyville") reported that the three students identified as not receiving EL services were erroneously designated as EL. 3 JA 1481 (Kazanis Decl.); 1 JA 95 (Kazanis Depo.).

Santa Cruz City Schools ("Santa Cruz") reported that 77 ELs did not receive EL instructional services, and it was difficult to reconstruct the reasons why. Some of the ELs were foreign exchange students enrolled in the district for a short period and may not have been "real" EL students. It was also possible that many of the ELs identified were special needs students. Id.; 1 JA 98 (Kazanis Depo.).

Lakeport Unified School District ("Lakeport") reported that one EL student was not receiving services, and that student had been inadvertently missed when scheduling EL students into support classes. That student has been monitored and she was reclassified as English

proficient in April 2011. 3 JA 1481 (Kazanis Decl.); 1 JA 101 (Kazanis Depo.).

Santa Monica-Malibu Unified School Districts ("Santa Monica") reported 17 ELs as not receiving any EL instructional services. It explained that ELs in elementary school are placed in Sheltered English Immersion classrooms, and at the secondary level are placed in ELD courses with certified teachers. A few EL students were placed with teachers without CLAD credentials. 3 JA 1482 (Kazanis Decl.); 1 JA 104 (Kazanis Depo.).

**b. EL Students Assigned to a Certified Teacher**

Multiple school districts asserted that their report of no instructional services was erroneous because all of their EL students had been assigned to classes with a teacher who had a CLAD credential and was trained in ELD and SDAIE techniques. These districts claimed that, because the teacher had the appropriate credential, the students necessarily were receiving appropriate instructional services. *See, e.g.,* 1 JA 80 (Anderson); 1 JA 87 (Merced Union High School District); 1 JA 90 (Kern Union High School).

CDE had consistently rejected this assertion, explaining that "[d]istricts often incorrectly report all of their teachers who hold, [sic] an authorization listed above on the Language Census, whether or not the teachers provide EL instruction." *See, e.g.,* 1 JA 440 ("Only report the authorized teachers who are providing ELD to ELs.... Do not report teachers who are authorized to provide ELD if they are not actually providing ELD services to ELs."); 1 JA 0440 (Common Misunderstandings Associated With Reporting Language Census Data: "Districts often incorrectly report teachers who have EL students in their class, even if they do not provide direct EL instruction to the students.").

**c. Invalid Explanations**

Some the explanations were legally unsupported. Several districts explained that the EL students denied services were ELs with special education needs. 1 JA 79 (Charter Oak School District); 1 JA 93 (Sierra Sands Unified School District); 1 JA 99-100 (Central Unified School District). Some disclaimed responsibility because EL students were denied services because they were in alternative or charter settings. 1 JA 82 (Torrance); 1 JA 83 (Stockton Unified); 1 JA 84 (Vallejo City Unified School District). Hughson School District ("Hughson") "noted that all students that should be receiving [ELD] in the high school were not." 1 JA 69, 71 (Kazanis Depo.).<sup>14</sup>

At least without more information, these explanations were legally insufficient. Neither the EEOA nor the state constitution exempts special education students or students attending charter schools and alternative schools from the right to equal educational opportunity.

**d. No Follow-Up**

CDE reviewed the responses, which showed confusion amongst districts with respect to the "not receiving instructional services" category. None of the districts stated that they failed to

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<sup>14</sup> Another district was unsure whether children had received services, and had questions to which CDE never responded. 1 JA 79 (Vallecito Union School District); 1 JA 63-64 (Kazanis Depo.).

provide services to ELs, and CDE concluded that it should not use the data as a monitoring tool. 2 JA 1476 (Kazanis Decl.).

CDE did not follow up with the districts that did respond, or those that failed to respond. 1 JA 45-46 (Kazanis Depo.). Respondents had no authority to compel compliance by districts that did not respond and the data was collected only to get information as to whether districts were accurately reporting their data; CDE wanted to determine whether districts were reporting data consistently with Petitioners' argument. CDE concluded that Petitioners were wrong, and districts reporting EL students in the "not receiving instructional services" category were in fact providing EL services to their students. 3 JA 1479, 1482 (Kazanis Decl.).

#### **11. The February 27, 2013 Letter**

After the transition to CALPADS in 2010-11, CDE ceased collecting and publishing the results of the Language Census. 2 JA 1677 (Ashley Decl.). CALPADS does not have a collection category for "no instructional services." However, CALPADS data can be analyzed in a way that reports whether EL students are receiving services because it automatically performs the counts for this category based on the district's failure to assign EL services to a class, the failure to assign a class to an EL student, and/or the failure to fill out adequate information with respect to the teacher assigned to a class. 2 JA 1486 (Kazanis Decl.).

The districts' 2011-12 and Fall 2012-13 CALPADS submissions showed an unexpected increase in EL students certified as receiving "no EL education services." *See, e.g.*, 3 JA 2092-93 (Kazanis Depo.). *See, e.g.*, 3 JA 2178 (Grossmont Union High School District: 1006 students); 3 JA 2180 (Inglewood Unified School District: 1006 students); 3 JA 2181 (Kern Union High School District: 344 students); 3 JA 2200 (LAUSD: 771 students); 3 JA 2206 San Francisco Unified School District: 489 students with "no services"). It was clear to CDE that the districts did not understand the major change in the transition to CALPADS, and the reported data was erroneous and misleading. 3 JA 1878-79 (Ashley Depo.). As a result, Kazanis was asked to contact the school districts to ensure that they were accurately reporting their EL education services data and properly entering information into CALPADS. 2 JA 1486 (Kazanis Decl.).

On February 27, 2013, Kazanis sent a letter to all school districts regarding their 2011-12 CALPADS submissions.<sup>15</sup> 2 JA 1044-45. The letter noted that districts are required to provide services for ELs until reclassified to English proficient, EL services were now being reported through CALPADS, and the services should be reported even if provided to students in a mainstream environment. 2 JA 1044. The letter then stated: "A review of the initial data certified to date shows that many [districts] have certified **"no EL education services"** for all or a large proportion of their EL students. This unexpected change or increase in the certified data suggests that some LEAs may not have reported this data accurately." 2 JA 1044 (emphasis in original). The letter recommended that districts review their CALPADS reports, noted that many districts determine EL service based on teacher certification and stated that it is critical that the district indicate the code for each course section as CALPADS counts any EL student in such

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<sup>15</sup>CDE has not published the 2011-12 EL student data submitted by the districts. 3 JA 1876-79 (Ashley Depo.).



courses as receiving EL services. 2 JA 1045.

### **12. The Elimination of the “No EL Services” Class Code**

In July 2013, CDE eliminated the districts’ option in CALPADS to report affirmatively that an EL student is receiving no services. 2 JA 1047. In a memorandum to districts, CDE’s CALPADS Project Team stated that it was adding a new code<sup>16</sup> which would be implemented in a Release Update. *Id.* In the Release Update, CDE eliminated the capacity of school districts to affirmatively code a class as providing no EL instructional services. 2 JA 1050 (“Modify code set ‘Education Service English Learner’ to: -Delete Code 5 (No Services)”); 3 JA 1881-82 (Ashley Depo.).

As a result, there is no active indicator in CALPADS that “no EL services” have been provided in a particular class. 3 JA 1880 (Ashley Depo.). If a school district administrator believes that a course provides no EL instructional services, he or she has no way to directly report that course-level information.

### **13. The Report by Specific Districts of EL Students “Not Receiving Services”**

Apart from the district responses to the February 15, 2013 letter, the parties present evidence with respect to the report by certain school districts that EL students were “not receiving EL services.”<sup>17</sup>

#### **a. Kern**

For over ten years, up to and including the 2010-11 school year, Kern Union High School District (“Kern”) completed the Language Census through collecting data from the English Language Coordinator at each school site and sending it to Kern’s District Program Specialist for submission to CDE. 3 JA 1465 (Hoffman Decl.). Although instructions were provided on how to complete the Language Census, not all of Kern’s English Language Coordinators interpreted the instructions the same way, and there were inconsistencies in the data reported. For example, some coordinators reported EL students as receiving instructional services only if they were enrolled in a designated ELD classroom. Students receiving SDAIE instruction in a mainstream classroom were marked as “not receiving any EL instructional services.” As another example,

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<sup>16</sup>“Code 6 - Other English Learner Services...defined as ‘The course section is providing some type of instructional service, that, while specifically designed for ELs, is an instructional service that is not narrowly defined in the other English learner services. . . .’” *Id.*

<sup>17</sup>Several teachers and parents from other districts testified that students were denied EL services. *See, e.g.*, 3 JA 2096 (Miller Depo.) (in Salinas, her child “was not in any special class to learn English”), 3 JA 2097 (her son “never attended class designed for ELs); 3 JA 2100-01 (Palmer Depo.)(teacher aware of EL students enrolled at Monte Vista High School who were not enrolled in ELD class), 3 JA 2102-08 (Palmer Depo.) (identifying specific EL students who needed EL instructional services and did not receive them); 3 JA 2217 (Hunter Decl.) (Temecula Valley Unified School District teacher’s EL classes were gradually reduced and then eliminated, and all of his EL students transitioned to regular classes without adequate support).

some schools did not properly identify course codes for classes where SDAIE strategies were provided, resulting in a failure to include those students as receiving EL instructional services. It is therefore inaccurate to assume or interpret a “no instructional services” designation on the Language Census as a failure of Kern to serve its EL students. 2 JA 1465 (Hoffman Decl.).

In the 2011-12 school year, Kern stopped using the Language Census, and started using CALPADS. Beginning with the first year of using CALPADS, the clerk entering the data did not check the appropriate box on the screen that reflected the appropriate credential for any teacher in the district.<sup>18</sup> This error affected the reporting of student data for all 37,000 students in the district, not just EL students. As a result of this error, CALPADS automatically reported EL students in the “not receiving any services” category. 2 JA 1466 (Hoffman Decl.).

Kern received Kazanis’ February 13, 2013 letter asking about EL students listed in the “not receiving EL instructional services” category. Kern reviewed the data and identified students who were not in a specific ELD course but were receiving SDAIE instruction in other courses (math, science, English language arts) and were inaccurately identified in the “not receiving services” category. In addition, students in independent study, home study, and retention programs were included as “not receiving services” because they were not assigned individual courses. Special education students also were included in the “no services” category because they had no specific EL courses assigned to them. Instead, special education students receive appropriate services as identified in their individual educational plans, including EL services. 2 JA 1467 (Hoffman Decl.).<sup>19</sup>

#### **b. Grossmont**

the 2010-11 school year report by Grossmont Union High School District (“Grossmont”) stated that 1389 EL students “received no English language instructional services.” Grossmont’s person most knowledgeable, Theresa Kemper (“Kemper”), testified that it was impossible for an EL student not to receive EL instructional services for half a school year (2 JA 1358) and the Language Census statement to the contrary was inaccurate. 2 JA 1359. Grossmont mistakenly reported that 1389 EL students were not receiving EL services because they were enrolled in classes that had been incorrectly tagged in the computer system. 2 JA 1351. Where an EL student was enrolled in a class where SDAIE was used that was incorrectly tagged as not offering EL services, then all EL students in the class would appear in the computer system as not receiving instructional services. 2 JA 1351-52. Kemper has never received any report from a

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<sup>18</sup>Since 2004, all teachers in Kern with EL students have been appropriately certified and trained to teach EL students. No EL students have been placed in a classroom of a non-certified teacher. 3 JA 1465 (Hoffman Decl.).

<sup>19</sup>Petitioners criticize this evidence from Kern’s EL program coordinator (2 JA 1465) because it was (1) based on conversations with only three out of 18 coordinators (*see* 3 JA 2140), (2) based on the flawed assumption that merely assigning a credentialed teacher is sufficient to ensure appropriate instructional services (2 JA 1466), and (3) not supported by verification that ELs marked as not receiving instructional services were in fact receiving such services. *See* 3 JA 2141-45.

student or parent that an EL student was denied EL services. JA 1353. Many EL services are provided, including: curriculum services, instructional services, translation services, and parent/family services. 2 JA 1302-03. Based on student performance, Kemper believes the EL services offered at Grossmont are working. JA 1338.<sup>20</sup>

**c. Oxnard**

Oxnard Union High School District (“Oxnard”) reported 588 ELs as not receiving any instructional services in the 2010-11 school year. 2 JA 980.<sup>21</sup> In the previous 15 years, Oxnard reported hundreds of LE students as not receiving services. 2 JA 979-1003.

Petitioner Dunlop retired in 2012 from his job as Oxnard’s Director of Compensatory Education. 1 JA 219-20 (Dunlop Depo.). As part of his duties, Dunlop administered Oxnard’s EL programs. 1 JA 221-22. According to Dunlop, Oxnard’s report of EL students without services on the Language Census Forms were based in part on the fact that ELs at the intermediate level did not receive EL language instructional services. 1 JA 223-25. Oxnard had specific ELD courses which would show on the EL students record. 3 JA 2012 (Dunlop Depo.). Oxnard also had a number of courses designated as SDAIE. 3 JA 2013 (Dunlop Depo.). If a student was in an SDAIE class, the title of the class includes “SDAIE.” 3 JA 2014 (Dunlop Depo.). SDAIE is not provided in mainstream classes. 2 JA 1666 (Dunlop Depo.). Students at the intermediate level in a mainstream classroom received instruction at a native English speaker level, and SDAIE was not provided. 1 JA 223, 225. EL students were placed in mainstream classes if they were reasonably fluent in English or if their parents requested it. 1 JA 225. Some children not reasonably fluent in English also were placed in mainstream classes. *Id.*

Other Oxnard administrators charged with collecting EL instruction data for the Census Form agreed with Dunlop. They observed students who were not proficient in English placed in mainstream classrooms where appropriate SDAIE instruction was not provided. While those teachers may be credentialed to provide SDAIE strategies, the concern is that they were not actually provided SDAIE. 1 JA 263 (Johnson Depo.). Oxnard was not always able to provide SDAIE in an EL-friendly teacher’s class (1 JA 166 (Cordova Depo.)), and long-term placement of EL students in mainstream classrooms instead of dedicated SDAIE courses resulted in limited student growth by any measure. 1 JA 152 (Reyes-Castillo Depo.).

Oxnard’s Assistant Superintendent Gregory O’Brien (“O’Brien”) criticizes Dunlop as a retired teacher who has no personal knowledge whether EL students were denied EL services and who misunderstands the Language Census data. 2 JA 1584 (O’Brien Decl.). In 2008, Oxnard was identified by CDE’s monitoring program as failing to make adequate yearly progress on compliance with Title III regulations. *Id.* For over ten years, Dunlop directed the completion of Oxnard’s Language Census. Although instructions were provided on how to complete the

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<sup>20</sup>Petitioners criticize Kemper’s testimony for her lack of personal knowledge of the data collecting operations (3 JA 2120), and for a flawed assumption that assigning a credentialed teacher is sufficient to ensure appropriate instructional services. 3 JA 2121.

<sup>21</sup>Oxnard apparently did not respond to Kazanis’s February 15, 2013 inquiry regarding reports of students not receiving instructional services. *See* 1 JA 59-60 (Kazanis Depo.).

Census Form, Dunlop made his own decisions on what instructional services EL students were receiving.

Dunlop incorrectly thought that if a class was not labeled as ELD or SDAIE, then EL instructional services were not being provided in that class. Contrary to Dunlop's understanding, Oxnard's Master Plan permits different students in a class to be given different instructional options. For example, a classroom may provide a mainstream English program of instruction and still provide ELs in the class with a program of Structured English Immersion. 2 JA 1585 (O'Brien Decl.). As a result, Dunlop was wrongly reporting on the Language Census that EL students were receiving instructional services only if the students were enrolled in a class with ELD or SDAIE in the title. Students who received ELD and/or SDAIE instruction in their classes incorrectly were marked as "not receiving any EL instructional services." *Id.*

Due largely to Dunlop's error, Oxnard did not properly fill out the Language Census Form. It is inaccurate to assume or interpret a "no instructional services" designation on the Language Census as a failure of Oxnard to serve its EL students. *Id.* Since 2004, over 99.5% of Oxnard's teachers with EL students are CLAD certified. Since 2011, every attendance roster has noted whether a student is an EL student. Under CALPADS, Oxnard no longer identifies a student as not receiving EL instruction, but if EL services are not attached to a particular course then CALPADS would identify the students in that class as not receiving EL services. 2 JA 1586 (O'Brien Decl.).

In reply, Dunlop states that O'Brien was not present when Oxnard collected the Language Census data, and it is not accurate to conclude that he (Dunlop) merely reported students enrolled with SDAIE or ELD in the course title. 3 JA 2233 (Dunlop Supp. Decl.). His methodology included an evaluation of EL performance, including course titles, graduation rates, and classroom visits to confirm whether ELs actually were receiving appropriate instruction. 3 JA 2234. His observations confirmed that the course title is an appropriate method to verify that ELs actually were receiving EL instruction. 3 JA 2235. While Oxnard's Master Plan permits EL instruction in a mainstream program, some EL students in a mainstream program did not receive EL instructional services. 3 JA 2234. Oxnard did not over-report the number of EL students not receiving services. Indeed, to do so would not have reflected well on the district. *Id.* While 99.5% of Oxnard's teachers with EL students were CLAD-certified, that fact did not ensure the students actually received EL instruction. 3 JA 2235. Mainstream teachers sometimes were unable to identify EL students at all until their CELDT scores were released at the end of January each year, and could not have provided services until then. 3 JA 2235-36. Thus, a report that all teachers provided EL instruction to EL students would have been a lie. 3 JA 2236.

#### **d. Compton**

Compton Unified School District ("Compton") reported having 1697 EL students that did not receive instructional services in the 2010-11 school year. 2 JA 1007. Compton also reported hundreds of students not receiving instructional services annually since the 1995-96 school year. 2 JA 1005-42.

Lidia Mendoza ("Mendoza") taught ELD for ten years in Compton. 1 JA 275-76 (Mendoza Depo.). According to Mendoza, some EL students spend weeks, even entire years, without instructional services required by law. 1 JA 285 (Mendoza Decl.) She recently examined

the class schedules of EL students, many of whom she previously taught, and found that 49 were not enrolled in a class where they would receive instructional services. 1 JA 277-78. This occurred partly because Compton's master schedule for students courses is "messed up" and the EL students can be assigned to an ELD class twelve weeks into the school year. 1 JA 285 (Mendoza Decl.). Compton has "no system to ensure that all English learner students get ELD from the beginning of the school year." 1 JA 287 (Mendoza Decl.).

EL students, including Petitioner students, received "NAs" on their report cards for ELD (as opposed to letter grades), which meant that they had not received that ELD service. 1 JA 294-95 (E.A. Depo.); 1 JA 304-10 (A.R. Depo.). When Petitioner E.A. asked why her fifth grade daughter D.J. received "NAs" on her report card, the teacher admitted that she "did not have [an EL] class to give to [D.J.]." 1 JA 295-96 ((E.A. Depo.).

CDE's Federal Program Monitoring Division also found after onsite observations that EL students at Compton's Whaley Middle School, Davis Middle School and Compton High School did not receive instructional services as required by law. 1 JA 209.<sup>22</sup>

Ramon Zavala ("Zavala"), Compton's director of EL, disagrees with Mendoza. In January 2013, Zavala heard an allegation that school districts were failing to provide EL services and discovered Compton's 2010-11 report that 1697 EL students had not received EL services. This prompted Zavala to review the submitted data and the class schedules of those 1697 EL students. He found that each of the 1697 students was actually receiving EL instructional services because he or she was enrolled in an ELD class and/or a class in which the teacher was using SDAIE strategies. 2 JA 1682-83.<sup>23</sup> Zavala and a subordinate subsequently learned that the reason CALPADS showed 1697 EL students as not receiving services was due to a glitch in inputting data which prevented the software program from showing that the 1697 students actually were enrolled in ELD classes and/or SDAIE. 2 JA 1683 (Zavala Decl.).

Petitioners criticize Zavala's opinion because he based it on a review of class rosters (1 JA 183-84 ((Zavala Depo.)), but was unable to locate the rosters which he reviewed. 1 JA 194-95. He also only checked the rosters from the 2010-11 school year and did not investigate why Compton had been reporting ELs as not receiving services since 1995-96. 1 JA 180-81.

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<sup>22</sup>CDE does not keep track of school sites visited, assuming that non-compliance as to the delivery of legally required services at one school in a district may be presumed to occur at all schools in the district. 1 JA 36-37 (Kazanis Depo.).

<sup>23</sup>Compton is governed by a master plan for EL students. Pursuant to the master plan, Compton monitors the progress of all EL students and provides ELD classes, English language arts ("ELA") classes, and core content courses with SDAIE strategies for all EL students. An ELA class differs from an ELD class in that ELA comprehensively addresses the structures of speaking, reading, and writing and ELD engages students with discourse to acquire listening, speaking, reading, and writing and the standards are aligned to the ELA standards. Despite these differences, an ELA class is an appropriate English language service for EL students because teachers are required to hold a CLAD certificate to authorize them to instruct ELs. 2 JA 1683-84 (Zavala Decl.).

#### **14. CDE's Monitoring Process**

CDE has a long-standing process for monitoring district compliance with legal requirements for providing EL services. 2 JA 1487 (Kazanis Decl.). CDE's Language Policy and Leadership Office ("LPLO") supervises Title III compliance. Districts are expected to comply with federal and State requirements for educating EL students by implementing comprehensive programs that provide services to overcome language barriers and provide access to core curriculum so ELs develop proficiency in English and meet the same academic expectations of non-EL students. Title III provides supplemental funding to school districts to implement programs serving EL students, and federal law allows districts great latitude in the design of these services. LPLO is responsible for the monitoring and oversight of districts to ensure their compliance with federal and State requirements. 2 JA 1573 (Fajardo Decl.).

In 2009, CDE revised its monitoring process and implemented Federal Program Monitoring ("FPM").<sup>24</sup> FPM evaluates school districts through onsite and online reviews. LPLO staff are tasked with determining whether a district selected for review through the FPM process is in compliance with EL requirements. 2 JA 1574 (Fajardo Decl.). LPLO conducts the review through a combination of data and document review and on-site visits. Districts are assigned to one of four cycles: A, B, C, or D. Each year, CDE analyzes data for all districts in two of the four cycles. Districts may be selected for an on-site or online monitoring every two years. Several factors, including compliance history, academic achievement, program size, and fiscal analysis are considered in identifying a district for review. Several districts are also randomly selected each year for monitoring. Approximately 60 districts are selected for online monitoring and 60 districts are selected for on-site reviews each year. 2 JA 1488 (Kazanis Decl.).

Regional Team Leaders coordinate the on-site and online monitoring of a district using Program Instruments, which are developed and reviewed by LPLO on an annual basis and change from year to year to respond to changes in federal or state law. 3 JA 1487 (Kazanis Decl.). The Program Instrument reviews not only a district's EL instructional services and settings, but also obligations to EL students in a much broader context. 2 JA 1487 (Kazanis Decl.).

An FPM online review consists of data and document review of the categorical programs only. 2 JA 1488 (Kazanis Decl.). FPM on-site reviews consist of data and document review, stakeholders' interviews, and classroom observations of categorical programs administered by districts. 2 JA 1488 (Kazanis Decl.). Depending on the size of the district, on-site reviews typically last between three and five days and visit between one and three school sites. Prior to the review cycle, programs conduct training for district staff on the program instruments. In addition, throughout the review process, program monitors provide districts compliance assistance to ensure that a district understands what it must do to meet legal requirements and the process for resolving findings. Id.; 2 JA 1574 (Fajardo Decl.).

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<sup>24</sup>CDE previously monitored district compliance through the English Learner Accountability Unit ("ELAU"). 2 JA 1576 (Fajardo Decl.). ELAU did not use Language Census data to determine whether a district was in compliance with federal and state requirements related to EL students because it did not provide a comprehensive picture of EL services and could not account for the different services provided by a district to address EL students' needs. 2 JA 1577 (Fajardo Decl.).

FPM also uses the California Accountability and Improvement System ("CAIS"), a web application that gives districts and CDE a common site for transmitting documents for monitoring such as district plans, and evidence of compliance. 3 JA 1574 (Fajardo Decl.). CAIS was designed to enhance and streamline the FPM process by providing tools for storage and retrieval of district documents as well as electronic communication specific to compliance monitoring. CATS provides an opportunity for effective monitoring and targeted technical assistance through an exchange of information between CDE and the districts. Districts are monitored to ensure that they meet fiscal and program requirements of federal categorical programs and mandated areas of state responsibility and funding. *Id.*

LPLO staff also engage in regular communication with districts and county offices of education through monthly meetings in which monitoring is a central theme. LPLO hosts quarterly meetings with county office coordinators where federal and state requirements are addressed and the information is disseminated to districts directly. For the past 13 years, an annual Title III Accountability Institute for English Learners, Immigrant, and Migrant Students has been held to provide district administrators with information from researchers and CDE office staff on legal requirements and best practices for EL students. 2 JA 1574 (Fajardo Decl.).

CDE also monitors school districts through accountability measures. Title III requires each state establish English language proficiency standards, conduct an annual assessment of English proficiency, define two measurable achievement objectives ("AMAOs") for increasing the percentage of EL students making progress in attaining English proficiency, include a third AMAO relating to meeting EL academic achievement progress at the district level, and hold Title III-funded districts accountable for meeting the three AMAOs. The AMAOs are performance objectives that the districts must meet each year for ELs, and English language proficiency AMAOs in California are based on the CELDT. The third academic achievement AMAO is based on data from other tests. There are progressive levels of consequences or sanctions for districts which do not meet the three AMAOs in any year. 2 JA 1575 (Fajardo Decl.). Pursuant to agreement with CDE, the various county offices of education monitor district improvement, provide technical assistance, and instruct on protocols to verifying implementation of plans and practices. 2 JA 1576 (Fajardo Decl.).

In the event a FPM review finds a district to be out of compliance with EL service requirements, LPLO issues a Notification of Findings ("NOF") informing the district of the steps it must take to resolve the item within 45 calendar days. If the district is unable to cure the failures within 45 days, it must explain why and propose a date by which it expects to resolve the issues. That date cannot exceed 225 calendar days from the review. LPLO staff assist the district in timely resolving the matter. 3 JA 1488-89 (Kazanis Decl.).<sup>25</sup>

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<sup>25</sup>Fajardo, an administrator at LPLO, opines that Petitioner's expert, Echevarria, actually supports the use of FPM. Echevarria opines that professional development is essential for enhancing teachers' understanding of appropriate EL student instruction, and professional development is only effective when teachers actually implement what they learn. According to Fajardo, Echevarria's opinion supports the FPM process of on-site and document review to ensure district compliance with federal and State requirements. 2 JA 1579 (Fajardo Decl.). Similarly, Echevarria's opinion that CLAD certification is only a starting point for instructional

In addition to FPM, Respondents provide a Uniform Complaint Process (“UCP”) for students and parents to report district violations of federal or state law, including a failure to provide EL services. 5 Cal. Code Regs. §4600 *et. seq.* Districts must notify parents, students, and other interested parties about the UCP and information about it is publicly available on the CDE website. 2 JA 1124-29.<sup>26</sup>

Petitioners do not challenge the sufficiency of the FPM, contending that CDE simply ignored the Language Census data in determining EL services compliance. *See* 2 JA 1577 (Fajardo Decl.) (stating that Language Census data is “not used to determine whether the LEA was in compliance with federal and state requirements related to EL students”). Petitioners also suggest that the FPM’s design, in which only 60 districts are selected for on-site review out of over 1000 districts and 10,000 schools, provides a reason why it may have failed to unearth the denial of EL services. 3 JA 2077-78 (Ashley Depo.) (there are “schools that may never be the subject of an on-site interview in our lifetimes”).

### **E. Analysis**

Petitioners seek a writ of mandate directing Respondents to perform ministerial acts required by law to: (1) cease doing nothing in response to reports from districts that nothing has been done to serve EL students; and (2) establish policies and procedures to effectively ensure that all EL students in California public schools receive required English language instructional services. Petitioners also seek injunctive relief enjoining Respondents from permitting its school districts to deny EL instruction to EL students, and declaratory relief that Respondents’ conduct has violated the law. The court must decide whether there is credible evidence that EL students are not receiving instructional services based on which Respondents have a duty to take some action.

#### **1. Standing**

Petitioners are three public school students, their mothers, and a retired public school teacher (Dunlop). Respondents contend that Petitioners lack standing to bring this action.<sup>27</sup>

Standing is a “threshold,” jurisdictional issue that must be addressed before addressing the merits of a petitioner’s claims. Blumhorst v. Jewish Family Services of Los Angeles, (2005) 126 Cal.App.4th 993, 1001-4; Schmier v. Superior Court, (2000) 78 Cal.App.4th 703, 707. Standing for a CCP section 1085 writ of mandate generally requires a beneficial interest over and above the general public interest. Mission Hosp. Regional Med. Center v. Shewry, (2009) 168

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services, and does not by itself guarantee actual delivery of appropriate instruction, supports the approach by FPM of on-site and document review. *Id.* Nowhere does Echevarria show that the Language Census would be more effective than FPM monitoring. 2 JA 1580 (Fajardo Decl.).

<sup>26</sup>CDE’s January 23, 2013 press release directs concerned parents to make use of the complaint process to promptly resolve any concerns about their children’s instruction. 2 JA 1131. Petitioners received the press release and did not use the UCP process.

<sup>27</sup>Petitioners respond to the standing issue in a single footnote. *See* Reply at 1-2, n.1.



Cal.App.4th 460, 479. Only parties with standing may pursue a mandamus action. Lindelli v. Town of San Anselmo, (2003) 111 Cal.App.4th 1099. “The party seeking the writ of mandate must sustain the burden of showing he is entitled to it.” Haase v. Diego Community College Dist., (1980) 113 Cal.App.3d 913, 919. A writ will not issue to enforce a technical, abstract or moot right. Braude v. City of Los Angeles, (1990) 226 Cal.App.3d 83, 87. “The petitioner also must show his legal rights are injuriously affected by the action being challenged.” Id. The standard used for determining whether a petitioner seeking a writ of mandate is beneficially interested in the subject matter for purposes of establishing standing is equivalent to the federal “injury in fact” test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent. State Water Resources Control Bd. Cases, (2006) 136 Cal.App.4th 674, 829.

**a. The Student Petitioners**

The FAP implies that the student Petitioners lack “proficiency in English” and lack “oral and written fluency in English” (see FAP, ¶16), and contends that Respondents received reports from districts that instructional services are not being provided and have not met their statutory and constitutional duties.

**i. Petitioner D.J.**

The FAP alleges that D.J. has been designated an EL student “continuously,” she received no language instructional services when she was in first grade, and she is not currently receiving any EL instructional services.

Upon entering the Los Angeles Unified School District as a kindergartner in the fall of 2007, D.J. was given the CELDT exam and scored at an advanced level of English proficiency. 3 JA 2016-18. Based on her CELDT score, D.J. was classified as Initial Fluent English Proficient (“IFEP”). JA 2018. Thus, D.J. was never even designated as an EL student and never required EL instructional services. See 2 JA 1685 (Zavala Decl.) (student designated as IFEP is not an EL and is not required to receive EL services).

Respondents contend that Petitioner D.J.’s grades and test scores illustrate that she has not suffered any harm to her ability to learn or succeed in school. At her deposition, D.J. stated that she spoke English and declined the services of an interpreter. 2 JA 1184. She does well academically, both in her mainstream classrooms at school (2 JA 1185-86, 1191) and on standardized tests. 2 JA 1190. Respondents contend that Petitioner D.J. lacks standing to bring suit. Opp. at 7-8.

Petitioners reply that D.J. has standing because Compton identified her as in the EL program, but denied her EL services. 3 JA 2062, 2064-65, 2069 (E.A. Depo.).

Contrary to Petitioners’ implic argument that D.J. should have been provided EL services, the evidence shows that D.J. was designated IFEP upon entry into kindergarten. D.J.’s mother is simply wrong that D.J. was in the EL program. D.J. did not suffer any injury as result of Respondents’ alleged misconduct and she lacks standing to bring this lawsuit.

**ii. Petitioner A.M.**

The FAP alleges that A.M. has been designated an EL student “continuously” and that she received no language instructional services when she was in fourth grade.

At present, A.M. is not an EL student, having been reclassified by Compton in April 2013 as “fluent English proficient.” 2 JA 1262. Her mother confirmed that A.M. is not now an EL student, and did not know if she received EL services in the fourth grade. JA 1201. A.M.’s progress developing English language skills is illustrated by her CELDT scores, which have risen every year. 2 JA 1260-61.

A.M., who was in sixth grade at the time of her deposition, stated that she spoke English and declined the services of an interpreter. 2 JA 1236-37. A.M. testified that she was an EL student (2 JA 1238-39), she stopped being an EL student sometime in fifth grade (2 JA 1239), she has never had a teacher she could not understand (2 JA 1240), she has never had to repeat a grade (2 JA 1238), she is getting mostly good grades (3 JA 2020), she is an honor student (2 JA 1241-42), she likes to read (2 JA 1243), and the last book she read for school was “Tom Sawyer,” which was in English. 2 JA 1244. She is currently reading a book “Holes” for fun in English. 2 JA 1244-45. She enjoys school other than being bored in the third grade. 2 JA 1247-48.

Respondents argue that A.M.’s deposition testimony, her school records, CELDT scores, reclassification as Fluent English Proficient, and her achievement as an honors student demonstrate that: she has received appropriate EL instructional services. She writes, comprehends, and speaks English well; and neither Respondents nor her schools have injured her by failing to provide appropriate services to develop her English language skills so that she has the same educational opportunities as her peers. A.M. has not been “injuriously affected” by Respondents’ conduct and lacks standing to bring this action. Opp. at 8-9.

Petitioners reply that the Petitioner students do not lack standing simply because they speak English; the range of academic skills in reading and writing required for educational opportunity requires more than that. Petitioner A.M. was an EL student, and EL students require EL instructional services until they are reclassified. Reply at 2, n.1 (citing 3 JA 1931 (Echevarria Decl.)).

This is true, but Petitioner A.M. has not shown any injury because shown she never was denied EL services. The evidence of her reclassification, fluency in English, and good grades suggests that she received appropriate EL services and sustained no injury. Petitioner A.M. lacks standing to sue.

### **iii. Petitioner S.M.**

The FAP alleges that S.M. did not receive EL services for half the school year in the third grade, his English reading, writing, and listening scores dropped that year, and he “is not currently receiving any English language instructional services.” FAP, ¶17.

In her deposition, S.M.’s mother (A.R.) could not verify that S.M. did not receive EL services in third grade because she was not in class all day long. 2 JA 1199-1200. S.M. was in fifth grade at the time of his mother’s deposition, and she could not confirm that he was not then receiving EL services; she thought S.M. was enrolled in an ELD class. 2 JA 1197-98. In a declaration filed in reply, S.M.’s mother states that he was an EL in second and third grade, and

did not receive any EL services for half a year in third grade. 2 JA 2329.<sup>28</sup>

The progress S.M. has made developing English language skills is illustrated by his CELDT scores, which was 540 in 2010, went down to 534 in 2011, and went up to 608 in 2012. 2 JA 1233; 3 JA 2333, 2334.

S.M., who was in fifth grade at the time, chose to have his deposition conducted in English without an interpreter. 2 JA 1207-09. He testified that he speaks English better than Spanish (2 JA 1209), he has never had a teacher he could not understand (2 JA 1211), he has never had to repeat a grade (2 JA 1210, 3 JA 2022), he is getting good grades (2 JA 1211), he enjoys reading books in English (JA 1212-13), and he recently read "The Phantom Tollbooth" in English for school and received a 90 percent on the written test. 2 JA 1214-15.

Respondents contend that S.M.'s testimony, school records (2 JA 1221-33) and rising CELDT scores demonstrate that he writes, comprehends, and speaks English well, and that Respondents' conduct has not injuriously affected him and he lacks standing. Opp. at 9-10.

Petitioners argue in reply that Respondents' argument that the Petitioner students lack standing simply because they speak English misunderstands the range of academic skills in reading and writing required for educational opportunity. Petitioner S.M. is an EL student, and EL students require EL instructional services until they are reclassified. Reply at 2, n.1 (citing 3 JA 1931 (Echevarria Decl.). S.M. is an EL student, and his CELDT scores actually dropped after not receiving services in the third grade. 3 JA 2329-30 (A.R. Decl.), 2333, 2344.

Petitioner S.M. has standing to contend that he suffered injury as result of Respondents' alleged misconduct on the ground that he did not receive EL services.

#### **b. The Adult Petitioners**

Petitioner A.R. has standing for the first four causes of action (violation of EEOA and State constitution) to the same extent as her child, S.M., for injury sustained from the denial of EL services. As her child D.J. lacks standing to raise these claims, so does E.A.

The FAP does not allege any other direct injury for the adult Petitioners Dunlop, A.R., and E.A., raising only a taxpayer claim in the fifth cause of action. Petitioner Dunlop alleges that he resides in California and is taxpayer. FAP, ¶22. Petitioners A.R. and E.A. each allege that they are parents to the student Petitioners and reside and pay taxes in Los Angeles County. *Id.*, ¶¶ 19, 21.

A party may not maintain a cause of action under CCP section 526a ("section 526a") "without first satisfying the fundamental requirement of 'taxpayer' status." Reynolds v. City of Calistoga, (2014) 223 Cal.App.4th 865, 872. A taxpayer plaintiff must establish that he or she is a taxpayer to invoke standing under section 526a. *Id.* at 873.

Dunlop and the parent Petitioners did not discuss their taxpayer standing in the opening brief. At her deposition, A.R. testified that she did not own a home, and was instructed not to answer further questions on property ownership. 2 JA 1195-96. In her deposition, E.A. testified that she pays taxes in Los Angeles County. 2 JA 1179 (E.A. Depo.). All three adult Petitioners

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<sup>28</sup>The declaration of S.M.'s mother does not contradict her deposition testimony because the records corroborate the fact that S.M. was an EL student and that he received a "NA" as a grade which other evidence shows means a lack of EL services in Compton.

objected to requests for admission about payment of “taxes,” income taxes, and property taxes, and expressly denied that they did not pay taxes in California. 2 JA 1372-74, 1406-08, 1440-42. After Respondents raised the standing issue in their opposition, Dunlop provided reply evidence that he paid income and property taxes in 2011 through 2013. 3 JA 2274.

This is inadequate. Petitioners must affirmatively demonstrate taxpayer standing through the payment of property taxes in Los Angeles County. Petitioners A.R. and E.A. utterly fail to do so (E.A.’s testimony that she pays taxes in the County is not sufficiently specific), and they lack taxpayer standing. Petitioner Dunlop may not prove taxpayer standing for the first time in reply.

An action by a taxpayer also must be based upon the unlawful expenditure or waste of public funds by a state or local public official. Stanson v. Mott, (1976) 17 Cal.3d 206, 223 (specific allegations required re: public official authorized illegal or wasteful expenditure of public funds); Lucas v. Santa Maria Public Airport District, (1995) 39 Cal.App.4th 1017, 1026-7 (no taxpayer standing based on public official’s authorized discretionary expenditure of public funds).

It is conceivable that Respondents failure to take action in response to no EL services reports by school districts led to a waste of public funds devoted to EL services. Yet, Petitioners have failed to submit any evidence or argument concerning illegal use or waste of public funds by Respondents. When a party fails to support a point with reasoned argument and citation to authority, the point may be treated as waived. Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784, 85; Solomont v. Polk Development Co., (1966) 245 Cal.App.2d 488 (point made which lacks supporting authority or argument may be deemed to be without foundation and rejected).

Petitioners Dunlop, A.R., and E.A. lack standing to pursue the fifth cause of action for taxpayer relief.

### **c. Public Interest Standing**

Although the court has decided that Petitioners S.M. and A.R. have standing for the first four causes of action (violation of EEOA and State constitution), and the parties do not argue the issue, all Petitioners have public interest standing for those four claims anyway.

California courts have crafted a limited “public interest” exception to the beneficial interest requirement. When “the duty is sharp and the public need weighty, the courts will grant mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced.” McDonald v. Stockton Met. Transit Dist., (1973) 36 Cal.App.3d 436, 440 (citing Board of Social Welfare v. County of Los Angeles, (1945) 27 Cal.2d 98, 100-01).

“[W]here 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.” Save the Plastic Bag Coalition v. City of Manhattan Beach, (2011) 52 Cal.4th 155, 166 (citations and punctuation omitted). “This public right/public duty exception to the requirement of beneficial interest for a writ of mandate 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.” Ibid. (citations and punctuation omitted).

This is referred to as “public interest standing.” *Id.* at 166, 170 (corporation can have public interest standing). Public interest standing promotes the guarantee to citizens of the opportunity of ensuring that government does not impair or defeat a public right. Brown v. Crandall, (2011) 198 Cal.App.4th 1, 14 (citation omitted). The policy underlying the exception may be outweighed in a particular case by competing considerations of a more urgent nature. *Ibid.* If the public interest is “weighty,” that fact can overcome otherwise competing considerations. *Ibid.*

A number of cases have invoked public interest standing on the basis of a public duty. *See, e.g., Common Cause v. Board of Supervisors*, (1989) 49 Cal.3d 432, 437-39 (public interest standing applied to plaintiff seeking to enforce public right to voter outreach program); Green v. Obledo, (1981) 29 Cal.3d 126, 145 (“There can be no question that the proper calculation of AFDC benefits is a matter of public right.”); Venice Town Council v. City of Los Angeles, (1996) 47 Cal.App.4th 1547, 1564-65 (plaintiffs had public interest standing where they were seeking compliance with the Mello Act, which requires affordable housing for low and moderate income persons in the coastal zone); Brown v. Crandall, (2011) 198 Cal.App.4th 1, 14 (public interest standing applied to petitioners challenging the denial of medical benefits to indigent citizens who were not provided an opportunity for administrative review of decision). *Compare Carsten v. Psychology Examining Commission*, (1980) 27 Cal.3d 793 (plaintiff member of board lacked public interest standing to compel her own board to comply with statute).

Respondents’ alleged failure to comply with their duties to EL students is a matter of public duty under the State Constitution and EEOA. The public has a strong interest in ensuring that Respondents follow this duty in ensuring that school districts follow their duty to provide EL services. *See Driving School, supra*, 11 Cal.App.4th at 1519 (school district’s statutory authority to charge high school students tuition for driver training is issue of public duty).

In deciding public interest standing, a court may consider the burden that would otherwise fall on those who would have standing but are ill-prepared to seek review. *See Driving School Assn. v. San Mateo Union High School District*, (“Driving School”) (1992) 11 Cal.App.4th 1513, 1518-19 (citing Board of Social Welfare v. County of Los Angeles, (1945) 27 Cal.2d 98, 100-01). Petitioners have had difficulty obtaining EL students and parents of EL students willing to act as petitioners in a lawsuit against Respondents. Even where willing, these persons often lack the personal resources to retain counsel. It also is difficult for an individual EL student to show that he or she specifically was harmed through the denial of services. Thus, this is a situation where, unless Petitioners have public standing, the issue will be effectively removed from judicial review. *See Driving School, supra*, 11 Cal.App.4th at 1519 (public standing for writ compelling school district to desist charging tuition for drivers education to high school students because students were unlikely to have financial resources or interest in testing district’s statutory authority).

The purpose of the standing requirement is to ensure that the courts will decide actual controversies between parties with a sufficient interest in the matter to press their case with vigor. Brown v. Crandall, supra, 198 Cal.App.4th at 14 (citation omitted). This purpose is satisfied where Petitioners seeks to enforce a statutory and constitutional duty for thousands of EL students. Petitioners have public standing to seek prospective relief.

## **2. Abstention**

Respondents contend that the court should refrain from deciding this case pursuant to the doctrine of judicial abstention.

DOJ's Civil Rights Division "is charged with enforcing the EEOA," 2 JA 1134. Title 20 United States Code section 1706 confirms this obligation, providing in part that the United States Attorney General may institute a civil action on behalf of an individual who is denied an equal educational opportunity. 20 U.S.C. §1706. In or about May 2013, DOJ initiated an investigation into some of the allegations raised in this case. 2 JA 1133-38. Respondents have participated in that investigation, which they contend involves complex issues of agency expertise. *See* 2 JA 1140-60.

When a plaintiff seeks equitable remedies, "courts have the discretion to abstain from employing them." Alvarado v. Selma Convalescent Hosp., ("Alvarado") (2007) 153 Cal.App.4t 1292, 1297. Typically, the abstention doctrine applies where the court should defer to another branch of government's superior ability to resolve a controversy in a lawsuit. "Judicial abstention is appropriate when granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency." *Ibid.* Also, "[c]ourts may abstain when an administrative agency is better equipped to provide an alternative and more effective remedy." *Id.* at 1306.

A court should abstain in favor of an agency where (1) the lawsuit involves determining complex economic policy, which is best handled by the legislature or administrative agency, (2) granting injunctive relief would be unnecessarily burdensome for the trial court to monitor given the availability of more effective means of redress, (3) federal enforcement of the subject law would be more orderly, effectual, and less burdensome to the affected interests, (4) granting the requested relief would require a trial court to assume or interfere with the functions of an administrative agency. *Id.* at 1298. Finally, "[c]ourts may abstain when an administrative agency is better equipped to provide an alternative and more effective remedy." *Id.* at 1306.

Respondents argue that the court should abstain from adjudicating this case because a grant of equitable relief would interfere with DOJ's function of evaluating state compliance with complex federal education laws, a matter in which it has expertise. DOJ has the power, expertise, and statutory mandate to regulate and enforce the EEOA and federal civil rights laws in the education arena, and the DOJ is currently exercising that power. Respondents further contend that equitable relief would be unnecessarily burdensome given the availability of more effective means of administrative redress. Respondents contend that the court should not be burdened with fashioning a remedy to a situation involving complex facts best addressed by DOJ expertise when that agency already has acted in response to the allegations in this case and where Respondents are fully cooperating with the federal inquiry. *Opp.* at 22-23.

Respondents rely on Alvarado, in which the appellate court upheld the trial court's exercise of discretion in sustaining the defendant's demurrer without leave to amend. 153 Cal.App.4th at 1295. The Alvarado court determined that adjudicating the lawsuit "would have required the trial court to become involved in complex health care matters concerning the staffing of skilled nursing and intermediate care facilities and assume regulatory functions of the Department of Health Services ... [and] granting and enforcing the requested relief would place an unnecessary burden on the trial court given the power of the DHS to monitor and enforce compliance with [the Health and Safety Code]." *Id.* at 1295. Respondents contend that

adjudication of this lawsuit would compel the court to become involved in complex education matters concerning the variety of ways that school districts deliver EL services, and Respondents' corresponding oversight of the districts.

The court declines to abstain for several reasons. First, DOJ expressly asks the court to decide the case in favor of Petitioners. This request is significant in that DOJ wants the court to decide the case and does not believe that a court decision would interfere with or usurp its function, or that the decision involves matters of special expertise.

Second, Respondents fail to present any real evidence on the issues of complexity, undue burden, and interference with superior expertise that could justify abstention. Unlike Alvarado, the court will not need to make complex determinations about specific agency decisions; the court will merely decide whether Respondents have received notice that EL students are not receiving instructional services and whether they must take some action to remedy the problem. See 153 Cal.App.4th at 1305-06 (court would have been required to make decisions regarding specific details governing nursing hours for different types of care facilities). While the various programs and services involved are complex, the issue is not. Nor have Respondents shown that the court would need to remain involved by reassessing Respondents' conduct on a continual basis. See Acosta v. Brown, (2013) 213 Cal.App.4th 234 (court would have been required to continually assess and evaluate various performance plans).

Third, there is nothing particularly unusual or troubling about the existence of a parallel federal investigation to state civil litigation. Parallel investigations to civil lawsuits happen frequently, and the courts are well equipped to deal with the difficulties and potential inconsistencies they may create. It is not the existence of a separate investigation, but rather the complexity of the issue, the interference with the superior expertise of the agency, or the undue burden of court involvement that is of import under the abstention doctrine. The parallel investigation merely demonstrates that the federal government is evaluating the same or similar issues.

Fourth and finally, DOJ has the expertise to administer the EEOA and its underlying principles. But this case is not just about Respondents' compliance with a federal education program. It is also about the California Constitution and Govt. Code section 11135. The court has less reason to defer to a federal agency in enforcing State law, even if that law is merely the mechanism for enforcing a federal education program subject to DOJ expertise.

The court declines to invoke the judicial abstention doctrine in this case.

### **3. Mootness and Laches**

Respondents contend that the claims are moot and barred by the equitable doctrine of laches. They point out that the Language Census was publicly published annually by Respondents from 1996 to 2011. 2 JA 979-1042. Petitioners did not file this case until 2013 even though they had at least constructive notice that the Language Census contained district reports of "no services." Petitioners waited until Respondents stopped using the Language Census and started using CALPADS to commence this proceeding based on the Language Census. Respondents contend the FAP is barred by laches. Opp. at 23-24.

Writs are extraordinary equitable proceedings. Burce v. Gregory, (1967) 65 Cal.2d 666, 671. The equitable doctrine of laches applies to writ proceedings. People v. Department of

Housing and Community Dev., (1975) 45 Cal.App.3d 185, 195. "Laches requires a showing of unreasonable delay on the part of the plaintiff in bringing the action, which may show abandonment or waiver of a right, or the acquiescence by the plaintiff in the defendant's fault." Connolly v. Trabue, (2012) 204 Cal.App.4th 1154, 1163 (internal citation omitted). Laches is an implied waiver resulting from knowing acquiescence in existing conditions and an inexcusable delay in asserting a right which results in prejudice to the adverse party. Ibid. "Delay alone will not constitute laches. It must also appear that some prejudice to the defendant was caused thereby." Abbott v. City of Los Angeles, (1958) 50 Cal.2d 438, 459. Laches is an affirmative defense for which Respondents bear the burden of proof.

Respondents fail to establish that Petitioners are guilty of laches. It is not enough to simply observe that Petitioners were on constructive notice of the content of the Language Census for many years. Respondents fail to demonstrate Petitioners' actual knowledge of the reports of "no services" for EL students, how long they have known it, and when they were harmed by it. More important, Respondents have not demonstrated any prejudice suffered from a delay in challenging the use of the Language Census. Nor does it appear that they could do so.

Respondents also contend that the court should deny the petition as moot because they stopped using the Language Census and in 2011 began using CALPADS, which no longer permits a school district to report EL students into the category of "no services."

This argument is a *non-sequitur*. The issue in this case is not how the school districts report -- whether through the Language Census, the initial CALPADS with a "no services" report, or the more recent CALPADS without a "no services" report. The issue is whether Respondents have received sufficient notice that EL students are not receiving instructional services that they must do something about it. Respondents change in the manner in which they collect information does not moot this issue.

#### **4. Governing Law**

##### **a. The EEOA**

The EEOA prohibits both states and districts from denying equal educational opportunity to any individual "on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703 ("section 1703"). Such a denial occurs when, *inter alia*, an "educational agency fail[s] . . . to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program." §1703(f). The term "educational agency" includes both state educational agencies and local educational agencies. 20 U.S.C. § 1720(a).

Thus, the EEOA requires that EL students receive educationally effective instructional services so that they can overcome their language barriers and participate equally in standard instructional program. The EEOA places this responsibility in the hands of both states and school districts. While districts must provide the day-to-day EL instructional services, the EEOA requires states to supervise the districts' provision of those services. In this respect, states and districts share related but independent obligations under the EEOA to take "appropriate action" to ensure that EL students' needs are addressed. *See Horne v. Flores*, (2009) 557 U.S. 433, 439 ("The question at issue. . . is not whether [the state] must take 'appropriate action' to overcome the language barriers that impede ELL students. Of course it must."). *See also United States v. City of Yonkers*, (2d Cir. 1996) 96 F.3d 600, 620; *Gomez v. Illinois State Board of Education*,



(“Gomez”) (7th Cir. 1987) 811 F.2d 1030, 1041 (“[Section] 1703(f) places the obligation on both states and districts to provide equal educational opportunities to their students”). Although the statute allows agencies some discretion in determining an appropriate action, courts have consistently interpreted the EEOA to mean that appropriate action requires “something more than ‘no action.’” *Id.* at 1043.

The Fifth Circuit in Castaneda v. Pickard, (“Castaneda”) 648 F.2d 989 (5th Cir. 1981) created a three-prong test for what constitutes appropriate action under section 1703(f): (1) whether the EL program chosen by the state or district is based upon a sound educational theory; (2) whether the EL program is reasonably calculated to implement that theory effectively and is adequately resourced to do so (e.g., with teachers qualified to deliver the program); and (3) whether the educational agency evaluates the EL program to determine if it is in fact overcoming EL students’ language barriers and achieve parity of participation in the standard instructional program within a reasonable period of time. *Id.* at 1010-11, 1113-14. This test has been widely adopted when analyzing claims against states and districts, including by the United States in its enforcement of the EEOA. See, e.g., Gomez, *supra*, 811 F.2d at 1037.

Under Castaneda’s test, education officials retain discretion to choose among types of EL programs that will be most responsive to student needs. Castaneda, *supra*, 648 F.2d at 1008-09. However, that discretion is limited. The EL program must be educationally sound, adequately resourced, and effective in practice, as demonstrated and addressed through evaluation and monitoring. See *id.* at 1010-11; see also Gomez, *supra*, 811 F.2d at 1041 (“[A]lthough Congress has provided in § 1703(f) that the spectrum of permissible choice for educational agencies would be broad, that does not mean that the spectrum is without discernible boundaries”).<sup>29</sup>

States have a mandatory duty under the EEOA to supervise school district compliance so as “to ensure that needs of students with limited English language proficiency are addressed.” Flores v. Arizona, (9<sup>th</sup> Cir.) 516 F.3d 1140, 1173 (quotation omitted). This duty to supervise districts’ provision of EL services also exists under California law, which requires CDE to monitor and supervise school districts in the provision of services to EL students. Ed. Code §64001(b).

A state’s supervision of EL services in its school districts may take a variety of forms, but it must contain the following elements to constitute appropriate action under section 1703(f). First, the state must monitor whether the districts are providing EL instructional services to their EL students. See Idaho Migrant Council v. Board of Education, (“Idaho”) (9<sup>th</sup> Cir. 1981) 647 F.2d 69, 71. Second, the state must confirm that the districts not only have a program to serve EL students, but that the program comports with Castaneda’s three-prong test. *Ibid.* Third, the state must promulgate guidelines to ensure that school districts are clear on their duties under the

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<sup>29</sup> Analysis under the Castaneda test is consecutive and dispositive. If an EL program lacks a sound educational theory, then it fails the first prong and the inquiry ends. Castaneda, *supra*, 648 F.2d at 1008-10. Although many different types of EL programs may meet the first prong, school districts in California have almost no discretion because they are required to provide SEI services, including ELD and SDAJE, subject to a few exceptions. See Ed. Code §§ 305-06, 310-11. California school districts retain discretion over how they provide EL services, but neither state nor federal law permits them to provide no EL services at all.

EEOA and are addressing their EL students' language needs. Gomez, 811 F.2d at 1034 (rejecting district court's decision. . . that the [state] need only issue regulations . . . [and] need not monitor and enforce the implementation of the program chosen by the state's legislature.").

A state cannot abdicate its supervisory responsibilities by ignoring credible evidence of persistent or significant district noncompliance. A state cannot be said to have taken appropriate action for purposes of the EEOA where it "fails to follow through with practices, resources, and personnel necessary to transform that theory into reality." Id. If districts fail to provide EL services and the state has notice of this failure, the state has a duty to ensure that the EL students' needs are met by taking reasonable action.

#### **b. State Constitution**

The State has a mandatory duty under the California Constitution to intervene when the educational opportunity provided to some students falls below "prevailing statewide standards," resulting in the "students of one district [being denied] an education basically equivalent to that provided elsewhere throughout the State." Butt v. State of California, ("Butt") (1992) 4 Cal.4th 668, 685-87. The failure to provide appropriate services to EL students denies them equal educational opportunity. See Lau v. Nichols, (1974) 414 U.S. 563, 566 ("It seems obvious that the [non-English]-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program").

#### **5. The Mandatory Duty**

An agency must have a clear, present ministerial duty in order for mandamus to issue. Transdyn/Cresci v. City and County of San Francisco, (1999) 72 Cal.App.4th 746, 752. The act sought to be compelled is ministerial where the law prescribes, defines, and limits the duties to be performed "with such precision and certainty as to leave nothing to the exercise of discretion." Glickman v. Glasner, (1964) 230 Cal.App.2d 120, 125. The mandatory nature of an alleged duty must be phrased in explicit and forceful language. Guzman v. County of Monterey, (2009) 46 Cal.4th 887, 891 (citation omitted).

Respondents argue that they do not have a clear, present ministerial duty in order for mandamus to issue. Opp. at 14-15. According to Respondents, neither the California Constitution nor the EEOA impose a mandatory duty on Respondents to consider Language Census data in implementing a school district monitoring system to ensure compliance with the law. Rather, both state and federal law afford discretion. In particular, Education Code section 64001(b) provides the SPI with the discretion to "establish the process and frequency for conducting reviews of district achievement and compliance with state and federal categorical program requirements." In section 1703(f), the EEOA also affords Respondents discretion by requiring them only to "take appropriate action" to overcome language barriers that impede equal participation by students in instructional programs without specifying the particular action that must be taken. See Horne v. Flores *supra*, 557 U.S. at 440, 441.

It is true that Respondents have substantial discretion in choosing a compliance program, but this case is not about what compliance program Respondents must use. As a result, Respondents' argument that they have no mandatory duty to use the Language Census to monitor

is a red herring. The issue is not whether Respondents are required to use the Census to monitor, but whether there is reasonable, credible evidence that school districts are denying legally mandated instructional services to EL students. If there is, Respondents have a mandatory duty to take appropriate action.<sup>30</sup> Under the EEOA, the State must ensure that school districts are clear on their duties under the EEOA and are addressing their EL students' language needs. Gomez, 811 F.2d at 1034. Butt also establishes the State's duty to intervene where it has knowledge from its districts that they are failing to provide EL students instructional services. 4 Cal.4th at 673.

#### **6. The Relevance of the Reports of No Instructional Services**

This lawsuit was triggered when CDE publicly stated for the 2010-11 school year that out of more than 1.4 million EL students statewide, "a total of 20,318 English learners do not receive any instructional services required for English learners." 1 JA 443. CDE's statement was a result of a count of the school districts' report of "no instructional services" on the Language Census. Petitioners contend that this admission, coupled with other evidence, requires Respondents to take some action to intervene in the districts' failure to provide EL services.

Respondents acknowledge that Butt "establishes the State's duty to intervene where it has knowledge from districts that they are failing to provide EL students instructional services." They contend, however, that the Language Census does not trigger the duty articulated in Butt because its data is not evidence that districts are failing to provide EL students instructional services. Opp. at 17. In making this argument, Respondents discount the relevance of the Language Census. Opp. at 11-12.

Respondents have clearly shown that, from its inception, the Language Census was not a method intended for school districts to report compliance with state and federal obligations to EL students. Rather, it was a planning mechanism whose original purpose was to determine the number of students eligible for bilingual-education services and to provide school districts with data to plan for the number of bilingual classrooms needed for the following year. See Ed. Code §52164.<sup>31</sup> When bilingual education was eliminated in Proposition 227, the educational settings and EL student services changed to the current system of SEI and English language mainstream education. The Language Census was modified to count teachers providing EL instructional services and EL students receiving ELD, SDAIE, and primary language instruction, but it never

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<sup>30</sup>The court agrees with Respondents that the Castaneda test has no direct bearing in this case because it analyzes the "appropriateness of a particular school system's language remediation program" (648 F.2d at 1009) and California's EL program is not being challenged in this case. The Language Census is not a "program" that can be analyzed for its "educational or scientific basis" under Castaneda. See Opp. at 16.

<sup>31</sup>The Language Census was required to include the number of students whose primary language was other than English and who were enrolled in basic bilingual education, bilingual-bicultural education, experimental bilingual programs, secondary' level language development programs, secondary level individual learning programs, and elementary level individual learning programs. Ed. Code §52164.5.

was intended to monitor whether EL students were receiving required services. For this reason, CDE does not report the Census data to the federal government, and has no obligation to do so.

Respondents also have shown that the Language Census is a poor mechanism for monitoring EL services. First, the timing of the Census, which was collected in March and April, served little use for CDE compliance reviews started in October. Second, and more important, the Language Census did not provide an accurate picture of EL services. The definition of EL students receiving "no EL services" changed over time, and school districts reported EL students in this category for a variety of reasons. There were frequent errors caused by data entry, confusion in the districts, and other human errors.

As a result, the numbers did not always reflect the complete EL instructional services provided by a district, particularly SDAIE, and not match up when CDE staff performed online and on-site FPM review. No one has testified that the Language Census reports of no services for EL students are accurate. Despite Petitioners' criticisms, the testimony from administrators at Grossmont, Compton, Oxnard, and Kern demonstrates that the Language Census data of no services for EL students was not reliable because EL instructional services often were provided. For example, Kern students were wrongly reported as not receiving EL instructional services even though they received SDAIE instruction in a mainstream classroom. Grossmont incorrectly tagged EL students in its computer as not receiving EL instructional services where they were receiving services. Thus, Respondents have demonstrated that the Language Census was not intended to monitor the provision of EL services, it is not a reliable indicator of EL services, and that there can be a number of reasons why a school district reported "no services" for EL students.

Nonetheless, the fact remains that Respondents publicly announced that 98% of 1.4 million EL students statewide received EL services, and "a total of 20,318 English learners do not receive any instructional services." This is a party admission that more than 20,000 EL students did not receive EL instructional services. Ev. Code §1220. For Respondents to overcome the admission's significance, it is not enough simply to attack the reliability of some of the data on which this admission was based. Instead, Respondents must show that the reports are so unreliable that they carry no credible weight. They have not done so.

No interpretation of the category "ELs Not Receiving EL Instruction Services" is plausible except that those students are not receiving instructional services. *See* 1 JA 459. The Census and CALPADS data responds to the very questions asked about whether the district's EL students receive ELD and SDAIE with authorized teachers, or no EL services at all. As Petitioners argue, why did Respondents include the instructional services data in the Language Census if it was completely unreliable? *See* Reply at 3.

Therefore, CDE's admission that 20,318 EL students did not receive any EL instructional services in 2010-11 has not been totally undermined, and carries some evidentiary weight, in the determination whether Respondents must take appropriate action to ensure the provision of EL services by the school districts.

#### **7. Respondents' Breach of Their Ministerial Duty to Take Appropriate Action**

In addition to CDE's admission, there is credible evidence that not all EL students have been receiving EL instructional services.

Thus, Respondents have received district reports for over a decade in the Language Census that a significant number of EL students were not receiving EL services. It is undisputed that districts must provide instructional services to ELs until they are reclassified, and Respondents have repeatedly stated that instructional services are legally required in order for ELs to access classroom content. Yet, the Language Census reports reflected admissions by school districts that they were denying instructional services to ELs. These reports triggered Respondents' duty to take some action to ensure that the students were not being denied equal educational opportunity.

Petitioners have presented corroborating evidence that EL students were in fact denied instructional services in several districts which reported a lack of instructional services. Petitioner Dunlop explained, and four Oxnard administrators corroborated, that EL students were placed in mainstream classrooms without SDAIE instruction.<sup>32</sup> Mendoza explained that Compton did not ensure that EL students received services from the beginning of the school year, and was corroborated by the fact that students received "NA" on their report card for ELD services. Individual teachers and administrators from several teachers and parents in other districts also stated that students were denied EL services. While this evidence has no bearing on Respondents' notice or knowledge, it does corroborate district reports in the Language Census and CALPADS that EL instructional services were not provided.

Respondents contend that even if the district reports are accurate, EL services are not limited to instructional services. An EL student who is designated on the Language Census as not receiving instructional services may still be receiving appropriate EL services tailored to the student's needs. These non-instructional services include after-school tutoring and English language programs, English language counseling, parent literacy, and community services. EL services may also include professional development for teachers or assisting parents to help their students meet academic goals. None of these services are accounted for in the Language Census. Opp. at 20.

Petitioners strongly disagree, arguing that Respondents' evidence is supported only by non-expert evidence, and CDE has repeatedly advised districts in the Language Census instructions that "[a]ll [EL] students must receive [ELD] instruction until they are reclassified" (1 JA 413). Petitioners provide expert testimony that after-school programs may be helpful supplemental services but cannot make up for the time lost in a mainstream classroom, services such as English language counseling and family counseling are unrelated to academics, and the professional development of teachers who teach EL students is essential but cannot substitute for in-class instructional services. Reply at 3.

There is no doubt that Respondents require EL students to have instructional services. Having defined instructional services as an indispensable component of the services provided to EL students, Respondents cannot, consistent with their constitutional duty, ignore reports that instructional services were not received. Non-instructional EL services may well qualify as EL services, but that only means that a district may supplement its ELD or SDAIE instruction with

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<sup>32</sup>The credibility issue between Dunlop and O'Brien is resolved in favor of the former, who supervised the Census reports and was corroborated by other Oxnard administrators.

other EL services. It may not eliminate instructional services until the EL student is reclassified. Moreover, a district's provision of non-instructional services does not explain why the district would report that its EL students had received no instructional services. Respondents have the duty to find out why they did so.

In sum, the reports by school districts that they were denying instructional services activated Respondents' mandatory duties under the EEOA and the California Constitution to take appropriate action.

#### **8. Respondents' Subsequent Conduct Underscores the Breach**

Respondents contend that the Language Census data is the entire basis for Petitioners' claims. Opp. at 2. But Respondents' conduct after receipt of Petitioners' demand letter represents a distinct violation of their mandatory duties.

When confronted with potential litigation from the ACLU, Respondents sent the February 15, 2013 letter to inquire about the reports of "no instructional services" on the Language Census. There are several problems with the letter.

First, the inquiry was not mandatory and was designed only to gauge the general feeling of the districts. Respondents never heard from 60% of the 251 districts reporting no instructional services for EL students. Plainly, Respondents could not assess whether the district reports of no instructional services were accurate without a mandatory response from all 251 districts.

Second, Respondents did not analyze the statements from those school districts which provided legally unsupportable explanations, including that (1) the EL students denied instructional services were students with special education needs or were in charter settings, (2) the district simply had not provided EL services (Hughson), and (3) the "no services" reports were in error because their teachers have CLAD credentials. (A credential alone is insufficient; the teacher actually has to provide ELD/SDAIE to the EL students). Another district responded with an inquiry to which CDE never responded. Each of these reports was at least potentially inadequate and required follow-up.

Third, after CALPADS data reflected many EL students receiving no services in 2011-12, Respondents sent the February 27, 2013 letter encouraging districts to correct their submissions because the data may be inaccurate. The February 27 letter recommended that districts could report EL students as receiving services if the teacher had a credential. At best, this recommendation was an incomplete statement which ignored CDE's own guidance prohibiting the reporting of EL services based solely on a teacher's credential.

Fourth, instead of responding to the CALPADS information, in July 2013 Respondents eliminated the districts' ability to report denials of instructional services. Thus, the only meaningful action taken by Respondents in response to district reports that EL students were not receiving services has been to modify the reporting mechanism so that it will be impossible for districts to make such admissions in the future.

Respondents' actions after the Language Census reports of no instructional services independently violate their duty to take action to ensure equal educational opportunity for EL students. The Language Census data alone triggered Respondents' duty to intervene, and their decision to solicit and then ignore evidence concerning the denial of instructional services also violated their mandatory duty.

### **9. The FPM Is Not an Adequate Monitoring Mechanism**

Respondents argue that they have no ministerial duty to use the Language Census data for monitoring LEA compliance with state and federal law, and they are meeting their obligation to monitor school districts and ensure that EL students receive required and appropriate services through FPM. They point out that Petitioners have not challenged the “educational or scientific basis” for the FPM program, and they have not provided evidence that the monitoring program is ineffective. Opp. at 20-22. Respondents rely on the deference given by courts to administrative agencies as a result of their expertise and in accordance with the separation of powers of doctrine. Opp. at 19 (citing Shapell Industries, Inc. v. Governing Board, (1991) 1 Cal.App.4th 218, 230). Respondents conclude that they cannot be compelled to exercise their discretion in a particular way. Common Cause v. Board of Supervisors, (1989) 49 Cal.3d 432, 446.

This argument is not well taken. The FPM monitoring system does not relieve Respondents of their obligation to take some action in the face of credible evidence to ensure that EL students receive the services to which they are entitled. Respondents are not free to ignore credible evidence about denials of equal educational opportunity simply because it was received through a channel never intended or designed to monitor district compliance. FPM may well be an adequate monitoring system even though only 60 out of 1000 districts are reviewed on-site each year. But it is not foolproof and cannot be used to insulate Respondents from having to take action in the face of credible evidence that districts have not provided instructional services. Respondents have a duty to ensure school district compliance with the EEOA and the California Constitution that cannot be avoided. See Idaho, *supra*, 647 F.2d at 70-71.

Additionally, as the United States argues, the record is devoid of evidence that FPM monitoring has effectively reduced the number of EL students lacking EL instructional services. Although Respondents no longer collect the Language Census data, the CALPADs reports continue to show the same lack of services; these reports could be readily used in Respondents’ monitoring to ensure EL students receive the services to which they are entitled under the EEOA. U.S. Br. at 22.

### **10. The Remedy**

Credible evidence has been presented that districts are denying required instructional services, and Respondents have a duty to take some action under the EEOA and California Constitution. See Gomez, *supra*, 811 F.2d at 1030; Butt, *supra*, 4 Cal.4th at 685-87. That action must be reasonably calculated to ensure the appropriate delivery of educational services to EL students to ensure the students are provided with equal educational opportunity. The failure of a state to act in accordance with its EEOA obligations in response to credible evidence of district noncompliance could well have long-term, negative effects on EL students. See Lau v. Nichols, (1974) 414 U.S. 563, 566 (“students who do not understand English are effectively foreclosed from any meaningful education”).

As Respondents argue, the appropriate action which they must take under the EEOA to is mixed with both discretionary power and the exercise of judgment. See Opp. at 16. Respondents have discretion to determine the precise scope of the action they must take, but they cannot refuse to act at all. See Conlan v. Bonta, (2002) 102 Cal.App.4th 745, 764 (although respondents had discretion regarding how to comply with law, “ignoring the recipients’ right and doing nothing is

not an option”).

Respondents not only are capable of assessing whether EL students actually are receiving EL instructional services, but also are equipped to intervene to ensure that districts provide such services. There are several options available. As the United States suggests, CDE could make use of the Language Census data when selecting districts for FPM review, and then require the districts under review to provide evidence that they are responding to the unmet needs of ELs. Alternatively, CDE could direct all of the districts reporting ELs as not receiving instructional services to provide such services immediately and submit evidence that this has been done (e.g., submit rosters of EL students’ ELD and content classes with authorized teachers through CAIS). U.B. Br. at 20. Ultimately, the decision belongs to Respondents and that discretion cannot be crabbed by direction from the court.<sup>33</sup>

#### **F. Conclusion**

The FAP is granted. Petitioners are entitled to a writ of mandate directing Respondents to perform ministerial acts required by law to take appropriate action in response to reports from districts that EL students have not received instructional services. Petitioners also are entitled to an injunction requiring Respondents to establish procedures that effectively ensure all EL students receive required EL instructional services.

Petitioners’ counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on the opposing parties for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for September 16, 2014 at 1:30 p.m.

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<sup>33</sup>Petitioners have not briefed the fourth cause of action (violation of Govt. Code §11135), and they lack standing for the fifth cause of action (taxpayer relief). Both claims are denied.