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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DISTRICT

D.J. by Guardian Ad Litem E.A.; E.A.; B.S. by Guardian Ad Litem C. L.; F.S. by Guardian Ad Litem C. L.; C.L.; S.M. by Guardian Ad Litem M.R.; A.M. by Guardian Ad Litem M.R.; M.R.; S.Z.; WALT DUNLOP,

Petitioners and Plaintiffs,

v.

STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF EDUCATION; TOM TORLAKSON, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, in his official capacity; STATE BOARD OF EDUCATION; DOES 1-20, INCLUSIVE,

Respondents and Defendants.

Case No. BS142775

RESPONDENTS' AMENDED OPPOSITION BRIEF

[FILED CONCURRENTLY WITH NOTICE OF ERRATA AND SUPPLEMENTAL DECLARATION OF CHARA L. CRANE]

Trial Date: July 31, 2014
Time: 9:30 a.m.
Dept.: 85
Judge: The Hon. James C. Chalfant

Action Filed: April 24, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

STATUTES

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

PREFACE

On April 24, 2014, 42 days after the discovery cutoff in this case and less than three weeks before the date set for the hearing on the merits, this Court held a hearing on petitioners' motion for leave to file an amended petition and ex parte application to reopen discovery to depose Gregory O'Brien and Crystal Hoffmann.[1] Declarations from O'Brien and Hoffmann were filed in support of respondents' original opposition brief. The Court questioned petitioners' counsel on the need for these depositions, and counsel replied: "Because I want to impeach the statements that are in those declarations. The government does rely heavily on those individuals to attempt to impeach our witnesses from Oxnard and our overall positions." (Supplemental Declaration of Chara L. Crane, Ex. A, 4:19-25.) Ultimately, the Court granted petitioners leave to depose O'Brien and Hoffmann and ruled that the parties could amend the opening briefs they had already filed to include information obtained during these two depositions. (*Id.*, Ex. A.) *The Court was clear that it would be unfair if petitioners addressed these new depositions in their reply brief.* (*Id.*, Ex. A, 8:1-9.)

Petitioners deposed O'Brien on May 15, 2014, and Hoffmann on May 19, 2014. They filed their amended opening brief (AOB) on June 12, 2014. *Remarkably, the AOB contains no references to either deposition.*[2] Despite petitioners' plea to depose these witnesses and despite the resources spent to obtain leave to take the depositions after the discovery cutoff, to prepare for the depositions, to take the depositions, to defend the depositions, and to amend the already-filed opening briefs, petitioners fail to make even a single mention of these depositions in their AOB. The sole conclusion to be drawn from this fact is that petitioners obtained no information during either deposition that helps their case, confirming that the petition should be denied. As this

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[1] Petitioners had previously noticed depositions of PMKs from Oxnard Union High School District and Kern Union High School District but then cancelled them; had the depositions gone forward, O'Brien and Hoffmann would have been deposed on behalf of the districts.

[2] This is not the first time petitioners have deposed an individual beyond the discovery cutoff date and not cited information from the deposition in their opening brief. Specifically, although the discovery cutoff was on March 13, 2014, petitioners, despite respondents' objection, deposed Elizabeth Miller on March 19, 2014, without respondents. There is no reference to her testimony in the AOB.

Court noted at the April 24 hearing, it would be unfair for petitioners to cite or reference these depositions in their reply because it would eviscerate respondents' ability to respond and because the deposition transcripts were available to petitioners when they filed their AOB.

INTRODUCTION

Petitioners allege that over 20,000 students in the State of California are being denied English language instructional services. However, petitioners themselves have not been denied required services, and they fail to identify any other student who did not receive required English language services. Remarkably, one of the three student petitioners remaining in this case,[3] D.J., *was never even an English Learner (EL) student*, was never required to receive English language instructional services, and *is fluent in the English language*. Another student petitioner, A.M., *is an honor student and is no longer an EL student*, and *both she and her brother S.M. are fluent in the English language* and confirmed during depositions that they received appropriate English language services. Their mother, M.R.,[4] could not point to any specific instance when her children were denied required English language services. Petitioner Walt Dunlop is a retired teacher who has no direct knowledge of EL students being denied required services and who misunderstands the R-30 Language Census data. (Joint Appendix (JA) 1584, ¶¶ 3-4.) The evidence shows that Dunlop is confused as to how English language instructional services are provided to students in various instructional settings and also as to how that information is reported on the R-30 Language Census (Language Census). (JA 1584-1585, ¶¶ 4-5; JA 1666:3-25; JA 1667:1-6; JA 1668:4-21; Respondents' Notice of Errata, Ex. A, pp. 30-33; 36-37.)

In fact, the Language Census is the only evidence on which petitioners rely to support their contention that Local Education Agencies[5] (LEAs) have denied services to EL students. As the creators, distributors, and publishers of the Language Census, respondents are best-suited to explain the data and its application. The statutory purpose of the Language Census never was to monitor whether EL students were receiving instructional services. (JA 1675, ¶ 6.) LEAs have

[3] At first, this case involved six student petitioners; three student petitioners voluntarily dismissed themselves from this action so only three remain.
[4] M.R. is also known as A.R.
[5] LEAs include school districts.

repeatedly confirmed that the information reported on the Language Census does not provide a comprehensive picture of the English language instructional services they are providing to students. (JA 1475, ¶ 3; 1492-1524; JA 1577, ¶ 14.) Respondents use a much more effective monitoring program to monitor, evaluate, and affirm LEA compliance with state and federal requirements for providing academic instruction to EL students. (JA 1487-1488, ¶¶ 21-28; JA 1574-1576, ¶¶ 5-11.) Nonetheless, petitioners seek an order that the Language Census be interpreted as a "report that a school district is failing to serve EL [students]." (JA 0025:11.) Petitioners' theory of how they would like the Language Census data to be used cannot overcome the actual purpose and use of the data. Petitioners have deposed more than 15 witnesses in this case and reviewed more than 50,000 pages of documents, yet they are unable to produce any evidence that shows that the Language Census must be used for monitoring LEA compliance with state and federal requirements. They cannot produce this evidence because it does not exist. Nor have petitioners established that using the Language Census data would aid respondents in their monitoring obligations because LEAs and respondents confirm that the Language Census does not accurately reflect English language services offered by an LEA. (JA 1476-1478, ¶ 5; JA 1577, ¶ 14; JA 1263-1368[6] [7]; JA 1465, ¶ 3; JA 1585, ¶¶ 5-6; JA 1682-1683, ¶ 5.)

In spite of these facts, petitioners attempt to assign broader meaning to the Language Census data that simply does not exist and attempt to establish a ministerial duty to utilize the data in a manner for which it was never intended. The reality is (1) the Language Census data is a collection of information that is not a component of respondents' monitoring program (JA 1578, ¶ 15); (2) respondents do not have a ministerial duty to use the Language Census data for monitoring LEA compliance with state and federal law; (3) respondents are meeting their obligation to monitor LEAs and ensure that California's EL students receive required and appropriate services (JA 1578, ¶¶ 5-16; JA 1487-1489, ¶¶ 21-28); and (4) this Court should

[6] See specifically, Deposition of Michelle Krantz, Director of Special Programs and Professional Development, William S. Hart Union High School District (Krantz Depo.), JA 1269-1271, 1274:8-1275:3, 1276:24-1277:11, 1280:25-1282:21, 1283:6-1289:7.

[7] See specifically, Deposition of Theresa Kemper, Assistant Superintendent of Educational Services, Grossmont Union High School District (Kemper Depo.), JA 1342:19-1343:8, 1345:20-1349:11, 1351:5-1355:14, 1359:14-25, 1360:16-1363:25; Respondents' Notice of Errata, Ex. E, p. 184.

abstain from ruling in this matter as the same issue is being addressed by the U.S. Department of Justice. Finally, respondents stopped using the Language Census three years ago.[8] (JA 1676-1677, ¶¶ 9-11.) Accordingly, the issue of whether the Language Census should be used to monitor LEAs is moot, and a writ compelling respondents to respond to these discontinued "reports" would serve no useful purpose. Accordingly, no writ may issue.

STATEMENT OF FACTS

Petitioners are three public school students, their mothers, and a retired public school teacher. Respondents are the State of California, the California Department of Education (CDE), the State Board of Education (SBE), and Tom Torlakson in his official capacity as the State Superintendent of Public Instruction (SPI). Petitioners contend that respondents have failed to adequately respond to reports that LEAs are not providing English language services to more than 20,000 EL students in California. (Amended Petition (AP), ¶¶ 1-16.) Petitioners bring causes of action for violation of: the equal protection clauses in the California Constitution; the Equal Education Opportunities Act (EEOA), 20 U.S.C. § 1700 et seq.; Government Code section 11135; and Code of Civil Procedure section 526a. (AP, ¶¶ 103-143.) They seek a writ directing respondents to "cease doing nothing in response to reports from districts indicating that nothing is being done to serve EL students" and to establish various policies and procedures relating to EL students. (AP, p. 35.) The "reports" referenced in the AP are actually Language Census data that LEAs have self-reported since 1979 in various manners. The data provides, in part, information about the instructional settings of EL students within an LEA, whether certain courses are taught by certificated teachers as well as general data for funding. (JA 1675, ¶ 6.) The data is used to inform LEAs and assist in planning for the following school year. (Ed. Code, § 52163.) However, it is inaccurate to interpret a "no instructional services" designation on the census as a failure to provide appropriate services to EL Students identified in this category. (JA 1577, ¶ 14; JA 1676, ¶ 8; JA 1476-1478, ¶ 5.) This census data is not a report or monitoring mechanism of

[8] Since 2011, respondents have used the California Longitudinal Pupil Achievement Data System (CALPADS) to gather data regarding instructional settings and services provided to ELs. CALPADS was developed pursuant to Education Code section 60900 to accomplish certain goals, none of which included monitoring LEA compliance with state and federal laws. (JA 1678, ¶ 13.)

LEA compliance with federal and state obligations to EL Students. (JA 1675-1676, ¶ 7.) Moreover, the Language Census data does not provide an accurate depiction of the services being provided to EL students. (JA 1577, ¶ 14.; JA 1676, ¶ 8; JA 1476-1478, ¶ 5.; JA 1263-1368[9] [10]; JA 1465, ¶ 3; JA 1585, ¶ 5-6; JA 1682-1685, ¶¶ 5,8,9,12.)

Respondents utilize a process called Federal Program Monitoring (FPM) to monitor LEA compliance with legal requirements for EL students. (JA 1487-1489, ¶¶ 21-28; JA 1096-1100.) FPM evaluates LEAs through onsite and online reviews. (*Ibid.*) The comprehensive instruments used to evaluate the delivery of EL Services align with state and federal requirements. (*Ibid.*) As the monitoring instruments indicate, when reviewing EL Services, respondents review not only *instructional* services and settings, but also review obligations to EL students in a much broader context. (*Ibid.*; JA 1101-1123.) Compliance monitoring also includes use of the California Accountability and Improvement System (CAIS), which allows LEAs to exchange electronic information with CDE specific to compliance monitoring. (JA 1675-1676, ¶ 7.)

In addition to using FPM and CAIS, respondents ensure the effective delivery of EL services by making available a Uniform Complaint Process (UCP) which allows students and parents to report alleged LEA violations of federal or state law, including allegations of unlawful discrimination and failure to provide EL Services. (Cal. Code Regs., tit. 5, § 4600, et.seq.) LEAs must notify parents, students, and other interested parties about the UCP and information regarding the UCP is also publicly available on the CDE website. (JA 1124-1129.) Petitioners are aware of the UCP and, in fact, the January 23, 2013 press release referenced in paragraph 13 of the AP directs concerned parents to make use of the complaint process to promptly resolve any concerns about their children's instruction. (JA 1131.) Petitioners failed to utilize this administrative relief process, opting instead to file this lawsuit. In fact, respondents have not seen any complaints from students who were purportedly denied services, even since the American Civil Liberties Union made its concern public in January 2013.

[9] See specifically, Krantz Depo, JA 1269-1271, 1274:8-1275:3, 1276:24-1277:11, 1280:25-1282:21, 1283:6-1289:7.

[10] See specifically, Kemper Depo., JA 1342:19-1343:8, 1345:20-1349:11, 1351:5-1355:14, 1359:14-25, 1360:16-1363:25; Respondents' Notice of Errata, Ex. E, p. 184.

STANDARD OF REVIEW

A writ of mandate is used to enforce a plain, nondiscretionary legal duty to act, and a writ "will not lie to control discretion conferred upon a public officer or agency." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.) "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent . . . and (2) a clear, present and beneficial right in the petitioner to the performance of that duty." (*Ibid.*) A ministerial duty is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment. (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.) Mandamus is an extraordinary remedy which is equitable in nature, and the necessity of the writ must be clearly established. (*Clough v. Baber* (1940) 38 Cal.App.2d 50, 53.) Petitioners bear the burden of pleading and proving each fact upon which their claim for relief is based. (Code Civ. Proc., § 1109; Evid. Code, § 500; *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.) They have failed to meet this burden; they have not shown that respondents breached a ministerial duty, and they have not shown that they have a clear and beneficial right to the performance of the alleged duty. Thus, no writ may issue.

LEGAL ARGUMENT

I. NO WRIT MAY ISSUE BECAUSE PETITIONERS LACK STANDING

Standing is a "threshold," jurisdictional issue that must be addressed before addressing the merits of petitioners' 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.) 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.) To have standing to obtain a writ of mandate, a petitioner must demonstrate that he is "beneficially interested" in obtaining the writ, meaning his "interest in the outcome of the proceedings must be substantial, i.e., 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." (*Ibid.*, emphasis added.) 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 Have Not Met Their Burden of Showing Injury Caused by Respondents' Alleged Conduct.

The operative writ petition implies that the student petitioners lack "proficiency in English" and lack "oral and written fluency in English" (see, e.g., AP, ¶ 16), and that respondents are to blame because respondents receive "reports" from LEAs that instructional services are not being provided. (AP.) However, the evidence shows that none of the students have suffered injury as a result of respondents' alleged conduct. Rather, each student that requires English language services is receiving them, and each student petitioner is fluent in English and succeeding academically. Thus, the student petitioners lack standing.

Petitioner D.J.

The AP alleges that D.J. has been designated an EL student "continuously," that she received no language instructional services when she was in first grade, and that she is not currently receiving any English language instructional services. (AP, ¶ 20.) Yet, upon entering the Los Angeles Unified School District as a kindergartener in the fall of 2007, DJ was given the CELDT exam and scored at an advanced level of English proficiency. (JA 1190-1192; Respondents' Notice of Errata, Ex. B.) Based on her CELDT score, D.J. was classified as Initial Fluent English Proficient (IFEP). (JA 1192.) *Thus, D.J. was never even designated as an EL student and never required EL instructional services.* (JA 1685, ¶ 11 [Dr. Zavala stating that a student who has been designated IFEP is not an EL and is not required to receive English language services].) Thus, not only are respondents not required to provide D.J. with EL services, but she does not even need these services because, in addition to being classified as

IFEP more than seven years ago, she declined the services of an interpreter during her deposition (JA 1184:7-15) and does well academically – both in her mainstream classrooms at school (JA 1185:13-20, 1186:7-17, 1191) and on standardized tests. (JA 1190.) D.J.'s good grades and high test scores illustrate that she has not suffered any harm to her ability to learn or succeed in school. Further, because respondents were not required to provide EL instructional services to D.J., she lacks standing to pursue a claim that she was wrongly denied such services.

Petitioner A.M.

The AP 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. (AP, ¶ 18.) There is no merit to these allegations. First, A.M. *is no longer an EL student* because she was reclassified as "fluent English proficient" in April 2013. (JA 1262.) Second, petitioners have not submitted evidence establishing that A.M. was denied required language services when she was in fourth grade, and her mother cannot confirm the truth of this allegation. (JA 1201:23-1202:1.)

Further, A.M., who was in sixth grade at the time, chose to have her entire deposition conducted in English without an interpreter. (JA 1236:1-15; 1237:2-3.) A.M. testified that: she has never had to repeat a grade (JA 1238:16-17); she is not an EL student (JA 1239:2-4); she is getting good grades (Respondents' Notice of Errata, Ex. C, lines 6-20); she is an honor student (JA 1241:15-1242:22); she likes to read and the last book she read was Tom Sawyer, which was in English. (JA 1243:22-1244:6.) She also testified that she is currently reading the book Holes for fun in English and that she understands it (JA 1244:17-1245:3); she does not know why she is suing the State of California (JA 1246:3-5); and she enjoys school and, other than being bored in third grade, she has no complaints about her time in school. (JA 1247:3-1248:1.) Finally, A.M. testified that she has never had a teacher she could not understand. (JA 1240:14-16.)

The progress that A.M. has made developing English language skills is illustrated by her California English Development Test (CELDT) scores, which have risen every single year. (JA 1260-1261.) In short, 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. Thus, A.M. has not been "injuriously affected" by the alleged conduct of respondents and lacks standing to bring this action.

Petitioner S.M.

The AP alleges that when S.M. was in third grade, he did not receive English language services for half the school year; that his English reading, writing, and listening scores dropped that year; and that he "is not currently receiving any English language instructional services." (AP, ¶ 17.) There is no merit to these allegations. First, no evidence has been submitted in support of the AOB to establish that S.M. did not receive required English language services, and S.M.'s mother cannot confirm the truth of these allegations. (JA 1199:16-70:14.) Second, S.M.'s mother testified that she cannot confirm the allegation that S.M. is not currently receiving English language services. (JA 1197:3-6 [M.R. answering "I don't know" in response to: "this year is [S.M.] receiving any special services because he's an English learner?"].) Later in her deposition, she testified that she thinks S.M. is currently enrolled in an English Language Development class. (JA 1198:17-20.)

Further, S.M., who was in fifth grade at the time, chose to have his deposition conducted in English without an interpreter (JA 1207:21-1208:7; JA 1209:8-9), and testified that: he speaks English better than Spanish (JA 1209:13-15); he has never had to repeat a grade (JA 1210:24-Respondents' Notice of Errata, Ex. D, line 1); he is getting good grades (JA 1211:6-22); he enjoys reading books in English (JA 1212:22-1213:1); and he recently read The Phantom Tollbooth in English for school and received a 90 percent on the written test he was given on the book after he read it. (JA 1214:13-1215:2.) S.M. further testified that the State of California has not done anything to harm him. (JA 1216:15-17.) Finally, S.M. testified that he has never had a teacher he could not understand. (JA 1211:3-5.)

The progress that S.M. has made developing English language skills is illustrated by his 2012 CELDT score of 608 compared to a score of 534 in 2011. (JA 1233.) In short, S.M.'s testimony, school records (JA 1221-1233) and rising CELDT scores demonstrate that he has

received appropriate EL instructional services; that he writes, comprehends, and speaks English well; and that neither respondents nor his schools have injured him or failed to provide him with appropriate instruction and services to develop English language skills. Thus, S.M. has not been "injuriously affected" by the alleged conduct of respondents and lacks standing to bring this action.

B. Dunlop and the Parent Petitioners Lack Taxpayer Standing.

Petitioners Dunlop, A.R., and E.A. fail to allege that they have suffered *any injury whatsoever*. The allegations specific to Dunlop provide only that he resides in California and is a taxpayer. (AP, ¶ 22.) The allegations specific to M.R. and E.A. provide only that they are parents to the student petitioners and reside and pay taxes in Los Angeles County. (*Id.*, ¶¶ 19, 21.) No allegation in the AP provides that Dunlop, M.R., or E.A. suffered any physical, emotional, financial, or other loss or damage as a result of respondents' alleged conduct.

Further, a party may not maintain a cause of action under Code of Civil Procedure 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.) In other words, a plaintiff must establish that he or she is a taxpayer to invoke standing under section 526a. (*Id.* at p. 873.) Dunlop and the parent petitioners failed to submit any evidence in support of the AOB establishing that they are taxpayers. In fact, not a single argument is made in the AOB to support the section 526a cause of action, and when Dunlop, A.R., and E.A. were asked about their status as taxpayers during depositions and/or in written discovery questions, they refused to answer. (JA 1179:20-25; JA 1195:4-1196:21; JA 1372:1-1374:22; JA 1406:1-1408:22; JA 1440:1-1442:6.)[11]

Also, petitioners have failed to submit any evidence of illegal use or waste of public funds by respondents, whereas an action by a taxpayer 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

[11] Parent petitioners E.A. and M.R. objected to written discovery requests designed to obtain information regarding their status as taxpayers. (JA 1370-1374; JA 1404-1408.)

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].) Thus, Dunlop, A.R., and E.A. lack standing to pursue this litigation, the fifth cause of action in the AP has no merit, and petitioners have waived any right to pursue the cause of action.

II. RESPONDENTS DID NOT IGNORE REPORTS THAT LEAS DENIED LEGALLY MANDATED INSTRUCTIONAL SERVICES TO EL STUDENTS

Petitioners assert that respondents have "violated their mandatory duty to take appropriate action in response to district admissions that they are denying legally mandated instructional services without which ELs are denied equal educational opportunity." (JA 0021:20-22.) The "district admissions" on which petitioners rely are actually Language Census data submitted to CDE by LEAs annually from 1979 until 2011. The Language Census data is the entire basis for petitioners' claims.

The Language Census was established in response to California's Chacone-Moscone Bilingual-Bicultural Education Act of 1976 (Chacone-Moscone). Education Code section 52164 directed LEAs to complete a yearly census in order to identify the number of Limited English Proficient (LEP) pupils, as well as pupils who had become bilingual and met the language reclassification criteria, and to report this number annually to the SPI. (Ed. Code, §§ 52164 - 52164.6.) Section 52164.5 required the census to include the numbers of students who were enrolled in certain classes defined in the now sunset code. (JA 1675, ¶ 6.) Chacone-Moscone sunset in 1987 and, in 1998, Proposition 227 was passed, virtually eliminating bilingual education in California. The educational settings and services offered to EL students changed with the sunset of bilingual education and the passage of Proposition 227 which led to the current system of structured English immersion and English language mainstream. Accordingly, the Language Census categories were modified to reflect these changes and started to include counts of teachers providing EL instructional services and EL students receiving different instructional services, such as English Language Development (ELD), Specially-Designed Academic Instruction in English (SDAIE), and primary language instruction. The categories are designed to allow LEAs discretion in categorizing the instructional services of their EL students. (JA 1675, ¶ 6.) As a

result of these changes, and in an effort to keep the categories concise, the boxes on the census eventually included a category for LEAs to report "English learners not receiving any English learner instructional services." Because the definition of this category has changed over time, LEAs have reported ELs in this category for a variety of reasons. (JA 1676, ¶ 8; JA 1476-1478, ¶ 5; JA 1577, ¶ 14; JA 1267:8-1272:2; JA 1274:1-1275:19; JA 1276:24-1282:21; JA 1283:6-1289:11[12]; JA 1345:8-1349:1; JA 1351:5-1352; JA 1360:16-1363:13[13]; JA 1465, ¶ 3; JA 1585, ¶¶ 5-6; JA 1682-1683, ¶¶ 5-6.)

The Language Census is not a mechanism for monitoring LEA compliance with federal and state obligations to EL students nor was the Language Census data designed to provide a comprehensive picture of the English language instructional services an LEA provides to EL students. (JA 1475, ¶ 3; JA 1675-1676, ¶¶ 6-7.) CDE does not report the Language Census data to the federal government and is under no obligation to do so. (JA 1578, ¶ 15.) LEAs have reported to CDE that the data provided in the Language Census frequently contains errors caused by: data entry problems; confusion regarding instructions; and other human error issues. (JA 1476-1478,¶ 5; JA 1465,¶ 3; JA 1584-1585, ¶¶ 3-6; JA 1682-1683, ¶¶ 5-6; JA 1267:8-1272:2; JA 1274:1-1275:19; JA 1276:24-1282:21; JA 1283:6-1289:11;[14] JA 1345:8-1349:1; JA 1351:5-1352; JA 1360:16-1363:13.[15] Respondents do not rely on the data for monitoring purposes because the numbers reported in the Language Census do not always reflect the complete EL instructional services provided by an LEA, nor do the numbers match up when CDE staff review LEAs pursuant to FPM. (*Id.*; JA 1577, ¶ 14; JA 1676, ¶ 8.) Petitioners claim they "substantiated the census reports for districts where they undertook investigation." (JA 0017:9-10.) This statement is false, and the evidence proffered in support distorts the facts. (JA 1263-1298[16]; JA 1297-

[12] See specifically, Krantz Depo., JA 1269-1271, 1274:8-1275:3, 1276:24-1277:11, 1280:25-1282:21, 1283:6-1289:7.

[13] See specifically, Kemper Depo., JA 1342:19-1343:8, 1345:20-1349:11, 1351:5-1355:14, 1359:14-25, 1360:16-1363:25; Respondents' Notice of Errata, Ex. E, p. 184.

[14] See specifically, Krantz Depo., JA 1269-1271, 1274:8-1275:3, 1276:24-1277:11, 1280:25-1282:21, 1283:6-1289:7.

[15] See specifically, Kemper Depo., JA 1342:19-1343:8, 1345:20-1349:11, 1351:5-1355:14, 1359:14-25, 1360:16-1363:25; Respondents' Notice of Errata, Ex. E, p. 184.

[16] See specifically, Krantz Depo., JA 1269-1271, 1274:8-1275:3, 1276:24-1277:11, 1280:25-1282:21, 1283:6-1289:7.

1368[17]; JA 1664-1672; JA 1686-1844.) In truth, no one has testified under oath that the Language Census provided an accurate picture of the services being provided to EL students, nor was any witness able to identify a single student who was deprived of required English language services. For example, with respect to Grossmont Union High School District (Grossmont), petitioners allege that it is one "of the largest and [sic] egregious" examples of a district that failed to serve its ELs. (AP, ¶ 50 & pp. 14-15.) The AP further alleges that student S.Z. received no English language instructional services since the second quarter of eleventh grade and that, for the 2010-2011 school year, Grossmont reported that 1,389 of its EL students "received no English language instructional services." (*Id.*, ¶¶ 67, 71.) On behalf of Grossmont, Ms. Kemper[18] denied these allegations. She testified that it is impossible for an EL student to not receive English language instructional services for half of a school year in Grossmont. (JA 1358:17-25.) And, significantly, she denied that Grossmont failed to provide English language services for 1,389 of its ELs during the 2010-2011 school year. (JA 1359:14-25; JA 1360:16-1363:13.) Kemper testified that Grossmont mistakenly reported the 1,389 number to CDE because EL students enrolled in classes that had not been correctly tagged in the computer system as providing English language services were erroneously reported as not receiving English language instructional services. (JA 1341:22-1343:24; JA 1344:1-1349:1; JA 1350:8-1351:18.) She explained, for example, that if an EL student was enrolled in a class where SDAIE was being utilized or a class with a bilingual aid that was incorrectly tagged as not offering English language services, then that EL student would appear in the computer system as not receiving English language services when in fact he was. (JA 1351:19-1352:7; JA 1364:1-1365:3.) Kemper further testified that she is not aware of any ELs at Grossmont who did not receive English language services (JA 1352:8-15), and that she has never received any reports from students or parents that students were denied required English language services. (JA 1353:19-1355:14.) Finally, Kemper explained in

[17] See specifically, Kemper Depo., JA 1342:19-1343:8, 1345:20-1349:11, 1351:5-1355:14, 1359:14-25, 1360:16-1363:25; Respondents' Notice of Errata, Ex. E, p. 184.

[18] Grossmont designated Kemper as its person most knowledgeable on English language services provided to EL students in the district and on reports of EL students in the district who were denied English language services. (JA 1163:7-9.)

great detail the many English language services being provided at Grossmont, and they fall into four categories: curriculum services; instructional services; translation services; and parent/family services. (JA 1302:12-1337:6.) Kemper believes the comprehensive English language services offered at Grossmont are working. (JA 1338:14-1340:16.) Likewise, administrators from Compton, Kern, Oxnard, and William S. Hart school districts agree that the Language Census data is not (and has never been) a reliable way to determine the services offered in their districts to EL students, and that the data does not reflect whether students in their districts were denied required services.[19] In sum, the evidence in this case illustrates why it is inaccurate to characterize the Language Census data as "admissions by school districts that they were denying instructional services." (JA 0022:10.) Petitioners are attempting to assign meaning to this data that it does not, and was never designed to, show. Thus, the AP, which relies entirely on the authenticity of the Language Census data, must be denied.

III. PETITIONERS CANNOT SHOW BREACH OF A MINISTERIAL DUTY

The authorities relied on by petitioners involve discretionary acts, not ministerial duties, thus, petitioners cannot allege abuse of discretion by respondents. Accordingly, a writ of mandate is improper. A writ of mandate "compel[s] the performance of an act which the law specially enjoins." (Code Civ. Proc., § 1085.) Thus, there must be a clear, present ministerial duty on the part of the respondent for a writ 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.)

Petitioners contend that the California Constitution and the EEOA create a mandatory duty to "take appropriate action in response to district admissions that they are denying legally mandated instructional services without which ELs are denied equal educational opportunity." (JA 0021:20-22; AP, ¶¶ 103-123.) However, the mandatory nature of an alleged duty must be

[19] See specifically, JA 1263-1368, 1464-1467, 1583-1587, 1681-1685.

phrased in explicit and forceful language. (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 891, citing *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 689; *Carrancho v. Cal. Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1267.) Neither the cited constitutional provisions nor the EEOA impose any explicit duty to perform a specific act. Neither state nor federal law imposes a mandatory duty on respondents to consider Language Census data in implementing an LEA monitoring system to ensure compliance with laws, as petitioners request via mandate. Rather, both state and federal law afford discretion.

In particular, Education Code section 64001 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," including those applicable to EL Students. (Ed. Code, § 64001, subd. (b).) In accord with section 64001, respondents have a compliance monitoring system in place.

The writ of mandate sought by petitioners could not be issued under the EEOA, either, because it, too, affords respondents discretion and does not mandate that respondents pursue an explicit course to overcome language barriers that prevent equal educational opportunity.

Specifically, the EEOA requires respondents to "take appropriate action" to overcome language barriers that impede equal participation by students in instructional programs. (20 U.S.C. § 1703(f).) By requiring respondents to "take appropriate action," without specifying particular actions that must be taken, Congress intended to grant state officials substantial discretion in choosing the programs and techniques to meet their obligations under the EEOA. (*Horne v. Flores* (2009) 557 U.S. 433, 440-441, 129 S.Ct. 2579, 2589-2590, citing *Castañeda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009; *Coachella Valley Unified School District v. State of California* (2009) 176 Cal.App.4th 93, 115-116.) This requirement grants state agencies broad latitude to design, fund, and implement programs for EL students that suit local needs and account for local conditions. (*Horne v. Flores,* (2009) 557 U.S. 433, 468; 129 S. Ct. 2579, 2605.)

Petitioners cite the three part test articulated in *Casteneda* as the appropriate guide to analyze whether respondents' use of the Language Census violates the EEOA. (AOB, p. 18.) Concluding that only the first prong of the *Casteneda* test needs to be applied, petitioners argue

that "[t]here is no educational or scientific basis for Respondents' complete and deliberate indifference to reports of ELs receiving no instructional services." (AOB, p. 18.) However, the *Casteneda* test is designed to analyze the "appropriateness of a particular school system's language remediation program" (*Castañeda v. Pickard, supra,* 648 F.2d at p. 1009.) California has complied with this first prong and has a language remediation program enacted by Proposition 227, which is not being challenged in this case.[20] The Language Census is not a requirement of Proposition 227, nor is it a "program" that can be appropriately analyzed for its "educational or scientific basis" under *Castaneda.* Additionally, respondents have presented ample evidence that the Language Census data would not be a useful monitoring tool for a variety of reasons. (JA 1577, ¶ 14; JA 1476-1478, ¶ 5; JA 1676, ¶ 8.) Completely ignored by petitioners is the fact that respondents *do* implement an LEA compliance monitoring program discussed in detail at section IV below. Petitioners have not challenged the "educational or scientific basis" for respondents' actual monitoring program, nor have petitioners alleged or provided evidence that the monitoring program respondents have in place is ineffective, other than to argue that the Language Census must be included as a monitoring component.

The obligation under the EEOA to "take appropriate action" is mixed with both discretionary power and the exercise of judgment, and it does not establish a ministerial duty. Respondents have taken appropriate action in regard to ensuring educational opportunity for EL students by implementing a comprehensive LEA compliance monitoring program. (JA 1573-1576, ¶¶ 4-11; JA 1487-1489, ¶¶ 21-28.) Thus, no writ may issue here.

A. Mandamus Is Unavailable Because There Is No Ministerial Duty That Respondents Use Language Census Data to Monitor.

Originally, the primary purpose of the Language Census was to determine the number of students eligible for bilingual-education services and to provide LEAs with data to plan for the number of bilingual classrooms needed for the following year. (Ed. Code, § 52164.) In addition,

[20] Interestingly, petitioners' attorneys did file suit challenging the implementation of Proposition 227 as a program not based on sound educational theory. The Court rejected this argument in *Valeria G. v. Wilson* (1998) 12 F.Supp.2d 1007.

section 52164.5 required the census to include the number of students whose primary language was other than English and who were enrolled in certain instructional settings, defined in the now sunset code, including 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, which are all defined in section 52163. Different teacher authorizations were required for the various programs of instruction. From its inception, the Language Census was not a method to report compliance with state and federal obligations to EL students, but was instead a planning mechanism. (JA 1675, ¶ 6.) Petitioners acknowledge that the purpose of the Language Census was to "provide local educational agencies and governmental organizations with critical information on which to base their funding, research, program planning, and policy decisions . . . ." (JA 0011:20-22.)

Petitioners argue that *Butt v. State of California* (1992) 4. Cal. 4th 668 "establishes the State's duty to intervene where it has knowledge from districts that they are failing to provide EL students instructional services." (JA 0023:7-9.) However, the Language Census data does not provide respondents with "knowledge" that LEAs are "failing to provide EL students instructional services" and therefore does not trigger the duty articulated in *Butt*. As demonstrated herein, the Language Census data is not evidence that districts are failing to provide EL students instructional services, nor does the Language Census provide a complete depiction of the services being provided to EL students at a particular LEA. (JA 1676, ¶ 8; JA 1476-1478, ¶ 5; JA 1477, ¶ 14; JA 1264-1296[21]; JA 1298-1368[22]; JA 1465, ¶ 3; JA 1466, ¶¶ 5-6; JA 1682-1685, ¶¶ 5-12.)

The Language Census was never intended or designed to monitor whether EL students were receiving required services, and no statute dictates that respondents must use the data for that purpose. The statutes and regulations governing administration of the Language Census clearly do not impose a duty on respondents to "take appropriate action in response" to the Language

[21] See specifically, Krantz Depo., JA 1269-1271, 1274:8-1275:3, 1276:24-1277:11, 1280:25-1282:21, 1283:6-1289:7.

[22] See specifically, Kemper Depo., JA 1342:19-1343:8, 1345:20-1349:11, 1351:5-1355:14, 1359:14-25, 1360:16-1363:25; Respondents' Notice of Errata, Ex. E, p. 184.

Census data as suggested by petitioners. Thus, there is no question that the Education Code sections governing the implementation and existence of the Language Census do not impose a ministerial duty on respondents to use the Language Census for monitoring compliance with state and federal requirements to provide appropriate services for EL students.

B. Mandate Cannot Issue to Control an Exercise of Discretion.

It is the general rule that a writ will not issue to compel action unless it is shown that the duty to do the thing asked for is plain and not mixed with discretionary power or the exercise of judgment. (*Texas Co. v. S.C.* (1938) 27 Cal.App.2d 651, 654.) Mandamus will not lie to control an exercise of discretion, i.e. to compel an official to exercise discretion in a particular or certain manner. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432.) Mandate is unavailable, as a matter of law, unless a statutory scheme *requires a particular act to be performed in a particular manner*. (*Id.* at p. 446; *Larson v. City of Redondo Beach* (1972) 27 Cal.App.3d 332, 336.) Here, that is clearly not the case. The manner in which Respondents proceed to monitor LEA compliance is discretionary. There is no statutory scheme that compels respondents to monitor LEAs in a manner consistent with petitioners' wishes.

Education Code section 64001, subdivision (b) provides: "Onsite school and district compliance reviews of categorical programs shall continue, and school plans shall be required and reviewed as part of these onsite visits and compliance reviews. The Superintendent shall establish the process and frequency for conducting reviews of district achievement and compliance with state and federal categorical program requirements. In addition, the Superintendent of Public Instruction shall establish the content of these instruments, including any criteria for differentiating these reviews based on the achievement of pupils, as demonstrated by the Academic Performance Index developed pursuant to Section 52052, and evidence of district compliance with state and federal law. The state board shall review the content of these instruments for consistency with state board policy."

The plain language of the statute is clear and unambiguous. The statute requires onsite monitoring and review of school plans, there is no mention of Language Census data. The SPI is given discretion to "establish the process and frequency for conducting reviews" and has the

discretion to "establish the content" of the monitoring instruments and the "criteria" reviewed. It is clear from the statutes that the Legislature intended to provide respondents discretion on how to conduct LEA monitoring and that discretion cannot be mandated by the courts. (See *Powers v. Fisherman's Marketing Assoc, Inc.* (1990) 222 Cal.App.3d 339, 343 [the board's determination of the "reasonable terms" for the use of the marina is a matter of discretion and could not be mandated by court].) In this case, petitioners improperly request the court to impose what they believe to be a reasonable method of monitoring LEA compliance – i.e. relying on Language Census data - over respondents' existing methods of monitoring, authority over which are properly vested in respondents alone.

The Court should not cave to petitioners' demands to review whether the Language Census is an appropriate way to monitor LEAs, particularly when respondents already have a comprehensive monitoring program in place (JA 1574-1576, ¶¶ 5-11; JA 1487-1489, ¶¶ 21-28), and when presented with evidence that the Language Census data is unreliable for purposes of monitoring whether EL students are receiving required instructional services. (JA 1678, ¶ 15; JA 1476-1478, ¶ 5; JA 1492-1524.) For the same reasons that respondents cannot assume that 20,000 students that fall within the "No Instructional Services" category are not receiving services, respondents cannot assume that the 1.3 million students reported in the other categories are, in fact, receiving appropriate services. This is why respondents have a comprehensive system to review and monitor districts, as well as a procedure that allows any individual EL student to file a complaint if he or she is being denied appropriate services.

C. Respondents Have Not Abused Their Discretion.

In mandamus proceedings, courts defer to administrative agencies due to their expertise and in accordance with the separation of powers of doctrine:

> An agency acting in a quasi-legislative capacity is not required by law to make findings indicating the reasons for its action and the court does not concern itself with the wisdom underlying the agency's action any more than it would were the challenge to a state or federal legislative enactment. In sum, the court confines itself to a determination whether the agency's action has been arbitrary, capricious, or entirely lacking in evidentiary support.

(*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230, internal quotations

and citations omitted.) Respondents' use of the Language Census and the strategies implemented to effectively monitor the services offered by LEAs to EL students are well-reasoned and supported. Thus, no writ may issue because respondents have not abused their discretion.

IV. RESPONDENTS IMPLEMENT A COMPREHENSIVE MONITORING PROGRAM TO ENSURE LEAS ARE SERVING EL STUDENTS

To comply with federal and state requirements, LEAs provide English language services (EL Services) to EL students to help these students overcome language barriers and provide access to core curriculum so EL students develop proficiency in English and meet the same academic expectations of non-EL students. Federal law allows LEAs great latitude in the design of their services. (*Castañeda v. Pickard, supra,* 648 F.2d at p. 1009.) Title III provides funding to LEAs to implement programs serving EL students. CDE's Language Policy and Leadership Office (LPLO) is responsible for monitoring and oversight of LEAs that have received federal Title III No Child Left Behind Act funds. (JA 1573, ¶ 4.)

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 that individual EL student's needs.[23] Non-instructional EL Services could include: after school tutoring or English language programs, English language counseling, parent literacy, and community services. Title III services may also include indirect services such as professional development for teachers who serve El students or assisting parents to help their children meet academic goals. None of these services are accounted for in the Language Census. (JA 1578, ¶ 16.)

CDE's current compliance monitoring process is FPM. FPM includes evaluation of LEAs through onsite and online reviews. To evaluate LEAs' EL Services and compliance with law, LPLO reviews and updates a monitoring "instrument" every year. The instruments used to evaluate the delivery of EL Services review not only instructional services and settings, but also

[23] For example, the law specifically allows discretion to LEAs as to whether a program is designed to simultaneously develop English language and to recoup academic deficits or whether the program allows for the development of the English language followed by extra assistance in content areas. (*Castañeda v. Pickard, supra,* 648 F.2d at p. 989.)

review obligations to EL students in a much broader context. LPLO staff are tasked with determining whether an LEA selected for review through the FPM process is in compliance with each of the EL instrument elements. Educational consultants determine compliance through a combination of LEA document review, interviews with LEA staff and stakeholders, and classroom observations. Additionally, the California Accountability and Improvement System (CAIS) is a web-application that gives LEAs and CDE a common site for transmitting source documents for monitoring such as LEA plans, and evidence of compliance. (JA 1574, ¶ 5.)

The LPLO also engages in regular communication with LEAs and County Offices of Education via multiple venues including monthly meetings between LPLO staff and staff that support LEAs. During these monthly meetings, monitoring is a central theme and improvement is the expected outcome. The LPLO also hosts quarterly meetings with county office coordinators through a Bilingual Coordinators' Network where federal and state requirements are addressed and the information is disseminated to LEAs directly. (JA 1574, ¶ 6.) Also, a two-day Title III Accountability Institute for English Learners, Immigrant, and Migrant Students is held annually to provide LEA administrators with information on legal requirements, systems of best practices, and other current information regarding programs for EL students. (JA 1574, ¶ 6.)

CDE also monitors LEAs through accountability measures from assessment results of their designed EL programs and services. Title III requires each state to establish English language proficiency standards, conduct an annual assessment of English proficiency, define two annual measurable achievement objectives (AMAOs) for increasing the percentage of EL students making progress in learning English and attaining English proficiency, include a third AMAO relating to meeting Adequate Yearly Progress for EL subgroup at the LEA or consortium level, and hold Title III funded LEAs and consortia accountable for meeting the three AMAOs. (JA 1574-1575, ¶ 7.) The Title III AMAOs are performance objectives that the Title III sub-grantees must meet each year for its EL students. All LEAs and consortia receiving a Title III-Limited English proficient (LEP) grant are required to meet the Title III AMAOs. In California, the two English language proficiency AMAOs are calculated based on data from the CELDT exam. The third academic achievement AMAO is based on data from the California Standards Test, the

California Alternate Performance Assessment, the California Modified Assessment and/or the California High School Exit Examination (CAHSEE). (JA 1575, ¶ 8.) The SBE established annual growth targets for each AMAO starting in the 2001-2002 school year. In 2007, the SBE approved new annual growth targets for the 2006-2007 through 2013-2014 that were aligned to the new CELDT performance level cut scores and the new common scale. Generally, AMAO 1 reflects the percentage of ELs making annual progress on the CELDT. AMAO 2 measures the percent of EL students in a defined cohort at a given point in time who have attained the English proficient level on the CELDT. AMAO 3 measures academic achievement and specifies the percent of EL students that must score at the proficient or advanced level in English-language arts and mathematics on state assessment instruments used to determine Adequate Yearly Progress. (JA 1575-1576, ¶ 10.)

CDE annually monitors student academic performance data from each LEA and consortia from various test instruments in order to determine whether the LEA and consortia meet the AMAOs for the year. There are progressive levels of consequences or sanctions for LEAs and consortia which do not meet one or more of the three AMAOs in any year. First, it must inform the parents of all EL students that the AMAOs have not been met. If the LEA or consortia does not meet the AMAOs for two consecutive years, it must also develop an improvement plan that will ensure that the AMAOs are met. If the LEA or consortia do not meet the AMAOs for four consecutive years, they are subject to sanctions pursuant to the No Child Left Behind Act. CDE will require an LEA or consortia to modify its curriculum program and method of instruction of EL students. In addition, CDE, by way of an agreement with selected County Offices of Education, will work with and assist the LEA and/or consortia to develop and implement a Title III Year 4 Action Plan or an Improvement Plan Addendum to ensure they will achieve the AMAO targets in the future. (JA 1576, ¶ 11.)

V. THE COURT SHOULD ABSTAIN FROM DECIDING THIS ISSUE AS THERE IS AN ONGOING IDENTICAL INVESTIGATION BY USDOJ

The Court should abstain from adjudicating this case because granting the equitable relief sought would interfere with the functions of the United States Department of Justice (USDOJ)

involving compliance with complex education laws, over which this federal agency has expertise. Also, the relief sought would be unnecessarily burdensome given the availability of more effective means of administrative redress. "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." (*Alvarado v. Selma Convalescent Hosp.* (2007) 153 Cal.App.4th 1292, 1297.) Also, "[c]ourts may abstain when an administrative agency is better equipped to provide an alternative and more effective remedy." (*Id.* at p. 1306.)

In response to a press release from the ACLU, in or about May 2013, the USDOJ, Civil Rights Division, Educational Opportunities Section initiated an investigation into the allegations raised in this case. (JA 1133-1138.) Since that time, respondents have been participating in that investigation, which involves complex issues of agency expertise. (JA 1140-1160.) USDOJ's Civil Rights Division "is charged with enforcing the EEOA." (JA 1134, ¶ 2.) 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.) This Court should not be burdened with the duty to fashion an additional remedy to a situation involving complex facts best addressed by agency expertise when the federal agencies charged with enforcing the laws at issue have already promptly responded to the allegations in this case and when respondents are fully cooperating with the federal inquiry. (JA 1133-1160.) USDOJ has the power, expertise, and statutory mandate to regulate and enforce the EEOA and federal civil rights laws in the education arena, and USDOJ is currently exercising that power. Thus, this Court should abstain.

VI. THE INSTANT PETITION SHOULD BE DENIED UNDER THE EQUITABLE DOCTRINES OF LACHES AND MOOTNESS

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.) The Language Census data was publicly published annually by respondents from 1996 to 2011. Petitioners did not file this case until 2013 even though they were on notice of the Language Census reports of "no services"

years before they filed this case. In particular, petitioners reference copies of language census data dating back to 1996 (JA 0979-1042), yet they waited until *after* respondents stopped using the Language Census and started using CALPADS before they filed this lawsuit based on the Language Census.[24] Thus, the doctrine of laches bars this case. Finally, the AP should be denied because a writ may not issue if it would work injustice, cause confusion and disorder, operate harshly, or serve no useful purpose. (*Board of Educ. v. Common Council* (1990) 128 Cal. 369, 371.) Petitioners seek a writ directing respondents to "cease doing nothing in response to reports from districts indicating that nothing is being done to serve EL students . . . ." (AP, p. 35.) As discussed above, the "reports" referenced in this language from the prayer for relief in the AP are data contained in the Language Census. And, as also discussed above, respondents stopped using the Language Census in 2011 and now use CALPADS, which does not ask LEAs to self-select students into the category of "no services." (JA 1676-1677, ¶¶ 9-11.) Thus, issuing the requested writ would serve no useful purpose because the Language Census is no longer used. Finally, issuing the requested writ would impose a tremendous burden on the State because State aggregate reports cannot be created in CALPADS as it is currently designed; instead, respondents would have to aggregate data from over 6 million students, 800,000 courses, and 300,000 teachers on a yearly basis for each of approximately 1700 districts. (JA 1678, ¶ 14.) Thus, for these additional equitable reasons, no writ should issue in this case.

CONCLUSION

For all the reasons articulated herein, and in the exhibits and declarations filed in support of this opposition, the amended petition for writ of mandate must be denied in its entirety.

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[24] Interestingly, petitioners now argue that it is because of this lawsuit that respondents implemented CALPADS; however, CALPADS was being developed and implemented years prior. (JA 1677, ¶ 11.)

Dated: July 3, 2014

Respectfully Submitted,

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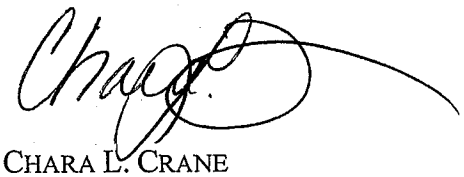

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **D.J., et al., v. Dept. of Education, et al.**
No.: **BS142775**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **July 3, 2014**, I served the attached **RESPONDENTS' AMENDED OPPOSITION BRIEF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 3, 2014**, at Los Angeles, California.

Martha Ochoa
Declarant

Signature