

Petitioners apply for a writ of traditional mandamus directing Respondents Los Angeles Unified School District, its Superintendent, and its Board of Education (collectively “the District” or “LAUSD”) to comply with the Stull Act by including pupil progress, as it reasonably relates to the standards of expected pupil achievement at each grade level, in its performance evaluations of certificated employees. The court has read and considered the moving papers,¹ oppositions, and reply, held a June 5, 2012 hearing concerning preliminary matters, and renders the following tentative decision.

A. Statement of the Case

Petitioner Alice Callaghan and several anonymous petitioners (minor students in LAUSD and their guardians *ad litem*) commenced this proceeding on November 1, 2011. The Verified Amended Petition for Writ of Mandate, filed on November 18, 2011, is the operative pleading. It seeks traditional mandamus to compel the District to meet its obligations under a forty year old law, Education Code section 44660 *et seq.*, commonly referred to as the “Stull Act,” which mandates that the District implement and enforce periodic evaluations of certificated personnel.

According to the Petition, the Stull Act, originally enacted in 1971, requires that the governing board of each school district establish standards of expected pupil achievement at each grade level in each area of study. The Stull Act requires further that the governing board of each school district also evaluate and assess the performance of certificated employees as it reasonably relates to the progress of pupils toward the standards adopted by the district locally. The “evaluate and assess” aspect of the Stull Act was expanded in 1999 to mandate additional pupil progress measures in the assessment of certificated employees’ performance: pupil progress toward the State adopted academic content standards as measured by State adopted assessments.

The Petition alleges that the District currently fails to comply with its obligation to evaluate certificated employees based in part on pupil performance.

Although the initial Petition named as Real Parties-in-Interest the United Teachers Los Angeles (“UTLA” or the “Teachers Union”), the Associated Administrators of Los Angeles (“AALA” or the “Administrators Union”), and the Public Employment Relations Board (“PERB”), the Amended Petition did not. On November 21, 2011, the court ordered that the unions be re-joined as Real Parties-in-Interest and granted PERB leave to intervene by joint stipulation. PERB submitted a stipulation and proposed complaint in intervention, and the court approved it as an intervening party.

B. Standard of Review

“A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is

¹The application of Los Angeles Mayor Antonio R. Villaraigosa for leave to file an *amicus* brief is granted. The court has read and considered his brief.

unlawfully precluded by such inferior tribunal, corporation, board, or person.” CCP §1085(a).

A traditional writ of mandate under CCP section 1085 is a method of compelling the performance of a legal, usually ministerial duty. Pomona Police Officers’ Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84. “Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance.” *Id.* at 584 (internal citations omitted). When an administrative decision is reviewed under CCP section 1085, judicial review is limited to an examination of the proceedings before the agency to determine whether its action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether it did not follow the procedure and give the notices required by law. *Ibid.*

C. The Stull Act²

First enacted in 1971, the Stull Act is codified at Education Code section 44660 *et seq.*³

²Petitioners did not present their evidence in proper form. In support of their motion, Petitioners rely principally on a 324-page request for judicial notice and a 619-page Declaration of Scott J. Witlin, which includes many exhibits. None of the exhibits is separated by a hard exhibit tab. *See* CRC 3.1110(f). Despite this defect, the court will consider this evidence if admissible.

Petitioners ask the court to judicially notice (1) certain legislative history of the Stull Act, (2) the State Board of Education’s February 9-10, 1972 minutes, (3) the Department of Education’s Three Year Plan for Assessments, 2002, (4) the District’s Guidelines for Instruction, Secondary, 2001, (5) the District’s CST Periodic Assessment Chart, (6) the California Commission on State Mandates’ September 27, 2005 Decision regarding Parameters and Guidelines, and (7) District claims to the State Controller’s Office for various years. All but the last are subject to judicial notice as official acts of an agency. (Ev. Code §452(c). Not every action by an agency qualifies as an official act. The District’s claims to the State Controller are not official acts, and the request to judicially notice them is denied.

In reply, Petitioners ask the court to judicially notice a U.S. Department of Education publication concluding that 38 states have adopted “student growth” as a factor in teacher evaluations. The publication is an official act under Ev. Code section 452(c), and the request is granted.

The Teachers Union asks the court to judicially notice portions of the legislative history of the Stull Act and its amendments. The request is granted. Ev. Code §452(b).

The Teachers Union objects to some of Petitioners’ exhibits on grounds of relevance. The court agrees that some of the evidence presented by Petitioners, as well as other parties, is of marginal relevance, relating mostly to background or collateral issues. Nonetheless, the court cannot say the evidence is completely irrelevant and the objections are overruled.

The Teachers Union also objects to portions of the Deasy deposition. The UTLA fails to quote the testimony to which it objects, and the court has no obligation to perform the task of looking up the citations. The objections are overruled in their entirety.

³All further code references are to the Education Code unless specified otherwise.

Therein, the Legislature expressly declared its intent that “governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the State, including schools conducted or maintained by county superintendents of education.” §44660. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district. Ibid.

The school district may, through the mutual agreement with the pertinent certificated employee unions, include in the guidelines any objective standards from the National Board for Professional Teaching Standards or objective standards from the California Standards for the Teaching Profession in the guidelines. §44661.5.

The evaluation of certificated personnel is governed by section 44662, and provides, in pertinent part:

“(a) [t]he governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.

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

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

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

(3) The employee’s adherence to curricular objectives.

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

(c) The governing board of each school district shall establish and define job responsibilities for certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b) and shall evaluate and assess the performance of those noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.”⁴

Thus, the Stull Act requires that a school district (1) establish standards of expected pupil achievement and (2) evaluate certificated employee performance as it “reasonably relates” to the progress of pupils toward those standards, as well as applicable State standards. §44662(a), (b)(1). With respect to administrative personnel, the Stull Act recognizes that some or all “noninstructional personnel” cannot be evaluated based on student progress, instructional techniques, adherence to curricular objectives, and establishment and maintenance of a suitable learning environment. School districts must establish and define job responsibilities for those employees, and evaluate and assess their performance as it relates to the fulfillment of those defined responsibilities.

⁴The legislative history provides that section 44662 “[r]equires school district governing boards to evaluate certificated employee performance on the progress of pupils toward the state-adopted academic content standards as measured by state-adopted criterion referenced assessments.” UTLA RJN 171-72.

The Stull Act requires that the evaluation be reduced to writing (§44663), and occur at least every year for probationary personnel, every other year for permanent personnel, and every five years for highly qualified personnel who have been employed for ten years or more. §44664(a).

The evaluation must include recommendations, if necessary, as to areas in which the employee needs improvement. §44664(b). If an employee is not performing duties in a satisfactory manner, the school district must notify the employee of that fact in writing and describe the unsatisfactory performance, and also confer with the employee and make specific recommendations as to areas of improvement and endeavor to assist the employee in his or her performance. Ibid. If a permanent certificated employee receives an unsatisfactory evaluation, the district must annually evaluate the employee until he or she achieves a positive evaluation or is separated from the district. Ibid. Moreover, if the school district participates in the Peer Assistance and Review Program for Teachers, any certificated employee who receives an unsatisfactory rating on an evaluation must participate in that program. §44664(c).⁵

Pursuant to decision by the California Commission on State Mandates, a school district may obtain reimbursement from the State for the costs incurred for compliance with the 1999 amendment to the Stull Act concerning teacher and administrator evaluation based on pupil performance. Pet. RJN Ex.F.

D. Statement of Facts

The following pertinent⁶ facts have been presented by the parties.

1. The District

LAUSD is a school district within the meaning of the Stull Act. Each year, the District serves over 650,000 K- 12 students, at over 1,000 school sites throughout Los Angeles County. The District is subdivided into multiple Local Districts, each serving a designated region.

John Deasy ("Deasy") is LAUSD's superintendent. He is delegated authority by the District under section 35026, and is the "employing authority" responsible for evaluations of "certificated employees." §§ 44664(b), 44665.

The term "certificated employees" means employees who by law are required to have a certificate or credential to be eligible for employment. Certificated personnel may be

⁵The Stull Act was amended in 1995 and again in 1999, when then Speaker, now Los Angeles Mayor Villaraigosa sponsored an amendment to section 44662(b)(1), imposing the requirement that teachers and administrators be evaluated based on the "progress of pupils toward state adopted academic content standards as measured by state adopted criterion referenced assessments."

Section 44661.5 -- which permits a school district to include in the certificated personnel evaluation system required by section 44660 any objective standards created by certain teaching entities through mutual agreement with pertinent employee unions -- was enacted at the same time as the 1999 amendment to the Stull Act

⁶The following section does not discuss the evidence on background and collateral issues.

instructional (teachers) and non-instructional (administrators and management). In the schools, there are three categories of certificated employees: (1) teachers, (2) support staff (school psychologists, counselors, school nurses, teacher advisors, and certain others), and (3) management, consisting of principals and assistant principals. In addition, counsel clarified at the June 5, 2012 hearing that some certificated administrative and/or management personnel work outside of schools in the Local Districts and are subject to the Stull Act's evaluation requirements. For convenience, the court will refer to in-school certificated instructional personnel as "teachers" and the rest of the certificated personnel subject to the Stull Act, whether management or administrators, in-school or outside of school in Local District offices, as "administrators."

2. The State and Local Standards

The State has "criterion-referenced" content standards for secondary students. As clarified by counsel on June 5, a "criterion-referenced content standard" is what a proficient student in a particular subject would know. It is not a relative standard dependent on the competitive knowledge of a large body of students. In other words, a criterion-referenced standard is what a student should know, not how well the student knows it compared to other students.

The State Board of Education has developed tests to measure a student's progress toward these State standards. *See* §60642.5; Pet. RJN Exh. C. These tests, also known as assessments, are part of the California Standardized Testing and Reporting Program ("STAR").

The principle set of STAR tests pertinent to this case is the California Standards Tests ("CSTs"). The CSTs are given to public school students in the State each year, and cover core content areas for each of grades 2 to 11. There is not yet a CST for every subject in every grade, and the CSTs also are not given to non-English speaking students. The parties agree that the CSTs are "criterion referenced assessments" that measure the State's "adopted academic content standards." *See* §44662.

The Department of Education annually conducts the CSTs at LAUSD schools. The CSTs are conducted at the District's traditional calendar and special education schools during the month of May, but the District and its schools do not receive the results of the tests until August.⁷

The District has established its own standards of expected pupil grade level achievement in various content areas. Pet. RJN Ex. D at p. 4. Beginning approximately in 1996, LAUSD conducted a major review of District-adopted standards. As the State-adopted standards came online, the District periodically revisited its local standards of expected pupil achievement and modified its local standards accordingly.⁸ As it modified its standards, LAUSD provided its certificated staff with side-by-side comparisons of District-adopted standards with State-adopted

⁷The Stull Act evaluation process must be completed by the end of the school year and the District's school year ends in June.

⁸District counsel stated at the June 5 hearing that the District's standards can vary from the State standards, but was unsure whether the District must view the State standards as a minimum. *See* Deasy Depo. at 124-25.

standards and related State and District assessments. Id.; Pet. RJN Ex. E.⁹

The District performs tests of student progress toward its standards at least three times per year.

3. The District's Teacher Evaluation System

The District maintains a system of evaluation and assessment of the performance of teachers and administrators. Under the District's system, teachers are evaluated by school administrators, and school administrators are evaluated by higher-level management personnel.

This evaluation system has been in existence for many years and conducted prior to the end of every school year. An evaluation conducted under this system is informally known as a "Stull evaluation." The form used for evaluating the District's teachers is informally known as a "Stull form." The guide used by school administrators in completing that form is known as the "Stull Performance Indicators." Bowes Decl., Ex.E.

The District evaluates the performance of teachers and administrators (i) at least once each year for probationary employees, (ii) at least every other year for permanent employees, and (iii) at least every five years for permanent employees who have been employed at least 10 years with the District and who are highly qualified, by mutual agreement between the employee and the evaluator.

The District's performance evaluation system is described in a series of bulletins and guides issued by the District, and is implemented by the use of several standard forms, including the following: (1) Initial Planning Sheets (Bowes Decl., Exs. F, G); (2) Observation/Conference Sheets (Bowes Decl., Exs. H, I); and (3) Final Evaluation Forms (Bowes Decl., Exs. J, K).

a. The Initial Planning Sheet

The Stull evaluation process is a year-long endeavor, beginning with completion of the Initial Planning Sheet. A big part of the final Stull evaluation is providing teachers with recommendations for improving their craft and, thereby, improving student performance. The Initial Planning Sheet contains teacher objectives under the headings (1) Support for Student Learning, (2) Planning and Designing Instruction, (3) Classroom Performance, (4) Developing as a Professional Educator, and (5) Punctuality, Attendance and Record Keeping. Bowes Decl., Ex.E. The Initial Planning Sheet contains an area for discussion of strategies to meet these objectives. Ibid. The Initial Planning Sheet does not include any direct reference to pupil progress.

At the beginning of the school year, teachers and administrators draft objectives and goals in the Initial Planning Sheet, which are based in part on student data. Student test results from the previous year inform the teacher what work needs to be done, which is plotted on the Initial Planning Sheet. The teacher and his or her administrator collaborate on preparing the Initial Planning Sheet. They extract information from the test results to guide the objectives mapped out on the Initial Planning Sheet. The teacher is later evaluated on whether or not he or she met the objectives on the Initial Planning Sheet, the point of which is to improve the teacher's

⁹Exhibit E is actually a side-by-side comparison of the formulas for creation of the tests used to measure progress toward the respective State and District standards.

teaching and his or her students' performance.

Throughout each school year, the District tests pupils by the use of periodic District-level school-level, and classroom level tests. The data collected from these tests is used to guide instruction and advise teachers on how to help students progress toward proficiency on the District's academic standards. Once trends and patterns are identified, teachers are assisted in developing goals to improve student scores in identified areas of need, such as improving the delivery of instruction in a certain area.

b. The School Year Tracking of Teachers

During the year, school principals track the teachers' progress toward achieving the goals established during the Initial Planning Sheet. They do this by meeting with teachers to discuss the results of the District's periodic assessments, observing teachers in the classroom, and facilitating department-level "data chats." These data chats involve conversations on a department-level (i.e., math or English), in which the student test results are analyzed, areas of need are identified and strategies, and best practices are discussed and shared.

Additionally, student test results can sometimes be a "red flag" in identifying teachers who may be struggling. A struggling teacher's problems often are shown through other problems, such as in the classroom environment, delivery of instruction, and adherence to the curriculum. The test results are used to counsel the teacher and improve his or her teaching. Principals have conversations throughout the school year with teachers regarding their performance as informed by their students test results.

In evaluating teachers, school administrators look to patterns of deficit over time as reflected in student data in order to identify areas of need. For examples, the principal might identify the fact that the test results for students in a teacher's class show a pattern of comprehension deficit. The principal will provide the teacher with guidance and counseling on ways to improve the general student comprehension deficit. The teacher will then be evaluated on whether the teacher effectively implemented the methodologies to improve this comprehension deficit. By improving the teacher's teaching methodologies, the students should perform better and progress toward achieving proficiency of State and District standards. Thus, student test results are regularly used as a tool in teacher-development.

c. The Final Evaluation

At the close of the school year, teachers are evaluated in part based on whether they have met the goals described in the Initial Planning Sheet. A teacher's year-end final evaluation includes assessment of the teacher's (i) instructional techniques and strategies; (ii) adherence to instructional objectives; and (iii) maintenance of a suitable learning environment. In completing the final evaluation form (Ex. J), the administrator is required to evaluate the teacher as to 27 separate "areas of evaluation," including the following:

- Uses the result of multiple assessments to guide instruction;
- Guides all students to be self-directed and assess their own learning;
- Engages students in problem solving, critical thinking and other activities that make subject matter meaningful;

- Uses a variety of instructional strategies and resources to respond to student's diverse needs;
- Demonstrates evidence of short-term and long-term plans to foster student learning and achievement of the State standards;
- Uses State subject matter content standards to establish rigorous learning goals for students;
- Interrelates ideas and information within and across subject matter areas;
- Uses instructional strategies, materials, resources, and technologies that are appropriate to the subject matter;
- Demonstrates knowledge of State Standards and student development;
- Uses a grading/evaluation system that is aligned with State Standards; and
- Plans and implements classroom procedures and routines that support student learning.

The final evaluation form does not expressly include any factor of pupil progress. For each area of evaluation on the form, the school administrator is required to check one of three boxes: (a) "Meets;" (b) "Needs Improvement;" or (c) "No." If a teacher has participated in the Peer Assistance and Review Program for Teachers (known as "PAR") described in Education Code section 44500 *et seq.*, the results of that participation are added to the evaluation form by the administrator. If improvement is needed in a teacher's performance, the evaluator includes recommendations on the evaluation form as to the needed areas of improvement.

The evaluation is reduced to writing and given to the teacher, who is given an opportunity to submit a response. The evaluation and response are attached to the teacher's personnel file, and a meeting is customarily held between the administrator and the teacher to discuss the evaluation before the end of the school year.¹⁰

4. The Evaluation of Administrators

The District has established job responsibilities for its administrators.¹¹ When the performance of an administrator is evaluated, the evaluator takes into account factors that the District deems to be "reasonably related" to the fulfillment of these job responsibilities. The administrator final evaluation form includes the following areas of evaluation:

- Oral communication, written communication;
- Analysis, judgment, decisiveness, extra-organizational sensitivity;
- Planning and organizing, delegation and follow-up;
- Development of staff members, leadership and influence, instructional leadership; and
- Initiative/innovation.

¹⁰Occasionally, the final evaluation is mailed to the teacher if he or she is on leave of absence, declines to meet, or it was not feasible to hold the meeting for some other reason. Even under those circumstances, the teacher is entitled to submit a response for the personnel file.

¹¹As discussed above, the court is defining the term "administrator" to include all certificated non-teaching personnel inside and outside of schools, including principals and assistant principals.

The evaluation of an administrator follows a similar procedure to that identified for a teacher.

5. The AGT System

The District has concluded that pupil progress on the CSTs over a number of years should be a significant factor in the evaluation of teachers. The District created a metric that allows it to track, measure, and link student achievement on the CSTs to specific teachers. The District is now in the process of phasing in the metric — known as Academic Growth over Time (“AGT”).

The AGT system entails significant changes in the District’s evaluation system and will affect thousands of teachers and hundreds of administrators. The District’s management has devoted much of the last two school years (2010-11 and 2011-12) to the research and development of the system followed by extensive testing of the new evaluation procedures by volunteers and related training. The District intends to test AGT on a “no stakes” basis (meaning the evaluation can have no negative repercussions for the teacher or administrator) in all of its schools during the upcoming school year (2012-13) (Phase II of the “Pilot Program”). District management believes it is prudent to delay implementation of AGT on a “full stakes” basis until the additional year of testing and training has been completed.

No teachers or administrators are currently being evaluated under the AGT System except on a no stakes basis.

6. The Superintendent’s Testimony

Superintendent Deasy testified in his deposition in pertinent part as follows.

The CSTs are “the California assessments that we use, so they are the state testing as part of the STAR testing program.” Deasy Depo. at 64. STAR tests are criterion-referenced assessments (academic knowledge standard), as opposed to norm-referenced assessments (measured against other students). Deasy Depo. at 64-65.

The District has adopted standards which add to, but cannot subtract from, State standards on student promotion and graduation. Deasy Depo. at 124-25.

In the current system, there is a planning session between the administrator and teacher, then there is observation of the teacher in the classroom, and there is a conference afterwards. Deasy Depo. at 126. Administrators evaluating teachers do not have any regular or uniform training. Deasy Depo. at 126-27.

There are four Stull Performance Indicators used in the teacher evaluation process: (1) “support for student learning....-- using a variety of instructional strategies to respond to students’ adverse needs;” (2) “planning and designing instruction - - for example,...demonstrates evidence of short-term and long-term plans to foster student learning;” (3) “classroom performance. Demonstrates a knowledge of state standards and uses the grading and evaluation system that’s aligned to Los Angeles;” and (4) “developing . . . as a professional educator; how you communicate, how you collaborate, do you perform your adjunct duties, et cetera.” Deasy Depo. at 60-61.

The current system of teacher evaluation “does not have a discrete component by which teachers are provided information as part of the evaluation process, using student outcome and student achievement indicators over time.” Deasy Depo. at 25. There is no uniform process to

include any student achievement in teacher evaluations. Deasy Depo. at 25. Student progress is not contained in the Initial Planning Sheet. Deasy Depo. at 99-100. The teacher final evaluation form also does not contain information about pupil progress in the teacher's classroom. Deasy Depo. at 104. While there is some expectation that a teacher will make pedagogical changes to instruction, the District does not currently evaluate teachers by how students do academically. AR 67. Student academic outcomes are used to adjust instruction. Ibid. But in terms of the teachers' year-end performance evaluation, "It's not used." Deasy Depo at 67, 69.

"We do not currently construct evaluations of teachers by using how students do over time in terms of their academic outcomes." Deasy Depo. at 66-67. "[T]he current system doesn't best serve adults or students." Deasy Depo. at 34. "The system itself that we currently use is absent kind of the fundamental goal of the whole process of an education, and that is how do students do." Deasy Depo. at 35.

Similarly, student achievement is not used in the evaluations for administrators. Deasy Depo. at 25-26.

The Pilot Program is being conducted on a "no stakes" basis for the volunteer principal and teacher participants. "No stakes" means "that the volunteer participants will not be negatively evaluated during the test year [based] upon the quality of their implementation of the pilot activities." Deasy Depo. at 55. The reason for a "no stakes" Pilot Program is to maximize the learning curve before full implementation, ease the nervousness of those subject to the AGT evaluation, and avoid running two systems at the same time. Deasy Depo. at 32-34.

There are numerous differences between the current system and the Pilot Program. Deasy Depo at 22-23. In the Pilot Program, one component is student achievement over time. Deasy Depo. at 23-24. The teacher evaluators "go through a lengthy training, and they actually get certificated that they have a level of competency to master the framework for learning." Deasy Depo. at 23-24. The volunteer teacher and administrator participants in the Pilot Program are exempt from evaluation under the current evaluation system.

The current collective bargaining agreement between the District and the unions does not allow for teachers and administrators to be evaluated regarding the progress of pupils. UTLA has expressed hostility toward incorporating student test data in teacher evaluations. Deasy Depo. at 118. UTLA warned its members: "if your administrator makes any indication or comments on your Stull evaluation that ties your evaluation to student test scores in any way, talk to your chapter chair who will then contact your school and UTLA representative." Deasy Depo. at 115. This struck Deasy in a negative way, who "thought we were supposed to always be talking about how students are doing. That's the fundamental business we're in, is how students do." Deasy Depo. at 115.

E. Jurisdiction

Real Parties UTLA and AALA and Intervenor PERB contend that the court does not have subject matter jurisdiction over the Petitioners' claim. They argue that PERB has exclusive initial jurisdiction.

Subject matter jurisdiction is a defense that is never waived, despite delay or failure to object. People v. National Auto. & Cas. Ins. Co., (2000) 82 Cal.App.4th 120, 125. A judgment rendered by a court that lacks subject matter jurisdiction is simply void. Marlow v. Campbell,

(1992) 7 Cal.App.4th 921, 928.

1. PERB's Jurisdiction

Codified at Government Code section 3540 *et seq.*, the Educational Employees Relations Act ("EERA") is the statutory scheme governing labor relations in California's public schools (kindergarten through 12th grade) and community colleges. The evaluation of certificated employees is a matter that is the subject of collective bargaining pursuant to Govt. Code section 3543.2(a).

PERB is the expert administrative agency charged with interpreting and administering EERA and has exclusive jurisdiction over the initial determination of whether charges of unfair labor practices are justified, and if so, the remedy necessary to effectuate the purposes of EERA. Gov. Code §3541.5.¹² PERB was created to avoid "numerous superior courts throughout the state interpreting and implementing statewide labor policy inevitably with conflicting results...." Public Employment Relations Board v. Modesto City Schools District, ("Modesto") (1982) 136 Cal.App.3d 881, 895.

Judicial review of PERB decisions involving claims of unfair practices must be presented in the first instance in the court of appeal. "Any charging party . . . aggrieved by a final decision or order of the board in an unfair practice case. . . may petition for a writ of extraordinary relief from such decision or order." Govt. Code §3542(b). "Such petition shall be filed in the district court of appeal in the appellate district where the . . . unfair practice dispute occurred." Govt. Code §3542(c). Tex-Cal land Management v. Agriculture Labor Relations Board, (1979) 24 Cal.3d 335, 345-46.

Public policy is best served if PERB retains exclusive initial jurisdiction over any action which is arguably prohibited or protected by EERA. Modesto, *supra*, 136 Cal.App.3d at 894. In addition to being arguably prohibited or protected, the controversy presented to the state court must be identical to that which could have been presented to PERB. El Rancho Unified School District v. National Education Assn., ("El Rancho") (1983) 33 Cal.3d 946, 956. Only where the controversy is identical is there a risk of interference with the unfair labor practice jurisdiction of PERB. Ibid.

2. The Unions' Unfair Labor Practice Claims

In May 2011, the Teachers Union filed an unfair labor practice charge with PERB alleging that the District intended to implement changes to the evaluation procedures for

¹²PERB also administers six other statutory schemes governing California public-sector labor relations: the Meyers-Milias-Brown Act (Govt Code §3500 *et seq.*) (local government); Ralph C. Dills Act (Govt. Code §3512 *et seq.*) (State government); Higher Education Employer-Employee Relations Act (Govt. Code §3560 *et seq.*) (CSU System, the UC System, and Hastings College of Law); Trial Court Employment Protection & Governance Act and Trial Court Interpreter Employment & Labor Relations Act (Govt. Code §71600 *et seq.*, 71800 *et seq.*) (trial courts); and Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (Pub. Utilities Code §99560 *et seq.*) (supervisory employees of the transit agency).

administrators without collectively bargaining those changes. Specifically, the District had developed the Pilot Program based on the AGT System to evaluate teachers based in part on student performance, and was soliciting volunteers for the program. Despite the UTLA's demand that this issue be collectively bargained, the District continued to solicit teacher volunteers for the program.

Also in May 2011, the Administrators Union filed an unfair labor practice claim with PERB over the Pilot Program. The Administrators Union subsequently settled with the District and withdrew its claim. In order to implement Phase II of the Pilot Program, the District and the Administrators Union entered into a September 2011 memorandum of understanding providing for use of AGT on a test "no stakes" basis in the upcoming school year. Phase III remains to be negotiated, and would involve larger-scale implementation of the AGT system.

On December 1, 2011, the UTLA and the District jointly asked PERB to stay its proceedings while they negotiated the Pilot Program issue. PERB granted this request, and its case remains stayed pending completion of the negotiations.

3. PERB's Argument

PERB makes the principal jurisdictional argument that Petitioners' claim is preempted. It argues that the District and the two unions are subject to EERA and within PERB's jurisdiction. PERB Opp. at 7. It notes that the scope of mandatory bargaining under EERA expressly includes "the procedures to be used for the evaluation of employees." Govt. Code §3543.2(a). A school district may not unilaterally change any subject within the scope of mandatory bargaining without committing an unfair labor practice. See Oakland Unified School District v. Public Employment Relations Board, (1981) 120 Cal.App.3d 1007, 1014. Because Petitioners claim that the District has not adopted the proper evaluation procedures for teachers and administrators, and seek to force immediate change in such procedures, PERB concludes that "this matter falls squarely within PERB's original jurisdiction under the 'arguably prohibited' prong of the Modesto test." PERB Opp. at 8.

PERB acknowledges that Petitioners have no standing to appear in a PERB proceeding, and therefore this case does not present an identical controversy under El Rancho. PERB contends that this case falls within an exception to the identical controversy requirement. The United States Supreme Court stated in Sears Roebuck & Co. v Carpenter, (1978) 436 U.S. 180, that the lack of identical controversies would not foreclose preemption under the National Labor Relations Act if court resolution of the dispute would create a risk of misinterpretation of federal law.¹³ See El Rancho, *supra*, 33 Cal.3d at 959 (relying on Sears to conclude that where employer has no method of invoking PERB jurisdiction there is no preemption of court action unless there is a significant risk of misinterpretation of labor statute).

PERB concludes that since the Teachers and Administrators Unions filed unfair labor practice claims concerning the very issue in this case, there is a risk of conflicting decisions or misinterpretation of the EERA. PERB Opp. at 10. Moreover, a decision granting Petitioners'

¹³Federal interpretation of the National Labor Relations Act is considered by California courts to be persuasive authority in interpreting California labor statutes. Regents of the University of California v. Public Employment Relations Board, (1986) 41 Cal.3d 601, 648.

claims would deprive UTLA of its opportunity for PERB to determine in the first instance the District's obligation to bargain over the Pilot Program. PERB Opp. at 11. As the courts have recognized, PERB has the expertise and is in the best position to perform the delicate balancing of competing interests and the harmonization of statutes involved in the collective bargaining process. PERB Opp. at 12.¹⁴

Separate from its preemption argument, PERB argues that the court cannot grant the relief requested by Petitioners -- mandamus to compel the District to immediately change the system for evaluating the performance of teachers and administrators based on the performance of students on standardized tests -- because it would interfere with the right to collectively bargain. PERB Opp. at 1, 15. PERB notes that section 44661.5, enacted at the same time as the 1999 amendment to the Stull Act, expressly contemplates that where certificated employees are represented by a union, the school district employer will implement changes to employee evaluation procedures only by mutual agreement with the union. PERB Opp. at 13-14. Under a predecessor to EERA, the appellate court in Certificated Employees Council v. Monterey Peninsula Unified School District, (1974) 42 Cal.App.3d 328, 333, 337, held that the procedures under the Stull Act are subject to the meet and confer requirements of collective bargaining because "[i]t is difficult to imagine a matter more directly related to *employer-employee relations* and working conditions than the evaluation made pursuant to the guidelines that becomes [part of an employee's personnel file]...." PERB concludes that adoption of guidelines for evaluation of employees under the Stull Act may be effectuated only through collective bargaining. PERB Opp. at 15.

4. Analysis

PERB does not have exclusive initial jurisdiction over the issues in this case. Nor would mandamus interfere with the collective bargaining rights of the District and the unions.

The simplest reason why PERB does not have exclusive jurisdiction, or any jurisdiction, is that parties may not enter into a contract that violates a statutory law. Petitioners contend that the District does not comply with a mandatory legal duty under the Stull Act to evaluate teachers and administrators based in part on student performance. They further argue that the District and the unions have agreed for decades "to enter into unlawful collective bargaining contracts...that prevented compliance with the statutory mandate of evaluating certificated staff based in part on available evidence of whether or not the children are learning." Op. Br. at 11. If this allegation is true, the District has failed for years, and through any number of collective bargaining agreements between the District and the unions, to comply with the law. Whatever the collective bargaining rights of the District and unions, and whatever PERB's jurisdiction, the parties and PERB cannot avoid the District's mandatory legal duty by arguing that it has a duty to collectively bargain, or that PERB has exclusive jurisdiction to address unfair labor practices. The District is without power to negotiate or waive the mandatory provisions of the Education

¹⁴The unions make similar preemption arguments. UTLA Opp. at 3-5; AALA Opp. at 2. In addition, AALA argues that court interference with the collective bargaining process would violate the separation of powers doctrine. AALA Opp. at 12. The court views this as simply a restatement of the jurisdiction issue.

Code, and any provision in a collective bargaining agreement violating a statute in the Education Code is void. California Teachers' Assn. v. Livingston Union School District, (1990) 219 Cal.App.3d 1503, 1518.¹⁵

The jurisdictional argument raised by PERB and the unions confuses *whether* the District is violating a mandatory duty under the Stull Act with *how* the District meets that duty. It is beyond cavil that a mandamus claim will lie to compel a public agency to comply with the law. If the court determines that LAUSD is not complying with the Stull Act, the court will grant mandamus relief directing that it do so. The specific *means* by which LAUSD complies may well be a matter subject to collective bargaining. Thus, some or all of the following may be subjects for which the District must collectively bargain: (1) whether the District adopts the AGT System, uses student grades or pass/fail rates, or uses some other means of measuring student performance; (2) how student performance criteria are incorporated into teacher and administrator evaluations – *e.g.*, as an express provision on a Stull final evaluation form or some other manner; (3) the importance of student progress in relation to the other factors for teachers and administrators are evaluated; and (4) the training requirements for principals and assistant principals in how to use student progress in teacher evaluations.¹⁶ None of these collective bargaining issues prevents the court from issuing mandamus to compel the District to comply with the Stull Act by using student progress to evaluate teacher and administrator performance, and to exercise its discretion in deciding how to do so without committing an unfair labor practice. *See Doe v. Albany Unified School District*, (2010) 190 Cal.App.4th 668, 675.

Petitioners may be overreaching for some of the relief they are requesting, but this does not mean they are not entitled to any relief at all. The court cannot tell the District how to implement changes to its evaluation process, but this would be true even if the unions had no labor interest in, and PERB had no jurisdiction over, collective bargaining issues. Mandamus will not lie to force a public entity or official to exercise its discretionary powers in any particular manner, only to compel the agency to act in some manner. Sego v. Santa Monica Rent Control Board, (1997) 57 Cal.App.4th 250, 255.

The test for preemption is (1) whether public policy is best served if PERB retains exclusive initial jurisdiction because the action is arguably prohibited or protected by EERA, and (2) the present controversy is identical to that which could have been presented to PERB, unless it presents a significant risk of misinterpretation of a labor statute. Neither issue favors preemption.

With respect to first issue, Petitioners are arguing that the District is violating the Stull Act. As Petitioners contend (Reply at 10), PERB only has authority to adjudicate allegations of unfair labor practices. Govt. Code §3541.3(b)(i). “PERB does not have exclusive initial jurisdiction where a pure Education Code violation (as opposed to an arguably unfair practice) is alleged.” Dixon v. Board of Trustees, (1989) 216 Cal.App.3d 1269, 1277. The action is simply not arguably prohibited or protected by EERA.

¹⁵EERA expressly provides that it does not supersede the Education Code. Govt. Code §3540.

¹⁶The court offers no opinion on which issues must be collectively bargained.

With respect to the second issue, PERB concedes that Petitioners have no standing to file an unfair labor practice charge with PERB, and no direct way to invoke its jurisdiction. Therefore, the controversy is not identical to the Teachers Union's claim before PERB concerning the Pilot Program. Nor is there any significant risk that EERA will be misinterpreted by the court in determining Petitioners' claim. Indeed, the EERA is not relevant to the merits of this case.¹⁷

If Petitioners prevail on their claim, the court will essentially tell LAUSD, "You're not complying with the Stull Act. Go do whatever you need to do to bring your evaluation process for teachers and administrators in compliance with the Act." It will then be up to LAUSD to decide how to do this without committing an unfair labor practice.

F. Other Procedural Issues

The Administrators Union contends that Petitioners lack standing to make their mandamus claim, and that they have failed to name the District's Board as an indispensable party.

1. Standing

Petitioners reside within the District. They consist of the parents acting as guardians *ad litem* of minors who attend District schools.¹⁸ The parents also are taxpayers, as is individual Petitioner Alice Callaghan.

Standing for mandamus requires that the petitioner have a "beneficial interest." In general, The petitioner must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." Carsten v. Psychology Examining Commission, (1980) 27 Cal.3d 793, 796. Where a public right is involved, the petitioner is not required to have any legal or special interest; it is sufficient that as a citizen he or she is interested in having the public duty enforced. Burrtec Waste Industries, Inc. v. City of Colton, (2002) 97 Cal.App.4th 1133, 1137.

There is no doubt that Petitioners as parents of students and as taxpayers may enforce a legal duty of the District under the Stull Act. See Doe v. Albany Unified School District, (2010) 190 Cal.App.4th 668, 685 (parent of plaintiff had standing to compel compliance with Education Code requirement of physical education). The Administrators Union makes no argument and cites no case law to the contrary, merely alleging that Petitioners have no standing to interfere in the collective bargaining process before PERB. AALA Opp. at 11.

¹⁷PERB's argument that section 44661.5 prevents the District from unilaterally changing employee evaluation procedures fails for the same reason that the District can comply with a duty under the Stull Act and do so through collective bargaining. The court need not decide whether Petitioners are also correct that section 44661.5 is permissive, not mandatory, in its reference to collective bargaining. See Reply at 13.

¹⁸The Petition lists the parents and children as Does. While the court is dubious that there is any need for this procedure, no party has objected to the fact that they are not specifically identified.

Petitioners have standing.

2. Indispensable Party

The Administrators Union argues that the District's Board is not named as a Respondent, is the entity that employs all of the District's certificated employees, and is therefore indispensable. AALA Opp. at 13.

CCP section 389(a) defines the persons who ought to be joined if possible, known as "necessary parties." A determination that a party is necessary is a predicate for the determination whether the party is also indispensable. County of Imperial v. Superior Court, ("Imperial") (2007) 152 Cal.App.4th 13, 26. Once a missing party is found to be necessary, the court must assess whether it is indispensable pursuant to CCP section 389(b).¹⁹ Failure to join an indispensable party is not a jurisdictional defect in the fundamental sense of jurisdiction. The court has the power to render a decision as to the parties before it in the absence of an indispensable party. It is for reasons of equity and convenience only that a court will not proceed with a case where it determines that an indispensable party is absent and cannot be joined. Save Our Bay, Inc. v. San Diego Unified Port District, ("Save Our Bay") (1996) 42 Cal.App.4th 686, 693.

The controlling test for whether a necessary party is also indispensable under CCP section 389(b) is whether "the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined. Save Our Bay, *supra*, 42 Cal.App.4th at 692. In other words, a third party is indispensable if his or her rights must necessarily be affected by the judgment. *Id.* Each of the four factors in CCP section 389(b) must be considered, but "no factor is determinative or necessarily more persuasive than another." Imperial, *supra*, 152 Cal.App. 4th at 35.

Petitioners fail to address the AALA's argument. Nonetheless, the argument fails. Petitioners have named the District, its Superintendent, and all members of the District's Board. They have not named the Board as an entity. The Administrators Union provide no analysis showing that the Board is a separate entity apart from its members. Nor does it analyze any of the factors for an indispensable party under CCP section 389(b). Assuming *arguendo* that the Board is a necessary party, it also is clear that it is not indispensable because the District and individual Board members can adequately defend the entity Board's interests. See Imperial, *supra*, 152 Cal.App.4th at 38 ("The test for determining the ability to protect an absent party's

¹⁹ CCP section 389(b) provides: "If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

interest is whether existing and absent parties' interests are sufficiently aligned that the absent party's right necessarily will not be affected or impaired by the judgment or proceeding."); see also Deltakeeper v. Oakdale Irrigation District, (2001) 4 Cal.App.4th 1092, 1103.

The Board is not an indispensable party.

G. Public Policy²⁰

The state of public education generally, and within LAUSD in particular, is troubling. Only 56 percent of the District's students graduate from high school, test scores are low, and less than a third of students take the courses necessary for admission to the University of California. Thus, even if they had adequate grades and test scores, the vast majority of the District's students would not be eligible for admission to the State's premier college system.

A number of factors outside school affect a student's success, including parental involvement, family and community culture of education, transportation and other logistical issues, and financial ability to focus on school. But effective teachers are an important factor as well. Teachers differ in their motivation, experience, talents, skills, and effectiveness. Some teachers foster remarkable academic growth in their students, and others do not. Students inspired by effective teachers are more likely to go to college and live successful lives. For this reason, there is much to be gained from identifying those teachers whose performance lags, both for themselves and for their students.

School principals, too, can have a far-reaching effect on a student body and its success as a whole. According to the *amicus* brief, one study found that school principals account for 25 percent of a school's impact on student achievement.

The District's teacher evaluation process has been the subject of criticism. In 2009-10, 99.3 percent of LAUSD's teachers receive the highest rating of "meets standard performance." Moreover, 79 percent received a "meets" for all 27 indicators of performance, meaning that they did not need improvement in any area. This one dimensional rating of virtually all teachers as "effective" provides little meaningful evaluation. It is aggravated by the fact that the Stull Act does not require the District to evaluate all teachers every year. Teachers themselves have been frustrated by the lack of feedback from their principals.

Although in 2009-10 the vast majority of the District's teachers were rated as effective and not needing any improvement, that same year only 46 percent of District students scored as proficient in English language arts and only 56 percent scored as proficient in mathematics. LAUSD continues to have one of the lowest high school graduation rates in the State, and an even lower percentage of students are college ready. These failures cannot be laid solely at the feet of the District's teachers. Students must want to learn in order to do so, and some students can never be motivated to learn. But the District has an obligation to look at any and all means available to help improve the dismal results of its student population.

One means of improving student education is to evaluate teachers and administrators based on the overall progress of their students. Twenty four states have adopted policies to consider classroom effectiveness as measured by student progress as part of how teaching

²⁰Much of this section is based on the *amicus* brief of Mayor Villaraigosa. It is not supported by evidence, and is essentially a public policy argument.

performance is assessed. When classroom observations and student data are used together in a multi-measure teacher evaluation system, comparisons between the two components can be made to check for accuracy and provide more detailed information on a teacher's practice.

H. Merits

Whatever the public policy merit of using pupil progress in evaluating teachers and administrators, the District cannot be compelled to do so unless the law requires it. The issue becomes whether the Stull Act requires student progress to be a basis for teacher and administrator evaluation and, if so, whether the District is following the law.

1. The Standards

The State is required to develop assessment tests, known as the CSTs, that measure pupil achievement against content standards adopted by the Board of Education. §60642.5. The parties agree that the Board of Education has created CSTs that measure pupil achievement. Pet. RJN, Exs.C, E. The CSTs are part of the Board of Education's STAR program. The CSTs are "criterion-referenced assessments," meaning that they measure what students have learned in relation to the State's academic standards, as opposed to "norm-referenced assessments," which measure one student's knowledge compared to that of other students.

Section 44662(a) requires the District also to establish standards of expected pupil progress at each grade level in each area of study. The parties agree that the District has established standards of pupil progress. Pet. RJN Exs. C, E.

2. The Certificated Personnel Who Must Be Evaluated

a. Teachers

The District is required to evaluate the performance of teachers as that performance reasonably relates to (a) the progress of pupils toward the District's standards and (b) the CSTs, if applicable. See §44662(b)(1).

Pursuant to section 44662(b)(1), the District is not required to use student test scores in measuring pupil progress toward District standards for purposes of teacher evaluations. The District has various ways to measure pupil progress. It may use periodic assessment scores, individual letter grades, grade point average, pass-fail rates, college prep requirements, high school graduation, ACT & SAT scores, and AP class enrollment to help measure pupil progress toward District standards. However measured, the Stull Act requires the District to evaluate teacher performance as it reasonably relates to measured pupil progress.

b. Administrators

The Stull Act divides administrators are divided into two categories: (1) those who can be evaluated based on pupil progress toward District and State standards, and (2) those who cannot. The performance of administrators must be evaluated as it reasonably relates to District standards and CST results, if possible. See §44662(b)(1).

As a practical matter, principals and assistant principals are the obvious administrators who can be measured by the progress of children in their schools. Other administrators who work in the schools (including school nurses, psychologists, counselors, teacher advisors, and

certain others) have no direct relationship with student teaching. Under the Stull Act, the District must establish the job responsibilities for such administrative employees. §44662(c). If the District determines that these job responsibilities cannot be evaluated under the provisions of section 44662(b) -- which includes pupil progress, instructional techniques and strategies, adherence to curricular objectives, and a suitable learning environment -- the District must evaluate the performance of these employees "as it reasonably relates to the performance of those responsibilities." §44662(c).²¹

The District disagrees, lumping together all administrators as noninstructional certificated personnel "whose responsibilities cannot be evaluated appropriately" under section 44662(b). Dist. Opp. at 6-7.

While nurses, counselors, and psychologists, and other persons not responsible for student education, certainly fit under section 44662(c), the District does not explain in any detail why principals and assistant principals cannot be evaluated under section 44662(b). It is possible -- although the court has no evidence on the issue -- that principals and assistant principals can not be evaluated on their "instructional techniques and strategies" (§44662(b)(2)), or their adherence to curricular objectives (§44662(b)(3)). But they seemingly can be evaluated on whether they have established and maintained "a suitable learning environment" at their school. §44662(b)(4). Most important for present purposes, principals and assistant principals also can be evaluated based on pupil progress at their school. *See* §44662(b)(1). Indeed, the District is negotiating with the Administrators Union to use AGT for this very purpose, and school principals and assistant principals are participating in the Pilot Program which evaluates them based on pupil progress on a no stakes basis.

Section 44662(c) permits the District to evaluate administrators as it reasonably relates to the performance of their defined responsibilities only if their responsibilities "cannot be evaluated appropriately" under section 44662(b). It is clear that some portions of section 44662(b) can be used to evaluate principals and assistant principals. Of course, an evaluation of principals and assistant principals based on student performance and establishment of a suitable learning environment are not the only factors on which the District may choose to evaluate these administrators. But section 44662(b) does not limit the District to the four specified items. Rather, the statute lists four items which must be considered in evaluating teachers and pertinent administrative personnel, leaving for the District to determine what other factors are germane.

Under section 44662, the performance of teachers and school principals and assistant principals (hereinafter, collectively "principals") must be evaluated as their performance reasonably relates to pupil progress toward the District's standards and by the CSTs, if applicable.²²

²¹Still other administrators work outside schools in the Local Districts. Depending on whether they have responsibility for the education in a school or schools, such personnel may or may not be subject to evaluation based on pupil progress toward District and State standards. The court has insufficient evidence to make this determination.

²²Whether other certificated, noninstructional personnel working in the Local Districts also must be evaluated based on pupil progress is a matter for determination by the District in the

3. The Applicability of the CSTs

The next issue is whether the CSTs are “applicable.” Section 44662(b)(1) only requires that State standards as measured by the CSTs or other State tests be used for teacher and principal evaluations if they are applicable. The District and unions argue that the CSTs are not applicable for the practical reason that they are administered in May of each year, and the scores are not available until August. Meanwhile, the Stull Act requires the District to evaluate teachers and administrators by the last day of the school year. §44663. Thus, the opposing parties contend that the CST results are not available for teacher and principal Stull evaluation. Dist. Opp. at 6.

The opposing parties seem to be arguing that last year’s CST results are not applicable to the evaluation of a teacher or principal in the current year. There is nothing in the statute or logic to sustain this conclusion. Historical performance is a perfectly acceptable data for evaluation of current performance. Of course, the closer the data is to the time of evaluation, the more valuable it is. Teacher performance, and student progress, can and does change as the teacher evolves his or her instructional technique and other aspects of the profession. But that does not make last year’s CST results inapplicable.

Section 44662(b)(1)’s limitation on the use of State standards “if applicable” is a reference to the facts that CSTs do not exist for every grade and every subject, and that some students (non-English speakers) do not take the CSTs. That is, section 44662(b)(1) requires that teachers and principals be evaluated based on pupil progress toward District standards and any applicable State standards as measured by pertinent State tests. Whether a State standard “applies” must be determined on whether it exists for a particular grade and subject, and English-speaking student. The District cannot determine that the State standards, and hence the CSTs, are inapplicable to teacher and principal evaluations on a wholesale basis simply because it is inconvenient to use them. A conclusion to the contrary would negate section 44662(b)(1)’s mandate that the CSTs be used, giving a school district complete discretion to ignore them. That is not consistent with the statute’s plain meaning or its condition that the CSTs must be “applicable” in order to be used to measure teacher and principal performance.

The District acknowledged that the CSTs can be used in Stull evaluations by developing its AGT system, which measures teacher and principal performance as it relates to student progress on the CSTs over time. See Dist. Opp. at 6. This is an admission both that the CST’s historical results are relevant to teacher and principal evaluations, and that they can be incorporated in those evaluations, albeit as part of a project of great complexity. See ibid. 44662(b).

The performance of the District’s teachers and principals must be evaluated as their performance reasonably relates to pupil progress toward the District’s standards²³ and toward the State standards measured by the CSTs.

first instance.

²³The District is correct that section 44662(b)(1) does not require it to measure student progress toward District standards by student test scores. Dist. Opp. at 3. Only State standards must be measured by test scores: the CSTs.

4. The Meaning of “Reasonably Related”

The next issue is to interpret the phrase “reasonably relates” in section 44662(b). The statute only requires the District to evaluate teachers and principals as their performance reasonably relates to the progress of pupils. What does the term “reasonably relate” mean in the statute?²⁴

Parsing the phrase, the term “reasonable” is a common word of legal parlance. Among other definitions, it means “fit and appropriate to the end in view.” Black’s Law Dictionary, (4th ed. 1968) 1431. The term “relate” means “to stand in some relation” or “to have bearing or concern.” Id. at 1452. Thus, a reasonable relationship is one that is appropriate for the matter in concern.

The court’s research disclosed little in the way of California cases discussing the phrase “reasonably relate” in a statute. The most pertinent is Balch Enterprises, Inc. v. New Haven Unified School District, (1990) 219 Cal.App.3d 783, which concerned Govt. Code section 65995(b)(2), which at the time provided that a school district could not levy a fee on a commercial development for school construction unless the school board found that the amount of the fees (1) bears a “reasonable relationship” to the needs of the community for school facilities and (2) is “reasonably related” to the need for schools caused by the commercial development itself. The Balch court quoted from the progeny of Associated Home Builders etc., Inc. v. City of Walnut, 4Cal.3d 633, a case concerning the constitutional standard for whether an exaction for property development is a Fifth Amendment taking of property, and indicating that whether an exaction is “reasonably related” to the need created by the development only requires an indirect relationship between the two. Id. at 794-95 (citation omitted). The Balch court did not adopt this indirect relationship test for purposes of statutory interpretation, finding that the record contained no more than a recitation of statutory language and no citation of evidence supporting a conclusion that the development was reasonably related to a need for schools caused by the development itself. Ibid.

Obviously, nothing in Balch controls the interpretation of “reasonably relates” in section 44662(b). Nonetheless, it is worth mentioning that the California Supreme Court in Associated Home Builders permitted an indirect relationship for purposes of what is “reasonably related.” The common meaning of a reasonable relationship -- one that is appropriate for the matter in concern -- suggests that whether an indirect relationship is permitted depends on the overall circumstances of a particular case.

In the context of teacher and principal evaluations, nothing in section 44662(b) requires a direct relationship in order to be reasonable. The phrase “reasonably relates” means that the performance of teachers and principals must be evaluated by pupil progress toward the District’s standards (as measured by the District’s testing), and toward the State standards as measured by the CSTs, but that the District has discretion in whether pupil progress must be direct or indirect in this evaluation. The District may make pupil progress a direct factor in the final teacher and principal evaluations, or it may consider pupil progress indirectly in such evaluations,

²⁴While both Petitioners and the Teachers Union ask the court to judicially notice portions of the Stull Act’s legislative history, no party argues that the phrase “reasonably relates” lacks a plain meaning requiring the court to look to the legislative history for interpretation of the statute.

incorporating it through other measurements and means. But there must be a nexus between pupil progress and the evaluations.

This interpretation is consistent with the Stull Act's purposes, one of which is to require that school districts evaluate teacher and principal performance based in part on the progress of pupils. The Stull Act does not say how pupil progress should be factored into the evaluation, leaving it to the school district's discretion. It is perfectly appropriate for a school district to incorporate pupil progress into the evaluation indirectly, through other factors in assessing the teacher or principal.

5. The District Does Not Comply with the Stull Act

Despite the discretion given to the District in using pupil progress in teacher and principal evaluations, the District does not currently comply with the Stull Act. The District is not required to directly consider pupil progress in these evaluations, but there must be a nexus between pupil progress and the evaluations. No such nexus currently exists.

The District argues that it does indirectly evaluate at least teachers as shown on the final evaluation form. Dist. Opp. at 3-4.

By their express terms, the factors in the final evaluation form that are relied on by the District evaluate a teacher on his or her instructional techniques and strategies, a completely separate Stull Act factor from pupil progress. See §44662(b)(2). Thus, a teacher is evaluated on how he or she (1) uses the result of multiple assessments to **guide instruction**; (2) **guides** all students to be self-directed and assess their own learning; (3) **engages students** in problem solving, critical thinking and other activities that make subject matter meaningful; (4) uses a variety of **instructional strategies** and resources to respond to student's diverse needs; (5) demonstrates evidence of short-term and long-term **plans to foster student learning** and achievement of the State standards; (6) uses State subject matter content standards to **establish rigorous learning goals** for students; (7) **interrelates ideas and information** within and across subject matter areas; (8) uses **instructional strategies**, materials, resources, and technologies that are appropriate to the subject matter; (9) **demonstrates knowledge** of State Standards and student development; (10) **uses a grading/evaluation system** that is aligned with State Standards; and (11) **plans and implements classroom procedures** and routines that support student learning. As the bolded language shows, these final evaluation factors concern what the teacher does, plans, or uses as part of the teaching process. Nothing in these factors concerns student progress.

The District essentially contends that if a teacher performs these instructional tasks well, then his or her students should improve on both District periodic assessments and their CSTs. Dist. Opp. at 4.

It is true, as the District argues, that it is not required to check a box on a teacher evaluation form at year-end that assesses pupil progress, and that it has flexibility in performing this evaluation. *Ibid.* But there must be a nexus between pupil progress and teacher evaluations. This nexus has several essential components. First, the evaluator must know what the pupil progress is with respect to that teacher. A teacher cannot be evaluated on pupil progress if the evaluator lacks information. Second, the evaluator must know how to use the pupil progress information. That is, the evaluator must be trained or otherwise know how significant the

information is concerning pupil progress to the overall evaluation of the teacher. Third, since the evaluation must be in writing (§44663), the evaluator's determination of the impact of pupil progress must be reflected somewhere in writing. This does not mean that there must be a box on a form which directly addresses pupil progress. It does mean that pupil progress must be reflected in some factor on a written teacher evaluation.

The District also argues that it does consider pupil progress in evaluating teachers over the school year. The periodic testing and grading of students provides data which is used to guide and advise teachers on their instruction of students. Once a trend develops, the tests are used to assist teachers in developing goals to improve student scores, including improved instruction. Whether a teacher meets these teaching goals is evaluated in the year-end form. This is an indirect evaluation of the teacher based on student progress. Dist. Opp. at 5.

This argument is simply a restatement of the tautology that as teachers teach, students will learn. The point of section 44662(b)(1) is to incorporate pupil progress in the teacher's evaluation. The required nexus between teacher evaluations and student progress toward District standards is not traceable where a teacher is evaluated based on his or her instructional technique, as separately required by section 44662(b)(2).

Superintendent Deasy agrees that the District's current evaluation system does not comply with the Stull Act. Thus, he testified that there is no uniform process to include any student achievement in teacher evaluations. Deasy Depo. at 25. Student progress is not contained in the Initial Planning Sheet. *Id.* at 99-100. The teacher final evaluation form also does not contain formation about pupil progress in the teacher's classroom. *Id.* at 104. While there is some expectation that a teacher will make pedagogical changes to instruction, the District does not currently evaluate teachers by how students do academically. *Id.* at 67. Student academic outcomes are used to adjust instruction (*ibid.*), but not for teachers' year-end performance evaluation. *Id.* at 67, 69. In short, the District does "not currently construct evaluations of teachers by using how students do over time in terms of their academic outcomes." *Id.* at 66-67. Similarly, student achievement is not used in the evaluations for administrators. *Id.* at 25-26.

The District does not address Superintendent Deasy's admissions that the evaluation system for teachers and principals does not use student progress toward District or State standards. He is, after all, the employing authority responsible for teacher and administrator evaluations. §§ 44664(b), 44665. His admissions underscore the above conclusion that the District is not currently complying with the Stull Act.

In sum, the District does not currently comply with the Stull Act's requirement that teachers and principals be evaluated by the progress of students toward District standards, however measured, and by the progress of students toward State standards as measured by the CSTs.²⁵

²⁵Petitioners and the District agree that implementation of the AGT system for teachers and principals would comply with the Stull Act. Pet. Op. Br. at 9; Dist. Opp. at 5. Whether the District imposes the AGT system in order to comply is a matter within its discretion and subject to the collective bargaining issues raised by UTLA and AALA.

6. The District's Duty is Enforceable by Mandamus

Both the District and UTLA argue that, if the District is not complying with the Stull Act, mandamus is not available as a remedy.

The Teachers Union points out that nothing in section 44662 requires the use of a specific methodology such as the AGT system to comply with the Stull Act's mandate that a teacher's performance be evaluated as it reasonably relates to District and State standards. UTLA Opp. at 7. The UTLA relies on Doe v. Albany Unified School District, (2010) 190 Cal.App.4th 668, 678, for the proposition that there must be a clear ministerial duty in order to grant a mandamus petition. As section 44662 does not prescribe a method as to how the District must include student progress in teacher evaluations, there is no clear procedure for performance evaluations and mandamus will not lie. UTLA Opp. at 9-10.

The District similarly argues that mandamus is appropriate only to compel a clear, present and ministerial duty. Dist. Opp. at 10-11. It points to Petitioners' proposed order, seeking a court writ compelling the District to implement a system of evaluating applicable certificated employees as their performance reasonably relates to student progress toward District and State standards, compelling it to confer with employees who receive an unsatisfactory performance evaluation, reducing the evaluations to writing and transmitting them to the employee, revoking consent to evaluate employees who have been employed at least ten years less frequently than every other year, and rescind any five year cycle of review for senior staff until a Stull Act evaluation has been conducted. Ibid. The District argues that the proposed writ interferes with the vast discretion committed to the District, and would be impossible to enforce. Ibid.

To the extent UTLA and the District contend that mandamus does not lie to compel the District to comply with the Stull Act, they are wrong. An agency can always be compelled to comply with the law. The failure to do so is arbitrary and capricious action under CCP section 1085. To the extent that UTLA and the District contend that the District has discretion as to how to comply with the Stull Act's requirements that it evaluate teachers (and administrators), the court has repeatedly stated (*see post*) that it does have that discretion. But discretion in how to comply with the law does not prevent mandamus from issuing to compel the District to do so. See Sego v. Santa Monica Rent Control Board, (1997) 57 Cal.App.4th 250, 255.²⁶

I. Conclusion

The Legislature passed the Stull Act and its 1999 amendment in an effort to improve the dismal progress of students in California's public schools. The law is premised on the public policy belief that student achievement will improve if student progress is made a component of teacher and administrator performance evaluations. The District does not currently comply with the Stull Act's requirement that teachers and principals be evaluated by the progress of students toward District standards, however measured, and by the progress of students toward State standards as measured by the CSTs. The District must do so, and a writ will issue compelling this task.

The performance of the District's teachers and principals must be evaluated as their

²⁶The court agrees with the District that it cannot be compelled to evaluate teachers and administrators more frequently than required by section 44664.

performance reasonably relates to pupil progress toward the District's standards, however measured, and toward State standards as measured by the CSTs. The District has a great deal of discretion in how it complies with the pupil progress requirement, and this discretion must be exercised without committing an unfair labor practice in violation. The discretionary issues which the District must decide include (1) whether the District adopts the AGT System, uses student grades or pass/fail rates, or uses some other means of measuring student performance, (2) how student performance criteria are incorporated into teacher and administrator evaluations – *e.g.*, directly as an express provision on a Stull final evaluation form or indirectly in some other manner, (3) the importance of student progress in relation to the other factors on which teachers and administrators are evaluated, and (4) the training requirements for principals and assistant principals in how to use student progress in teacher evaluations. Some or all of these issues may be required to be the subject of collective bargaining with the Teachers and Administrator Unions.

Additionally, while principals and assistant principals are clearly within the scope of section 44662(b)(2), the District must determine in the first instance whether administrators located outside of schools and in the Local Districts also are within its scope, or instead fall within section 44662(c) as certificated noninstructional personnel whose responsibilities cannot be evaluated appropriately under section 44662(b).

Petitioners' counsel is ordered to prepare a proposed judgment and writ of mandate consistent with this decision, serve them on counsel for all 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. The court expects the parties to agree as to the form of the judgment.²⁷ An OSC re: judgment is set for July 10, 2012, at 1:30 p.m.

²⁷Petitioners seek attorneys' fees under CCP section 1021.5. Pet. Op. Br. at 15. No opposing party addresses this issue, which is better left to a separate motion for attorneys' fees. *See* CRC 3.1702(b). Before such a motion is filed, the parties are ordered to meet and confer on whether Petitioners are entitled to attorneys' fees and the reasonableness of the amount sought in an attempt to resolve the issue.