CONSOLIDATED CASE NOS. A142858/A143428

IN THE

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT, DIVISION ONE

UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA

PLAINTIFF AND APPELLANT,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DEFENDANT, CROSS-DEFENDANT AND APPELLANT,

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

REAL PARTY IN INTEREST AND RESPONDENT.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

PLAINTIFF AND RESPONDENT,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DEFENDANT AND APPELLANT.

SAN FRANCISCO SUPERIOR COURT, NO. 12-512437

THE HONORABLE RICHARD B. ULMER, PRESIDING

BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: A142858
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APPELLANT/PETITIONER: United Educators of San Francisco et al. RESPONDENT/REAL PARTY IN INTEREST: California Unemployment Insurance Appeals Board, et al	

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Date: November 30, 2015

Laura Schulkind, Esq.
(TYPE OR PRINT NAME)

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I. INTRODUCTION

Amicus Curiae, the California School Boards Association's Education Legal Alliance ("ELA"), submits this brief in support of the San Francisco Unified School District ("District" or "SFUSD"). The issues raised in the instant appeal implicate matters of statewide public concern for hundreds of local school districts and county offices of education throughout the State due to the nature of substitute work and the delivery of summer school programs. ELA asks that this Court sustain the ruling of the superior court for three reasons.

First, CUIAB's interpretation of Unemployment Insurance Code[1] section 1253.3 is contrary to the plain meaning of the statute. As explained by the superior court, the non-eligibility for benefits "between academic years or terms" is clear. Moreover, the California Department of Education ("CDE"), the regulatory body charged with interpreting and enforcing the Education Code, treats "academic year" to mean the period when school is regularly in session for all students and does not include summer or summer school.

Second, even if outside interpretive aids are found necessary to understand section 1253.3, they support the superior court's analysis. The legislative history is clear: Congress intended that school employees who expect and understand that their regular employment will occur during the fall and spring terms are not entitled to benefits during the summer break. That a school may offer a separate summer program has no bearing on the reasoning behind this over-arching principle.

[1] All future references are to the Unemployment Insurance Code unless otherwise indicated.

Moreover, the same conclusion has been reached by virtually every other jurisdiction with a statute that, like California's, is derived from the federal law. ELA highlights this national trend in light of the California Court of Appeal's recognition that, where the state unemployment insurance codes mirror the federal law and each other, " ... the interpretation placed on that language by federal and other courts is unusually persuasive . . ." (*Board of Education v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 685 (*Long Beach*).) By way of example,

- The New York Supreme Court Appellate Division squarely addressed the issue and held:

> The board's holding that because claimant chose to teach two days a week during a five-week summer session she was "not between academic terms" and, therefore, eligible, is both irrational and unreasonable and thwarts the clear legislative intent. The law was . . . not enacted to supplement the income of a regularly employed teacher who chose to teach a few days during her regular summer vacation while awaiting the commencement of the next academic year for which she had unquestioned assurance of employment.

Claim of Lintz (N.Y. App. Div. 1982) 89 A.D.2d 1038, 1039 [454 N.Y.S.2d 346, 347]

- The Hawaii Court of Appeals similarly held:

> A substitute teacher who teaches during the regular school year is not eligible for unemployment benefits during the summer break even when one or more summer school substitute teaching positions was or were available and unsuccessfully sought.

Harker v. Shamoto (Hawaii Ct. App. 2004) 104 Hawai'i 536, 545 [92 P.3d 1046, 1055].

Further, similar results have been reached in **Minnesota** (*Halvorson v. County of Anoka* (Minn. Ct. App. 2010) 780 N.W.2d 385, 392); **Illinois** (*Campbell v. Department of Employment Sec.* (Ill. App. Ct. 1991) 211 Ill.App.3d 1070, 1081; *Doran v. Department of Labor* (Ill. App. Ct. 1983) 116 Ill.App.3d 471, 475-76); **Colorado** (*Herrera v. Industrial Claim Appeals Office of State of Colo.* (Colo. App. 2000) 18 P.3d 819; and **Pennsylvania** (*DeLuca v. Com., Unemployment Compensation Bd. of Review* (Pa. Commw. Ct. 1983) 74 Pa.Cmwlth. 80; *Glassmire v. Unemployment Compensation Bd. of Review* (Pa. Commw. Ct. 2004) 856 A.2d 269.)

Finally, even if CUIAB's interpretation of section 1253.3 is not found to conflict with the language or intent of the statute, ELA submits that CUIAB's analysis is more akin to the formation of a regulatory rule than the application of law to a specific dispute. In particular, CUIAB applies newly-crafted terms, rules and standards to determine what is/is not an "academic year" or an "academic term". It also applies newly-devised terms and concepts in the context of substitute employment (i.e. "expectation of work" and "loss of work"). ELA is troubled that a decision of such sweeping impact to school programs and the employer-employee relationship could occur through the issuance of nonprecedent decisions. The lack of clarity and unworkability of CUIAB's approach is symptomatic of a rule that was developed in a vacuum, without the benefit of comment from stakeholders and experts—as is intended in the rulemaking process. (See, e.g., Gov. Code §11346.45; *POET, LLC v. California Air Resources Bd.* (2013) 217 Cal.App.4th 1214, 745.)

Nor can CUIAB invoke its precedent decision, *Alicia Brady* (2013) Precedent Benefit Decision No. P-B-505 ("*Brady*"), or its other past precedent decisions in defense of its position here. As an initial matter, the superior court properly invalidated *Brady* in ruling on SFUSD's separate action, initiated pursuant to section 409.2. Additionally, the position CUIAB takes in the nonprecedent decisions is far broader than its position in *Brady*. Here, for example, CUIAB finds substitutes who may have only worked one day during a summer session eligible for benefits both for that summer and the next. This is an extension of *Brady*. Finally, CUIAB's past precedent decisions do not support its position in the instant cases. To the contrary, they address the rights of 12-month employees who lose summer work—facts very different from those here. As such, it is not accurate for CUIAB to characterize the nonprecedent decisions as continuing applications of established law.

In sum, ELA submits that CUIAB's approach should be rejected as contrary to the plain meaning and intent of the statute. However, even if this Court were to find that CUAIB's analysis is not contrary to the law, it should find that its positions is tantamount to unofficial rulemaking that has improperly deprived ELA and its members the opportunity for meaningful input.

II. BACKGROUND

The facts relevant to this dispute have been stipulated by the parties and ELA relies upon them here. Particularly noteworthy, the parties agree that:

- The last day the SFUSD operated during the "*regular*" session of the 2010-11 school year was May 27, 2011;

- The first day of instruction for the 2011-12 school year was August 15, 2011; and
- Each of the individual claimants in this litigation received a letter of "reasonable assurance" of employment for the 2011-12 school year.

ELA also notes the following facts recognized by the Trial Court that are particularly relevant to the analysis of section 1253.3:

- "In the 1970s, as now, the conventional academic year in schools ran from late summer or early fall to late spring." (Statement of Decision, p. 8.)
- "The academic year was divided into a fall term and a spring term, generally separated by a winter break between those terms." *Id.*
- "A summer school session between academic years was already a common feature in the 1970s." *Id.*

III. LEGAL ARGUMENT

A. The Plain Language of Section 1253.3 Makes Clear That Benefits Are Not Payable to School Employees Whose Contract or Assured Work Occurs During a District's Regular School Year, Whether or Not The District Offers an Optional Summer Session

Section 1253.3, subsections (b) and (c), provide that benefits are not payable to the employee of an educational institution during any period between two successive "academic years or terms" if: 1) the individual performs services in the first of the academic years or terms; and 2) there is a contract or a reasonable assurance that the individual will perform services for the educational institution in the second of the academic years

or terms. The Trial Court concluded, and ELA agrees, that this language is unambiguous in its meaning that an employee of an educational institution who is employed in the spring term is not eligible to receive unemployment insurance benefits during the summer, where the employee has received reasonable assurance of reemployment in the fall term, regardless of whether a summer session is offered. This is for the following reasons discussed below:

- The phrase "academic year" must refer to the regular school year of mandated and compulsory school days and does not include a district's voluntary summer school session. As such, because benefits are not payable *either* between academic years or academic terms, employees who work in academic year "one" who are assured work in academic year "two" are not eligible for summer benefits, regardless of whether the district offers students a voluntary summer session.
- Summer school is not an "academic term" as that term is used in section 1253.3.
- Treating an intervening summer session as an "academic year" or "academic term" renders the reasonable assurance language in section 1253.3 meaningless and inoperable.

1. The phrase "academic year" in section 1253.3 refers to the period during which a school district is required by law to be in session and is not synonymous with "calendar year"

The term "academic year" as used in section 1253.3 cannot reasonably be read to mean "calendar year" or otherwise include the

summer period between mandatory academic terms. As the Trial Court noted, "[i]f the 'academic year' truly ran the entire calendar year . . . , a 'period between two successive academic years' could never exist." (*Id.*) Because such a reading would render the phrase "period between two successive academic years" meaningless, it is disfavored. (*San Diego Police Officers' Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 284, as modified (Dec. 11, 2002), as modified on denial of reh'g (Jan. 9, 2003).)

Further, statutory analysis presumes the legislative body's familiarity with the laws it has enacted and an intention to create a harmonious body of law. (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 6.) Thus, interpretations that create statutory conflict or absurd results are also disfavored. (*California School Employees Ass'n v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574, 587, as modified (Dec. 10, 2004).)

Here, to treat "academic year" to include summer (even where summer school is offered) creates such an absurdity.

As SFUSD points out in its brief, the California Education Code establishes a mandatory period of instruction of at least 175 days. (Ed. Code, § 37620.) It is during this period that, among other things: 1) the state's compulsory education laws apply; 2) public schools are mandated to provide instruction; and 3) certificated employees receive credit toward permanent status. (See, e.g., Ed. Code, §§ 37620, 41420, 48200, 44913.) Moreover, section 37620 expressly requires mandatory instruction "during the *academic* year" which it distinguishes from the "*school* year". (*Ibid.* (emphasis added).)

In contrast, offering summer school is permissive, and attendance voluntary. (See Ed. Code, § 37252 *et seq*.)[2] Further, under the Education Code, no right to summer employment flows from employment during the regular school year. These important distinctions apply whether an employee is classified or certificated, full-time or substitute. Of particular note, the Education Code establishes a detailed statutory scheme with regard to teacher layoffs that makes clear that the on-going right to employment applies to the academic year. Education Code section 44949 states in part:

> (a) (1) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required *for the ensuing year* . . ., the governing board and the employee shall be given written notice . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

(Emphasis added.) As this process makes clear, the rights and protections of a layoff arise upon notice that a teacher will not be employed in the next *academic* year. There is no duty to provide notice that a teacher will not be employed during the intervening summer, and the failure to do so is not a layoff.

It would create an absurd result to treat non-employment during summer school functionally as a layoff under the Unemployment Insurance Code, while it is clearly not a layoff under the Education Code. As such,

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[2] Although the referenced Article is entitled "summer school" and mandates, "supplemental instructional programs" for some students, it makes clear that "summer school" is not required. "…programs *may* be offered pursuant to this section during the summer, before school, after school, on Saturday, or during intersession, or in any combination …, but shall be in addition to the regular schooldays." (Ed. Code, § 37252, subd. (e), emphasis added.)

the rules of statutory construction require reading "academic year" to mean the period during which schools are required to be open and students required to attend.

For the above reasons, ELA submits that it is contrary to the meanings given to "academic year" and "school year" that permeate the Education Code to treat "academic year" in the Unemployment Insurance Code to mean "calendar year" or otherwise include the summer period. The CUIAB's attempt to circumvent this plain reading is unpersuasive. It asserts that because "academic year" is not defined in the statute, it must be given its "ordinary meaning". (CUIAB Brief, p. 13) However, this "ordinary meaning" is best derived from its use in the Education Code, as described above.

CUIAB should have turned to the California Department of Education ("CDE") to give "ordinary meaning" to the term "academic year", as it is the regulatory body with the authority and expertise to interpret the Education Code. Because CUIAB has raised the issue of the "ordinary meaning" of the term "academic year," ELA submits that this Court can and should take judicial notice of CDE's treatment of this term. (See ELA Request for Judicial Notice.) For example, in explaining the difference between a traditional school year and a year-round school calendar, CDE explains: "Both traditional and some year-round school calendars can have 180 days of instruction. The traditional calendar, *of course*, is divided into nine months of instruction and three months of vacation during the summer. Year-round calendars break these long instructional/vacation blocks into shorter units." (http://www.cde.ca.gov/ls/fa/yr/guide.asp (Emphasis added).) CDE further notes, in discussing the potential merits of year-round schools:

> Also, summer school, the typical time for remediation in traditional calendar schools, is held just once a year. *It is scheduled after the school year has been completed . . . .*

(*Ibid.* (Emphasis added).)

Rather than consider CDE's treatment of "academic year," CUIAB reached to Webster's Dictionary to assert the sweeping definition of "academic year" as any period when schools are "open" and "people are studying".[3] It then concludes—based on this definition—that "the meaning [of academic year], in a particular district, is a question of fact." (CUIAB Brief, p. 13.) In other words, districts that opt to offer summer school define academic year differently from districts that do not.

However, this argument turns statutory construction and the enforcement of laws on their head. The *meaning* of the law is derived from the statute and is applied consistently. Individual parties do not get to decide what the law or its terms mean. Certainly, as most jurisprudence before this Court demonstrates, the *application* of the law to different situation produces varying results. However, that is far different from what CUIAB proposes here.

Further, CUIAB's reliance on Education Code section 67102 does not advance its broad and malleable definition of academic year. CUIAB correctly notes that the Education Code establishes a minimum of 175 days of instruction. It then states: "[t]hat there must be a minimum period of instruction does not mean that the Legislature has limited the academic year

[3]CUIAB also narrowly points to the Education Code's treatment of academic and school years for funding purposes, while failing to reconcile its analysis with those provisions relating to employment and the delivery of instruction—provisions more appropriate for discerning the meaning of section 1253.3. (CUIAB Brief, p. 13)

to those days only as the superior court held." (CUIAB Brief, p. 13 at fn. 8.) As an initial matter, this misstates the holding of the superior court. Additionally, it misconstrues the flexibility afforded districts to extend the days of instruction in the academic year to permit a redefinition of the term "academic year". The establishment of a minimum number of instructional days does not assist this analytic leap.

2. The plain meaning of section 1253.3 makes benefits nonpayable between academic years, where the employee has assurance of employment in the successive year, and on this basis alone benefits were properly denied

As the superior court properly noted, the proper definition of academic year ends the matter. Section 1253.3 provides that benefits are not payable between "two successive academic years *or* terms . . . if the individual performs services in the first of the academic years *or* terms and if there is a contract or a reasonable assurance that the individual will perform service . . . in the second of the academic years *or* terms. . ." (Emphasis added.) Thus, regardless of how "academic term" is defined, the employees at issue: 1) worked in the 2010-11 academic *year*, and 2) received assurances of work in the 2011-12 academic *year*. As such, unless they were not employed during the 2011-12 academic year, the plain language of the statute renders them ineligible for benefits during the period between these two academic years.

3. Summer school is not an "academic term" within the meaning of section 1253.3

CUIAB also argues that, "[a]cademic term" should be construed to include a summer term when school is in session, and should not include

any true recess periods—when no instruction is provided." (CUIAB Brief, p. 14.) This interpretation should be rejected, as it is not grounded in the plain meaning of the statute. Rather, it would work absurd results and thwart the operation of the statute.

First, as noted above, summer school is not part of the regular and mandatory school year as these terms are used in the Education Code and by its regulatory authority, CDE. Rather, as the Trial Court recognized, academic terms logically fall within the academic year.

More importantly, treating summer school as an academic term would vitiate section 1253.3 for any district that offers summer school. Under CUIAB's analysis, district's *not* offering summer school would be able to send teachers (whether full-time or substitute) who are employed during the regular school year notices of assurance for the following school year. This notice would render the employees ineligible for benefits during the summer. In contrast, consider the effect of CUIAB's analysis on districts that offer summer school:

- Summer school programs are generally remedial in nature and serve a fraction of a district's student body. Thus, it follows that summer school programs only employ a fraction of a district's academic-year employees. In other words, it is a given that the majority of a district's academic-year employees will not be employed during summer school.
- If summer school were treated as an academic term, arguably no exception to eligibility would be available as to *all* district employees. The statute provides that benefits are only "not payable" *between* two successive academic years or terms. Thus, if summer is treated as an academic term, any employee not hired in the next

successive term (i.e. summer) would be eligible for benefits if not employed during that summer session. Indeed, CUIAB concedes as much. (CUIAB Brief, p. 22, fn. 12.)

In other words, the logical extension of CUIAB's analysis is that the offering of summer school creates eligibility for benefits for all employees not employed during that limited, voluntary session. ELA submits that it would be an absurd result contrary to the plain meaning of the statute for districts, by virtue of offering summer school, to become responsible to pay benefits to all employees not employed during the summer session.

4. Treating summer school as part of the academic year or academic term renders the "reasonable assurance" language in section 1253.3 meaningless

The plain language of section 1253.3 operates to deny eligibility for summer-month benefits to employees who work the spring term and receive contracts or assurances for work the next fall term. That a district offers a summer school session has no bearing on the on-going employment or assurance of employment of academic-year employees. So long as that employee receives the reasonable assurance of employment in the next academic year, whether or not the district offers an intervening summer school is of no moment.

Indeed, CUIAB appears to agree. In rejecting the Union's position, it advances precisely this point:

> The Union's error is that for an employee whose employment contract contemplates work only during the fall and spring terms, a voluntary add-on summer-term assignment cannot be a basis to disrupt the reasonable-assurance process for the employee's regular contract. The Union cannot use this add-on work assignment (for summer) to effectively negate the statutory denial provision. The reasonable-assurance process only operates

> to qualify the individual for or deny to an individual benefits between academic terms *that the employee's contract actually presumes the employee will be working.*

In other words, however "academic year" and "academic term" are defined, section 1253.3 only confers eligibility for benefits during a period that the employee's contract or assured employment covers. Employee's whose contracts or assurances for work do not include summer are not "unemployed" in summer for the purpose of eligibility. This fundamental operating principle of section 1253.3 is lost where an interceding summer school program is permitted to affect the eligibility of employees who have reasonable assurance of employment in the ensuing academic year.

B. The Cuiab's Interpretation Is Contrary to Statutory Intent and Other Interpretive Aids

Where a statute's plain meaning is unambiguous, a court need go no further. (*Green v. State* (2007) 42 Cal.4th 254, 260; *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.) Words in a statute should be given their plain and commonsense meaning. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332, as modified (Mar. 30, 2010).) Nor should a court add to or alter statutory language to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*People v. Knowles* (1950) 35 Cal.2d 175, 183.) However, if statutory language permits more than one reasonable interpretation, courts may consider a statute's purpose, legislative history, and public policy. (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 583, as modified (Sept. 18, 2006).)

Here, because the statutory language at issue is unambiguous, this Court need not consider interpretive aids designed to discern statutory

intent. Nevertheless, ELA notes that the legislative history and apparent purpose of section 1253.3 support the superior court's and ELA's interpretation.

1. The legislative history of the federal statute from which section 1253.3 is derived supports that benefits are denied during the summer

"Because California must track federal law in order to receive federal unemployment money—and thus enacted 'in substance, exact counterparts' of federal law—the same intent must apply to § 1253.3." (Statement of Decision, p. 9, citing *Long Beach*, *supra*, 160 Cal.App.3d at 685-86; *Russ v. Unemployment Ins. Appeal Bd.* (1981) 1256 Cal.App.3d 834, 842-44.) Indeed, all parties appear to agree, as each seeks to invoke congressional intent. However, it is the superior court and SFUSD that have the better argument.

Congress evidenced clear intent that unemployment insurance benefits be denied to teachers and other school employees temporarily unemployed during the period between academic years or terms. (See *Harvey v. Director of Dept. of Employment Sec.* (1978) 120 R.I. 159, 167.) "Payments of SUA to teachers, researchers, and principal administrators employed by schools are prohibited during the period between academic years or terms if they have performed services in the first of such terms and have a contract to perform such services for the later of such terms." (*Serfass v. United States* (1975) 420 U.S. 377, 382; See also *Id.*, 386.)[4]

[4] The denial provision was later expanded to include situations where the employee received "reasonable assurance" of employment in the following academic year or term.

The legislative history cited in CUIAB's reply is unpersuasive. CUIAB cites Senator Javits' comments that pertain to a situation where the employee who is provided reasonable assurance is not employed in the following academic year or term. (See CUIAB Reply, p. 3.) Every party agrees, and the statute clearly dictates, that where an employee is provided reasonable assurance of employment for the following academic year or term and is in fact not employed, the individual is entitled to retroactive benefits during the summer. Senator Davits' comments, while consistent with the statutory language, do not support the CUIAB's rationale.

2. The weight of authority in other jurisdictions supports the Trial Court's interpretation

As noted above, the provisions of 26 U.S.C. section 3304(a)(6)(A) and section 1253.3 are nearly identical. Where "[t]he language [in the Unemployment Insurance Act] is practically identical with that used in similar sections of the federal legislation and in that of many states ... the interpretation placed on that language by federal and other courts is unusually persuasive here." (*Long Beach*, *supra*, 160 Cal.App.3d at 686, brackets in original.) Due to the conformity requirements for states, it is especially appropriate to look to other jurisdictions' interpretation of statutes emanating from 26 U.S.C. section 3304(a)(6)(a) as an interpretive tool.

While the CUIAB and the Union do not address the decisional law of other jurisdictions, the Trial Court properly did. It found that the courts of other jurisdictions almost uniformly hold that unemployment insurance benefits are not payable in the summer, where the employee has been given reasonable assurance of employment for the next semester. They have also held summer session is not an "academic term." The Trial Court cited

several such cases. (*Harker, supra,* 104 Hawai'i at 545 [Substitute teacher who teaches during regular academic term is not eligible for benefits during the summer break even where summer teaching positions were available and unsuccessfully sought.]; *Halvorson, supra,* 780 N.W.2d at 392 [Summer term is between academic terms when entity follows typical school calendar.]; *Campbell, supra,* 211 Ill.App.3d at 1081 [Instructor's "employment or lack of employment during the summer months is irrelevant because the applicable Federal and state statutes (citations), were designed to address the common academic practice of instructors not teaching during the summer months."].)

In addition to the cases cited by the superior court, several other cases have reached similar conclusions. (*Herrera, supra,* 18 P.3d 819 [Summer session not an academic term.]; *Claim of Lintz, supra,* 89 A.D.2d at 1039 [Decision that assistant professor who chose to teach two days a week in the summer was not between academic terms was irrational and unreasonable.]; *Doran, supra,* 116 Ill.App.3d at 475-76 [Teacher who taught eight week summer course not entitled to unemployment insurance benefits when summer session was eliminated because session constituted a period between academic terms.]; *DeLuca, supra,* 74 Pa.Cmwlth. 80; *Glassmire, supra,* 856 A.2d 269.) Other jurisdictions finding that summer session is an academic term are solidly in the minority. (See e.g. *Evans v. State Dept. of Employment Sec.* (Wash. Ct. App. 1994) 72 Wash.App. 862, 864.) Moreover, a Washington case decided after *Evans* states that Washington revised its statute after *Evans* because the Department of Labor notified it that the *Evans* decision raised conformity issues. (*Thomas v. State, Dept. of Employment Sec.* (Wash. Ct. App. 2013) 176 Wash.App. 809, 816-17.)

C. The CUIAB's Position Circumvents the Plain Meaning of the Statute and Proposes a Novel Approach to the Interpretation and Enforcement of Section 1253.3; As Such CUIAB Has Engaged in Substantively and Procedurally Defective Rulemaking

Especially troubling to ELA, which concerns itself with the lawful and effective governance of California's public school districts, is that CUIAB's position would affect sweeping change to the rules by which public schools operate, without affording them the opportunity to share their insights or concerns through the comment period that accompanies proper rule-making. (See Cal. Government Code §§ 11346 et seq.) ELA recognizes the quasi-judicial authority of CUIAB to issue precedent decisions. However this authority does not support the license that CUIAB has taken here with the Unemployment Insurance Code. This is for two reasons.

1. CUIAB's position is contrary to law, and thus exceeds its regulatory authority

As an initial matter, for the reasons discussed above, the superior court properly found that CUIAB's interpretation of section 1253.3 is contrary to law. As such, CUIAB has exceeded its regulatory role by refashioning the legislation it is charged to enforce.

Notably, in challenging the superior court's rejection of its precedent decision in *Brady,* CUIAB concedes that such decisions are reviewed, "much like a regulation . . . ." (CUIAB Brief, p. 9.) As such, they are subject to the same limitations. Namely, the decisions of the CUIAB may not contradict, alter, or expand the underlying statute they seek to interpret. Thus, while it is true that the precedent decisions adopted

by the CUIAB are reviewed similarly to regulations, "[i]t is well established that administrative regulations must conform to applicable legislative provisions, and that an administrative agency has no discretion to exceed the authority conferred upon it by statute." (*California Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 242.) Even though entitled to weight, an administrative interpretation of a statute cannot prevail where a contrary legislative purpose is apparent. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 117.) Surely, the *non*precendent decision at issue here must be subject to the same scrutiny, and cannot enjoy greater latitude to thwart the underlying statutes it seeks to enforce.

2. CUIAB's position constitutes a new and sweeping interpretation of section 1253.3 that goes beyond its quasi-judicial role

ELA submits that CUIAB's approach goes beyond the quasi-judicial role that CUIAB enjoys. CUIAB is charged with adjudicating challenges to the benefit eligibility decisions made by the Employment Development Department. While this necessarily includes the authority to interpret and apply the terms of the law, CUIAB has exceeded this function by crafting new terminology and standards for determining eligibility. In so doing, it has moved into the realm of rulemaking, which is outside the purview of the CUIAB.[5]

[5] ELA recognizes that CUIAB has independent authority to issue precedent decisions that express significant legal and policy determinations, as well as promulgate rules related to hearing appeals and other matters within its jurisdiction. (Unemp. Ins. Code, § 411.). However CUIAB does not promulgate rules and regulations designed to interpret and enforce the Unemployment Insurance Code. That function is under the purview of the Employment Development Department ("EDD"). (http://www.cuiab.ca.gov/Board/regulations.asp.)

Moreover, to promulgate new rules and standards through nonprecedent decisions improperly circumvents the rulemaking process—which is designed to take into consideration commentary from experts and stakeholders in the process. (See *POET, LLC, supra*, 217 Cal.App.4th at 745.) Here, as noted above, CUIAB recognized that eligibility applies only to "academic terms" that an employee's contract "actually presumes the employee will be working." CUIAB then goes on to craft a standard for determining whether an employee's contract "resumes" employment during summer school—which apparently makes summer an "academic term" for those employees. Under this novel approach, "academic terms" can simultaneous exist for some employees and not others during the same period.

Additionally, under this newly-crafted test, CUIAB seeks to apply section 1253.3 in the context of summer school through two underground rules: 1) "reasonable expectation" of summer school employment; and 2) "loss of customary work." According to CUIAB, where an employee has a "reasonable expectation" of employment, summer school constitutes an "academic term." In contrast, where an employee does not have a "reasonable expectation," summer school apparently is not an "academic term."

Further, the way in which CUIAB proposes to determine whether an employee has a "reasonable expectation" of summer school employment or a "loss" of summer school employment would require a dramatic shift in the nature of substitute employment. CUIAB asserts that an employee has a "reasonable expectation" of summer employment if she or he is placed on an "on-call" list or works even one day during the summer session. CUIAB also argues that where an employee works one day during the summer, the

employee has a "reasonable expectation" of employment the *following* summer, such that they "lose customary work" if they are not employed the following summer.

This approach to substitute expectations for work is contrary to how districts utilize substitute employees. For example, districts may "dismiss substitute employees at any time at the pleasure of the board." (Education Code § 44953.) How this provision would factor into an analysis of a substitute's "reasonable expectation" of employment is unclear. This lack of clarity provides one example of CAUIB's erroneous interpretation of section 1253.3, and why permitting rulemaking through nonprecedent decisions is ill-advised; it will create the sort of uncertainty and inconsistency in the law that the official rulemaking process is designed to avert through the posting of proposed rules and consideration of public comment. It is the notice and comment period that assists regulatory bodies craft rules that are clear, fair, operationally sound, and consistent with other bodies of law with which the regulatory body is not familiar. A major purpose of the rulemaking process is to promote meaningful public participation in agency rulemaking. (See *POET, LLC* , *supra*, 217 Cal.App.4th at 745.) "Moreover, the APA was designed not simply to advance meaningful public participation in the rulemaking process, but also to create an administrative record assuring effective judicial review." (*Sims v. Department of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1077.)

Thus, CAUIB's erroneous conclusions also constitutes unofficial rulemaking that has deprived school districts the opportunity to comment on CUIAB's novel approach. Although the decisions at issue here are "nonprecedential," they promulgate general terms and definitions that will

impact the statewide application of section 1253.3.[6] Districts will have to change their customary use of familiar terminology; consider reconfiguration of their programs and calendars; and address the budgetary impacts of on-call subs being eligible for benefits if summer school is offered. Such broad impacts should not derive from nonprecedent decisions, which deprives ELA and school boards across the state the opportunity to comment on what is a new interpretation and application of section 1253. 3.

3. CUIAB's reliance on *Brady* and past precedent is unavailing

CUIAB asserts that its analysis in the nonprecedent decisions at issue does not express a new rule or approach, but merely applies its precedent decision in *Brady* and prior precedent decisions. However, this argument fails for three reasons.

First, the superior court has properly invalidated *Brady.* As such, CUIAB should not be permitted to rely upon it.

Second, the nonprecedent decisions here go significantly beyond *Brady*. For example, CUIAB asserts for the first time in its briefing that if an individual is called in one day during summer school, the employee is entitled to benefits for the entire summer school period. The CUIAB also appears to extend *Brady* by asserting that if an employee works a single day in one summer, she or he has a "reasonable expectation" of continued employment in the *next summer* or has "lost customary work." Also noteworthy, CUIAB appears to extend *Brady* to all teachers: "Brady

[6] ELA is aware that the CUIAB also relies on its precedent decision in *Brady* as support for its position in the instant matter. However, as discussed below, *Brady* was properly invalidated by the trial court.

focused on substitute teachers, but the reasoning in *Brady* permitting benefits for teachers who are not truly on recess-particularly when they are on a district's on-call list, *is equally applicable to all teachers*. (CUIAB Brief, p. 22, fn. 12 (emphasis added).) [7]

Finally, neither the nonprecedent decisions nor *Brady* itself are supported by the CUIAB's past precedent decisions. The CUIAB asserts that its decision in *Brady*—and by extension the nonprecedent decisions at issue here—are grounded in thirty years of CAUIB precedent. This claim is untrue. First, the CUIAB cites *Vincent J. Furriel* (1980) Precedent Benefit Decision No. P-B-412. In that decision, the CUIAB was analyzing a traditional *year-round employee* who was laid off during the summer due to budget cuts. The CUIAB determined that the employee was *laid off* from regularly scheduled work and was entitled to benefits. Similarly in *Dorothy C. Rowe* (1981) Precedent Decision No. P-B-417, the CUIAB found a *year-round employee* who had a 12-month assignment for 18 years eligible for unemployment insurance benefits when the school district reduced her assignment to 10 months due to lack of work.

There is a large analytical and interpretive gulf between the decisions in *Furriel* and *Rowe* and the nonprecedent decisions here. *Furriel* and *Rowe* both involved a year-round employee who was required to work during the summer as part of a full-time assignment. The assignment was later reduced from full-time, which the employees had worked for years. Moreover, in *Furriel* the decision explicitly states that the employee's

[7] ELA notes that the parties have been inconsistent regarding the scope of the question before this Court. CUIAB and the Union purport to limit the rule to substitutes in portions of their briefs, but then state the rule will be applicable to all employees in other portions of their briefs. This further demonstrates the unworkable nature of CUIAB's interpretation.

contract provided for an 11.5 month assignment. (*Furriel*, *supra*, Precedent Benefit Decision No. P-B-412, p. 2.) In *Rowe*, the individual had "always worked as a 12-month employee." (*Rowe*, *supra*, Precedent Benefit Decision No. P-B-417, p. 1.) Both worked without regard for summer recess.

In contrast, no one is contending here that employees were required to work during the summer, or that summer employment was part of their contract or long-term assignment. Nor does CUIAB's position flow from *Furriel* or *Rowe*, or even *Brady*, that a single day of employment in a summer creates an entitlement to benefits in that summer and the next. As such, the CUIAB's attempt to characterize voluntary summer school assignments as "customary work" or employees as "suffering a layoff" finds no support in CUIAB precedent.

D. Whether or Not This Court Finds That the 2005 Decision Precludes SFUSD's Challenge to the Nonprecedent Decisions at Issue, It Has No Preclusive Effect Regarding SFUSD's Section 409.2 Challenge of *Brady*

The parties have fully briefed their respective positions on the preclusive effect of the 2005 Decision on these proceedings. As ELA agrees with the reasoning of the superior court and SFUSD, there is no need to repeat it here. ELA only notes that, whatever the Court's determination as to the res judicata effect for SFUSD's challenge to CUIAB's nonprecedent decisions, there is no basis to find that the 2005 Decision has any preclusive effect regarding SFUSD's challenge to the *Brady* decision.

No party makes a persuasive argument that the 2005 Decision has any preclusive effect on the Trial Court's decision to invalidate *Brady* to the extent it is at odds with the Trial Court's decision. Section 409.2

establishes a process under which parties may obtain a judicial declaration regarding the validity of any *precedent* decision of the CUIAB. However, *Brady* was not made a precedent decision until late 2013. Hence, its validity could not have been litigated or decided in 2005.

Moreover, the right to initiate a section 409.2 proceeding is independent of any issues previously litigated. Section 409.2 provides:

> "[a]ny interested person or organization may bring an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the appeals board issued under Section 409 or 409.1.

Under Section 409.2, employers are interested parties under the statute. (See *Pacific Legal Foundation, supra,* 74 Cal.App.3d at 155.) Under the plain language of the statute, the District has standing to challenge the validity of the decision. If follows that the District may raise any arguments in support of its challenge, and meet arguments raised by CUIAB in its defense.

CUIAB cites no persuasive authority for its position, mentioned only in a footnote, that *Brady* is immune from challenge. In support, the CUIAB cites a case discussing the "primary rights" doctrine in the context of an estate. (See *Crosby v. HLC Properties, Ltd.* (2014) 223 Cal.App.4th 597.) Here, the issue is a specific challenge brought under a statutorily granted procedure. The language in the statute is broad and includes any interested party or organization. Therefore, the issues raised in the parties' briefs are properly before this Court and are not precluded by the doctrine of res judicata.

IV. CONCLUSION

For the foregoing reasons, the ELA respectfully requests that this Court affirm the ruling of the superior court in its entirety.

Dated: November 30, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rule 8.204(c)(1))

I, Laura Schulkind, declare:

I am an attorney at law duly admitted and licensed to practice in the State of California and am one of the attorneys of record for Amicus Curiae California School Boards Association's Education Legal Alliance.

The word count of the foregoing Brief is exactly 6, 439 words, including headings and footnotes, as counted by the Microsoft Word word processing program used to generate this brief.

Executed on November 30, 2015, at San Francisco, California.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 135 Main Street, 7th Floor, San Francisco, California 94105.

On **November 30, 2015**, I served the foregoing document(s) described as **BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT** in the manner checked below on all interested parties in this action addressed as follows:

San Francisco County Superior Court
Honorable Richard B. Ulmer
400 McAllister Street
San Francisco, CA 94102

☒ **(BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY OVERNIGHT MAIL)** By overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service, FedEx, for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

Executed on **November 30, 2015**, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/S/ BECKY L. KIRBY
Becky L. Kirby