Case No. G052409

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

ANAHEIM CITY SCHOOL DISTRICT et al.,

Respondents and Appellants,

vs.

CECILIA OCHOA et al.,

Petitioners and Appellees.

Appeal from the July 16, 2015 Decision and Order from
County of Orange Superior Case No. 30-2015-00782615-CU-WM-CJC
Honorable Andrew P. Banks, Judge

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF APPELLANT ANAHEIM CITY SCHOOL DISTRICT

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth **APPELLATE DISTRICT, DIVISION** Three	Court of Appeal Case Number: G052409
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Edward J. Sklar, SBN 179025; Sloan R. Simmons, SBN 233752; Frances M. Valdez, SBN 285730; LOZANO SMITH 2001 North Main Street, Suite 500 Walnut Creek, CA 94596 TELEPHONE NO.: (925) 953-1620 FAX NO. *(Optional):* (925) 953-1625 E-MAIL ADDRESS *(Optional):* esklar@lozanosmith.com ATTORNEY FOR *(Name):* Cal. Sch. Bds. Assn's Education Legal Alliance	Superior Court Case Number: 30-2015-00782615-CU-WM-CJC *FOR COURT USE ONLY*
APPELLANT/PETITIONER: ANAHEIM CITY SCHOOL DISTRICT et al., RESPONDENT/REAL PARTY IN INTEREST: CECILIA OCHOA et al.,	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Cal. Sch. Bds. Assn's Education Legal Alliance

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 7, 2016

Edward J. Sklar
(TYPE OR PRINT NAME)

▶ Edward J. Sklar
(SIGNATURE OF PARTY OR ATTORNEY)

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

TO THE HONORABLE KATHLEEN E. O'LEARY, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE:

Pursuant to Rule 8.200(c) of the California Rules of Court, leave is hereby requested to file the accompanying Brief of *Amicus Curiae* on behalf of the California School Boards Association's Education Legal Alliance ("CSBA," " ELA" or "*Amicus Curiae*") in this action in support of Appellant Anaheim Unified School District.

INTEREST OF *AMICUS CURIAE*

This case concerns, in part, whether a school may still be defined as a "subject school" under California's Parent Empowerment Act (Ed. Code, §§ 53300-53303) ("Act"), despite elimination of the adequate yearly progress ("AYP") metric as contemplated by the Act. The present dispute involves only the Anaheim Unified School District and the singular fate of Palm Lane Elementary School. The Court's resolution of the case, however, presents serious implications for the thousands of California public schools that may be inappropriately categorized as "subject schools" under now obsolete and undefined laws. Such schools are, thus, put at risk of forced conversion into charter schools under a remedy that no longer has force or effect.

ELA and its members have a substantial interest in the outcome of this litigation. CSBA is an association of virtually all of the state's more than 1,000 school districts and county offices of education. It brings together school governing boards and their districts and county offices of education on behalf of California's school children. CSBA is a member-driven association that supports the governance team of school districts, including board members, superintendents, and senior administrative staff, in their complex leadership roles. CSBA develops, communicates, and advocates

the perspective of California school districts and county offices of education. As an advocate for its constituent members, ELA has determined that this case affects the ability of California school districts to maintain district schools without the threat that former "subject schools" will be transformed into charter schools, based on outdated and rejected metrics.

BRIEF OF *AMICUS CURIAE* WILL ASSIST THE COURT

Amicus Curiae's Brief will assist the Court in three ways. First, the Brief provides an overview of both the federal and state statutory scheme that established and subsequently abolished AYP as a measure for proficiency as envisioned and applied in this case under the Act. Second, the Brief addresses the Trial Court's subject Decision, including its erroneous holding that the metrics formerly utilized to convert a district school into a charter school are frozen in time. Third, this Brief explains the hardship the Trial Court's Decision would present school districts, especially for those districts with currently or prospectively improved academic performance by their students. A concrete understanding of these propositions is essential for the Court's proper resolution of this case.

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CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that the Court accept the accompanying Brief for filing in this case.

Dated: March 7, 2016

Respectfully submitted,

LOZANO SMITH

/s/ Edward J. Sklar

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INTRODUCTION

Palm Lane Elementary School is not a "subject school" under California's Parent Empowerment Act ("Act") (Ed. Code, §§ 53300-53303). There is thus no reasonable reading of the Act that would permit its forced conversion into a charter school. In fact, because of steps taken by the California Legislature and the United States Congress to discontinue use or calculation of the Adequate Yearly Progress ("AYP") metric as it was originally and formerly conceived for purposes of assessing proficiency, there is no longer any California public school that constitutes a "subject school." Said plainly, the Act is no longer operative as intended and is unenforceable as to Palm Lane Elementary and like-schools.

At the forefront of this appeal, the Orange County Superior Court ("Trial Court") Decision and Order ("Decision") misstates the law regarding the expiration of accountability measures that were the trigger for the Act's intervention penalties. Under the federal No Child Left Behind Act (Pub. L. No. 107-110 (Jan. 8, 2002) 115 Stat. 1425 (hereinafter "NCLB"), school districts and their schools were held to standards that have since been eliminated. California abandoned these standards, prior to the submission of Appellees Cecilia Ochoa et al.'s Petition to convert Palm Lane Elementary School into a charter school ("Petition"), currently at issue.

The Petition and the Trial Court's Decision rest upon a metric that has been discarded by federal law, i.e., it punishes schools for bygone metrics reported in years past. Appellees thus seek, and the Trial Court's Decision directs for, transformation of a public school into a charter school based upon an inoperative accountability metric—one that has no legal effect and in fact no longer exists. The practical effect is that the Trial Court's interpretation of the law holds school districts and their schools answerable for accountability reports and calculations that occurred *years*

ago and have since been discarded. As a matter of law and public policy, this outcome and consequence is unjustified, legally untenable, and will severely—and negatively— impact schools throughout the state. Accordingly, *Amicus Curiae* urge the Court to reverse the Trial Court's Decision and ensure that the State's public schools are not forced to face the burden of penalties under California statutes that are based upon an abandoned federal and state policy and statutory scheme. Without this Court's correction in course, California schools will be subjected to patently unfair penalties that are wholly disconnected from the realities of their current academic progress and student success.

ARGUMENT

I. THE ACT'S AYP CRITERIA FOR DESIGNATION OF "SUBJECT SCHOOLS," UPON WHICH THE TRIAL COURT'S DECISION IS BASED, IS NO LONGER IN EFFECT.

In 2002, as mandated by the NCLB, California implemented a statewide accountability system that required all schools to make AYP, which was a series of annual academic performance goals established for each school. (See *Horne v. Flores* (2009) 557 U.S. 433, 462 [NCLB required "States to set annual objective achievement goals for the number of students who will annually progress toward proficiency, achieve proficiency, and make 'adequate yearly progress' with respect to academic achievement, [20 U.S.C.] § 6842(a), and it holds local schools and agencies accountable for meeting these objectives, [20 U.S.C.] § 6842(b)."].) To make AYP in California, schools were required to meet or exceed, annually, the following four criteria:

(1) Participation rate;
(2) Percent proficient – Annual Measurable Objectives;
(3) Academic Performance Index ("API") as an additional indicator; and
(4) High school graduation rate.

(See *Amicus Curiae's* Motion for Request for Judicial Notice in Support of *Amicus Curiae* Brief ["Mot. RJN"], Ex. A, State of California Consolidated State Application Accountability Workbook (Apr. 2013), p. 15; see Mot. RJN, Ex. B, California Dep't of Education, 2013 Adequate Yearly Progress Report Information Guide: AYP Criteria (Aug. 2013), p. 18, at <http://www.cde.ca.gov/ta/ac/ay/documents/aypinfoguide13.pdf> [as of Mar. 7, 2016] [hereinafter "CDE 2013 AYP Information Guide"].)[1] However, as acknowledged by the California Department of Education ("CDE"), because the NCLB required that various subgroups of students improve academically on an annual basis, a school "may have up to 50 different criteria to meet in order to make AYP." (See Mot. RJN, Ex. B, CDE 2013 AYP Information Guide, *supra*, at p. 18; see also NCLB § 1111, subd. (b)(2)(I)(i).) If a school, or any one of the various subgroups within a school missed any of the criterion, the school as a whole did not make AYP and could be identified for "Program Improvement." (Mot. RJN, Ex. B, CDE 2013 AYP Information Guide, *supra*, at p. 18; see also NCLB § 1116, subd. (b)(2)(C).)

If a school failed to make AYP for a set number of consecutive school years, a parent at that school could pursue one of the sanction remedies

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[1] See also *State of Connecticut v. Spellings* (D. Conn. 2006) 453 F.Supp.2d 459, 471 ("In determining adequate yearly progress, the . . . [NCLB] requires states to use a statistically reliable method of measuring student progress based on academic assessments developed by the state. *Id.* § 6311(b)(2)(C)(ii), (iv). A state's definition of . . . [AYP] must also include "separate measurable annual objectives for continuous and substantial improvement" for all students. *Id.* § 6311(b)(2)(C)(v). At the risk of over-simplification, a school or district will fail to satisfy the . . . [AYP] requirement if one of certain specified subgroups of students in any grade fails to satisfy the state's annual proficiency standards. *Id.* § 6311(b)(2)(I) . . . . Schools or districts that fail to make . . . [AYP] face progressively severe consequences and must take corrective measures. See generally 20 U.S.C. § 6316(b)(1)-(8).").

under the Act. (See Ed. Code, § 53300.) One such sanction would have been to petition to implement interventions at a "subject school," including transforming the school into a charter school. (See *id.*, §§ 53202, subd. (a), 53300.) To be considered a "subject school," a school had to meet five criteria, one of which was a school's failure to make annual AYP. (Cal. Code Regs., tit. 5, § 4800.1, subd. (k).)

When the Act was passed in 2010, AYP was an accountability metric that was reported on an annual basis, as described above. However, in 2014, California sought and was granted a waiver from AYP reporting, such that AYP reports were not issued for *any* California school for the 2013-2014 school year. (Joint Appendix ["JA"] 2 at 430-31, 465-66; Reporter's Transcript ["RT"] 22:1-7, 552:8—553:18.) In December 2015, CDE announced that it would issue AYP reports for 2015—but based upon a new formulation of factors incongruent with prior measurements delineated by the NCLB and the Act. (Mot. RJN, Ex. C, California Dep't of Education, 2015 Adequate Yearly Progress Report Information Guide: AYP Criteria (Dec. 2015), p. 3, at <http://www.cde.ca.gov/ta/ac/ay/documents/aypinfoguide15.pdf> [as of Mar. 7, 2016].) CDE now measures AYP using only three criteria: participation, attendance, and graduation rates. (Mot. RJN, Ex. D, California Dep't of Education, FAQs for 2015 Accountability (Dec. 29, 2015) at <http://www.cde.ca.gov/ta/ac/ar/aprfaq15.asp> [as of Mar. 7, 2016] [The 2015 AYP "used only the participation information from the 2015 [state assessments], not the assessment results."].) The API and percent proficient (annual measurable objectives) were removed from the formula. Therefore, AYP as it exists in California today does not measure proficiency standards as contemplated when the Act was passed. The end result: AYP no longer exists as it did when the Act was enacted.

With regard to Palm Lane Elementary and the Petition, the timing is crucial. The Petition was submitted on January 14, 2015, during the period when California had received a waiver from AYP from the United States Department of Education. (See JA 2:430-31, 465-66.) Indeed, no AYP report for Palm Lane Elementary was issued for the 2013-2014 school year, such that the school's proficiency levels were unknown at the time of the Petition's submission and at the time of the Trial Court's Decision. (RT 22:1-7, 552:8—553:18.)[2]

Integral to the Court's proper resolution of this case, AYP, as a measure of school proficiency, has not returned because it has been abolished by federal and state law. (See Every Student Succeeds Act, Pub. L. No. 114-95 (Dec. 10, 2015) § 1111, subd. (d) [hereinafter "ESSA"]; see also Ed. Code, § 53301, subd. (b).) As a consequence, the law no longer provides for a basis to classify California schools as "subject schools" or to impose the previously available penalties for "subject schools" under the Act. Accordingly, a parent group's petition to implement interventions at a school, also known as "parent trigger," may not proceed as it was intended, since AYP no longer even measures proficiency. (See ESSA § 1111, subd. (d); Ed Code, § 53301, subd. (b).) The historical evolution of AYP as premised under the Act, from its genesis to its recent elimination from state and federal law, demonstrates that the Act's parent trigger remedy is no longer operative.

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[2] Notably, Palm Lane Elementary made AYP in 2015. (Mot. RJN, Ex. E, California Dep't of Education, 2015 AYP School Report (Dec. 15, 2015) at <http://ayp.cde.ca.gov/reports/Acnt2015/2015APRSchAYPReport.aspx?allcds=30664236027379&df=2> [as of Mar. 7, 2016].)

A. Starting in 1994, AYP Was Introduced into the ESEA's Statutory Scheme, and Reached its High Point Under the ESEA's Reauthorization as the NCLB in 2001.

Enacted in 1965, the Elementary and Secondary Education Act[3] was the first major federal education legislation ever signed into law. (Pub. L. No. 89-10 (Apr. 11, 1965) 79 Stat. 27 [hereinafter "ESEA"].)[4] Nearly 30 years later, the Improving America's Schools Act of 1994 reauthorized the ESEA and first introduced the concept of AYP. (Pub. L. No. 103-382 (Oct. 20, 1994) 108 Stat. 3518 [hereinafter "IASA"].) The IASA did not set forth a specific formula for AYP, and AYP was not included in criteria for implementing corrective action at underperforming schools. (*Id.* §§ 1111, subd. (b)(2)(B), 1116, subd. (c)(5).)

In 2001, Congress again reauthorized the ESEA, this time as the NCLB, and mandated that each school and school district be accountable for AYP. (Pub. L. No. 107-110 (Jan. 8, 2002) 115 Stat. 1425.) The NCLB required that each state implement a statewide accountability system to ensure schools made AYP. (NCLB § 1111, subd. (b)(2)(A).) The NCLB also required states to define AYP in a manner that met seven criteria.[5]

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[3] The Court may access electronic versions of ESEA and its various subsequent reauthorizations referenced in this Brief online at the United States Congress' website, https://www.congress.gov/, or the United States Government Publishing Office's website, https://www.gpo.gov/.

[4] The ESEA and its subsequent reauthorizations' educational funding are commonly referred to as "Title I" funds.

[5] The NCLB required that standards be defined in a manner that: (1) applies the same high standards for academic achievement for all students throughout the state; (2) is statistically valid and reliable; (3) results in continuous and substantial academic improvement for all students; (4) measures the progress of public schools, districts, and the state, based primarily on academic assessments; (5) includes separate measurable annual objectives for continuous and substantial improvement for achievement of various types of students; (6) includes graduation rates as an academic indicator; and (7) may include other academic indicators. (*Id.* § 1111, subd. (b)(2)(C).)

Furthermore, the NCLB developed a system of rewards and sanctions for schools, specifying several consequences for failing to meet AYP. (*Id.* § 1116, subd. (b).) As explained by the United States Supreme Court:

> NCLB marked a dramatic shift in federal education policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results . . . . NCLB conditions the continued receipt of funds on demonstrations of "adequate yearly progress."

(*Horne*, 557 U.S. at 461.)

For example, schools that failed to meet AYP for two consecutive years were identified for Program Improvement. (NCLB § 1116, subd. (b)(1)(A).) Schools that failed to make AYP after corrective action were subject to restructuring, including closing and then reopening the school as a charter school. (*Id.* § 1116, subd. (b)(8).) Additionally, the NCLB required that, by the 2013-2014 school year, *all* students meet or exceed each states' respective proficient level of academic achievement on the state assessments. (*Id.* § 1111, subd. (b)(2)(F).)[6]

B. Following California's Adoption of AYP as a Metric for School Success, Problems Ensued.

In accordance with the NCLB, in 2010, California adopted a system of sanctions tied to AYP results. (See Ed. Code, § 53300 et seq.) Indeed, the Act relied heavily on key components of the NCLB. Under the Act, a school may have been eligible for charter conversion if it was: (1) not identified as a persistently low-achieving school; (2) subject to corrective action under the NCLB; (3) *continued to fail to make AYP*; and (4) had an

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[6] See *Jindal v. United States Dept. of Ed.* (M.D. La. Sept. 15, 2015) 2015 U.S. Dist. LEXIS 123257, *48 ["Under NCLB, if a school or LEA repeatedly fails to make . . . AYP . . . , NCLB sets forth a series of escalating interventions from which the school or LEA must choose corrective action."], citing 20 U.S.C.§ 6316(b)(c) (of the NCLB).

API score of less than 800. (See *id.*, § 53300.) In analyzing the Act when proposed, the California Senate Rules Committee noted that the Act allowed "'parent empowerment' petitions to utilize *federal turn around strategies* in up to 75 schools in advanced stages of federal program improvement." (See Mot. RJN, Ex. F, Sen. Rules Com., Off. of Floor Analyses, 3d reading analysis of Sen. Bill No. 4 (2009-2010 Reg. Sess.) (Dec. 17, 2009), at p. 3, emphasis added.) Thus, the Act's intent and purpose hinged and depended upon the NCLB and the related consequences for failing to meet AYP. (See *People v. Wilson* (2010) 186 Cal.App.4th 789, 818 ["There is no doubt about the importance of ascertaining and fulfilling legislative intent . . . ."]; *In re Lance W.* (1985) 37 Cal.3d 873, 889 ["In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration."].)

As set forth above, California required schools to annually meet or exceed four different criteria. (See Mot. RJN, Ex. A, State of California Consolidated State Application Accountability Workbook (Apr. 2013), p. 15.) In practice, however, schools often had to satisfy many more criteria to make AYP, or else be deemed an underperforming school. (See Mot. RJN, Ex. B, CDE 2013 AYP Information Guide, *supra*, at p. 18.) Under these strict standards, many California schools failed to make AYP and were therefore considered in need of improvement. But the fact that a school failed to make AYP did not necessarily mean the school was performing poorly. This is especially true as the 2013-2014 deadline for reaching 100% proficiency approached. (See NCLB § 1111, subd. (b)(2)(F).)

Not to be overlooked, California's standards on assessments—that upon which AYP was measured—were comparatively high when viewed

with other states across the country.[7] For example, in 2012, a mere 26% of schools made AYP in California statewide. (Mot. RJN, Ex. G, Ed-Data, Adequate Yearly Progress Under NCLB (Mar. 27, 2014) at <https://www.ed-data.k12.ca.us/Pages/UnderstandingTheAYP.aspx> [as of Mar. 7, 2016].) Therefore, 74% of California's approximately 10,393 public schools *did not* make AYP in 2012. (See *id*.; see also Mot. RJN, Ex. H, California Dep't of Education, Fingertip Facts on Education in California (Sept. 21, 2015) at <http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp> [as of Mar. 7, 2016].) Included were schools in traditionally high performing school districts such as Palo Alto Unified School District, Pleasanton Unified School District, and Poway Unified School District. (Mot. RJN, Ex. I, California Dep't of Education, Research Files, at <http://www3.cde.ca.gov/researchfiles/pi/schlpi12.txt> [as of Mar. 7, 2016].)

Such measures are obviously skewed to penalize even well performing schools and could not be enforced on a statewide or national

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[7] Mot. RJN, Ex. J, Louis Freedberg, California Watch, State School Performance Data Can Be Deceptive (Apr. 29, 2011) at <http://californiawatch.org/dailyreport/state-school-performance-data-can-be-deceptive-10077> [as of Mar. 7, 2016] ["One reason California may have ended up looking worse relative to some other states on No Child Left Behind measures is because it has maintained what many educators view as relatively high standards."]; Mot. RJN, Ex. K, Education Week, Adequate Yearly Progress (July 18, 2011) at <http://www.edweek.org/ew/issues/adequate-yearly-progress> [as of Mar. 7, 2016] ["To keep their schools from failing, some states began lowering their cutoff scores, which determine whether a student is deemed 'proficient.'"]; see also Mot. RJN, Ex. L, Ed Source Report, How California Compares: Demographics, Resources, and Student Achievement (Sept. 2008) at < http://edsource.org/wp-content/publications/08HowCAComparesWeb.pdf> [as of Mar. 7, 2016] [describing California's rigorous and demanding definitions of proficiency].)

level. Put simply, NCLB, and specifically AYP, did not work; too many schools were being unfairly identified as underperforming. (See Kurzweil, *Disciplined Evolution and the New Education Federalism* (2015) 103 Calif. L. Rev 565, 600 ["[A] design flaw in the rules governing AYP ensured that many schools were identified for school improvement and that the number would ratchet up significantly over time."]; see also Comment, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice* (2007) 54 UCLA L. Rev. 1339, 1380, fn. 189 ["Some researchers predict that in the next few years, most of the nation's public schools will be labeled 'failing' according to AYP regulations."]; Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity* (2006) BYU Educ. & L.J. 157, 177 ["One study predicts that by 2014, ninety-nine percent of California public schools will have failed to make AYP."].)

C. As a Result of the Unjustified Imposition of Penalties on California Schools Due to AYP Determinations, the State Sought and Obtained a Waiver from Compliance with Same From the U.S. Department of Education.

In response to all of the problems presented by AYP, California sought and was granted a waiver from AYP reporting requirements by the U.S. Department of Education. (JA 2 at 430-31, 465-66.) Specifically, in a letter dated April 2, 2014, the United States Department of Education approved California's waiver request and advised that a 2014 AYP report would not be produced. (JA 2:430-31, 465-66.) Therefore, AYP determinations were not issued for the 2013-2014 school year in California. (RT 22:1-7, 552:8—553:18.)

California was not the only state to request a waiver. As one lawmaker commented, "[a]bsent that waiver process, under the formula of adequate yearly progress, nearly every State and district would have been labeled a failure." (Mot for RJN, Ex. M, *Providing for Further*

Consideration of H.R. 8, North American Energy Security and Infrastructure Act of 2015, and Providing for Consideration of the Conference Report on S. 1177, Student Success Act, 161 Cong. Rec. H. 8876, 114th Cong. (2015) [statement of Congressman Jared Polis] [hereinafter "*Conference Report on S. 1177*"].) As noted, in this case, the Appellee's Petition was submitted on January 14, 2015, while the entire state of California was under this waiver from AYP.

The AYP, at least as the draconian measure contemplated under the Act, has not returned to California since 2013.

D. Upon Significant Deliberation and Consideration of its Impacts, Congress Determined to Eliminate the AYP Metrics.

After prolonged negotiations by Congress, the ESEA was again reauthorized in 2015 as the Every Student Succeeds Act, which was signed into law on December 10, 2015. (See Pub. L. 114-95 (Dec. 10, 2015) S.177 [hereinafter the "ESSA"]; Mot for RJN, Ex. N, National Ass'n for Music Education, The Every Student Succeeds Act: What it Is, What it Means, and What's Next (2016), p. 1, at <http://www.nafme.org/wp-content/files/2015/11/ESSA-In-Plain-EnglishFINAL-2-2016.pdf> [as of Mar. 7, 2016].) The ESSA is a sweeping overhaul of the NCLB that restores local autonomy to schools and districts by making states responsible for students' academic achievement. Following California's lead, the ESSA eliminates NCLB's requirement that local educational agencies and schools make stringent AYP metrics or be subject to specified interventions, corrective action, or restructuring. (See Mot. RJN, Ex. O, *Student Success Act: Report of the Committee on Education and the Workforce*, H.R. Rep. No. 114-24, at 189 (2015) ["The bill eliminates [the] onerous federal 'Adequate Yearly Progress,' . . . requirement [] and provides states and school districts with increased flexibility and control to

boost student achievement."].) Instead, states must establish a system of meaningfully differentiating schools on an annual basis. (ESSA § 1111, subd. (c)(4)(C).) To ensure progress and improvement, underperforming schools must develop and implement either a comprehensive or a targeted support and improvement plan to improve student outcomes. (*Id.* § 1111, subd. (d)(2)(B).)

Unlike the NCLB, the ESSA does not require specific methods for intervention or restructuring, leaving the choice largely up to local educational agencies and states. (See *id.* § 1111, subd. (d).) Presently, any school identified for comprehensive support and improvement must create a plan that "includes evidence-based interventions." (*Id.* § 1111, subd. (d)(1)(B)(ii).) Schools identified for comprehensive support and improvement that have not improved for more than four years are subject to "more rigorous State-determined action, such as the implementation of interventions (which may include addressing school-level operations)." (*Id.* § 1111, subd. (d)(3)(A)(i)(I).) The ESSA therefore eliminates the NCLB's limited prescriptions for school restructuring, such as transforming a school into a charter school. (Compare NCLB § 1116, subd. (b)(8), with ESSA § 1111, subd. (d)(3)(A)(i)(I).)

In enacting the ESSA, lawmakers explained their reasons for "abolish[ing] the unworkable adequate yearly progress metrics." (Mot. RJN, Ex. P, *Conference Report on S. 1177, Student Success Act,* 161 Cong. Rec. H. 8884, 114th Cong. (2015) [statement of Congressman Luke Messer].) The NCLB's one-size-fits-all mandates and interventions for underperforming schools "proved to be unworkable." (Mot. RJN, Ex. Q, *Conference Report on S. 1177, Student Success Act,* 161 Cong. Rec. E. 1741, 114th Cong. (2015) [statement of Congresswoman Suzanne Bonamici].) The law had simply "resulted in too much emphasis on one-size-fits-all mandates and interventions, and the adequate yearly progress

requirements caused too much focus on high-stakes testing. Change is long overdue." (*Id.*)

Federal lawmakers "knew the fallacy of the formula for adequate yearly progress, and it was set up in such a way that all schools would eventually fail. [Lawmakers] saw the rigid structure that could even inhibit State and district innovation." (Mot. RJN, Ex. M, *Conference Report on S. 1177*, *supra* [statement of Congressman Jared Polis].) Indeed, one senator adeptly noted that NCLB, its focus on AYP and required interventions, unfairly characterized schools as underperforming:

> The one-size-fits-all did not work. My son's public school was deemed a failing school in the first year that adequate yearly progress was the standard of measurement. We were dubbed a failing school because we had one subcategory of students where the numbers were so small, but we didn't have enough students show up to take the test on that day. So we all know there were 31 different ways to fail AYP, and little Government Hill Elementary in Anchorage, AK, failed that first year. That is tough as a neighborhood. They were saying: What is wrong with our school? What is wrong with our neighborhood?
>
> Really, there was nothing wrong with our school. There was nothing wrong with our neighborhood. What we had was a directive that came out of Washington, DC—some 4,000 miles away—and it didn't work for us.

(Mot. RJN, Ex. R, *Student Success Act – Conference Report – Continued*, 161 Cong. Rec. S. 8457, 114th Cong. (2015) [statement of Senator Lisa Murkowski].) Wiped off the books by the ESSA, the NCLB's "one-size-fits-all formula of adequate yearly progress is rightfully gone." (Mot. RJN, Ex. M, *Conference Report on S. 1117*, *supra* [statement of Congressman Jared Polis].) The ESSA's enactment thus codifies what states, including California, had already concluded—AYP was an unusable and ineffective measure of actual student success, and worthy of abandonment.

II. DUE TO CHANGES IN FEDERAL AND STATE LAW RELATIVE TO AYP, THE ACT'S PARENT TRIGGER REMEDY IS NO LONGER OPERATIVE.

Under the Act, a school was subject to interventions, such as restructuring as a charter school, if it met five criteria "following the release of the *annual adequate yearly progress report*." (Cal. Code Regs., tit. 5, § 4800.1, subd. (k), emphasis added.) For purposes of the Act, a "subject school" was one that:

> (1) Is not one of the persistently lowest-achieving schools identified by State Superintendent of Public Instruction (SSPI) and the State Board of Education (SBE);
> (2) Has been in corrective action pursuant to paragraph (7) of Section 1116(b) of the federal Elementary and Secondary Education Act for at least one full academic year;
> (3) Has failed to make adequate yearly progress (AYP);
> (4) Has an Academic Performance Index (API) score of less than 800; and
> (5) Has not exited Program Improvement.

(*Id.*) Because AYP, as previously constructed when the Act became law, is no longer a method of school accountability, no "subject schools" existed in California as of the 2013-2014 school year. In other words, a school could not and cannot fail to make AYP because AYP, as envisioned by the Act, no longer exists.

With the elimination of AYP as contemplated by the Act and its regulations, the Act's parent trigger remedy no longer operates as it once did under the NCLB. For instance, in *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1024, the court concluded that an initiative implicitly repealed prior statutes regulating private contracting. The court set forth the following rule: "[R]epeal may be found where (1) the two acts are so inconsistent that there is no possibility of concurrent operation, or (2) the later provision gives undebatable evidence of an intent to supersede the earlier provision." (*Id.* at 1038,

internal quotation marks omitted.) In order for a subsequent change in law to supersede a previous law "the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first." (*Id*.) The *Kempton* court acknowledged that the initiative did not expressly repeal certain statutes, but nevertheless concluded that the provisions of the initiative "viewed in the context of the initiative as a whole, impliedly repeal these statutes." (*Id*.)

Correspondingly, in cases where "the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns." (*Rankin v. Longs Drug Stores Cal., Inc.* (2009) 169 Cal.App.4th 1246, 1256; see also *Sonora v. Curtin* (1902) 137 Cal. 583, 589 ["[T]he repeal of the statute destroys the remedy."].) "As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal." (*People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 67; see also *Governing Bd. v. Mann* (1977) 18 Cal.3d 819, 829 [citing the general rule "that a cause of action or remedy dependent on a statute falls with a repeal of the statute"].) This is especially true when a repealed statute provides a remedy not known to the common law. (*Bank of San Luis Obispo*, 159 Cal. at 67*; Lemon v. Los Angeles T. R. Co.* (1940) 38 Cal.App.2d 659, 671 ["[A] right or remedy unknown to the common law and dependent entirely on a statute is extinguished by the repeal of the statute."].)

Applying such judicial precedent here, the Act's parent trigger remedy cannot function or exist without an annual AYP proficiency measurement. Furthermore, the ESSA does not establish any substitute for AYP. (See *id.*, § 1111, subd. (c).) Instead, states are left to define new indicators of poor school performance to determine eligibility for

interventions, such as those under the Act. (See *id.* § 1111, subd. (c)(4)(C).) In addition, the Act specifically referenced "federally mandated alternative governance" as set forth by the NCLB. (See Ed. Code, § 53300.) The NCLB was replaced by the ESSA, which contains no such "federally mandated alternative governance." (See ESSA § 1111, subd. (d)(3)(A)(i)(I).)

In California, AYP exists today in name only. No AYP reports were issued in California for the 2013-2014 school year. Although CDE recently announced AYP reports for 2015, these reports bear no resemblance to an accountability metric. Therefore, California's AYP is no longer the same metric that existed under NCLB and the Act.[8] Because AYP in California is no longer a proficiency-based standard, the formerly effective parent trigger remedy under the Act cannot, and should not, be enforced—it has no teeth.

III. THE TRIAL COURT ERRED REGARDING THE EXPIRATION OF AYP AND ITS IMPACT ON THE ACT.

Compounding the improper understanding of the Act's current effect, in its Decision, the Trial Court misstates the law regarding how the expiration of AYP impacted California's parent trigger law. Without any citation to legal authority, the Trial Court concluded that California's waiver from AYP "froze those schools and districts in their status based on prior measured AYP results." (JA 13:3250-59.) Although the Legislature

[8] The ESSA contains a provision that states: "Nothing in this section shall be construed to alter any State law or regulation granting parents authority over schools that repeatedly failed to make adequate yearly progress under this part, as in effect on the day before the date of the enactment of the Every Student Succeeds Act." (ESSA § 1111, subd. (f).) This provision, however, has no impact on this case, since the Petition was filed while California was under a waiver from AYP reporting. Additionally, the CDE's recent iteration of California's AYP fails to measure proficiency, thereby undercutting any attempts to keep afloat the Act's parent trigger remedy.

provided a new measure for API, it notably did not set forth any provision stating that *AYP* results would remain "frozen." (See Mot. RJN, Ex. S, Assem. Bill No. 104 (2015-16 Reg. Sess.); Ed. Code, § 52052, subd. (e)(4).) By addressing API, the Legislature presumably knew that it could address and "freeze" AYP, but it chose not to do so. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 260 ["where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statue or from its legislative history"].)

The Trial Court's Decision is purportedly based in part on a letter drafted by the CDE. (JA 2:430-31.) This letter opines that despite the elimination of AYP reports during the waiver period, schools and districts will not enter *or exit* Program Improvement. (*Id.*) The CDE's conclusion regarding the status of districts and schools has no binding or precedential impact. Rather, as the California Supreme Court has held that while courts may consider such interpretations by state agencies such as the CDE, "the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) "The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." (*Id.*)

In the context of the legislative history of AYP, and the sound rejection of AYP by federal lawmakers, CDE's opinion is unpersuasive and should not guide this Court. (See *Sara M. v. Super. Ct.* (2005) 36 Cal.4th 998, 1012-13 ["An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's legal opinion, however 'expert,' rather than the exercise of a delegated

legislative power to make law, it commands a commensurably lesser degree of judicial deference."].) A school cannot and should not be subject to Program Improvement based on outdated data. Continuing to hold schools to a static standard is illogical given both the federal rejection of AYP and California's recent adoption of participation-based AYP reporting.

For example, schools that were previously in Program Improvement could very well have improved since that identification. Conversely, it is possible that schools not considered in need of Program Improvement could have declined in the past years. And even if the Court did give some weight to the CDE's opinion, the letter merely discusses Program Improvement in general, not AYP or the specific requirements for implementing the Act's parent trigger remedy. Binding judicial precedent cannot be turned to for points not addressed in a court's opinion; an agency's advisory letter deserves no more. (See *Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, 470, fn. 4 ["The [advisory opinion] letter is no more than a staff attorney's interpretation of the law . . . [w]e have considered the letter and find it unpersuasive."].)

By concluding that schools should be held accountable for several years-old AYP metrics, the Trial Court ignores the plain language of the Act and its inextricable nexus to the NCLB's proficiency-driven restructuring penalties. (See *Chatsky & Associates v. Super. Ct.* (2004) 117 Cal.App.4th 873, 877 ["it must be presumed that the Legislature had existing laws in mind when it enacted a new statute."]; *Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, 670 ["The Legislature is presumed to be aware of existing laws and judicial decisions interpreting those laws when it enacts legislation."].) The Act specifically provides that interventions are only possible when a school "continues to fail to make adequate yearly progress." (Ed. Code, § 53300.) Correspondingly, the

implementing regulations contemplate the release of an annual AYP. (Cal. Code Regs., tit. 5, § 4800.1, subd. (k).)

The language of the Act and its regulations are clear: In adopting the Act, the Legislature presumed AYP would be an ongoing and annual measure of student proficiency. It is inappropriate to identify and penalize "subject schools" based on AYP metrics that are no longer used in California. The law plainly contemplated the release of an annual AYP report that measured student proficiency, which controlled whether a school could be identified as a "subject school." (See *Indian Springs v. Palm Desert Rent Review Bd.* (1987) 193 Cal.App.3d 127, 134 ["The plain meaning of . . . may be disregarded only when it would inevitably result in absurd consequences or frustrate a manifest purpose of the Legislature as a whole." (*Cal. Highway Patrol v. Workers' Comp. Appeals Bd.* (1986) 178 Cal.App.3d 1016, 1024.) This rule would seem applicable as well to regulations approved by a legislative body . . . ."]; see also *Com. for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 45 ["If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls."]; *People v. Pieters* (1991) 52 Cal.3d 894, 899 [Courts interpret statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness."].)

Accordingly, any use of the Act's parent trigger remedy presumes there will be an AYP report issued year-to-year that measures student proficiency. Contrary to the Trial Court's Decision, nothing in the law allows a subject school to be identified based on previous annual AYP reports. Neither the Act nor the implementing regulations support "freezing" a school's AYP from several years ago.

Again, at the time Appellees' Petition was filed in this case and the writ was issued, California had sought and been granted a waiver from the

federal government such that AYP was not generated during the 2013-2014 school year. (RT 22:1-7, 552:8—553:18.) Therefore, the Petition could not properly seek to implement a remedy because there was no annual AYP.

Because AYP, as contemplated by the NCLB, has been rejected at the federal and state levels, new accountability measures must be developed by the California Legislature, not by the courts. (*Santa Monica Coll. Faculty Assn. v. Santa Monica Community Coll. Dist.* (2015) 243 Cal.App.4th 538, 554 ["It is not [the courts'] place to gainsay the Legislature's judgment on which policies are better for the state; those policy decisions rest initially—and solely—with the Legislature."]; *People v. Bell* (2015) 241 Cal.App.4th 315, 342 ["The Court's] office . . . 'is simply to ascertain and declare' what is in the relevant statutes, 'not to insert what has been omitted, or to omit what has been inserted.'"].) Should parents seek to impose interventions, the interventions should be based on current and accurate school performance data, not outdated and rejected AYP metrics. The comprehensive scope and scheme of the ESSA, and any state legislation that follows, shows that educational reform measures are legislative, not judicial, fixes. The subject matter of this lawsuit must be directed to the Legislature, not the courts.

IV. THE TRIAL COURT'S DECISION CREATES A HARDSHIP AND IS UNFAIR TO SCHOOLS THAT HAVE IMPROVED SINCE 2012-2013.

The Trial Court's determination that AYP is "frozen" and a school is subject to interventions based on AYP results from previous school years creates a substantial hardship for all California schools that did not meet AYP several years ago. Such a policy is unfair to schools that have actually improved their academic performance in recent school years. Holding a school accountable for the 2012-2013 AYP results requires the use of out-

of-date data, as well as data that is no longer considered an acceptable measure of academic performance.

In fact, the Trial Court's determination contradicts CDE's recent decision to issue AYP reports in 2015 based solely on participation, attendance, and graduation rates. Using data from the 2012-2013 school year does not adequately reflect the state of a school at present, would end in absurd results, and fails to harmonize the Act with the legal absence of AYP in state or federal law. (See *Klein v. United States of America* (2010) 50 Cal.4th 68, 77 [court "may consider the likely effects of a proposed interpretation because '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'"], citation omitted; *People v. Loeun* (1997) 17 Cal.4th 1, 9 ["Interpretations that lead to absurd results . . . are to be avoided."]; *Pieters*, 52 Cal.3d at 899 [Courts interpret statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness."].)

Stale metrics also fail to take account of potential improvements of schools in the past few years. For example, a school that was previously in Program Improvement for failing to meet only one of several AYP criteria, could very well have improved academically since the release of the 2012-2013 AYP results. Schools have had two entire school years to improve academically, something that cannot be considered if only looking at "frozen" data. Holding schools accountable for AYP as it previously existed, disrupts any improvements made by schools. The remedy to utterly transform a school into a charter school is drastic and should not be done lightly. Appellees' position and the Trial Court's Decision turns public policy on its head, and this Court should not condone such an

outcome. (See *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 107 ["Finally, the court may consider the impact of an interpretation on public policy, for '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.' [Citation.]"], citing *Mejia v. Reed* (2003) 31 Cal.4th 657, 633.)

CONCLUSION

Based on the foregoing and for those reasons set forth in Appellant Anaheim City School District's briefing, *Amicus Curiae* respectfully requests that this Court reverse the Decision of the Trial Court.

Dates: March 7, 2016

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the word count of the Microsoft® Office Word 2013 word-processing computer program used to prepare this brief (excluding the cover, tables, and this certificate) is 6,574 words.

Dates: March 7, 2016

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PROOF OF SERVICE

I, Dawn Flanery, am employed in the County of Contra Costa, State of California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 2001 North Main St., Suite 500, Walnut Creek, CA 94596.

On March 7, 2016, I served the attached:

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF APPELLANT ANAHEIM CITY SCHOOL DISTRICT

on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope addressed as follows and I caused delivery to be made by the mode of service indicated below:

SEE ATTACHED SERVICE LIST

[X] (Regular U.S. Mail) on all parties in said action in accordance with Code of Civil Procedure Section 1013, by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth above, at Lozano Smith, which mail placed in that designated area is given the correct amount of postage and is deposited at the Post Office that same day, in the ordinary course of business, in a United States mailbox in the County of Contra Costa.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed March 7, 2016, at Walnut Creek, California.

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