S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

AFTER DECISION BY THE COURT OF APPEAL
CASE NO. A142858/A143428

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF SAN FRANCISCO
CASE NO. CPF 12-512437
THE HONORABLE RICHARD B. ULMER, JR., PRESIDING

OPENING BRIEF OF PETITIONER UNITED EDUCATORS OF SAN FRANCISCO

STEWART WEINBERG, BAR NO. 031493
DAVID ROSENFELD, BAR NO. 058163
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, California 945011001 Marina Village Parkway, Suite 200
Alameda, California 94501
Tel: (510) 337-1001(510) 337-1001
ATTORNEYS FOR PETITIONER-APPELLANT UNITED EDUCATORS OF SAN FRANCISCO AFT/CFT, AFL-CIO, NEA/CTA

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This Brief is filed on behalf of the Petitioner and Appellant United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA ("Appellant" or "UESF").

I. ISSUES PRESENTED

Statement pursuant to California Rules of Court, rule 8.520(b)(2):

(1) When determining eligibility for unemployment benefits for on-call classified employees and day-to-day certificated employee substitutes, does a summer school session in a K-12 district constitute an "academic term"?

(2) Were the School District and the California Unemployment Insurance Appeals Board subject to issue preclusion from re-litigating the issue of whether these educators are entitled to benefits during a summer session?

II. INTRODUCTION

This case presents a matter of first impression in California appellate courts.[1] Unemployment Insurance Code section 1253.3, subdivision (b) (all undesignated section references are to the Unemployment Insurance Code), referring to certificated employees of school districts, provides that "[b]enefits ... are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms or, ... 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 services for any educational institution in the second of the academic years or terms." Section 1253.3, subdivision (c) pertains to classified employees and has a similar preclusion of benefits for classified employees during the period between two successive academic years or terms if they have performed services in the first of those years or

[1] There is a superior court judgment involving two of the parties in the instant case, which is discussed *infra* and which constitutes issue preclusion on the issue in this case.

terms and are given reasonable assurance of employment in the second academic year or term. This case explores the effect of a summer school session that is offered between the spring semester of an academic year and the fall semester of the next academic year. This case applies only to day-to-day substitute teachers and the on-call classified employees who are paid according to how many days they actually work. It raises the issue of whether or not that summer school session (during which the employees did not work) qualifies as an "academic term" for purposes of section 1253.3, subdivisions (b) or (c), where, although reasonable assurance was given for employment in the fall semester, no assurance was given for employment during the intervening summer school session.

A second issue is whether a decision of the superior court in earlier litigation between the District and the California Unemployment Insurance Appeals Board ("CUIAB") in 2005, holding educators are entitled to unemployment insurance benefits, constitutes issue preclusion and may be asserted in this litigation by Appellant, UESF.

III. APPLICABLE STATUTES

Section 1253.3, subdivisions (a), (b), (c) states as follows:

> (a) Notwithstanding any other provision of this division, unemployment compensation benefits, extended duration benefits, and federal-state extended benefits are payable on the basis of service to which Section 3309(a)(1) of the Internal Revenue Code of 1954 applies, in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to this division, except as provided by this section.
>
> (b) **Benefits specified by subdivision (a) based on service** performed in the employ of a nonprofit organization, or of any entity as defined by Section 605, with respect to service in an instructional, research, or principal administrative capacity for an educational institution **are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms or, when an agreement provides instead for a similar period between two regular but not successive terms**, during that period, or during a period of paid sabbatical leave provided for in the individual's contract, **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 services for any educational institution in the second of the academic years or terms.

(c) **Benefits specified by subdivision (a) based on service** performed in the employ of a nonprofit organization, or of any entity as defined by Section 605, with respect to service in any other capacity than specified in subdivision (b) for an educational institution **shall not be payable to any individual with respect to any week which commences during a period between two successive academic years or terms if the individual performs the service in the first of the academic years or terms and there is a reasonable assurance that the individual will perform the service in the second of the academic years or terms.** However, if the individual was not offered an opportunity to perform the services for an educational institution for the second of the academic years or terms, the individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of this subdivision. Retroactive benefits shall be claimed in accordance with the department's procedures which shall specify that except where the individual was entitled to benefits based on services performed for other than an educational institution, an individual who has a reasonable assurance of reemployment may satisfy the search for work requirement of subdivision (e) of Section 1253, by registering for work pursuant to subdivision (b) of Section 1253 during the period between the first and second academic terms or years. A claim for retroactive benefits may be made no later than 30 days following the commencement of the second academic year or term. (Emphasis added.)

Subdivisions (b) and (c) are at issue. Subdivision (b) applies to certificated educators, research and principal administrators. Subdivision (c) applies to classified employees. Although there are differences between the sections, the governing language for this case is the same. We have bolded the language involved in this case. Subdivision (a) is the "equal benefits" provision.

The federal statute that is the basis of Unemployment Insurance Code provides in relevant part:

> (a) Requirements The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—
>
> (6)
>
> (A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that—
>
> (i) with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms,
>
> (ii) with respect to services in any other capacity for an educational institution to which section 3309(a)(1) applies—
>
> (I) compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between 2 successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms, except that ...

(26 U.S.C. § 3304(a)(6)(A).)

Section 1253 adopts the federal statute, using identical language (with some modifications not relevant here). They "'are, in substance, exact counterparts ... .'" (*Bd. of Education of the Long Beach Unified School District v. Unemp. Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 686 [quoting *Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 384] (hereafter *Long Beach Unified School District.*) We refer to the state statute in this brief, although we will comment on the purposes animating the federal statute below.

IV. STATEMENT OF THE CASE

This case began as an administrative claim when 26 unemployment insurance benefits claimants filed unemployment claims in the summer of 2011. Each of them was denied benefits by the Employment Development Department for any period during the summer of 2011. Each appealed, and an administrative law judge reversed in each case and awarded benefits for various periods during the summer. The District appealed to the CUIAB, which reversed and found none was eligible for benefits. Those decisions were issued in March of 2012. The record of the administrative proceedings consisting of the CUIAB's decision, which attaches the ALJ's decision, are contained in the record as Exhibits A through Z to the Second Amended Petition. (2 CT 360–683.)

Appellant initiated the action by the filing of a Petition for Writ of Mandate/Prohibition on August 27, 2012. (1 CT 1.) On April 11, 2013, the Appellant filed a Second Amended Petition for Writ of Administrative Mandamus. (2 CT 360.) The action named the CUIAB as the Respondent and the San Francisco Unified School District ("District" or SFUSD") as the Real Party in Interest. (2 CT 360.)

After several rounds of pleadings, and while this was pending, the CUIAB adopted the decision in *Matter of Brady* (2013) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-505 (hereafter *Brady*) as a Precedent Benefit Decision on December 10, 2013. (3 CT 890–903.) That decision had direct impact upon the 26 claimants although its reasoning and holdings were at odds with the earlier decisions. The District filed a First Amended Cross-Complaint against the California Unemployment Appeals Board, seeking to nullify the *Brady* decision. (3 CT 879–905.)

The trial court denied the Second Amended Writ filed by the Appellant. The trial court granted the relief sought in the First Amended Cross-Complaint and vacated *Brady*. The Appellant and the CUIAB appealed, but the Court of Appeal affirmed. The Union, on behalf of 26 members, and the CUIAB petitioned this Court for review. This Court granted review in both Petitions for Review.

V. FACTS

A. PROCEEDINGS RELATING TO THE ISSUE OF SUMMER SESSION AS AN ACADEMIC TERM FOR PURPOSES OF UNEMPLOYMENT INSURANCE CODE SECTION 1253.3

On August 15, 2014, the trial court filed its judgment denying the petition. (3 CT 1104–1107.) The court incorporated its statement of decision into the judgment. (3 CT 1105:20; 1106:6.) The court made an express finding that benefits are "'not payable to any individual with respect to any week between' the end of one academic year and the beginning of the next whether that week (or those weeks) is called 'summer recess,' 'summer vacation,' 'summer vacation period,' 'summer school,' 'summer session,' or anything else ... ." (3 CT 1105:25–28.) The effect is to deny benefits during a summer session even if it is an academic term.

After so finding, the court reversed the decisions of the CUIAB and remanded each of the cases back to the CUIAB with instructions to find the 26 claimants not eligible for the unemployment benefits requested. The court also invalidated the decision of the CUIAB in the *Brady* case. That result is the subject of the appeal that is consolidated with this appeal.

B. PROCEEDINGS RELATING TO THE DENIAL OF ISSUE PRECLUSION

On October 1, 2013, the Appellant filed a request that the superior court take judicial notice of its own court records in an earlier case, *San Francisco Unified School District v. California Unemployment Insurance Appeals Board* (Super. Ct. S.F. City and County, 2005, No. CPF-05-504939) (hereafter *San Francisco Unified School District*). (2 CT 686–687.) The court did not respond directly to the request that it take judicial notice of the earlier decision of the superior court. However, it appears that the court granted the request for judicial notice because the court discussed and rejected the argument that issue preclusion applied in footnote 13 of its statement of decision.

> The Union relies in part on an opinion of a now-retired San Francisco Judge. However, *res judicata* does not apply "if

> injustice would result or if the public interest requires that relitigation not be foreclosed." *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 622; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 (California Supreme Court declines to apply *res judicata* in unemployment insurance context).

(3 CT 1098.)

The judgment that the trial court declined to follow as issue preclusion was rendered by San Francisco Superior Court Judge James L. Warren. In that case, *San Francisco Unified School District, supra*, No. CPF-05-504939, the trial court was called upon to decide whether or not to grant a petition for writ of mandate filed by the SFUSD against the CUIAB. The CUIAB had held that ten substitute teachers who were employed by the SFUSD were eligible for unemployment insurance benefits after they had been unable to find work during a six week summer school term in 2003.[2] (2 CT 692:5–12.) In the course of rendering his judgment denying the petition for writ of mandate, Judge Warren made the following finding:

> Real Parties' period of unemployment also did not begin "between two consecutive academic terms." The CUIAB held that real parties potentially were eligible for benefits during the summer term, which ran from June 19, 2003 through July 25, 2003. Consistent with the express language of § 1253.3, CUIAB appropriately limited real parties' potential liability to the summer term, and excluded the true summer recess periods on either side of it. At oral argument, SFUSD contended that summer school is not a "term" because it is different in length from a regular term and attendance is not mandatory. However, no such limitation appears in the text of the statute, which uses the phrase "academic term" without qualification. To conclude that SFUSD's six-week summer school was an academic term for purposes of § 1253.3, its suffices that during that period educational instruction was provided to students, and that at least some teachers were employed to provide that instruction (which is not in dispute).

(2 695:8–18.)

[2] None of the substitute teachers who were affected by those decisions are involved in this case. (2 CT 689.)

Judge Warren denied the petition for writ of mandate, and the ten substitute teachers were granted unemployment benefits, since they failed to find work during the six week summer school term conducted by the SFUSD in 2003. That case differs from the instant case in the sense that the claimants in that case were seeking unemployment benefits only while the summer school was in operation, whereas the claimants in the instant case seek benefits for the entire period between the conclusion of the regular school year of 2010–2011 and the beginning of the regular school year 2011–2012.

C. STATEMENT OF THE FACTS

In lieu of a hearing, the parties filed a Stipulation of Facts. (2 CT 718–725.) We repeat the facts with some deletions which are noted below in brackets:

> 1. United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA ("Union") is an employee organization that has been recognized as the exclusive representative of certificated employees of the San Francisco Unified School District, and classified para-professional employees of the San Francisco Unified School District.
>
> 2. The San Francisco Unified School District is a public school employer, as defined by California Government Code Section 3540.1(e).
>
> 3. In the Spring academic year 2010-2011, the San Francisco Unified School District employed employees in the position of substitute teachers for the purpose of replacing individuals who were temporarily absent or on leave. (Education Code § 3540.1(e).)
>
> 4. The following individuals were employed as substitute teachers by the San Francisco Unified School District on an on-call or as-needed basis during academic year 2010-2011: [naming eleven]. Each of those persons was a member of the Union.
>
> 5. During academic year 2010-2011, the San Francisco Unified School District employed individuals in the capacity of para-professional classified employees who are not paid during summer months unless they are actually employed for a summer session during which instruction is provided or are paid to perform special projects during the summer such as custodial services.

6. The following individuals were all members of the Union and were employed as para-professional classified employees during the 2010-2011 school year: [naming fifteen].

7. Each of the substitute teachers and classified employees claimants who are identified in paragraphs 4 and 6, above, received a "reasonable assurance" letter during the Spring of the 2010-2011 school year advising him or her that he or she had a reasonable assurance of employment during the 2011-2012 school year (with the exception of Novoa, who received the letter on July 25, 2011).

8. The last date that the San Francisco Unified School District schools operated during the "regular" session of the 2010-2011 school year was May 27, 2011.

9. The first day of instruction for the 2011-2012 school year was August 15, 2011.

10. The San Francisco Unified School District operated a summer session during which instruction was given to students of the San Francisco Unified School District. The summer session began on June 9, 2011 and ended on July 7, 2011 for elementary school students, and began on June 9, 2011 and ended on July 14, 2011 for middle and high school students.

11. No instruction was offered by the San Francisco Unified School District between May 27, 2011 and June 9, 2011 or between July 14, 2011 and August 15, 2011.

12. Each of the above-named claimants, including the substitute teacher claimants and the classified employee claimants applied for unemployment benefits for the period of time between May 27, 2011 and August 15, 2011.

13. The Employment Development Department denied benefits to each named claimant. The claimants appealed to an administrative law judge, who after hearings at which each claimant was represented by the Union, reversed the EDD and held that each claimant was entitled to benefits for the period of time during the summer of 2011 that the claimant did not work.

14. The California Unemployment Insurance Appeals Board reversed all of the decisions of the administrative law judge as to each of the substitute teacher and the classified employee claimants, either in whole or in part. The California Unemployment Insurance Appeals Board, in each

case involving the substitute teacher and the classified employee claimants held that the entire summer session was a recess period as defined in Unemployment Insurance Code section 1253.3(b). However, it also held that if an individual claimant was employed during the summer of 2010, he or she generally had a reasonable expectation of employment during the summer session 2011. Thus, the Respondent generally held that all individual substitute teacher and classified employee claimants who were employed during the summer of 2010 were eligible for unemployment benefits during the period of summer session 2011 but ineligible for unemployment benefits thereafter. Respondent also held that those individual claimants who had worked in the preceding summer were generally eligible for benefits during the summer session of 2011.

a.) Substitute teacher claimants [naming four], all of whom did not work in either the summer session of 2011 or 2010, were held by Respondent to be ineligible for benefits from the last date that they worked in 2010-2011 to August 13, 2011 (and in the case of [naming one], to August 21, 2011).

b.) Substitute teacher claimant [naming one] was employed during summer sessions 2010 and 2011 in a special facility that operated from June 6, 2011 through August 5, 2011 but which did not operate from August 6, 2011 to August 13, 2011. The Unemployment Insurance Appeals Board held that claimant [naming one] was ineligible for benefits for one week ending August 13, 2011.

c.) Substitute teacher claimant [naming one] was employed during summer 2010 and 2011. The Unemployment Insurance Appeals Board held that claimant [naming one] was ineligible for benefits for two weeks ending June 4, 2011.

d.) The remaining substitute teacher claimants, [naming four], were held by Respondent to be ineligible only for the period of time following the end of summer session 2011 to August 13, 2011, but eligible for benefits for summer session 2011.

15. Classified employees who did not work during the summer session of 2011 were declared to be ineligible generally from the time they ceased work in the spring term of 2011 to August 13, 2011. That group included the following classified employees: [naming four].

16. Classified employees who worked during the summer session of 2011 were declared to be ineligible from the period that they ceased working the summer session, July 10 or 17, 2011, to August 13, 2011. That group included the following classified employees: [naming eight].

17. Some individuals were called to work in the period between the conclusion of the spring term in 2010-2011 and the beginning of the 2011-2012 school year. These individuals were employed as 20 Day Substitutes. They were declared to be ineligible for the period of time before they began their stint as 20 Day Custodians, but eligible once their work as 20 Day Custodians ceased. That group included the following: [naming three and identifying time periods of eligibility].

(2 CT 719–722.)

The Court of Appeal accurately summarized the facts as follows:

> UESF is a union that is the exclusive representative of the District's certificated employees and classified paraprofessional employees. In the academic year 2010–2011, the District employed UESF member Aryeh B. Bernabei and 10 others as substitute teachers who worked on an on-call or as-needed basis. The District also employed UESF member Celina R. Calvillo and 14 others as paraprofessional classified employees.2 Paraprofessional classified employees are not paid during summer months unless they are retained for a summer session or perform special tasks, such as custodial services. Each of the 26 employees received a letter during the spring of the 2010–2011 school year advising that they had a reasonable assurance of employment for the following 2011–2012 school year.
>
> The last date District schools operated during the regular session of the 2010–2011 school year was May 27, 2011. The first day of instruction for the 2011–2012 school year was August 15, 2011. The District operated a summer school session that began on June 9, 2011 and ended on July 7, 2011 for elementary school students and ended on July 14, 2011 for middle and high school students. The District did not offer any instruction between May 27, 2011 and June 9, 2011, or between July 14, 2011 and August 15, 2011.
>
> The UESF members described above filed claims for unemployment benefits for the period of time between May 27, 2011 and August 15, 2011. The Employment Development Department (EDD) denied benefits to each

> named claimant. The claimants appealed to a CUIAB administrative law judge (ALJ) who reversed the EDD and held that each claimant was entitled to benefits covering all the weeks for which they had applied.
>
> The CUIAB reversed the ALJ's decisions as to each of the claimants, either in whole or in part.3 The CUIAB held that the entire summer session was a "recess period" as defined in Unemployment Insurance Code 4 section 1253.3, subdivision (b), a provision that restricts public school employees' eligibility for unemployment benefits if they have been given reasonable assurance of continued employment. It also held, however, that if an individual claimant had been employed during the 2010 summer session, he or she had a "reasonable expectation" of employment during the 2011 summer session. Based on this reasoning, the CUIAB held that unemployment benefits could be paid to such employees for days not worked during the 2011 summer school session, but not for the days when school was not actually in session.

(*United Educators of San Francisco AFT/CFT v. California Unemployment Insurance Appeals Board* (2016) 247 Cal.App.4th 1235, 1240, fns. omitted (hereafter *United Educators*).)

Essentially, these few classified employees and certificated teachers were paid on an as needed basis and worked during the school term ending in May 2011 The District maintained a summer session for both high school and elementary and middle school students. The 26 claimants were not asked to work, nor were they provided employment during that summer session or term.

D. PROCEEDINGS RELATED TO THE ISSUE OF ISSUE PRECLUSION

This Court has recently clarified the difference between issue and claim preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 818–819 (hereafter *DKN Holdings*).) This is a matter of issue preclusion because the Appellant and the individuals whom it represents were not parties to the litigation, and the decision is asserted against the District and the CUIAB. (*Id.* at p. 818.) We use this Court's recent clarification and assume this is a question of issue preclusion.

In 2005, the CUIAB awarded unemployment benefits to a handful of certificated employees of the SFUSD who had failed to find employment during the summer recess in 2003. The SFUSD filed a petition for writ of mandate against the CUIAB in order to prevent the implementation of the order of the CUIAB.

The CUIAB had held that section 1253.3, subdivision (b) did not cause ten substitute teachers of the SFUSD to be ineligible for unemployment insurance benefits during the summer recess. The Superior Court of the City and County of San Francisco issued an order denying the petition for writ of mandate filed by the SFUSD in its attempt to nullify the CUIAB's order. (2 CT 689.) The only participants in that case were the SFUSD, as the petitioner, and the CUIAB, as the respondent. The ten substitute teachers of the San Francisco Unified School District were named as real parties in interest although none appeared. (2 CT 691.) The trial court denied the SFUSD's petition for writ of mandate and upheld the award of benefits during the summer session to the individual claimants for benefits and entered judgment in favor of the CUIAB. (2 CT 691–699.) In his 2005 decision, Judge Warren cited and relied upon the relevant federal law.

> Finally, because the California Legislature modeled § 1253.3(b) on a federal statute, congressional intent is also relevant. The language in section 1253.3(b) largely and purposefully tracks a provision of the Federal Unemployment Tax Act (FUTA) of 1976. (Stats. 1978, ch. 2, section 106; 90 Stat. 2667, 2670-1671(amending 26 U.S.C. § (a)(6)(A).) Congress' intent, with respect to the provision at issue in FUTA, was to prevent overcompensation of teachers who are paid a reasonable annual salary based on work performed only over nine months of the year. (See, e.g., Remarks of Sen. Long, 122 Cong. Rec. 33285 (1976); Remarks of Sen. Javitz, 122 Cong. Rec. 33284-33285 (1976); Remarks of Rep. Ullman, 122 Cong. Rec. 35132 (1976).) The debate on the measure confirms Congress's intention to prohibit payment of unemployment benefits during "vacation" or "recess" periods. (See, e.g., p. [*sic*] Remarks of Rep. Steiger, 122 Cong. Rec. 35136 (1976); Remarks of Rep. Corman, 122 Cong. Rec. 22899 (1976).)

(2 CT 693–694.)

The Court of Appeal affirmed because "[a] prior determination is not conclusive where the issue is purely a question of law if injustice would result or if the public interest requires relitigation of the issue." (*United Educators*, *supra*, 247 Cal.App.4th at p. 1246.) The Court of Appeal suggested, but did not hold, that it would be an injustice to the District to adhere to Judge Warren's prior decision.

VI. ARGUMENT

A. WHERE A SCHOOL DISTRICT OFFERS A SUMMER SCHOOL FOR K THROUGH 12 STUDENTS, THAT SUMMER SCHOOL SESSION CONSTITUTES AN ACADEMIC TERM FOR THE PURPOSES OF SECTION 1253.3, SUBDIVISIONS (B) AND (C).

1. Because the facts were stipulated by the parties, review is de novo.

As noted, the parties stipulated to the facts in the superior court, and, as this Court has "made clear in *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671, 679, where the probative facts are not in dispute, and those facts clearly require a conclusion different from that reached by the trial court, the latter's conclusions may be disregarded." (*Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 585 (hereafter *Sanchez*).) Thus, review is de novo.

The CUIAB has issued a detailed Miscellaneous Instruction, which explains how benefits are paid for educators in light of section 1253.3 and other provision of the Unemployment Insurance Code. (Cal. Employment Development Dept., Miscellaneous MI 65, at <http://www.edd.ca.gov/uibdg/Miscellaneous_MI_65.htm> [as of Nov. 29, 2016] (hereafter Miscellaneous Instruction 65).) It is not entitled to deference but is entitled to consideration for its persuasiveness. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582, 584.)[3]

2. Public Policy

Section 1253.3, subdivisions (b) and (c) sets forth a policy to prohibit individuals involved in education from being paid unemployment benefits during a "vacation"

[3] It does not appear to have been updated since *Brady* and this litigation.

period. However, the California Legislature has dictated to the Employment Development Department and to the courts the governing public policy of the State of California with regard to unemployment benefits:

> The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.

(California Unemployment Insurance Code § 100.)

The individuals on whose behalf the Appellant initiated this action are substitute teachers who work on an as-needed basis during the school year, and paraprofessional classified employees who are paid only for the time that they actually work and do not have perennial contracts. In other words, these are individuals who have no tenure or permanent employment rights, and whose compensation ceases as soon as the instructional period of the school district ends. They are precisely the kind of worker whom the unemployment law was designed to protect.

3. **The Background of Federal Law**

This case arises in the context of federal law since Unemployment Insurance is a federal program largely administered by the states. The Court of Appeal referenced this history (*United Educators*, *supra*, 247 Cal.App.4th at p. 1243) as did the CUIAB in *Brady* (3 CT 892–893). We do not repeat that history but make the following points:

- Section 1253.3 contains not only the denial provisions at issue in subdivisions (b) and (c), but it also contains the mandated "equal benefits" provision. Subdivision (a) requires benefits be paid "in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to this division … ." This is the fundamental requirement that the Unemployment Insurance Code be

applied to educators the same way it is as to all other claimants with the narrow exception of the denial provisions applying to vacation periods.

- The history of these amendments is a little more complicated than represented by the Court of Appeal. There were 5 separate amendments to the federal law between 1970 and 1983.[4]
- The denial language has spawned litigation over how the different states have implemented their school programs in light of the denial provisions. The terms used in the federal statute and the state counterparts are vague, and there are many variations to the statutory terms presented in this case as well as other relevant language.[5] This leaves room for San Francisco to have a summer session that is an academic term within the meaning of the statute while many other districts or states may not.
- Federal law governs these issues, and ultimately the question of whether the summer session is an academic term is a question of federal law. (See *Chicago Teachers Union v. Johnson* (7th Cir. 1980) 639 F.2d 353 and *Long Beach Unified School District, supra*, 160 Cal.App.3d at p. 686.)
- Congress understood that benefits were to be denied during a vacation period. The conference committee report identified the issues considered by both houses of Congress. Congress intended the language "between academic years or terms" to refer to summer recess vacation, and Congress intended to prevent receipt of unemployment benefits by fully employed or salaried professional and nonprofessional school employees, whether they

[4] Wilt-Siebert, *Unemployment Compensation for Employees of Educational Institutions: How State Courts Have Created Variations on Federally Mandated Statutory Language* (1996) 29 U. Mich. J.L. Reform 5858.

[5] A state is free to establish its own separate programs, which exceed those benefits. California has done so in other areas. Paid Family Leave supplements unemployment insurance and is administered through the Employment Development Department. (§§ 3300–3306.) California also maintains a state mandatory disability insurance program. (§§ 2601 *et seq.*)

worked pursuant to tenure, contract or agreement. There is no reference in the summary to substitute employees. (Joint Explanatory Statement of the Committee of Conference, 1976 U.S. Code Cong. & Admin. News, pp. 6030–6050.) (3 CT 753–759 (Excerpts).)

In summary, the federal legislation indicates a concern about full time teachers and educators who are effectively paid year around and for whom the summer is a vacation. But what is equally clear is that Congress did not address on-call substitutes or classified educational personnel. Furthermore, Congress allowed individual school districts and states to establish their own academic years and terms. We now turn to what is meant by "academic term" under California law as applied by the Unemployment Insurance Code.

4. The Governing Principles in Interpreting the Unemployment Insurance Code

The subdivisions (b) and (c) of section 1253.3 do not define an "academic term." Section 1253.3 also does not include any reference to a "summer school." It merely states that benefits are not payable to "any individual" for any week "which begins during the period 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 services for any educational institution in the second of the academic years or terms." (§ 1253.3, subd. (b). See also § 1253.3, subd. (c).) Although that description accurately describes the individuals in this case, it leaves open the question of whether or not a summer school or summer session is an "academic term."

Thus, this Court must look for guidance on the question of whether or not summer session constitutes an "academic term" for purposes of section 1253.3. Interpretive guidance is provided by Unemployment Insurance Code § 100. Moreover, this Court has

recently summarized the principles that govern the interpretation of statutes that are designed to protect workers:

> We apply settled principles when construing statutes and begin with the text. If it "is clear and unambiguous our inquiry ends." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103, 56 Cal.Rptr.3d 880, 155 P.3d 284 (*Murphy*).) "[S]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees." (*Ibid.*; see *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026–1027, 139 Cal.Rptr.3d 315, 273 P.3d 513 (*Brinker*).) To that end, we narrowly construe exemptions against the employer, "and their application is limited to those employees plainly and unmistakably within their terms." (*Nordquist v. McGraw–Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562, 38 Cal.Rptr.2d 221; see *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794–795, 85 Cal.Rptr.2d 844, 978 P.2d 2.) We employ these same principles to wage orders promulgated by the Industrial Welfare Commission (IWC). (*Brinker*, at p. 1027, 139 Cal.Rptr.3d 315, 273 P.3d 513.)

(*Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 667, fn. omitted.)

This Court applied this in *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551: "The fundamental purpose of California's Unemployment Insurance Code is to reduce the hardship of unemployment ... ." (*Id.* at p. 558, fn. omitted.) "The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective ... ." (*Sanchez, supra*, 36 Cal.3d 575, 584 and *Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499.) "[O]n appeal, we liberally construe the Unemployment Insurance Code to advance the legislative objective of reducing the hardship of unemployment." (*Robles v. Employment Development Department* (2015) 236 Cal.App.4th 530, 546 [citing to *Sanchez*, at p. 584].) "Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." (*California Dept. of Human Resources Development v. Java* (1971) 402 U.S. 121, 131–

132, fn. omitted (hereafter *Java*).) Federal law interpreting the provisions of FUTA is to the same effect:

> The very specificity of the exemptions, however, and the generality of the employment definitions indicates that the terms 'employment' and 'employee,' are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

(*United States v. Silk* (1947) 331 U.S. 704, 711–712, fns. omitted.)

Moreover, the denial provisions must be narrowly construed. The CUIAB and the DOL have ruled that the denial provisions are interpreted narrowly: The Department of Labor has made this clear. (See U.S. Dept. of Labor, Unemp. Ins. Program Letter No. 43-93 (Sept. 13, 1993), at <https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=194> [as of Nov. 29, 2016] and U.S. Dept. of Labor, Guide Sheet 8, at <http://wdr.doleta.gov/directives/attach/ETAH/301/guide_sheet_8.htm> [as of Nov. 29, 2016]. See also 3 CT 896.)

Section 1253.3 must be liberally construed in order to honor the public policy enunciated by the Legislature. The individuals on whose behalf this proceeding was brought are not persons who are enjoying a paid vacation from the SFUSD. They are without gainful employment although they provided services to the District during the fall and spring academic terms, and they have only "reasonable assurance" that they will once again be entitled to substitute for absent employees of the SFUSD when the new school year begins.

5. **The Summer Session in this case is an Academic Term**

We begin with the facts as stipulated by the parties:

> 8. The last date that the San Francisco Unified School District schools operated during the "regular" session of the 2010-2011 school year was May 27, 2011.
>
> [¶] ... [¶]
>
> 10. The San Francisco Unified School District operated a summer session during which instruction was given to students of the San Francisco Unified School District. The summer session began on June 9, 2011 and ended on July 7, 2011 for elementary school students, and began on June 9, 2011 and ended on July 14, 2011 for middle and high school students.

(2 CT 720.)

The parties stipulated that both of the terms during the period up to May 27, 2011, were sessions and that the summer period was also a session.[6] The SFUSD offered no evidence that the summer session was any different from the sessions that ended in May 2011 or began in August 2011. Since the District has the burden of proof of the facts supporting the exception, it has failed to prove the summer session was any different from the prior academic sessions during the fall and spring terms.[7] (See *Matter of Clower* (2002) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-490.) "Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim." (*Morris v. Williams* (1967) 67 Cal.2d 733, 760.) The SFUSD stipulated that both were sessions and has failed to meet its burden of proof that the summer session was in any way different and that it was not an academic term. The conclusion is that the summer session was just like the prior terms and subsequent terms, which are indisputably academic terms. The word "session" here in this factual context is synonymous with "academic term."

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[6] See Stipulation of Fact 5, 14(a), (b), (d), 15, and 16, using the words "summer session." (2 CT 719, 721.)

[7] See Stipulation of Fact 15, using the phrase "spring term." (2 CT 721.)

This conclusion is supported by the Department of Labor's interpretation of the statute. The United States Department of Labor defines an "academic term" to be,

> [T]hat period of time within an academic year when classes are held. Examples include semesters and trimesters. Terms can also be other nontraditional periods of time when classes are held, such as summer sessions.

(U.S. Dept. of Labor, Conformity Requirements for State UC Laws Educational Employees: The Between and Within Terms of Denial Provisions, at <http://www.ows.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf> [as of Nov. 29, 2016] (hereafter DOL Conformity Requirements).)

The Department of Labor interpretation is entitled to deference. (*Cabais v. Egger* (D.C. Cir. 1982) 690 F.2d 234 [program letters are interpretative], *Thomas Jefferson University v. Shalala* (1994) 512 U.S. 504, 512, and *United States v. Mead Corp.* (2001) 533 U.S. 218, 228–229.)

This is consistent with the Guidance published by the CIUAB:

> The following contains definitions of terms used when discussing recess periods as applied in CUIC Section 1253.3.
>
> 1. Academic Year, Term, and Vacation Period Defined
>
> a. Academic Year – The period of time when educational institutions are in session and constitute a "school year".
>
> b. Term – Those periods which do not fall within the normal "academic year" but during which classes are held. Examples include summer terms (summer school), trimesters (each trimester within the academic year is a term), or other non-traditional periods during which classes are held such as in year-round schools which use a "track" schedule.
>
> c. Holiday or Vacation Period – That period within an academic year or term during which school is not in session due to a holiday or school break, such as winter and spring break, Christmas vacation, etc.

(Miscellaneous Instruction 65, *supra*, at § IV.F Law and Policy; School Recess Period.)

Judge Warren held in his decision that the summer session was an academic term:

> The CUIAB held that real parties potentially were eligible for benefits during the summer term, which ran from June 19, 2003 through July 25, 2003. Consistent with the express language of § 1253.3, CUIAB appropriately limited real parties' potential liability to the summer term, and excluded the true summer recess periods on either side of it. At oral argument, SFUSD contended that summer school is not a "term" because it is different in length from a regular term and attendance is not mandatory. However, no such limitation appears in the text of the statute, which uses the phrase "academic term" without qualification. To conclude that SFUSD's six-week summer school was an academic term for purposes of § 1253.3, it suffices that during that period educational instruction was provided to students, and that at least some teachers were employed to provide that instruction (which is not in dispute).

(2 CT 695:9–18.)

Thus, the DOL, the CUIAB and Judge Warren have stated that summer school can be an academic term.

The CUIAB did not directly address this in *Brady*. In *Brady*, the Ontario-Montclair School District held a summer session for three weeks between the end of May the third week in June of the year. The CUIAB held that this summer school session was a period during which benefits were payable:

> Accordingly, during a summer school session there is no recess period for eligible substitute teachers because school is in session. Just as during the fall and spring terms, those teachers are not on recess. Benefits are payable to listed or eligible substitute teachers during a summer school session because while school is in session, it is not a recess period.

(3 CT 898.)

The Court of Appeal erroneously held that summer session can never be an academic term: "We conclude summer school is not an 'academic term' within the

meaning of section 1253.3's reference to 'academic years or terms.'"[8] (*United Educators*, *supra*, 247 Cal.App.4th at p.1249.) The court cited only one statutory reference, Education Code section 37620, which states:

> The teaching sessions and vacation periods established pursuant to [Education Code] Section 37618 shall be established without reference to the school year as defined in [Education Code] Section 37200. The schools and classes shall be conducted for a total of no fewer than 175 days during the academic year.

Section 37600 of the Education Code makes it clear that Chapter 5 applies only to those school districts that operate under a continuous school program.[9]

> It is the intent and purpose of the Legislature in enacting this chapter to authorize public school districts of any type or class to establish, maintain, and operate their educational program under a continuous school program, to be conducted throughout the entire school year. ...

(Ed. Code, § 37600.)

The record does not reflect that the SFUSD conducts a "continuous school program to be conducted throughout the entire school year" applicable to these employees. Thus, none of the references in Education Code section 37620 are pertinent to the SFUSD in this case. (See *People v. Johnson* (2015) 61 Cal.4th 674, 692 [Any presumption that terms may have same meaning is subject to context and legislative history].)

A school district that operates on a continuous school year could have an academic term during the summer that is a "summer school." Furthermore, the Court of Appeals was wrong when relied on Education Code § 37620 which provides: "[T]he schools and classes shall be conducted for a total of no fewer than 175 days during the academic

[8] The Court of Appeal did acknowledge that this definition was extracted from a portion of the Education Code "relating to the calendaring for year-round schools" (*United Educators*, *supra*, 247 Cal.App.4th at p. 1249) but did not explain why it would govern the rest of the Education Code, particularly when year-round schools are not at issue in this case.

[9] We note, *infra*, this supports the position that a summer session in a school district can be an academic term.

year." The "no fewer" means at least and the statute has the reverse meaning. The "175 days" does not refer to the academic year, but rather a period of instructional time during an academic year. It does not refer to calendar days but school days. That only has application, as noted above, to school districts that have a "continuous school year."[10] Moreover, this contemplates that for other school districts that have calendar years varying from 175 to 365 days, all of the academic terms, whenever they occur, will be a subset of the "academic year." Contrary to the Court of Appeal, the Legislature has used the phrase "academic term" in the Education Code in ways that comfortably encompass a summer term. (See, e.g., Ed. Code, §§ 66028.1, subd. (c); 69433.9, subd. (e)(2); 66721.5, subd. (c); 67424, subd. (a)(2)(F)(ii); 76003, subd. (d)(1).) In some contexts, the Legislature has expressly equated a summer session with a summer term. (See, e.g., Ed. Code, §§ 69433.5, subds. (f), (g) ["summer terms, sessions, or quarters"]; 66057, subd. (b) ["Summer session fees at all campuses of the University of California and the California State University shall not exceed the fees charged per credit unit for any other academic term"]; and 87474, subd. (a)(1) ["summer term maintained by a community college district"].)

The only statutory definitions of "academic year" that exist pertain to certificated employees of community colleges (Ed. Code, §§ 87601, 87661), and private colleges and vocational schools (Ed. Code, § 94812). Education Code sections 87601 and 87661 govern employment of employees but say nothing about whether a summer session is an academic term; the provision just excludes such sessions from the employment procedures of Education Code sections 87400–87885. There is no similar definition, for example, of classified employees of such community college districts. (Ed. Code, § 88001.) Education Code section 94812 governs private post-secondary schools and only

[10] The Court of Appeal's ruling is inconsistent with the rulings it cites from other jurisdictions. Each of those courts has looked to the facts of the summer session or lack thereof. See Part VI.A.8, *infra*.

establishes a "minimum of 30 weeks of instructional time," which easily includes a summer term if the school decides to conduct one.

The Court of Appeal ignored the canons of interpretation discussed above. It erroneously, and without explanation, concluded that the term "academic year" carried a "plain meaning." It derived that "plain meaning" by extrapolating from a provision relating to the minimum number of days that constitutes "a mandatory period of instruction." (*United Educators*, *supra*, 247 Cal.App.4th at p. 1249.) "'The schools and classes shall be conducted for a total of no fewer than 175 days during the academic year.'" (*Ibid.*, italics omitted [quoting from Ed. Code, § 37620].) Besides the fact that the provision applies only to year round continuous schools, the word "during" means that the academic year can be up to 365 days, but "during" that year there must be a minimum of 175 days of instruction. As pointed out above, there are other references in the Education Code that undermine this interpretation of a "plain meaning."

As to the definition of "academic term," besides relying on the sources that we have explained above, the Court of Appeal stated that to recognize the summer school as an academic term would render "section 1253.3 meaningless and inoperable." (*United Educators*, *supra*, 247 Cal.App.4th at p. 1250.) The Court's conclusion that there could never be a "'period between two successive academic years'" is mistaken. If a school has an academic term in the summer, the Court was wrong. The Court's interpretation is contrary to the undisputed fact that, for most districts, there are vacation periods during various other periods during the school or academic year. The reasoning would erroneously apply to a district that operated four quarters or any other "non-traditional" system. That reasoning is contrary to the DOL and CUIAB's position that a summer session can constitute an academic term. Finally, its conclusion is undermined by the obvious fact that many districts (in California and elsewhere) do have a summer school.

Applying the obligation to interpret the provisions liberally in favor of awarding benefits, the term "summer session" can easily be construed as the DOL, the CUIAB, and

Judge Warren have construed it as constituting an "academic term." That also is consistent with the goal of interpreting the denial provisions narrowly.

6. The Court of Appeal erred in attempting to find and apply a definition of academic year.

As we have demonstrated, the issue presented is whether the summer session is an academic term. If it is, benefits are awardable.

The Court of Appeal cited to Education Code section 37620, which establishes a minimum standard for the number of school days to constitute an "academic year" and states: "The teaching sessions and vacation periods established pursuant to [Education Code] Section 37618 shall be established without reference to the school year as defined in [Education Code] Section 37200. The schools and classes shall be conducted for a total of no fewer than 175 days during the academic year." But that allows an academic year that is longer and that need not be continuous.

The term "academic year" appears roughly 150 times in the Education Code. Sometimes the word "regular" or similar adjective proceeds the phrase "academic year," and it is clear from the context that this refers to a "regular" fall to spring academic year. (E.g., Ed. Code, § 60853, subd. (b).) We recognize that many districts have such a regular "academic year" and no summer school, session or term.[11] The question before this Court does not arise until the district has a summer session as an academic term. But it is clear that there are many references that contemplate a summer session as part of an academic year.

It is equally clear that most references to "academic year" are ambiguous, allowing a district to establish its own academic year. In some cases, the Legislature was

[11] The Court of Appeal relied on a posting from the California Department of Education. (*United Educators, supra*, 247 Cal.App.4th at p. 1250, fn. 16.) That reference supports our position. The CDE recognizes that the "traditional" calendar is "nine months of instruction." But the word "traditional" proves our point. San Francisco does not have that traditional model. It has a summer session similar to the fall and spring sessions. That is an academic term. Nothing in the CDE guide suggests that a school district cannot have such a non-traditional calendar with a summer session that is an academic term.

clear that it includes the entire year period. (Ed. Code, §§ 67102, subd. (a); 69800, subd. (d)(1)(A); 70032, subd. (a).)[12] What is at issue is whether the summer session was an academic term. We know, however, that an academic year can include many periods so long as it contains a minimum number of instructional days. For example, an academic year can consist of 4 quarters. (Ed. Code, §§ 68075.7, subd. (b) ["at least three of the quarters in an academic year for an institution using the quarter system"]; 68130.5, subd. (a)(3).) So too an academic term can include a summer session.[13] (See *People v. Johnson, supra*, 61 Cal.4th at p. 692 [the meaning of statutory terms or phrases can vary in the same code].)

All of this proves that the Legislature contemplated that a summer session could be part of the regular academic terms maintained by an education institution governed by the Education Code.[14] Contrary to the Court of Appeal, there is no presumption that the summer session is just a vacation or something other than a summer term. This is entirely consistent with the DOL's position: "Terms can also be other nontraditional periods of time when classes are held, such as summer sessions." (See DOL Conformity

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[12] The Court of Appeal relied on Education Code section 37200 for a definition of "school year." Although that section contains a definition of school year, so does Education Code section 25926, which states: "'School year' means the fiscal year or the academic year." The latter definition is limited to the Chapter in which it is found. This illustrates that it is difficult to impose one definition or concept to other parts of the Education Code. The Court of Appeal makes this error with respect to relying on Education Code section 37620.

[13] The Court of Appeal was correct that "summer school sessions held between academic years were already a common feature," when FUTA was amended to include educators. (*United Educators, supra*, 247 Cal.App.4th at p. 1250.) That proves nothing because no one is contending that all summer schools in all districts and all states constituted an "academic term." When the district maintains a summer session similar to any other school session and treats it as an academic term is it, for this purpose, an academic term.

[14] Implicit in the decision of the Court of Appeal is that a summer session is not "academic." Even though it is "permissive [and] attendance voluntary" (*United Educators, supra*, 247 Cal.App.4th at p. 1250), the parties stipulated it was a "session," and there is no argument here that the instruction is different, inadequate or any less academic than during other terms. (See 2 CT 719–721, numbers 5, 10, 14, 16.)

Requirements, *supra*, at p. 3, FAQ 4: What is an academic term?)[15] In summary, the summer session here was an academic term.

7. There is no California authority that establishes that a summer session cannot be an academic term.

Although there are reported cases concerning section 1253.3, none raises, let alone settles, this legal issue. The cases that cite section 1253.3 are primarily concerned with what constitutes "reasonable assurance" that the individual will perform services for any educational institution in the second of the academic year or terms. (E.g., *Cervisi v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal.App.3d 635 (hereafter *Cervisi*).) Another case turns on the issue of whether or not injunctive relief was available to halt the implementation of an administrative law judge's decision holding that certain school employees were eligible for benefits. (*Los Angeles Unified School Dist. v. Livingston* (1981) 125 Cal.App.3d 942.)

The issue in *Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834 involved a teacher's aide who was employed in the Long Beach Unified School District during the 1977–1978 academic year. She received a notification that "we expect to rehire you when school opens this next fall." (*Id.* at p. 838.) Shortly thereafter, the district sent her a letter informing her that she would be returning to work on August 28, 1978. (*Id.* at p. 839.) The issue was whether or not those letters constituted "reasonable assurance" that she would be re-employed in the successive regular school year, thus disqualifying her for receipt of unemployment insurance benefits. There was no summer school session between the spring term of the 1977–1978 school year and the fall term of the 1978–1979 school year. Thus, the issue in the present case was not presented to the court in the Russ case.

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[15] If the summer session is an academic term, then the Court of Appeal's Opinion would violate FUTA and would be invalid under the federal law. (*Java*, *supra*, 402 U.S. at p. 135 [state statute invalid where it would "frustrate" purposes of federal law].)

In the 1984 decision of the Court of Appeal in *Long Beach Unified School District, supra*, 160 Cal.App.3d 674, a substitute teacher who worked in one academic year was offered continued employment during the "post-recess term." The Court of Appeal held that such an employment offer rendered the substitute teacher ineligible for receiving unemployment insurance benefits during the summer recess. (*Id.* at p. 690.) Once again, there was no issue of the impact or effect of a summer school program since there was no summer school program.

These cases do not offer any support for the opinion of the Court of Appeal nor guidance to this Court except, as noted below, that if "reasonable assurances" is not given for the successive academic term, then benefits are awardable. (See Part VI.C, *infra*.)

8. **Authority from Other Jurisdictions**

This issue of whether a summer session constitutes an academic term or part of an academic year has arisen in jurisdictions outside of the State of California. The results are mixed as to the issue of whether or not a summer school constitutes an academic term or year. We concede that most courts have found under the facts of those cases or the law of those states that there was no academic term and thus the summer period was between academic years or terms and no benefits could be awarded. Each of those cases turns on the facts of the summer session and the state law defining the academic year or term. Most illustrative of this issue are the decisions from the Washington Court of Appeals in *Evans v. Employment Security* (Wash.Ct.App. 1994) 866 P.2d 687 (hereafter *Evans*) and *Thomas v. Dept. Of Employment Sec.* (Wash.Ct.App. 2013) 309 P.3d 761 (hereafter *Thomas*).) Some explanation of these cases that reached results that are consistent with Appellant's argument will illustrate the point.

In *Evans*, a relatively early case, the Washington Court of Appeals held that a teacher was entitled to unemployment benefits under the Washington statute as it existed relative to a community college. The teacher, Ms. Evans, had anticipated employment during a summer term, but the position was given to a junior employee. The court noted

that there had been no specific administrative ruling on whether the summer session "is a 'term', although the parties agree that summer classes are offered at Green River Community College. Summer classes themselves are suggestive that summer is an academic term at the college." (*Evans*, *supra*, 866 P.2d at p. 688.) The court concluded that there was no indication that the statute prohibited benefits and determined that benefits were awardable to the teacher involved.

The Thomas case was decided in 2013 and reflected statutory changes. In doing so, it expressly explained that *Evans* had "relied on an earlier version of RCW 50.44.050 that did not yet define 'academic year.'" (*Thomas*, *supra*, 309 P.3d at p. 765.) The court noted that the Department of Labor had raised a question of federal conformity and that the legislature had responded twice by amending the statute. (*Ibid.*) As a result, the court held that the amended statute clarified whether, under state law, a summer session would constitute an academic term. The statute at the time of *Thomas*, and the current statute, RCW 50.44.050 "provides that the Department, in determining whether a period is part of an academic year, should look to 'objective criteria, including enrollment and staffing ... for the particular institution.'" (*Ibid.* [quoting RCW 50.44.050].) Thus, the court held that Thomas was not entitled to employment or other benefits given the factual findings. The "objective criteria" before this Court is the stipulated fact that the summer session was a session, just like the other academic terms. (See also *Wilkerson v. Jackson Public Schools* (Mich.Ct.App.1988) 427 N.W.2d 570 [Benefits were awardable given the nature of the academic year as defined and as applied].)

We recognize that the majority of the cases have gone the other way and found that under the particular state statute or the facts of the individual case, the educator was

not entitled to benefits because there was no academic term for which the employee was denied employment and thus would have been entitled to unemployment benefits.[16]

These cases illustrate that whether a particular summer session is an academic term or part of an academic year depends, in part, upon state law, how the particular educational institution treats the summer session and of what the summer session consists. The SFUSD chose to establish a summer session like other sessions and therefore it is an academic term.

Finally, the Court of Appeal's holding that a summer session can never be an academic term is contrary to these out-of-state cases. None of those cases holds that a summer session can never be an academic term; the cases depend on the statutory language in the state and the facts of each case. As explained above, there is no support under California law that the Education Code forecloses all districts from having academic terms during the summer. (See Part VI.A.7, *supra*.) Indeed, this opinion is

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[16] (See *Kilpatrick v. Dept. of Employment Sec.* (Ill.Ct.App. 2010) 928 N.E.2d 545 [the summer period at the community college was in between academic terms because the college defined an academic year and differentiated it from the summer session]; *Doran v. Dept. of Labor* (Ill.Ct.App. 1983) 452 N.E.2d 118 [same result where a 47 week schedule was reduced to a 39 week schedule]; *Community College of Allegheny County v. Unemployment Compensation Bd. of Review* (Pa.Commw.Ct. 1993) 634 A.2d 845 [in light of significant cuts in program and other factors, summer school is not an academic term]; *In re Alexander* (N.Y.App.Div. 1988) 136 A.D.2d 788 [applying conventional academic calendar definition under New York law]; *In re. Lintz* (N.Y.App.Div. 1982) 89 A.D.2d 1038 [relying largely on the fact that it was a full time teacher who claimed unemployment benefits during a regular summer vacation]; *Halvorson v. County of Anoka* (Minn.Ct.App. 2010) 780 N.W.2d 385 [summer program was determined not to be a summer term because of the nature of the term even though the educational facility was in a maximum security facility]; *Herrera v. Indus. Claim Appeals Office* (Colo.Ct.App. 2000) 18 P.3d 819 [summer session was a scheduled academic break]; *Friedlander v. Employment Div.* (Or.Ct.App. 1984) 676 P.2d 314 [holding, under Oregon law, that the academic year means the traditional fall through spring sessions]; *Univ. of Toledo v. Heiny* (Ohio 1987) 507 N.E.2d 1130 (holding, under Ohio law, that the academic year means the traditional fall through spring sessions]; *Glassmire v. Unemployment Compensation Bd. of Review* (Pa.Commw.Ct. 2004) 856 A.2d 269 [employer had abbreviated summer sessions which are not part of the academic year]; *Wisconsin Dept. of Indus., Labor & Human Relations, Unemployment Compensation Div. v. Wisconsin Labor & Indus. Review* Com. (Wis. 1991) 467 N.W.2d 545 [recognizing that customary breaks in employment are between academic terms]; *Katz v. Unemployment Compensation. Bd. of Review* (Pa.Commw.Ct. 1988) 540 A.2d 624 [spring term was still an academic term even though there was a decrease in enrollment].)

contrary to FUTA, which allows a school district to have academic terms during various periods other than a traditional fall and spring term.

B. THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD AND THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT ARE BOUND BY A 2005 FINAL JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA THAT HELD THAT SUMMER SESSION IS AN ACADEMIC TERM.

In 2005, the SFUSD filed a petition for a writ of mandate against the CUIAB, which had awarded benefits to 10 on-call substitutes. On November 16, 2005, the superior court filed a judgment denying the petition for writ of mandate. (2 CT 688.) The CUIAB decision held that school employees were exempted from receiving benefits only during periods in which a school district was not providing any instruction to students. "CUIAB held that the exemption only applies to periods in which a school district is in recess: that is, when it is not providing any instruction to students. Thus, under the CUIAB's interpretation, a substitute teacher who was able and available for work during the weeks in which a summer school was offered, but who was totally or partially unemployed during that period, could potentially be eligible for benefits notwithstanding §1253.3(b)." (2 CT 692:19–24.) The trial court denied the petition for writ of mandate and held that the "CUIAB's interpretation of § 1253.3(b) is correct as a matter of law." (2 CT 692:26–27.) The 2005 judgment of the San Francisco Superior Court was not appealed by either party to that action.

The 2005 decision is issue preclusion and binding as to the parties to that litigation, the CUIAB and the SFUSD. The parties to that action litigated the issue of whether or not a summer session constituted an academic term within the meaning of section 1253.3, subdivision (b). The SFUSD and the CUIAB are directly precluded from asserting the position in a legal proceeding contrary to an issue previously decided in an earlier proceeding involving both parties. "[Issue preclusion] prevents relitigation of previously decided issues. ... [I]ssue preclusion can be raised by one who was not a party or privy in the first suit." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.)

The Court of Appeal rejected issue preclusion on the ground that there was a public interest exception to the doctrine, citing to *Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607, 621–622 (hereafter *Kopp*). (*United Educators, supra*, 247 Cal.App.4th at pp. 1246–1247.) In *Kopp*, the issue had an effect on taxpayers statewide, and thus relitigation was appropriate. Here, however, the issue was much narrower since it involved only the summer term adopted and maintained by the SFUSD. Every other school district remains free to adopt or to decline to have a summer session and to design that summer session in a way that makes it an academic term. We recognize that this Court's decision will have some impact on how the term "academic term" is applied, but it does not reach the statewide importance of *Kopp* and the few other cases in which this Court has applied the public policy exception. Here, particularly where there is the countervailing public policy of providing unemployment benefit issues, the public policy exception should not apply.[17]

The CUIAB and the SFUSD are thus foreclosed from relitigating the issue of whether the educators are entitled to benefits during the SFUSD summer session.[18]

C. THE CLAIMANTS ARE ENTITLED TO UNEMPLOYMENT BENEFITS FROM THEIR LAST DAY WORKED UNTIL THE FALL TERM BY OPERATION OF LAW.

What follows is compelled by section 1253.3. The substitute teachers and paraprofessional employees did not receive reasonable assurance of employment in the "second of two academic terms." They did not have reasonable assurance if the summer

[17] There is no statewide importance as to the impact on the SFUSD. We agree there is more statewide importance as to the impact of *Brady*. But this case remains a narrow issue of benefits, which are controllable by each district and which are funded by taxes which are not likely in any way to be impacted by this case.

[18] We also recognize, as the Court of Appeal did, that the prior decision of the superior court held only that the summer session was an academic term and did not apply to the period before the summer school and afterwards. We address that issue immediately below.

session is an academic term.[19] They were only given reasonable assurance of employment for the fall school term of 2011–2012 and not the intervening or "second of two successive academic terms." They were not given reasonable assurance of employment in the summer term, and the equal benefits provision, section 1253.3, subdivision (a), and section 1253.3, subdivisions (b) and (c) require that they receive benefits.

Unemployment benefits are payable for the period between the end of one term and the beginning of another term if the district "skipped" an academic term. This makes sense. If the employees are laid off, and there is one upcoming or successive term, or two terms, or three terms, and the school only gives assurances of employment in some later non-successive term, the employees are out of work because of a loss of work (the intervening term or multiple terms) and not because of vacation. This prohibits manipulation by school employers to avoid unemployment benefits.

This point seems undisputed. The Court of Appeal implicitly acknowledged that if the summer session were a summer term, then benefits would be awardable. Every case concerning whether reasonable assurances has been given, in this state or in other jurisdictions, has concluded that benefits are awardable for the entire intervening period if no reasonable assurances are given. (See, e.g., *Cervisi*, *supra*, 208 Cal.App.3d 635.) The claimants were entitled to benefits from the end of the 2010–2011 year until the beginning of the 2011–2012 year.[20]

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[19] The CUIAB has held that an educator is entitled to benefits during any period between successive terms. (*Matter of Johnson* (1985) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-440.)

[20] They were not automatically entitled to benefits. There is a seven day waiting period, (§ 1253, subd. (d)) they had to have earned enough wages during the base period to qualify (§ 1275) and otherwise qualify for benefits. For example, a substitute might have worked a few days during the base period and not earned enough to qualify for benefits. On the other hand, the employee might be eligible because of wages earned from other employers. (Miscellaneous Instruction 65, *supra*, at § IV.D. Law and Policy; School Wages in the Base Period.) Similarly, the amount of benefits may be affected by the amount of work they performed.

There is no anomaly in awarding benefits for the weeks after the end of the 2010–2011 year and before the beginning of the summer session and for the weeks after the end of the summer term and before the beginning of the 2011–2012 academic year. This happens every time anyone is laid off under the unemployment system. The claimants get benefits until they are reemployed (or their benefits run out) or they are otherwise disqualified. Here, the statutory scheme provides for such benefits for all educators. The point where those benefits end, however, is when they are employed by the school district in some later term. Alternatively, the District can give reasonable assurances for the successive term but not a successor to a "successive" term which results in skipping one or more successive terms. In the latter case, benefits would be awardable.

Seasonal workers are entitled to benefits. Workers who are laid off for temporary periods of time are entitled to benefits. All other workers would be entitled to benefits from the date of lay off or termination subject to the normal seven day waiting period. The statutory scheme allows an exception if "reasonable assurances" are given. Since none were given, benefits must be paid. This result is further compelled by the equal benefits requirement of section 1253.3.

If the individual worked during the summer, the CUIAB held that they were not ineligible for benefits for the period from the end of the spring of 2010, since that is consistent with the 2005 decision. But the CUIAB inconsistently held the employees were ineligible for benefits after the summer session ended until the 2010–2011 academic year began in August of 2010. That is inconsistent with the fact that the CUIAB is bound by the determination that the summer session constituted an "academic term" and the employees did not receive "reasonable assurance" of employment during that "academic term" of employment that followed the summer academic term.

D. THE CUIAB'S INTEPRETATION OF THE UNEMPLOYMENT INSURANCE CODE INCORRECTLY HOLDS THAT ON-CALL TEACHERS AND CLASSIFIED EMPLOYEES MUST HAVE WORKED THE PRIOR SUMMER TERM TO QUALIFY FOR BENEFITS THE SUCCEEDING SUMMER TERM.

1. The CUIAB has taken two different positions.

Initially, the CUIAB granted benefits to those claimants who worked during any period of the summer session in 2010 before the summer 2011 session. The parties stipulated that this was the determining factor determining the right to benefits under the decision in 2011. (See 2 CT 360–683, Exhibits A-Z.) Of course, each had also worked some time during the 2010–2011 fall and spring terms. The CUIAB concluded, for example:

> Due to the claimant's actual work during the Summer 2010 Term and his availability during the Summer 2011 Term, the weeks in question [in 2011] are not between terms for the claimant, he had a reasonable expectation of work during [the Summer 2011 Term], and section 1253.3 does not apply.

(2 CT 378.)

This was challenged by the District in its initial Cross-Complaint against the CUIAB. (1 CT 328–334.)

When the CUIAB issued *Brady*, the rationale shifted. Now, benefits were awarded if the employee in question had a reasonable expectation of working during the summer session because the employee was "on-call."

> When a substitute teacher is scheduled to work "on-call" during the spring term or the fall term and then is not called to work, that claimant's unemployment results from a lack of work, and benefits are payable. Similarly, when a substitute teacher is "on-call" during a summer school session, and is not called to work, the claimant is not on **recess,** but is unemployed due to a lack of work.
>
> Accordingly, during the summer school session there is no recess period for eligible substitute teachers because school is in session. ... Benefits are payable to listed or eligible substitute teachers during a summer school session because while school is in session, it is not a recess period.

(3 CT 898.)

The CUIAB suggested what factors could show that a substitute teacher is on-call to warrant the payment of benefits. (3 CT 899.) None of the factors related to whether the employee had worked during the prior summer, although *Brady* did not eliminate that as a consideration.

2. THE CUIAB Rationale in *Brady* May Be Sustainable.

These rationales all serve the same goal of determining whether an on-call employee is not working during the summer session because of lack of work or because of a summer vacation. It is not applicable where a district like the SFUSD has an academic term that is not a recess, as in this case. In those circumstances, these on-call employees are not working during that term because of lack of work.[21] Because there was a summer academic term, we are not addressing in our Opening Brief a more detailed response to the CUIAB's position. We will do so in any Reply Brief.

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[21] We will address in our Reply the issue whether benefits are payable under the CUIAB's rationale for the period before the summer session and afterwards, assuming the summer session is not an academic term.

VII. CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment and decision of the superior court be set aside and that this Court direct the superior court to enter judgment granting the relief sought in the Second Amended Petition for Writ of Mandate.

Dated: December 5, 2016

RESPECTFULLY SUBMITTED,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
STEWART WEINBERG
DAVID A ROSENFELD

By: 
STEWART WEINBERG

ATTORNEYS FOR PETITIONER-APPELLANT
UNITED EDUCATORS OF SAN FRANCISCO
AFT/CFT, AFL-CIO, NEA/CTA

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CERTIFICATE OF WORD COUNT
Cal. Rules of Court, Rule 8.204(c)(1).)

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the attached Petitioner/Appellant United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA's Brief, was prepared with a proportionately spaced font, with a typeface of 13 points or more, and contains 12,867 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: December 5, 2016

WEINBERG, ROGER &
ROSENFELD
A Professional Corporation

STEWART WEINBERG

Attorneys for Plaintiff/Appellant
United Educators of San Francisco,
AFT/CFT, AFL-CIO, NEA/CTA

PROOF OF SERVICE
CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 5, 2016, I served the following documents in the manner described below:

PETITIONER UNITED EDUCATORS OF SAN FRANCISCO'S BRIEF PETITIONER UNITED EDUCATORS OF SAN FRANCISCO'S BRIEF

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

On the following part(ies) in this action:

Clerk of the Court for
The Honorable Richard B.
Ulmer, Jr.
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

Clerk of the Court
Court of Appeal, First
Appellate District, Division 1
350 McAllister Street
San Francisco, CA 94102

John Yeh
Burke, Williams & Sorensen, LLP
1503 Grant Road, Suite 200
Mountain View, CA 94040-3270
jyeh@bwslaw.com
Attorneys for San Francisco Unified School District

Kamela D. Harris
Attorney General
Beverly R. Meyers
Deputy Attorney General
Office of the State Attorney General
455 Golden Gate Avenue
San Francisco, CA 94102
Beverley.meyers@doj.ca.gov
Attorneys for California Unemployment Insurance Appeals Board

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 5, 2016, at Alameda, California.

Mary Piro