Case No. S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant, Cross-Defendant and Appellant.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Real Party In Interest and Respondent.

SUPREME COURT
FILED
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Deputy

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Plaintiff and Respondent.

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant and Appellant.

Court of Appeal of the State of California, 1st District, Division 1
No. A142858/A143428
Superior Court of the State of California, County of San Francisco
The Honorable Richard B. Ulmer, Jr., Judge
Civil Case No. CPF 12-512437

SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S ANSWER BRIEF ON THE MERITS TO UNITED EDUCATORS OF SAN FRANCISCO'S OPENING BRIEF ON THE MERITS

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I.

INTRODUCTION

Petitioner CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD ("CUIAB") asks this Court to legislatively prescribe a rule that substitute teachers who are "on-call" during a school district's summer session, and who are unable to find work, should be eligible for unemployment benefits. The plain language of California Unemployment Insurance Code § 1253.3[1] establishes that school-term employees (those whose work schedules coincide with the academic year) who have reasonable assurance of returning the following academic year or term shall not be eligible to receive unemployment benefits for the period between academic years or terms. Nothing in the statute, or the legislative history, countenances such an ad-hoc rule as urged by CUIAB.

The court of appeal agreed, stating that "there is nothing in section 1253.3 suggesting any exceptions to the rule that school employees who receive reasonable assurance of continued employment are not entitled to unemployment benefits between the spring and fall academic terms." (*United Educators of San Francisco v. California Unemployment Insurance Appeals Board et al.*, Case Nos. A142858/A143428, Slip Opinion, p. 18 (hereafter "*UESF*, p. 18" or "*United Educators*").)

The clear legislative intent was that the end of an academic year or term, for a school employee with reasonable assurance of returning, does not constitute "unemployment." There is no indication in the legislative history or the plain language of the statute that being on call for a voluntary summer school session[2] would constitute

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[1] Hereafter "U.I. Code § 1253.3."

[2] A summer session, the court of appeal noted, not required for "compulsory education laws that mandate public schools to provide instruction," and that does not "allow certificated employees to receive credit toward permanent status. (See, e.g., Ed.Code, §§ 37620, 41420, 48200, 44913.)" (UESF, pp. 14-15.)

"unemployment" in the form of being "attached to the general labor force which is seeking other employment on a permanent basis." (*Board of Education of the Long Beach Unified School Dist. v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 690, fn. 7 ("*Long Beach*").)

A 1976 amendment to the federal unemployment statute reinforces this intent. This amendment created the only trigger for overriding between-term eligibility: the loss of the employee's right to return during the second academic year. This amendment was codified in state law in U.I. § 1253.3(i)(4), which provides that "the individual shall be entitled to a retroactive payment of benefits [between-term] if the individual is not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms" (*e.g.*, is permanently removed from the job market.).

Similarly, CUIAB erred in issuing the *Brady* decision when it concluded that the period between academic years was not a "recess" period, therefore overriding U.I. §1253.3. However, the plain language of the federal and state statute establishes that ineligibility attaches to the period between academic years and terms, and not only to "recess" periods. In fact, the federal legislative intent clearly demonstrates that Congress contemplated that employees could still procure other work during the period between academic years[3] without eviscerating the non-eligibility of that period, as urged by CUIAB here.

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[3] The Congressional Record recognizes that a teacher may seek other employment during the period between academic years or terms. ("So a schoolteacher is really not unemployed during the summer recess. He/[she] can take other employment, if he/[she] wants to.") (Congressional Record, Vol. 122, Part 26, 33285, September 29, 1976, Attached as Exhibit H to CUIAB Request for Judicial Notice in Support of Opening Brief (hereafter "CUIAB RJN"), pp. 108-109.)

"The role of the courts is not to legislate or to rewrite the law, but to interpret what is before them [Citation omitted.]" (*UESF* at 13.) This Court should decline CUIAB's invitation to legislatively rewrite U.I. 1253.3 to the effect that the reasonable assurance rule is eviscerated if a substitute teacher is "on-call" for summer school work and is unable to obtain such work.

II.

LEGAL ARGUMENT

A. Summary Of Legal Argument

The traditional academic year, starting in the fall, ending in the spring, with a summer break in between, is well established in California public schools.

The intent of the unemployment insurance statutes is that employees are eligible for benefits for losing work that they held – not for the inability to obtain work that they did not hold. The CUIAB itself seemed to realize this in its November 30, 2012 decision in the matter involving claimant Arthur Calandrelli (CUIAB Case No. AO-278558) ("the 2012 Calandrelli Decision"), which the CUIAB had agendized to designate as a Precedent Benefit Decision at its January, 2013 meeting. (Court of Appeal Clerk's Transcript, Volume 3, Pages 0805-0806 (hereafter "CT, Vol. 3, 0805-0806").)[4] In the 2012 Calandrelli Decision, the CUIAB recognized that school employees who work during the academic year do not "lose" employment once the academic year ends and the summer begins:

> Congress did not intend to provide school employees with paid vacations over the summer, *but wanted to provide protections for those school employees who had lost employment.* [Citation omitted.] According to

[4] The item was subsequently taken off calendar and no action taken. (CT, Vol. 2, 0746.)

> Congress, teachers who worked during the 9-month academic year are 'really not unemployed during the summer recess' but can choose 'to take other employment' during the summer. [Citation omitted.] (CT, Vol. 3, 811.) (Emphasis provided.)

CUIAB contends that there is no definition of the term "academic year" that excludes summer school. Contrary to CUIAB's argument, Education Code § 37620 clearly establishes the "academic year" as the 175-day regular school year, and excluding the summer session:

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

CUIAB's opening brief fails to mention this statute.

The clear legislative intent demonstrates that the only trigger for overriding between-term eligibility occurs when "the individual is not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms" under U.I. § 1253.3(i)(4). The statute precludes the legislative amendment that CUIAB proposes to add here.

B. The Standard Of Review

Questions of statutory interpretation are subject to de novo review. (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1228.)

For reviewing courts assessing the validity of precedent benefit decisions under § 409.2, this Court has set forth the proper standard of review: "in a third-party declaratory action under § 409.2 the courts may only determine whether the board

decision accords with the law that would govern were the rule announced articulated as a regulation." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal.App.4th 51, 58, *quoting Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111.)

While it is true that "a court will give great weight to an agency's view of a statute or regulation, the reviewing court construes the statutes as a matter of law and will reject administrative interpretations where they are contrary to statutory intent." (*Messenger Courier Ass'n of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1086-87 *quoting American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal.App.4th 51, 58; *See also, Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal. App.4th 168, 176.)

In deciding whether the CUIAB's application of governing law should be upheld, the Court is bound to apply settled standards and review whether the CUIAB's interpretation was contrary to statutory intent. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd., supra,* 29 Cal.3d 101 at 111.)

C. Pertinent Sections Of The California Unemployment Insurance Code

The plain language of the U.I. Code makes it clear that school-term employees with reasonable assurance of returning are not eligible for benefits during the period between academic years or terms. U.I. Code § 1253.3, subsection (b), governs instructional personnel (the substitute teachers in this matter):

> [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, 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....

U.I. Code § 1253.3, subsection (c), applies to those employees not serving in an "instructional, research, or principal administrative capacity" (the classified [noncredentialed] employees in this matter):

> 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.

The court in *Long Beach, supra,* 160 Cal.App.3d 674, 682 affirmed that the rule applied to substitute teachers. In *Russ v. California Unemployment Appeals Board* (1982) 125 Cal.App.3d 834, the court affirmed the application of the reasonable assurance rule to non-instructional employees.

D. Legislative History

1. CUIAB's Argument That The Original Federal Legislation Intended To Exclude Substitute Teachers Is Rebutted By The Legislative History And Subsequent Case Law

CUIAB relies heavily on the contention that Congress, in enacting the original unemployment insurance statute, certainly must have intended to exclude substitute teachers. CUIAB contends that:

- "The legislative history makes it clear that Congress, in enacting the federal provision on which section 1253.3 is based, intended only to *ensure that full-time teachers and educational professionals*, who are typically paid a salary that covers the entire year while only working for nine months, do not receive a windfall." (CUIAB Opening Brief, p. 3, para. 1.) (Emphasis provided.)
- "The limited purpose of the [reasonable assurance] exception – to avoid conferring a windfall *to salaried, full-time educational professionals,* whose compensation is designed to cover contemplated recess periods – is clear throughout the legislative history." (CUIAB Opening Brief, p. 17, para. 3.) (Emphasis provided.)

These arguments are neither new, nor novel, and have been rebutted for over 30 years by the legislature, and by courts interpreting the statute.

a. The District's Substitute Teachers Are "Professionals"

CUIAB's claim that "[t]here is no indication that Congress intended to create a blanket exclusion of summer benefits for all educational employees, regardless of the terms of their employment," is contradicted both by the plain language of, and legislative

history behind, the federal legislation. As CUIAB notes, the original legislation was intended to cover employees rendering "service in an instructional, research, or principal administrative capacity for an institution of higher education ..." (*See, e.g.,* Public Law No. 91-737 (August 10, 1970), CUIAB RJN, Exh. A, p. 2.) When the statute was amended six years later, it extended the reasonable assurance rule to any educational institution, and to include others rendering "services in *any other* capacity for an educational institution (other than an institution of higher education) ...." (*See*, Public Law No. 94-566 (October 20, 1976), CUIAB RJN, Exh. D, pp. 57, 77.) Neither the plain language of the statute, nor its legislative history, evidence any intent to limit the application of the reasonable assurance rule based on characterizations of positions as "professional" or "nonprofessional," or other terms of employment. The statute contains no limiting language whatsoever as to its scope.

It is clear from the legislative intent and statute that Congress saw the distinction between "professionals" and "non-professionals" as aligning with those rendering "service in an instructional, research, or principal administrative capacity" and those rendering "services in any other capacity (other than an instructional, research, or principal administrative capacity)" for an educational institution. (*See*, *e.g.,* Public Law No. 94-566 (October 20, 1976), [attached as CUIAB RJN, Exh. D, pp. 77].) This is borne out elsewhere in the legislative record, which makes reference to the reasonable assurance rule for "teachers and other professional employees" and as subsequently extended to "nonprofessional employees" (Senate Report No. 94-1265, 2d. Sess. (1976), CUIAB [attached as RJN, Exh. E, p. 79]; *See also*, *Id.* at P. 86; Joint Report, Senate Committee on Finance and House Committee on Ways and Means, H.R. 102110, 94th

Cong., 2d Sess. (1976), [attached as CUIAB RJN, Exh. F, p. 94].)[5]

Therefore, neither the plain language of the federal statute, nor its legislative history, support the CUIAB's attempt to carve out an exception to the reasonable assurance rule based on employees that it deems to be "professionals" as opposed to "nonprofessionals." In any event, substitute teachers, as instructional personnel, would be considered "professionals," in the nomenclature of Congress.

The case law interpreting the unemployment statutes drives this point home with even more resonance. The court in *Long Beach, supra,* 160 Cal.App.3d 674 explicitly stated that the non-vested nature of substitute employment did not exempt that classification of employees from the operation of the reasonable assurance rule:

> The exclusion of benefits under section 1253.3 applies to instructional educational employees regardless of whether their employment status is vested or non-vested. If there is a contract or a reasonable assurance that a teacher, who has taught for the District during the pre-recess period, will perform teaching services for the employer in the academic year or term during the post-recess period, then the teacher must be denied unemployment benefits during summer recess regardless of whether he or she is a tenured or non-tenured teacher or whether his or her employment is vested or non-vested. [¶] There is nothing in section 1253.3 which sets as a criteria the tenuous nature of a substitute teacher's position as a basis for

[5] The State law analogy for the distinction between teaching and non-teaching personnel is not "professional/non-professional," but consists of the classifications of certificated employees (*i.e.*, those serving in positions requiring certification requirements, such a teaching or pupil services credential per Education Code § 44830(a)); and classified employees (*i.e.*, those serving in positions not requiring certification requirements per Education Code section 45103(a).)

determining the "reasonable assurance" issue. (*Id.* at P. 683.)

The court of appeal in *Long Beach* noted as part of the record a memorandum from the Department of Labor's Unemployment Insurance Service acknowledging the tenuous nature of substitute employment:

> The record on appeal contains a copy of a memorandum from the Administrator, Unemployment Insurance Service, United States Department of Labor, Washington, D.C. to the Regional Administrator, San Francisco, dated October 3, 1979, concerning the subject of "Between-Terms Denial for Substitute Teachers."
>
> This memorandum addressed inquiries from organizations in several states concerning the meaning of "a reasonable assurance" for a prospective substitute teacher. The memorandum contained the following:
>
> > "The heart of the problem of 'a reasonable assurance' for substitute teachers is the nature of the work. The amount of work available cannot be determined. It is dependent on the number of regular teachers who will be absent during the school year. This is not susceptible to precise prediction. While the educational employer may have a general idea of the number of 'substitute days' needed on the basis of past experience, the exact number of days and substitutes needed cannot be forecast. Accordingly, it would be relatively impossible for the educational employer to guarantee, in effect, if and when work would be available for a particular

> substitute. In our view when an individual applies for and is accepted for work as a substitute teacher, the application and acceptance is made with the full knowledge of the realities of the situation: namely that there is no guarantee of work. There is only the opportunity to work if work is available." (*Long Beach, supra*, 160 Cal.App.3d at P. 684 (fn. 4).)

The court of appeal in *Long Beach* cited this letter in concluding that "[s]uch a guarantee of post-recess employment is not required in order to resolve eligibility or non-eligibility for unemployment benefits during summer recess periods." (*Id.* at 685.)

The *Long Beach* case also expressly rebuts CUIAB's contention that "[t]he limited purpose of the [reasonable assurance] exception – to avoid conferring a windfall *to salaried, full-time educational professionals,* whose compensation is designed to cover contemplated recess periods – is clear throughout the legislative history." (CUIAB Opening Brief, p. 17, para. 3.) (Emphasis provided.) In fact, the court in *Long Beach* also extended this same rationale to substitute teachers when it rejected the same contention made by CUIAB in that case:

> The practical effect of the [Unemployment] Board's decision is to assure that most, if not all, substitute teachers in California will be eligible for unemployment benefits during the annual summer recess periods while probationary and permanent teachers who are by statute or by contract guaranteed employment for the post-recess academic term are ineligible for such benefits. Thus, the Board's Precedent Benefit Decision constituted a violation of the principle of "like pay for like services." (*Long Beach, supra*, at 160 Cal.App.3d at 685.)

By like measure, the Court of Appeal in *United Educators*, like its predecessors in *Russ* and *Long Beach*, recognized that it is not the intent of the federal legislation, or its State counterpart, that substitute teachers should be exempt from the reasonable assurance rule, and therefore guaranteed a full calendar year's wage, when permanent and probationary teachers with reasonable assurance of returning had no such guarantee:

> The CUIAB itself acknowledges that in enacting the FUTA Congress 'had envisioned that many public school teachers would be employed from Fall through Spring, and on recess during the summer. Congress did not wish to award these employees a double-payment—one for their usual salary paid throughout the whole year and another for unemployment benefits in the summer.' Yet CUIAB's construction of 1253.3 would accomplish just that. Under its rationale, any teacher with an expectation of obtaining work during the summer session would be entitled to unemployment benefits if they were not hired (or if they were hired but not retained for the entire summer session). ... What the claimants in this case are requesting is that the government should provide them with a full year's income because they have agreed to work and be paid for only 41 weeks of each year. (*UESF*, p.19.)

The court in *Long Beach*, *supra,* also conducted a survey of case law in other states and concluded as follows:

> The weight of decisional authority in other states, who have enacted legislation identical or substantially similar to California's section 1253.3 in order to conform to applicable federal law (See 26 U.S.C. 3304(a)(6)(A)), is that substitute teachers without written contracts, and professional school

district employees, permanent and non-permanent, are ineligible for summer recess benefits because the legislators intended the disqualification to apply to continuing school employees. (*Long Beach, supra*, 160 Cal.App.3d 674; 686-691.)

Therefore, there is no basis for CUIAB's claim that substitute teachers should be exempt from the reasonable assurance rule.

E. <u>The Federal Legislative History Makes Clear That Congress Did Not Consider The Period Between Academic Years Or Terms To Be "Bona Fide Unemployment"</u>

The record of the United States Senate Proceedings to enact H.R. 14705 demonstrates what the legislature intended in defining "unemployment" for school employees. Dr. Arthur M. Ross, Vice President, University of Michigan, in statements during a hearing before the Committee on Finance, United States Senate, stated as follows:

- "We recognize the responsibilities of educational institutions to provide protection for their employees against *bona fide unemployment.*" (CUIAB Request for Judicial Notice, Exh. C, p. 50.) (Emphasis provided.)
- "By covering those who are *genuinely unemployed* the bill is equitable ... (*Id.* at p. 51.) (Emphasis provided.)
- "We believe that in this typical situation the employee should not be considered unemployed during the summer periods, semester break, a sabbatical period or similar periods during which the employment relationship continues." (*Id.*)

- "Appended hereto as appendix A is suggested statutory language which we believe would aid in solving the problem of extending protection to those instructional, research and administrative employees who may *become genuinely unemployed.*" (*Id.*) (Emphasis provided.)

The legislative history clearly shows the intent of Congress in establishing when a school employee became "genuinely unemployed." During the 1976 amendments to the unemployment statute allowing for retroactive eligibility if an employee in fact did not return to work during the succeeding academic year, Senator Javits confirmed that it was not in fact the end of an academic year that occasioned "unemployment," but the loss of employment during the succeeding academic year. As the Congressional Record reflects Senator Javits' remarks:

> ... The amendment provides that if, at the beginning of the term following the vacation period, the employee, whether professional or non-professional, is in fact not offered reemployment by the educational agency that gave him/[her] the reasonable assurance in the first place, he/[she] will be entitled to a redetermination of benefits applicable to the period for which he/[she] has been denied his/[her] entitled to compensation. In short, if this restrictive provision has worked unfairly to the detriment of an *actually unemployed* school employee, he or she will be entitled to a lump sum payment for the denial period. (Congressional Record, Vol. 122, Part 26, 33284-33285, September 29, 1976, [Attached as Exhibit H to CUIAB RJN, pp. 108-109].) (Emphasis provided.)

Senator Long, during the same hearing, made it clear that Congress did not intend to equate the end of an academic year to unemployment: "So a schoolteacher is really not

unemployed during the summer recess. He/[she] can take other employment, if he/[she] wants to. ..." (Congressional Record, Vol. 122, Part 26, 33285, September 29, 1976 [Attached as Exhibit H to CUIAB RJN, pp. 108-109].) As the Court in *Long Beach,* recognized, the period between academic years or terms does not constitute unemployment as contemplated by the statute: "[w]e note that the substitute teacher Smith, having not resigned or retired, was not 'unemployed' in the sense of being attached to the general labor force which is seeking other employment on a permanent basis." (*Long Beach, supra,* 160 Cal.App.3d 674, 690, fn. 7.) Likewise, here, substitute teachers are not "attached to the general labor force which is seeking other employment on a permanent basis," precisely because they have a reasonable assurance of returning to work during the succeeding academic year.

F. The Federal Statute Only Contemplates Retroactive Eligibility Over The Summer If An Employee Lost His/Her Job For The Following Fall

There is only one exception to the rule of ineligibility for the period between academic years or terms – if the employee does *not* return to work during the successive academic year or term. This rule was incorporated into California's unemployment statutes in U.I. Code § 1253.3(i)(4). Under U.I. Code § 1253.3(i)(4), an employee can only be retroactively eligible for the summer period if he/she loses his/her job and does not have the opportunity to return in the next academic year. This interpretation is consistent with the intent of unemployment insurance: to compensate employees who customarily held but lost employment.

The legislative history behind this exception demonstrates not only the Congressional intent that unemployment benefits for school employees be limited to those seeking other employment on a permanent basis, but also that the interpretation

advocated by CUIAB here would actually perpetuate the mischief that Congress sought to avoid by enacting the above-mentioned amendment to the unemployment statute.

The Congressional Record recognized that the statute allowed for a school-term employee receiving reasonable assurance to become retroactively eligible for benefits should he/she in fact lose his/her assignment for the following academic year:

> If, at the end of that vacation period, [an employee] actually finds that he/[she] had no reasonable assurance of employment by the school agency, and indeed, is not employed then retroactively, he/[she] may have his/[her] benefits redetermined. He/[she] does not get them until that determination is made. (Congressional Record, Vol. 122, Part 26, 33285, September 29, 1976, Attached as Exhibit H to CUIAB RJN, p. 109.)

The legislative history shows the intent that an employee who loses the right to return during the second academic year be considered "legitimately unemployed." (*Id.*) Otherwise, a school employee is not considered unemployed during the period between academic years.

The legislative record regarding the amendment to the federal unemployment statute demonstrates the legislative intent to avoid an employee being able to subvert the reasonable assurance rule by refusing to sign a contract in the succeeding academic year:

> Now, if we say he/[she] is regarded as unemployed unless he/[she] has a contract to hire him/[her] again in the fall, let us say in September, then that would set the stage for a ripoff for the teachers who say, 'Look, we do not want a contract. We will come back next year. We know the law requires you to hire us when we do come back, but we do not want a contract because we want to draw unemployment insurance in addition to school

> teachers' pay even though we are being paid a salary for which our people campaigned and obtained adequate adjustment to provide for an annual salary, adequate to provide for our needs.' (Congressional Record, Vol. 122, Part 26, 33285, September 29, 1976, [Attached as Exhibit H to CUIAB RJN, p. 109].)

While the DISTRICT does not adopt Senator Long's use of the colloquialism "ripoff," or its insinuation of malfeasance by any of its employees, this excerpt does evidence the Congressional intent that the ineligibility accorded to the period between academic years or terms was intended to be immutable, and not subject to unilateral override by the employee's decision as to his/her employment. By establishing the requirement that the school employee have a "reasonable assurance" of returning in the succeeding academic year, as opposed a contract do to so, Congress intended that the only intervening occurrence that would override the ineligibility during that period would be the employee not having the opportunity to return during the second academic year.

There is nothing in the legislative history, or plain language, of U.I. § 1253.3 that permits an ad hoc rule that substitute teachers "on-call" for working during a summer school session, but not called for work, would be eligible for benefits during the period between academic years. The clear legislative intent was that the end of an academic year or term, for a school employee with reasonable assurance, does not constitute "unemployment." Being on-call for a summer school session does not constitute permanent removal of the employee from the job market. The statute only permits one catalyst for overriding between-term eligibility – the loss of the employee's right to return during the second academic year.

G. The Federal Statute Was Based On The Traditional School Year Commencing In The Fall, And A Summer Recess Period

U.I. Code § 1253.3 is based upon the Federal Unemployment Tax Act ("FUTA") (26 U.S.C.A. §§ 3301-3331). In states operating unemployment insurance programs in conformity with FUTA, employers receive tax credits against taxes imposed by the federal government. (*Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 842.) As the court in *Long Beach, supra*, 160 Cal.App.3d 674, 686, stated, where the "California statutes ' ... are, in substance, exact counterparts of the federal rules. ... the Legislature must have intended that they should have the same meaning, force and effect as have been given the federal rules by the federal courts." (*Id.* at p. 686.) Therefore, the legislative intent behind the federal statute is relevant to interpreting California's statute.

The legislative intent behind the federal statute clearly contemplates that the academic year should exclude the summer, which was considered a period between academic years, after which employees would be given reasonable assurance of returning for "reemployment in the fall." As the court stated in *Russ, supra*, 125 Cal.App.3d 834 at p. 843:

> [The federal statute] was thus amended to provide in effect that public school employees might be eligible for benefits 'except' in certain instances involving their unemployment during periods of summer recess at the employing schools. Subparagraph (i) of the amended subsection requires in effect that a conforming state must deny eligibility for summertime benefits to a professional school employee (such as a teacher), at any grade level, if there is "a contract" providing for his or her reemployment *in the fall* or "reasonable assurance" of such reemployment. Subparagraph (ii) of the

amended subsection provides in effect that a conforming state may deny eligibility for summertime benefits to a nonprofessional school employee at a subcollegiate grade level (such as appellant) if there is "reasonable assurance" (only) of his or her reemployment *in the fall*. (*Id.* at p. 843.) [Footnote omitted.] (Emphasis provided.)

The following excerpt from the Congressional Record show that school-term employees were not intended to be eligible for unemployment benefits during the summer:

- "The bill prohibits payment of unemployment compensation benefits during the summer, and other vacation periods, to permanently employed teachers and other professional school employees. (Congressional Record, Vol. 122, Part 27, 35132.) (CT, Vol. 3, 0755.)

It is clear, then, that the legislative intent behind the statute was to recognize one academic year, with a traditional recess during the summer, and with employees returning in the fall.

1. The Federal Legislative Intent Is Corroborated By The Definition Of "Academic Year" Under State Law

a. Education Code § 37620 Creates Only One "Academic Year"

The California Education Code demonstrates a strong statutory intent to distinguish the mandatory regular school year from the permissive summer school term. Education Codes § 37620 provides as follows:

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

Education Code § 37620 clearly identifies the "academic year" as that occurring when "teaching sessions" are occurring, and to be conterminous with the regular school year of no less than 175 days. Likewise, Education Code § 41420(a) provides that "[n]o school district, other than one newly formed, shall, except as otherwise provided in this article, receive any apportionment based upon average daily attendance from the State School Fund unless it has maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year."

By contrast, summer sessions were never intended to be part of the school year. In *California Teachers Association v. Board of Education of Glendale* (1980) 109 Cal.App.3d 738, the court of appeal, in affirming the lower court's rejection of a teacher union's challenge to the district's contract with a university to provide summer school services, stated:

> "... [T]he governing body of a district may establish and maintain such summer schools. *No mandatory requirement of summer school is found in any of these sections, and it must therefore be concluded that the establishment and maintenance of summer school classes and programs is only permissive rather than mandatory."* (*Id.* at 744-45.) (Emphasis added.)

Likewise, in the context of employee rights, the Education Code recognizes that it would be unfair to treat employment during the summer school term in accordance with

the same rights as employment during the regular school year. Education Code § 44913 provides as follows:

> Nothing in [Education Code sections not applicable here] shall be construed as permitting a certificated employee to acquire permanent classification with respect to employment in a summer school maintained by a school district, and service in connection with any such employment shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of the district. The provisions of this section do not constitute a change in, but are declaratory of, the preexisting law.

Education Code § 44913 recognizes that it would be unfair to grant credit towards permanent status for service during summer school since not all employees work during summer school. Likewise, there is no statutory right to summer school employment that flows from employment during the regular school year. While school-term employees generally have the right to return the following school year unless released under a temporary or short-term contract (Education Code §§ 44954, 45103(d)(2)); laid off (§§ 44949, 45117); or dismissed for cause (§§ 44932, *et seq.,* 45113); there is no guarantee of summer employment from year to year. (Administrative Record submitted to the Court of Appeal, Vol. 7, P1537 (hereafter "AR, Vol. 7, P1537).)

2. An "Academic Term" Falls Within The "Academic Year"

The Trial Court noted that "[t]he statute's text evinces an unmistakable plain meaning," that an academic term falls within the academic year and that the legislative history also confirms this result:

> If more proof of legislative intent were needed, in 1977 Congress added references to 'academic terms' to the statute's already-existing references to 'academic years.' In doing so, Congress stated its intention to 'expand the *denial* provision to include periods of time between academic terms as well as years' so that school employees 'will not be able to obtain benefits in periods between terms *as well as periods between years.*' 123 CR 8204 (March 21, 1977). (CT, Vol. 3, 1099-1100.) [Emphasis original.]

Therefore, it is unmistakable that Congress intended that "academic terms" be a subset of the "academic year."

The United States Department of Labor ("DOL"), in a memorandum to states explaining the amendments, stated that:

> The period between two regular and successive terms is the short period of weeks between regular semesters or quarters, whether the institution operates on a two or three semester or a four-quarter basis. The suspension of classes during that short period in which services are not required is not a compensable period. (CT, Vol. 3, 812.)

More recently, the DOL issued a written advisory on December 22, 2016, titled "Interpretation of 'Contract' and 'Reasonable Assurance' in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act," concluding that a summer session could only be treated as an "academic term" if "the college has a 12-month academic year, consisting of four quarters." (DISTRICT Request for Judicial Notice in Support of Answer Brief on Merits, Exh. A, pp. 10-11.) Here, the DISTRICT's summer school session is voluntary, and falls outside of the academic year, and therefore is a period of ineligibility because it falls between academic years.

This intent harmonizes with Education Code § 37620, which clearly identifies the "academic year" as that occurring when "teaching sessions" are occurring, and to be conterminous with the regular school year of no less than 175 days. This intent also establishes that summer school cannot be an "academic term."

H. There Is No Basis Under State Law For Treating Summer School As An "Academic Term" For The Purposes Of Overriding The Legislative Intent Of The Unemployment Insurance Code § 1253.3

Employment during the academic year does not vest an employee to the right to employment during the summer term. (*See, e.g.*, AR Vol. 7, P1537; CT, Vol. 2, 0719 (¶ 5), 0729 (¶ 8).) Therefore, treating the summer session as an "academic term" for the purposes of U.I. Code § 1253.3 violates the intent behind that statute and would lead to absurd results. The intent of state law, and the federal law on which it was modeled, was to determine eligibility of school-term employees with a reasonable assurance of returning to their school-term positions when the academic year started in the fall. However, treating a summer school session as an "academic term" under U.I. §1253.3 would require school districts to provide two reasonable assurance notices – one in the spring applying to employment for the summer term, and a second in the summer applying to employment in the fall – in order to establish ineligibility during recess periods. There is nothing in the federal or state statute that would suggest that school districts should be obligated to issue multiple reasonable assurance notices throughout the calendar year.

As was noted in a December 13, 2005 ruling[6] of Administrative Law Judge Peter

[6] Claimant Seymour Glasser, SFUAB Case No. 1647976; CUIAB Case No. AO-127364. The DISTRICT cites the ALJ decisions not as binding authority, but because of the clarity with which they address the faulty reasoning behind the argument that summer school is an "academic term" for the purposes of U.I. § 1253.3.

Wercisnki, which was subsequently modified by the CUIAB:

> If a summer school session is an academic term, the summer school session is the second academic term to determine eligibility in the first summer recess period, and the fall term is the second academic term to determine eligibility in the second summer recess period. Thus, a claimant would not be ineligible for benefits during the first summer recess period but would be ineligible for benefits during the second summer recess period if there is no reasonable assurance of work in the summer session but there is reasonable assurance for the fall term. Nothing in the statute or decisions interpreting it suggest that different results should occur for the two summer recess periods or that separate findings of reasonable assurance for the summer school session and the fall term are required to determine whether section 1253.5(b) applies to the two summer recess periods .... (CT, Vol. 3, 0778-0779.)

School-term employees finishing the traditional school year in the spring "return" to their customary positions in the succeeding academic year in the fall. There is no indication that the statute contemplated that the reasonable assurance notice was intended to apply to a voluntary summer term that school districts are not required to offer, and with employment rights that, under the Education Code, are completely unrelated to rights affiliated with employment during the regular academic year.

1. A School District's Summer School Session Does Not Override Unemployment Insurance Code § 1253.3

CUIAB contends that a school-term employee who is on-call for, but unable to attain, summer school work, is eligible for between-term benefits. This contention is

rebutted by the court in *Long Beach,* which quoted the Department of Labor memorandum in recognizing that "when an individual applies for and is accepted for work as a substitute teacher, the application and acceptance is made with the full knowledge of the realities of the situation: namely that there is no guarantee of work. There is only the opportunity to work if work is available." (*Long Beach , supra*, 160 Cal.App.3d p. 684 (fn. 4).)

In its Cross-Complaint before the Trial Court, the DISTRICT challenged CUIAB's decisions attempting to override U.I. Code § 1253.3 using the DISTRICT's summer school session. The CUIAB cited two of its Precedent Benefit Decisions, P-B-412 and P-B-417, to justify the finding of eligibility of claimants Mark Fiore (CT, Vol. 2, 0381-0384) and Jose Rios (CT, Vol. 2, 0450-0459). The CUIAB based its ruling of eligibility upon a finding that each claimant performed a *single* day of work during either the current (2011) or previous (2010) summer school session, on the rationale that the single day of summer school work somehow created a "reasonable expectation" of summer work that overrode U.I. Code § 1253.3. Taking this faulty rationale even further, CUIAB, in the *Brady* matter, based eligibility upon the mere fact that the school district in that case offered a summer school session, and that the claimant was eligible and available to work in it.

The CUIAB's entire basis for overriding U.I. Code § 1253.3 and its vast legislative history are two of its Precedent Benefit Decisions, P-B-412 and P-B-417. A simple analysis of each decision shows that they are completely distinguishable, and cannot be used as a justification in completely overriding U.I. Code § 1253.3 and for finding eligibility based on the existence of a summer school program.

2. Precedent Benefit Decisions P-B-412, P-B-417 And P-B-431

P-B-412 (CT, Vol. 3, 0784-0787) involved a claimant whose work schedule was reduced from 12 months to 10 months (with the two lost months occurring during the summer). The CUIAB held that the claimant had a reasonable expectation of summer work, since it was "clear that the cause of his unemployment was not a normal summer recess or vacation period but the loss of customary summer work." (Emphasis provided.)

In P-B-417 (CT, Vol. 3, 0789-0794), based on similar facts (an employee reduced from a 12-month to a 10-month schedule), the CUIAB again based eligibility on "the loss of customary summer work," but only for the first year in which the employee served under the reduced schedule. In so holding, the CUIAB stated that, in enacting U.I. Code § 1253.3 "... it was not the intent of Congress to deny benefits to year-round employees or those regularly scheduled for summer work who, due to the cancellation of normal or scheduled summer work, became unemployed."

By "customary summer work," and "normal or scheduled summer work," CUIAB was referring to the summer months that an employee held by virtue of working a 12-month annual schedule. By "loss of customary summer work" and "cancellation of normal or scheduled summer work," CUIAB was referring to employees being reduced from a 12-month to a 10-month schedule, not a separate, voluntary summer school session.

CUIAB's intent was affirmed in P-B-431, in which claimants were reduced from 12 to 11 months in one year (1978), and from 11 to 10 months in the subsequent year (1979). The CUIAB held that the claimants' eligibility for unemployment benefits was *limited to the first year* (in that decision, 1980) in which the employee suffered a loss in months:

At that point there was no cancellation of agreed-upon summer work as no such commitment was ever made. Certainly code section 1253.3 is applicable to their claims for benefits for the summer of 1981. We do not believe that once a school employee has been employed on a 12-month basis and the contract is thereafter changed that the employee will always remain entitled to benefits during the recess period. (CT, Vol. 3, 0796-0803.)

Therefore, P-B-431 establishes that P-B-412 and P-B-417 do not stand for the proposition that availability for work in the current summer school session make the summer school session an "academic term." Rather, there has to be an actual loss in work in the form of the "cancellation of agreed-upon summer work." The loss in customary summer work in P-B-412, P-B-417, and P-B-431 involved a reduction in the contractual work schedule of the claimants during the traditional academic year. This is a far cry from overriding U.I. § 1253.3 on the mere existence of a summer school program, or the claimants' mere availability for summer school work.

I. The CUIAB's Decision In *Brady* Relies Upon An Invalid Interpretation Of Unemployment Insurance Code § 1253.3

1. The CUIAB Incorrectly Concludes That California Law Does Not Define The Term "Academic Year"

CUIAB, in the *Brady* decision, mistakenly claims that California law does not define the term "academic year" in U.I. § 1253.3(c):

- "Neither Congress nor the California Legislature defined the highlighted words ['during the period between two successive academic years or terms.'] used in the denial provisions, above." (CT, Vol. 3, 0893.)

- "Because the phrase 'academic year or term,' is not defined in the code nor in the cases discussed above, it is necessary to carefully analyze the intent of Congress." (CT, Vol. 3, 0895.)

To the contrary, the statutory scheme in the California Education Code obligates school boards to set up a regular school calendar, including an academic year and vacation recess periods. Education Code 37620 provides that "[t]he schools and classes shall be conducted for a total of no fewer than 175 days during the academic year." (Emphasis provided.) The intent of these statutes is clear: school boards have the obligation to create a regular school calendar, including discrete "teaching sessions" and "vacation periods." Within this calendar, Education Code § 37620 clearly identifies the "academic year" as that occurring during the regular school year of no less than 175 days.

Moreover, there is no intent expressed anywhere in the Education Code that a school district's optional summer school session is part of this "academic year." "[I]t must therefore be concluded that the establishment and maintenance of summer school classes and programs is only permissive rather than mandatory." (*California Teachers Association v. Board of Education of Glendale, supra,* 109 Cal.App.3d 738 at 744-45.) Education Code § 44913 – another statute that CUIAB fails to acknowledge – provides that service during a summer school session shall not be creditable towards attaining tenure at the District. Likewise, there is no statutory right to summer school employment that flows from employment during the regular school year. (AR Vol. 7, P1537) As noted by the court of appeal in *United Educators*:

> Further, during the academic year, the Legislature has provided for compulsory education laws that mandate public schools to provide instruction, and that allow certificated employees to receive credit toward

permanent status. (See, e.g., Ed.Code, §§ 37620, 41420, 48200, 44913.) In contrast, historically, offering summer school has been permissive, attendance voluntary, and permanent employment status has not accrued. (Former Ed.Code, § 37252.) (*UESF*, pp. 14-15.)

There is no indication that the statute contemplates that the reasonable assurance notice was intended to apply to a voluntary summer session.

2. CUIAB Also Erroneously Limited Ineligibility To "Recess" Periods

CUIAB, in *Brady*, also erroneously concluded that U.I. 1253.3 limits eligibility to "recess" periods:

- 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.* (CT, Vol. 3, 0898.) (Emphasis provided.)

The plain language of U.I. § 1253.3 does not limit ineligibility strictly to "recess" periods. It clearly creates ineligibility for periods "between academic years or terms." Therefore, CUIAB also erred in *Brady* by limiting ineligibility only to "recess" periods.

J. Other Jurisdictions Considering Substantially Similar Statutory Language Conclude Summer School Is Not An "Academic Term"

CUIAB incorrectly dismisses the relevance of several cases cited by the Court of Appeal that consider summer school under state statutes substantially similar to U.I. §1253.3 because the other jurisdictions' claimants are often full-time teachers, not

substitute teachers. The other jurisdictions' unemployment statutes, however, like U.I. §1253.3, do not articulate different rules for eligibility based on the on-call/as-needed status of educational institution employees.

For example, in *In re Claim of Lintz* (N.Y.App.Div. 1982) 454 N.Y.S.2d 346 (*Lintz*), a New York adjunct college professor worked during the traditional academic year, and had a contract for the succeeding academic year. After she acquired a part-time teaching position during a five-week summer session, she sought unemployment benefits, arguing that she was only partially employed during an academic term and she was not between two successive academic years Under a statute substantially similar to U.I. §1253.3, the *Lintz* court denied the claim, concluding that the law was intended for the "benefit of teachers whose employment had terminated at the conclusion of the academic year and whose employment prospects for the ensuing academic year were doubtful. It surely was not enacted to supplement the income of a regularly employed teacher who chose to teach a few days during her regular summer vacation while awaiting the commencement of the next academic year for which she had unquestioned assurance of employment." The *Lintz* court did not limit this ruling to non-substitute teachers.

A subsequent New York case, *In re Alexander* (1988) 136 A.D.2d 788, 789 reached a similar result regarding a noninstructional, temporary registration clerk who worked only during various school registration periods during the fall through spring school years. Not offered work during the summer session, she sought unemployment benefits for the summer period arguing that she was laid off while an academic term (summer school) was in progress. The New York court disallowed her claim, concluding that the school followed a conventional academic calendar, that a summer session was not considered an academic term under state unemployment insurance law, and that she

was unemployed between "two successive academic years or terms" with reasonable assurance that she would be rehired to work during registrations for the next succeeding term.

In *Campbell v. Department of Employment Security* (1991) 211 Ill.App.3d 1070, a part-time college instructor, like Claimants here, worked in the fall and in the spring. Like Claimants, he applied for unemployment benefits when he applied for and was not given summer teaching work. The Illinois appellate court affirmed that he was ineligible for benefits under the state statute, which, like U.I. § 1253.3, was adopted in compliance with FUTA, because he was employed "during a period between two successive academic years, or during a similar period between two regular terms, whether or not successive" and he had reasonable assurance of being employed "in the second of such academic years (or terms)". [Citations omitted.] (*Id.* at 1079-1080.) The Illinois court further stated that the part-time teacher's "*employment or lack of employment during the summer months is irrelevant because the applicable Federal and state statutes [citations omitted] were designed to address the common academic practice of instructors not teaching during the summer months.*" (*Id.* at 1081.) (Emphasis added.)

An Oregon court of appeal, interpreting an Oregon statute substantially the same as U.I. § 1253.3 [O.R.S. § 657.167(1)], rejected an argument similar to the one offered by CUIAB that the statutory term "academic year" must be defined based on each individual instructor and each educational institution's scheduling practices. In *Friedlander v. Employment Division* (1984) 66 Or.App. 546, a college instructor taught classes only if he achieved a minimum student enrollment. He taught one summer, but not the next, and consequently applied for unemployment benefits. He argued, in part, that the summer period was not between academic years because the university offered some summer

classes. The Oregon court stated that deciding whether his unemployment during the summer occurred between successive academic years was a matter of statutory construction, not a matter of his individual situation. The Oregon court found nothing to indicate that "academic year" was intended to mean anything different than its ordinary and traditional meaning of annual sessions extending from Fall to Spring. Particularly relevant to this case, the court stated, "*[t]hat an employee of an educational institution may choose to work during what is traditionally vacation time does not make it a part of the academic year, and an abbreviated summer session can and regularly does co-exist with a traditional academic year.*" (*Id.* at 552.) (Emphasis added.)

The Colorado school food service worker in *Herrera v. Industrial Claim Appeals Office* (2000) 18 P.3d 819, unsuccessfully offered an argument about her summer unemployment that is similar to CUIAB's argument here. The *Herrera* claimant argued that any time frame in which academics are taking place is an academic year or term or period, and, consequently, the summer session was an academic year or term or period. Thus, although she worked in the spring and had reasonable assurance of working in the fall, she asserted that she was unemployed during the second of two successive academic terms and eligible for benefits. The Colorado courts have determined that, like U.I. §1253.3, Colorado's statute was "patterned after and is complementary to analogous provisions of [FUTA] [Citations omitted]. Thus, like the comparable federal statute, [the Colorado statute] was intended to preclude school teaching and non-teaching personnel from receiving unemployment compensation during summer recess if they have the promise of work in the fall. [Citations omitted.]" (*Id.* at p. 821.) Further, the Colorado court accepted an administrative determination that under the state statute, the summer

session was not an "academic term or period" and that "academic year" meant the traditional fall through spring sessions.

An Illinois appellate court also considered the role of summer school in the unemployment benefits statutory scheme in *Doran v. Department of Labor* (1983) 116 Ill.App.3d 471. For ten years, the teacher claimant taught a 39-week period followed by an eight-week summer session. When the summer session was cancelled for fiscal reasons, the teacher applied for unemployment benefits for the eight week period, arguing that her school term was one 47-week period.

Similar to the U.I. § 1253.3, the Illinois unemployment insurance statute defines an instructional employee's period of ineligibility as "a period between two successive academic years, or during a similar period between two regular terms, whether or not successive . . . if the individual performed such service in the first of such academic years (or terms) and if [reasonable assurance for employment] in the second of such academic years (or terms.)" (IL.ST.CH 820 § 612(B)(1).) The Illinois court concluded that the terms "academic year" and "academic terms" as used in the statute are interchangeable. Without a statutory definition of "academic term" in the unemployment insurance law, the court looked elsewhere in Illinois law to statutes requiring preparation of an annual calendar for the school term and establishing a minimum number of pupil attendance days and concluded that the academic term was the regular term of 39 weeks designated by the school calendar. Consequently, the Illinois court concluded that the teacher was ineligible for benefits because the eight weeks were a period between academic years or terms.

1. CUIAB Fails To Distinguish Cases Handed Down By Hawaii Courts

A Hawaii appellate court decision dealing with substitute teachers is particularly instructive in this case, and, consequently, the CUIAB tries to distinguish the Hawaii statute from U.I. § 1253.3, both of which were enacted in compliance with FUTA. The claimant in *Harker v. Shamoto* (2004) 104 Hawai'i 536 worked as a substitute teacher for several years and was approved to work as a substitute teacher in the following school year. Asserting that he was never offered the opportunity to work at any of the schools where he had previously worked that also operated summer sessions, he applied for benefits for the summer break. Like Appellants, he argued that the Hawaii statute was not intended to apply to substitute teachers. The Hawaii statute at issue is substantially similar to U.I. § 1253.3 and denies benefits "based on service in an instructional . . . . capacity" for the "period between two successive academic years, or during a similar period between two regular terms, whether or not successive . . . [if reasonable assurance . . .] that the individual will perform services in any such capacity . . . in the second of such academic years or terms."(HRS § 383-29(b)(1) Analyzing the use of "academic years" and "regular terms" in the statute, the purpose and legislative history of the statute and the 1986 Department of Labor FUTA program letter, the Hawaii court determined that the words "or term" were added to include schools whose regular school academic term is not the typical regular school academic year.

The court concluded that the Hawaii statute "was written so that when . . . a regular teacher *or a substitute teacher* applies for unemployment benefit payments for the period after the end of one school year and the beginning of the succeeding school year, the merits of the application will be decided without any consideration of the facts that

(a) some schools have a summer school term, and (b) some regular teacher (and possibly substitute teachers) are summer school teachers. The [Hawaii statute] contemplates that a regular teacher who teaches during the regular school year or term will be on vacation during the summer break. The fact that some regular teachers are employed as teachers during the summer or that some regular teachers are involuntarily unemployed as teachers during the summer does not change that contemplation."

Consequently, the Hawaii court concluded, "[A] regular teacher who teaches during the regular school academic year or term is not eligible for unemployment benefits during the summer break even when one or more summer school teaching positions was or were available and unsuccessfully sought." And, the court concluded that the statute "*does not apply a different rule in the case of a substitute teacher. Thus, a substitute teacher who teaches during the regular school year is not eligible for unemployment benefits during the summer break even when one or more summer school substitute teaching position was or were available and unsuccessfully sought.*" (*Id.* at p. 545) (Emphasis added.)

2. <u>The Washington State Cases Cited By CUIAB Are Distinguishable</u>

Evans v. State Department of Employment Security (Wash Ct. of Appeals 1994) 72 Wash.App. 862 (*Evans)* dealt with a part-time community college instructor who taught one or two classes a quarter, without a contract, but never during the summer. The instructor applied for unemployment benefits after she did not receive a requested (not "anticipated" as described by CUIAB) summer quarter teaching assignment. She did not know whether she would be hired for the fall quarter. Washington state law mirrored the provision of the U.I. § 1253.3 prohibiting benefits "between two successive academic

years or terms." The claimant argued that summer was itself an academic term and not a period between academic terms. Without a statutory definition of "academic year" and in the absence of evidence to distinguish the community college summer quarter from any other quarter, the Washington court concluded that the community college summer quarter was an academic term, not a period between two successive academic years or terms and that the instructor was eligible for unemployment benefits during the summer.

Evans involved a community college, an absence of any statutory definition of or guidance regarding "academic year," and no evidence of any difference between the summer quarter and the other academic quarters. This case, however, concerns elementary and secondary schools, applicable statutory definitions, and evidence establishing the differences between summer school and the academic year. These significant factual differences render the *Evans* decision inapplicable to this case.

More importantly, after *Evans*, Washington unemployment insurance law was amended to define "academic year" as "fall, winter, spring and summer quarters or comparable semesters unless, based on objective criteria . . . the quarter or comparable semester is not in fact a part of the academic year of the institution." [Citation omitted.] In a case decided under the revised Washington statutory definition of academic year and under facts similar to this case, the Washington court reached the conclusion urged by the DISTRICT in this case. In *Thomas v. State Department of Employment Security* (Wash. Ct. of Appeal 2013) 176 Wach.App.809, fn. 3. (*Thomas*), claimant was employed as an elementary school lunchroom manager during the school year, which runs from September to June. Each spring, the school district invited lunchroom employees to submit their names if they were interested in summer grounds keeping or custodial work. The claimant submitted his name for summer work and accepted summer work

assignments for three consecutive summer breaks. Due to budget constraints, he was not offered summer work during the next summer break, although he knew he would be returning to his lunchroom manager position in September for the next school year. Because he did not have summer work with the school district, he applied for unemployment benefits.

The Washington appellate court concluded that no evidence indicated that summer was part of the school district's academic year or that the school operated on a year-round schedule similar to the community college in the *Evans* case. The court concluded that the claimant received summer work in previous years because he submitted his name each spring to indicate he was interested in available summer work, not because he was promised a permanent, full time, year-round position. The Washington court rejected the claimant's argument, similar to the CUIAB's argument, that the specific circumstances of his school employment must be considered. Denying his application for benefits, the Washington court found that *Thomas* met the three benefit-disqualifying factors in the Washington statute, which are identical to the California factors: (1) benefits based on non-instructional services provided to an educational institution, (2) benefits sought for a period between two successive academic years and (3) reasonable assurance that he would be returning to work for the next school year.

3. The Other Non-California Cases Cited By CUIAB Are Also Distinguishable

Finally, the following out-of-state cases cited by CUIAB as consistent with its view regarding summer school and the between-term exception, in fact, involved employees who became unexpectedly unemployed during the *traditional fall to spring*

school year and the facts in these cases did not present an opportunity for the courts to consider the place of summer school in the statutory scheme.

In *Chester Community Charter School v. Unemployment Comp. Bd. of Review* (Pa.Commw.Ct. 2013) 74 A.3d 1143), the claimant worked as a full-time building aide during the traditional school year, until she was laid off due to budget cutbacks two months before the scheduled end of the school year. Although she received reasonable assurance of reemployment in her position for the succeeding school year, the Pennsylvania appellate court concluded that the employee was eligible for unemployment insurance benefits because she was laid off prior to the end of the school year. Interpreting a provision of Pennsylvania law substantially the same as the U.I. § 1253.3, the court explained that the purpose of the law "is to preclude school employees from receiving unemployment benefits during anticipated breaks between school terms because they are able to anticipate those nonworking periods and, therefore, are not truly unemployed . . ." (*Id.* at p. 1145.)

Similarly, in another Pennsylvania case, *McKeesport Area School District* (1979) 40 Pa.Comwlth. 334, teachers and non-instructional employees reported to work on their first scheduled day of work in the fall of the school year, and were subsequently "locked out" by the school district in a labor dispute. The Pennsylvania court rejected the employer's argument that the school year did not begin until the lock-out ended and, consequently, that the claimants were unemployed between "two successive academic years." The Pennsylvania claimants, unlike Claimants here, were scheduled to work and ready to work at the beginning of the school year, and the court's interpretation and application of Pennsylvania's equivalent of the U.I. § 1253.3 was completely unrelated to whether summer school is part of the academic year.

Chicago Teachers Union v. Johnson (7th Cir. 1980) 639 F.2d 353 is similarly unsupportive of the CUIAB position. The school board's rules provided for a school year of not less than nine months between September and June 30, and the school board's adopted school year calendar established June 29 as the last day of school. Teachers contracted to receive 39 weeks of salary. On June 7, the school board informed teachers that due to lack of funds June 7, not June 29, was their last day of work, and the teachers received only 36 of the 39 weeks of pay required by their contract. With reasonable assurance of returning to work for the succeeding school year, the laid off teachers applied for unemployment benefits only for the three-week layoff period and argued that the layoff period occurred before the end of the academic year and not "between terms." These particular facts convinced the Seventh Circuit "that the three-week period of separation from work was a period of unemployment," and not a period between two successive academic years under FUTA. (*Id.* at p. 356)

The Rhode Island Supreme Court's decision in *Baker v. Department of Employment and Training Board of Review* (R.I. 1994) 637 A.2d 360, also cited by the CUIAB, is, in fact, not persuasive regarding the CUIAB's position. The only issue in the *Baker* case was whether teachers employed under one-year contracts for one school year had received reasonable assurance of re-employment for the succeeding school year. Whether the claimant teachers were between successive academic years or terms, was not a contested issue. In fact, the Rhode Island court's introductory explanation of that state's version of the U.I. § 1253.3, partially quoted by the CUIAB, can also be interpreted to support the Respondent's arguments: "[t]he intended purpose of Rhode Island's unemployment statute is to assist unemployed individuals who are seeking work. The statute, however, precludes payment of benefits to school employees who are out of

work only for holiday and summer recesses. (Citations omitted.)" (*Id.* at 363.) And, "[a]s evident from this statutory language, school teachers who have a contract or a reasonable assurance that they will teach in the upcoming school year are deemed to be between years or terms and therefor ineligible for unemployment benefits [during the summer recess]." (*Id.*)

K. Contrary To Its Claim, CUIAB Has Not Had A "Long-Standing" And Consistent Interpretation Of Unemployment Insurance Code § 1253.3

CUIAB claims a consistent interpretation of the reasonable assurance rule "for more than 30 years." (CUIAB Opening Brief, p. 18.) In reality, CUIAB reached a more appropriate interpretation of the statute in the 2012 Calandrelli Decision – which it almost designated as precedent – and then, on several material points, pivoted 180 degrees to an opposite conclusion in *Brady*. As will be shown below, CUIAB has not maintained a long-standing and consistent application of U.I. § 1253.3.

1. The Difference Between "Losing" And "Not Finding" Summer Work

Calandrelli: CUIAB, in the 2012 Calandrelli Decision, acknowledged that the legislative history behind the federal statute included the Congressional intent to only allow eligibility for benefits "for those school employees who had *lost* employment":

> Congress discussed how to address the summer time period for school employees who work a traditional school year and have a summer *recess period.* Congress did not intend to provide school employees with paid vacations over the summer, *but wanted to provide protections for those school employees who had lost employment.* [Citation omitted.] According to Congress, teachers who worked during the 9-month academic year are

'really not unemployed during the summer recess' but can choose 'to take other employment' during the summer. [Citation omitted.] The intent of Congress was to 'prohibit payment of unemployment benefits during the *summer, and other vacation periods*, to permanently employed teachers and *other professional school employees*. [Citation omitted.] (CT, Vol. 3, 0811.) (Emphasis provided.)

Brady: To the contrary, CUIAB, in *Brady*, abandoned its position in the 2012 Calandrelli Decision, instead adopting the view that the period between academic years in fact constituted "unemployment" resulting from "lack of work":

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, the 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 lack of work. ... 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. (CT, Vol. 3, 0898.) (Emphasis original.)

Far from being consistent, CUIAB has taken polar opposite positions. In the above-cited excerpt from the 2012 Calandrelli Decision, CUIAB acknowledges the existence of a "9-month academic year," and refers to "the summer, and other vacation periods" (i.e., acknowledging that summer fell between academic years) in concluding that teachers are "really not unemployed during the summer recess." (CT, Vol. 3, 0811.) In *Brady*, CUIAB now denies that summer is a period between academic years, and

claims that "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." (CT, Vol. 3, 0898.) However, this reasoning is faulty because the periods "during the fall and spring terms" are not periods between academic years or terms, and are therefore not periods of ineligibility, under U.I. § 1253. By contrast, the summer is a period between academic years under U.I. § 1253.3.

2. Precedent Benefit Decisions P-B-412 And P-B-417

Calandrelli: CUIAB, in the 2012 Calandrelli Decision, recognized that in both Precedent Benefit Decisions, "claimants were school employees who worked year round during the school year prior to their application for unemployment benefits." (CT, Vol. 3, 0815.) CUIAB also recognized that, in P-B-412, "it was not the intent of Congress to deny benefits to year-round employees or those regularly scheduled for summer work who, due to *cancellation* of normal or scheduled work, became unemployed." (*Id.*) (Emphasis provided.) CUIAB also recognized the ruling in P-B-417 that "[t]he Board found that 'the cause of her unemployment was not a normal summer recess or vacation period but *loss of customary summer work.*" (*Id.*) (Emphasis provided.) It also acknowledged its decision in P-B-431, in which it "restricted the layoff analysis to those cases involving the year in which the change in employment conditions takes place or the first summer the claimant is affected by the cancellation of regularly scheduled classes." (CT, Vol. 3, 0816.) In other words, a 12-month employee reduced to a 10-month schedule would only be eligible for benefits for the two lost months during the first year of the reduced schedule. CUIAB also concluded as follows:

> Because the summer session was not a part of the school's traditional academic year and because the claimant had no loss of customary summer

work, the summer school session was not a term for this claimant. (CT, Vol. 3, 0816.)

In other words, CUIAB, in the 2012 Calandrelli Decision, recognized that P-B-412 and P-B-417 only allow eligibility during the summer where there is a loss in customary summer work (i.e., a 12-month employee reduced to a 10-month employee.)

Brady: CUIAB, in *Brady*, acknowledged that P-B-417 involved "a clerical employee whose year round contract was reduced to ten months," and that "... the cause of her unemployment was not a normal summer recess or vacation period, but loss of customary summer work." (CT, Vol. 3, 0897-0898.) However, CUIAB then does an about face, and concludes that "[t]he fact that an employee's services end at the conclusion of an academic year or term, does not mean that the separation is a result of a summer recess. The lack of employment is due to loss of scheduled work. Therefore, benefits are payable." (CT, Vol. 3, 0898.) Whereas, CUIAB in *Calandrelli* recognized that "summer session [is] not a part of the school's traditional academic year" and that, therefore, the advent of summer signals the end of the traditional academic year, CUIAB in *Brady* now somehow conflates the end of the traditional academic year with "the loss of scheduled work." Put another way, in the Calandrelli 2012 decision, CUIAB recognized that employees could only be eligible during the summer period between academic years due to loss in customary summer work (*i.e.*, reduction from a 12 to 10 month schedule.) In *Brady*, CUIAB tacked to the position that this period can never be a period between academic years or terms due to the existence of a summer session. These positions are mutually incompatible.

3. Academic "Year" v. Academic "Term" v. "Recess"

Calandrelli: The CUIAB noted in the Calandrelli 2012 decision that in 1977 Congress amended the statute to add the reference to "terms," and quoted the then-existing statute to require "denial of benefits to teachers during periods between academic years for those teachers ... who have reasonable assurance that they will be reemployed in the fall." [Citation omitted.] (CT, Vol. 3, 0812.) (Emphasis provided.) The CUIAB also noted that "the academic term is a term within the regular academic year," citing the legislative history. (CT, Vol. 3, 0812.) This would prevent the summer school session from being considered an "academic term" within the 175-day "academic year" defined in Education Code § 37620.

Since U.I. § 1253.3 states that school-term employees shall not be eligible during the recess periods between "academic years *or* terms," (Emphasis provided), the summer recess period is a period of ineligibility if it comes between either "academic years" *or* "academic terms." As established above, Education Code § 37620 establishes the "academic year" as the 175-day regular school year. Since the summer period falls between "academic years," and since U.I. Code § 1253.3 only requires a period of ineligibility to fall between *either* an "academic year" or an "academic term," the fact that the summer period falls between "academic years" precludes CUIAB from subsequently attempting to characterize the summer school session as an "academic term," or, for that matter, anything but a period between academic years.[7]

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[7] U.I. Code § 1253.3(c) also provides that "benefits ... 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* ..." Even, assuming *arguendo* that one considers the summer school session an "academic term," one could reach the same conclusion by treating the summer school session as "a similar period between two regular but not successive terms."

Brady: This conclusion did not prevent CUIAB, in *Brady*, from trying to sidestep this distinction. In *Brady*, CUIAB stated that "[d]uring 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." (CT, Vol. 3, 0898.) However, using CUIAB's above stated rationale in 2012 Calandrelli Decision, one cannot conclude that the summer session is an "academic term," or, in fact, escape the conclusion that the summer is anything but a period between academic years. Yet, CUIAB, in *Brady*, attempts to conflate a summer school session with the fall and spring academic terms:

> 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. (CT, Vol. 3, 0898.)

However, contrary to CUIAB's turn in *Brady*, under U.I. Code § 1253.3, a school district's summer session cannot be considered a mirror image of the fall and spring terms. U.I. Code §§ 1253.3(b) and (c) expressly provide that school-term employees receiving reasonable assurance are not eligible for benefits during the summer period between academic years unless their right to return for the next academic year is terminated. (U.I. Code § 1253.3(i)(4).) CUIAB, in the 2012 Calandrelli decision, was able to recognize this basic rule. Inexplicably, it took pains to evade the very same rule in *Brady*.

L. CUIAB Incorrectly Contends That It Has Maintained A Consistent Interpretation Of The Unemployment Insurance Code § 1253.3

A historical retrospective of representative CUIAB decisions within the past 10 years will further disprove CUIAB's claim that it has consistently interpreted U.I. 1253.3.

1. CUIAB Variance Number 1: Definition Of "Academic Term"

In the 2012 Calandrelli Decision, the CUIAB recognized that "the academic term is a term within the regular academic year," and that a summer school session could not be considered an "academic" term unless an employee was *required* to work during the summer:

> Without the definition of 'academic year," the definition of 'academic term' offers little assistance because the academic term is a period within the academic year. Under this definition, an academic term is the period of time within an academic year, which could be a nontraditional academic school year. For example, if the school had a nontraditional academic school year that encompassed a summer term (perhaps a year round school) ***and employees are required to perform services*** then the summer term, being part of that school's academic year, would be an academic term for purposes of code section 1253.3 for those employees. (CT, Vol. 3, 0813, fn. 3.) (Emphasis provided.)[8]

Here, none of the claimants involved worked for a year-round school that *required* them to work during the summer. Rather, the claimants worked in a traditional 9-month school year, beginning the fall, and ending in the spring. Therefore, CUIAB, in the 2012

[8] UESF's citation (UESF Opening Brief, p. 22) to a publication issued by the Department of Labor acknowledging that an "academic term" could occur during the summer in fact refers to a mandatory, year-round academic year that includes the summer, not a separate, voluntary summer school session.

Calandrelli decision, recognized that the Fall and Spring academic terms were contained within the larger academic year, with the summer recess period in between, since *no employees were required to work during the summer school term.*

The CUIAB, throughout its history of interpreting the U.I. § 1253.3, has not always held fast to this conclusion. In its decision in Case No. 1371994 (Claimant Linda Weil, *et al.*), issued in 2004, the CUIAB concluded that the non-mandatory summer school term was in fact an academic term:

> *We concur with the administrative law judge that the summer sessions were academic terms* and that the employer was more than a nine-month employer in most schools where one or two summer academic terms were held. This is regardless of the language of the reasonable assurance letters, which tried to except the summer recess periods, which we find not to be recess periods but academic terms. Therefore the claimants were not ineligible for benefits under code section 1253.3 for the reasons given above. (DISTRICT's Request for Judicial Notice filed with the Court of Appeal ("Court of Appeal RJN"), Exh. A, p. 011.) (Emphasis provided.)

Therefore, in direct opposition to its conclusion in the 2012 Calandrelli decision, the CUIAB, in the 2004 *Weil* decision, found the summer school session to be an academic term even though no claimant was *required* to work during the summer.

2. CUIAB Variance On "Loss Of Customary Summer Work" v. Inability To Find Summer Work

While the CUIAB, in P-B-412 and P-B-417, triggered eligibility upon the "loss of customary summer work," it has not always held itself to this standard in finding eligibility under U.I. Code § 1253.3.

a. 2004 Decision, Claimant Stephen M. Dolgin, Case No. 1058460:

In 2004, the CUIAB departed from the "loss of customary summer work" standard by enunciating the following rule:

> Likewise, teachers who regularly teach a summer session during the summer break are not ineligible for unemployment insurance benefits under section 1253.3 during the summer session *if they are available for work.* A substitute teacher who is *on a summer substitute list* or otherwise available for summer work would be eligible for benefits during the summer session regardless of whether he or she received reasonable assurance for the fall, provided he or she is otherwise eligible. (DISTRICT Court of Appeal RJN, Exh. B, p. 051) (Emphasis added).

Therefore, the rule enunciated by CUIAB in 2004 does not require a "loss of customary summer work," but mere availability for work, or placement "on a summer substitute list."

b. 2009 Decision, Claimant Linda Weil, Case No. AO-179906:

In 2009, CUIAB stated a rule different from the one that it stated in 2004:

> Therefore, to be eligible for benefits during what would otherwise be a 'normal' work period between terms, recess or vacation, a claimant must meet the requirement imposed by P-B-412 and P-B-417: A *reasonable expectation* of work during the period for which benefits are sought, *a loss of that customary work*; and, under P-B-431 for contract employees whose contracts are changed, work history within the same period in the previous

year." (DISTRICT Court of Appeal RJN, Exh. C, p. 101. [Administrative Law Judge decision adopted and affirmed by CUIAB, p. 094.] (Emphasis added).

The rule enunciated by CUIAB 2009 shifted from "availability" for summer work to a "reasonable expectation," "loss of ... customary work," and "work history within the same period in the previous year."

c. <u>2010 Decision, Claimant Jilma Solorzano, Case No. AO-209182:</u>

In 2010, CUIAB, in affirming an Administrative Law Judge's finding of ineligibility, stated as follows:

> Unfortunately, school employees are generally not entitled to receive unemployment benefits during a summer recess *unless they have some reason to expect that they would be working during that period.* In this case, there is no evidence to indicate that the claimant worked during the 2008 summer school recess period. As such, she is not eligible to receive unemployment benefits during the 2009 summer recess even though she was willing to continue working during that time. (DISTRICT Court of Appeal RJN, Exh. D, p. 109.)

In 2010, the operative test for eligibility for summer benefits was whether the claimant had "some reason to expect working during that period."

d. <u>2012 Decision, Claimant Mark Fiore, Case No. 3794756:</u>

In 2012, the ALJ in this case found that the claimant had previously been employed by the District for one day during the 2010 summer session. The CUIAB modified the Administrative Law Judge's decision, finding that:

> We concur with the finding that that the claimant had a reasonable expectation of summer work from his history of working during the 2010 summer session and the fact that he *was ready and able to work* the 2011 summer session." (CT, Vol. 2, 0381-384.) (Emphasis added).

In 2012, the CUIAB utilized yet another trigger for eligibility: that a claimant was "ready and able to work" during the summer session.

III.

CONCLUSION

U.I. § 1253.3 establishes that school-term employees who have reasonable assurance of returning the following academic year or term shall not be eligible to receive unemployment benefits for the period between academic years or terms.

The clear legislative intent was that the end of an academic year or term, for a school employee with reasonable assurance of returning, does not constitute "unemployment." The existence of a voluntary summer school term does not change this conclusion. There is no indication in the legislative history or the plain language of the statute that being on-call for a voluntary summer school session would constitute "unemployment" in the form of being "attached to the general labor force which is seeking other employment on a permanent basis." (See, e.g., *Long Beach*, *supra*, 160 Cal.App.3d 674, 690, fn. 7.) Even if an employee does not obtain employment during the summer school session, he/she is not "unemployed" due to the reasonable assurance of returning to work in the succeeding academic year.

Likewise, CUIAB erred in issuing the *Brady* decision when it concluded that the period between academic years was not a "recess" period, therefore overriding U.I. 1253.3. The plain language of the federal and state statute establishes that ineligibility

attached to the period between academic years and terms, and not only "recess" periods. In fact, the federal legislative intent clearly demonstrates that Congress contemplated that employees could still procure other work during the period between academic years without overriding the non-eligibility of that period, as urged by CUIAB here. Therefore, there is no indication that a school district's voluntary summer school session would serve to eviscerate the reasonable assurance rule.

The only exception to the rule of ineligibility between academic years or terms is contained in U.I. 1253.3(i)(4), which provides that "the individual shall be entitled to a retroactive payment of benefits [between-term] if the individual is not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms" (*e.g.*, is permanently removed from the job market.) This exception recognizes that an employee who does not return during the succeeding academic year is "unemployed" as contemplated by the legislature when enacting the statute, as distinguished from a school-term employee – substitute or not – who is unable to find a summer school position.

The DISTRICT accordingly asks this Court to affirm the decision of the court of appeal.

DATED: February 1, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the Petition for Writ of Mandate is produced using 13-point Times New Roman type including footnotes and contains no more than 13,972 words, which is fewer than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: February 1, 2017

Respectfully submitted,

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