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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA

15 **CAYLA J. et al.,**

16 Plaintiffs,

17 v.

19 **STATE OF CALIFORNIA et al.,**

20 Defendants.

Case No. RG20084386

**DECLARATION OF ELIZABETH LAKE
IN OPPOSITION TO PLAINTIFFS'
REQUEST FOR INFORMAL
DISCOVERY CONFERENCE [L.R. 3.31]**

Date: August 2, 2023

Time: 10:30 a.m.

Dept: 23

Judge: The Honorable Brad Seligman

Trial Date: September 3, 2023

Action Filed: November 30, 2020

1 I, Elizabeth N. Lake, declare as follows:

2 1. I am a Deputy Attorney General of the State of California and am licensed to
3 practice law in the State of California. I am the counsel of record for defendants State of
4 California, State Board of Education (SBE), California Department of Education (CDE), and
5 Superintendent of Public Instruction Tony Thurmond (SPI) (defendants). I have personal
6 knowledge of the matters set forth herein, and if called as a witness, could and would competently
7 testify to them.

8 **Plaintiffs' Request is an Improper Attempt to Prematurely Interfere in a Contractual**
9 **Dispute Between CDE and its Authorized Representative**

10 1. CDE partners with qualified researchers, such as the John W. Gardner Center at
11 the Stanford Graduate School of Education (JGC), to conduct audits and evaluations and perform
12 research studies on CDE's behalf to assist in informing the development of education policy and
13 in improving its educational programs. When conducting audits and evaluations, weaknesses and
14 deficiencies are uncovered. And, in order to make improvements in educational programs, it is
15 essential to discover previously unknown defects and deficiencies. In both cases, CDE's intent in
16 forming these partnerships is to work collaboratively to develop solutions and improvements.

17 2. To effectuate such partnerships, CDE at times shares proprietary and confidential
18 data and, accordingly, enters into data protection agreements with its researchers. Such
19 agreements are structured in accordance with federal law, under which CDE is prohibited from
20 disclosing student records (i.e., the exact type of student-level data disclosed to Dr. Dee) to
21 researchers, unless they establish a fiduciary relationship with CDE pursuant to Family
22 Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g. FERPA regulations permit
23 disclosure of student record to "authorized representatives of . . . state educational agencies" and
24 to "organizations conducting studies *for, or on behalf of*" CDE for the specific purposes to: "(A)
25 Develop, validate, or administer predictive tests; (B) Administer student aid programs; or (C)
26 Improve instruction." (Emphasis in italics supplied.) Section 99.31(a)(6)(iii)(C) specifically
27 requires that the State and the organization enter into a written agreement.

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1 3. Because the distinction between research “to improve instruction” and an
2 “evaluation of an education program” is often blurred and overlapping, CDE requires all
3 recipients of its student-level data to execute an agreement in which CDE affirmatively appoints
4 the research organization as CDE’s “authorized representative,” and the organization
5 affirmatively accepts the appointment. (Exhibit 2 to the Jacobs Declaration, sections 2.a and 2.b.)

6 4. The Designation of Authorized Representative and Data Protection Agreement
7 (Agreement) entered into between CDE and JGC appoints JGC as CDE’s authorized
8 representative, outlines the scope of the studies or research to be conducted for or on behalf of
9 CDE, and expresses the rights and responsibilities of the parties to the agreement. (**Exhibit 2** to
10 the Jacobs Declaration.) The Agreement also incorporates an express conflict-of-interest
11 provision requiring JGC prevent its employees from voluntarily testifying for parties adverse to
12 CDE in legal proceedings during the term of the Agreement. (*Ibid.* at section 16).

13 5. Dr. Thomas Dee is identified as the principal investigator in the Agreement
14 entered into between CDE and JGC. (**Exhibit 2** to the Jacobs Declaration.) In that capacity, Dr.
15 Dee signed the Agreement on behalf of the JGC and also signed Attachment D on behalf of
16 himself, personally binding himself as an authorized representative for CDE. (*Ibid.*) After Dr. Dee
17 submitted a declaration adverse to CDE in this matter, CDE sent Dr. Dee a letter reminding him
18 of his obligations under the Agreement. (**Exhibit 1** to the Jacobs Declaration.)

19 6. As plaintiffs note, defendants have not objected to Dr. Dee’s participation as an
20 expert in this matter. (Jacobs Declaration at ¶ 3.) Defendants served a Notice seeking Dr. Dee’s
21 deposition on July 21, 2023.

22 7. The incentive to conduct audits, evaluations and research to discover deficiencies
23 in CDE’s educational programs would be significantly “chilled” if CDE’s authorized
24 representatives were free to profit by testifying as an expert witness in litigation rather than work
25 cooperatively with CDE through publishing papers, engaging in public dialogue and developing
26 further research questions. While defendants understand CDE’s enforcement of its Agreement
27 may have some impact on this litigation, the relief sought by plaintiffs through this informal
28 process would effectively bar CDE from enforcing its rights under the Agreement. An order from

1 this Court restraining CDE from enforcing the terms of its Agreement would constitute an
2 improper intrusion into a wholly separate legal and contractual dispute.

3 8. Plaintiffs' request for relief is also premature. At present, CDE has sent a letter to
4 Dr. Dee and requested corrective action pursuant to the Agreement terms. Whether or not CDE
5 will pursue any further action following the alleged breach of contract is hypothetical.

6 **The Constitutionality of a Contract Provision is Not at Issue in This Case**

7 9. According to plaintiffs, and as noted in the filings submitted by the ACLU SoCal
8 and ACLU NorCal in support of plaintiffs' request, one issue in the potential contract dispute is
9 whether the conflict-of-interest provision contained in Attachment D to the Agreement is an
10 unconstitutional infringement on plaintiffs' First Amendment rights. (Jacobs Declaration at ¶ 7.)

11 10. Plaintiffs' allegations in this matter are limited to the allegations in the Second
12 Amended and Supplemental Complaint. This informal request seeks relief from the terms of a
13 contract, is outside the scope of the claims alleged and is not a proper way to bring claims
14 regarding the constitutionality of a contract provision before the Court.

15 **Conclusion**

16 11. Any order of this Court that has the effect of restraining CDE from enforcing the
17 confidentiality provision could, and likely will, be interpreted, or relied on, by a party as this
18 Court's agreement with plaintiffs', the ACLU SoCal's, and the ACLU NorCal's legal argument
19 that the confidentiality provision is unconstitutional and/or unenforceable without any substantive
20 review of the merits of those arguments.

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Cayla J. v. State of California**
No.: **RG20084386**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for Electronic Service.

On **August 1, 2023**, I served the attached:

**DECLARATION OF ELIZABETH LAKE IN OPPOSITION TO PLAINTIFFS’
REQUEST FOR INFORMAL DISCOVERY CONFERENCE [L.R. 3.31]**

by transmitting a true copy via electronic mail, addressed as follows:

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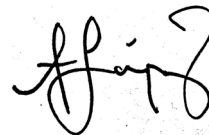
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Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on **August 1, 2023**, at San Diego, California.

A. J. Lopez

Declarant



Signature