Filed 8/15/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JASON ANTEBI, Plaintiff and Appellant, v. OCCIDENTAL COLLEGE et al., Defendants and Respondents.	B186951 (Los Angeles County Super. Ct. No. BC330249)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jane Johnson, Judge. Affirmed in part, reversed in part.

Turner Green Afrasiabi & Arledge and Christopher W. Arledge for Plaintiff and Appellant.

Musick Peeler & Garrett, Stuart D. Tochner and Kent A. Halkett for Defendants and Respondents.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, III A-C, E and IV of the Discussion.

Jason Antebi appeals an order dismissing his lawsuit following sustaining of a demurrer. The suit was against the college where he was disciplined as a student, the members of its governing board, and certain named individuals. He contends the court erred in finding he was limited to judicial review through administrative mandamus pursuant to Code of Civil Procedure section 1094.5[1] and that he should have been permitted to pursue his civil claims for tort and violation of statute. In the published portion of this opinion, we conclude that "Leonard Law" (Ed. Code, § 94367 et seq.) does not apply to appellant since he was no longer enrolled as a student when he brought suit. In the unpublished portion of this opinion, we conclude that one of his causes of action, for defamation, is distinct from the disciplinary proceedings and was sufficiently pleaded against the college and one individual, and conclude that in all other respects, the order of dismissal was proper and is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

Antebi entered Occidental College (Occidental) in the fall of 2000 as a full-time student. He graduated from this private institution in 2004. While a student there, he was a self-described "shock jock" on a radio program broadcast by the student-run radio station. This show consisted of political satire, parody, provocative humor, and mockery of people of every size, religion, gender, or political affiliation.

The following summary is taken from the first amended complaint, which is the charging pleading, and reasonable inferences from that pleading. Antebi's role as an outspoken disk jockey and some decisions he made as a member of the student council caused him to be disliked by some students. Three of them published statements that he was a racist and an anti-Semitic, and that he sexually harassed women. He reported the acts of these three students to Frank Ayala, the dean of students, and Sandra Cooper, the Occidental College general counsel. Ayala and Cooper dismissed his complaint because

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[1] All statutory references are to the Code of Civil Procedure unless otherwise noted.

the actions by the other students did not constitute harassment or defamation. They told him to "fight [his] own battles."

Angered, Antebi used his radio show to fire back against the three students. On March 11, 2004, he made insulting comments attacking satirical characters based on these students and others, and engaged in sexual discussions. Within two weeks, the three students filed separate sexual harassment complaints against him based upon his on-the-air statements on the March 11 broadcast. By then, Ayala had removed Antebi from the show.

Maryanne Horowitz, Occidental's Title IX[2] officer, conducted an investigation of the complaints against Antebi. She shared summaries of all the complaints with the students who had complained against Antebi. The investigation also covered allegations that Antebi had threatened physical violence and retribution in e-mails to the gay community, and that he had defaced brochures with terms derogatory towards women.

On March 22, 2004, as Cooper stood in an office at Occidental, she yelled into a public hallway at Antebi that he was a "racist," "sexist," "misogynist," "anti-Semite," "homophobe," "unethical" and "immoral" "trash." Numerous persons heard the comments.

On March 29, 2004, Occidental President Ted Mitchell transmitted a campus-wide e-mail expressing concern over the increasing sexual and racial harassment on campus. He did not accuse anyone specifically, nor did he cite a specific harassing event.

Horowitz submitted her formal report on the sexual harassment complaints on April 12, 2004. She concluded that Antebi's March 11 program violated Occidental's policy against hostile environment and sexual and gender harassment. She recommended that Antebi apologize to the complainants, or to the Occidental community, and suggested that he seek counseling.

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[2] Title IX of the Educational Amendments of 1972 prohibits discrimination on the basis of sex in educational institutions receiving federal financial assistance. (20 U.S.C. § 1681 et seq.)

Ayala accepted the recommendations and ordered Antebi to apologize to the complainants or face "alternative disciplinary action." Antebi refused. He appealed those findings on May 6, 2004. Rameen Talesh, the associate dean of students, conducted a disciplinary conference with Antebi to discuss acts related to the Title IX investigation. On May 14, 2004, Talesh found Antebi guilty of harassment, sending "spam" e-mail and lying to Cooper. Talesh ordered disciplinary censure until May 17, 2004. The findings stated that Antebi could appeal the decision by following the appeals section of the Student Code of Conduct. Antebi appealed to President Mitchell and the Board of Trustees nearly a month later, after the seven-day deadline specified in the student handbook. There is no information in the record about the outcome of this appeal.

In March 2005, Antebi brought this action in superior court against Occidental, its Board of Trustees, Ayala, Horowitz, Mitchell, Cooper, Talesh, and James Trandquada, Occidental's director of communications. Respondents demurred, and Antebi filed a first amended complaint. Respondents again demurred. The trial court sustained the demurrer without leave to amend because Antebi had not exhausted his internal remedies and, even if he had done so, his exclusive remedy was by administrative mandamus.

Antebi appeals to all respondents from the order of dismissal of seven out of eight causes of action: (1) defamation; (2) violation of Civil Code sections 51 and 52.1; (3) invasion of privacy; (4) intentional infliction of emotional distress; (5) negligence; (6) breach of fiduciary duties; and (7) declaratory relief under California's Leonard law (Ed. Code, § 94367 et seq.).

DISCUSSION

I

The sustaining of a demurrer is reviewed *de novo* to determine "whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) For these purposes, facts properly pleaded are accepted as true and construed

liberally. (*Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) Matters judicially noticed may be considered. (*Blank v. Kirwan*, *supra*, 39 Cal.3d 311, 318.)

II

In our review, we consider whether the trial court properly held that Antebi's only remedy was through administrative mandamus. We also consider whether he has stated any causes of action which fall outside the administrative mandamus requirement. We first dispose of respondents' argument that even if the trial court erred in finding that Antebi was required to seek administrative mandamus for any of his causes of action, he has abandoned all of his causes of action on appeal. They contend that he did so by not discussing the merits of each claim in his opening brief. Applying the *de novo* standard on review of an order sustaining a demurrer, we are not limited to plaintiff's theory of recovery in testing the sufficiency of his or her complaint against a demurrer, "but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory. The courts of this state have, of course, long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.)

Respondents demurred to Antebi's first amended complaint on two grounds: (1) all causes of action are barred because his exclusive remedy is administrative mandamus under section 1094.5; and (2) he failed to allege facts sufficient to constitute the second through eighth causes of action. In his opposition to the demurrer, Antebi insisted that he alleged sufficient facts for each cause of action. By doing so, he has preserved his claims, not abandoned them. The trial court sustained the demurrer on the administrative mandamus ground but did not deal with the sufficiency of factual allegations. Antebi's opening brief primarily argues that the trial court was wrong in deciding his exclusive remedy was administrative mandamus. He briefly mentions that his first amended complaint had separate causes of action that he would like to pursue if

we agreed with him on the administrative mandamus issue. Along with the allegations in his first amended complaint and his preservation of his claims in his opposition to the demurrer, this demonstrates that Antebi has not abandoned the second through eighth causes of action.

III

A

Antebi argues his civil action for declaratory and injunctive relief and damages is not precluded by his failure to pursue administrative mandamus. He contends that he is not challenging the result of Occidental's disciplinary hearing or its internal rules. Rather, he is seeking rights and remedies under California law.

Under section 1094.5, a plaintiff may challenge the result of a quasi-judicial proceeding provided by a public or private organization only through a petition for writ of administrative mandamus. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) By enacting section 1094.5, "the Legislature provided [that remedy, which] was to be used in all cases '[w]here *the writ* [i.e. the writ of mandate] is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which *by law* [1] a hearing is required to be given, [2] evidence is required to be taken and [3] discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . . .'" (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 814; see also *Gupta v. Stanford University* (2004) 124 Cal.App.4th 407, 411.)

Section 1094.5 applies to private universities (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722-1723) and in particular, to students subject to university disciplinary procedures. (*Gupta v. Stanford University, supra,* 124 Cal.App.4th 407, 411.) "The remedy of administrative mandamus applies to any organization that provides for an evidentiary hearing. Whether the aggrieved party is seeking redress for termination of employment, denial of tenure or academic discipline is irrelevant to the applicability of section 1094.5." (*Ibid*.)

"Section 1094.5 expressly provides that it is the *requirement* of a hearing and taking of evidence—not whether a hearing is actually held and evidence actually taken—that triggers the availability of mandamus review." (*Pomona College v. Superior Court, supra*, 45 Cal.App.4th 1716, 1729.) Here, the trial court took judicial notice of the Occidental student handbook submitted by respondents, which provided for a hearing and the taking of evidence, and vested discretion in the panel reviewing the proceeding. The hearing procedure was incorporated into the code of student conduct. That code had its own appeals process for disciplinary determination, requiring a hearing if a student appeals. Antebi admitted in his pleading that in order to appeal Occidental's decision, he had to follow the appeals section of the code of student conduct. "[A]dmissions of material facts made in an opposing party's pleadings are binding on that party as 'judicial admissions.' They are *conclusive* concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her. [Citations.]" (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248.)

Antebi argues that each of his causes of action is based on general principles of tort rather than a private organization's internal rules and, hence, he was not limited to administrative mandamus for review of the disciplinary proceedings. The requirement of exhausting internal remedies is limited to disputes between a private organization and its member(s) over the organization's own rules, membership policies or benefits because of the organization's expertise over such issues. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 86; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476.) But, if the tort claim arises from a dispute over the private organization's own rules, membership policies or benefits, such as a disciplinary hearing, the exclusive remedy is administrative mandamus. (*Gupta v. Stanford University*, *supra*, 124 Cal.App.4th 407, 412-413.) Given the university's expertise with its own rules, including quasi-judicial proceedings concerning student discipline, the *Gupta* court reasoned that such claims were "'precisely the type of claims that administrative mandamus is designed to address.'" (*Ibid*.)

Antebi appeals the dismissal of seven of eight causes of action in his first amended complaint: (1) defamation; (2) violation of Civil Code sections 51 and 52.1; (3) invasion of privacy; (4) intentional infliction of emotional distress; (5) negligence; (6) breach of fiduciary duties; and (7) declaratory relief under Leonard law. As we shall explain, four of these causes of action, for violation of Civil Code sections 51 and 52.1, invasion of privacy, breach of duty, and under the Leonard law, are based on allegations challenging the disciplinary action taken against him. We discuss the remaining three causes of action separately.

B

In his discrimination cause of action, Antebi argues that respondents discriminated against him in violation of the Unruh Act. (Civ. Code, §§ 51, 52.1.) He claims that they did so on the basis of sex, race, color, religion, and ancestry, and that they failed to provide full and equal accommodations. He alleges that respondents targeted him, as a Caucasian male, for harassment while letting three other students, either non-Caucasians or female, engage in the same behavior without disciplinary action. He further claims that respondents' threats of expulsion and disciplinary action in their correspondence violated Civil Code section 52.1. He argues that because of respondents' aversion to him, the actions were taken with the intent to cause injury. Each of these allegations stems from the disciplinary procedures, particularly the allegations of threats of expulsion and disciplinary action which occurred as Occidental was investigating complaints against him. Hence, Antebi was required to seek administrative mandamus for review of the disciplinary action. (*Gupta v. Stanford University*, *supra*, 124 Cal.App.4th 407, 412.) His argument that this claim is independent of the disciplinary action is without merit.

C

In his invasion of privacy cause of action, Antebi claims that Occidental invaded his privacy, specifically, that it violated The Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C. § 1232g). The United States Supreme Court has ruled that FERPA does not create a private cause of action. (*Gonzaga University v. Doe* (2002) 536 U.S. 273, 287.) Even if Antebi identified a cognizable cause of action for invasion of

privacy, his alleged facts arise out of the disciplinary procedure. These alleged facts concern disclosure by Occidental of summaries of all the complaints and facts of the investigation to the three students who filed a complaint against him and discussion of the case with other students and civil rights organizations which Antebi had contacted to help him in the case. He is limited to judicial review by administrative mandamus since the factual allegations supporting this claim arise from the disciplinary proceeding.

Allegations of the breach of fiduciary duty cause of action also arise from the disciplinary procedure, and therefore are barred by the doctrine of administrative mandamus according to the rule in *Gupta v. Stanford University, supra,* 124 Cal.App.4th 407.

D

Antebi argues the administrative mandamus rule does not apply to his Leonard law claim. The Leonard law, Education Code section 94367 et seq., prohibits private universities from disciplining students for speech that would be protected by the First Amendment if made off campus. Specifically, Education Code section 94367, subdivision (a) provides that "[n]o private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution."

A plaintiff cannot avoid the administrative mandamus rule by simply alleging constitutional violations. (See, e.g., *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 645.) In this case, however, Antebi was specifically authorized by statute to bring his Leonard law claim in the trial court without having to seek administrative mandamus.

Even with this exception to the exclusivity of a section 1094.5 proceeding for a Leonard law claim, Antebi lacks standing to pursue it. He graduated from Occidental before filing this action. Education Code section 94367, subdivision (b) provides: "*Any*

student enrolled in a private postsecondary institution that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate *injunctive and declaratory relief* as determined by the court." (Italics added.) "'Where possible, "we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . ." [Citations.]" (*Major v. Silna* (2005) 134 Cal.App.4th 1485, 1493.) Not surprisingly, both sides argue that the plain meaning of the provision, "[a]ny student enrolled . . ." supports its position. (§ 94367, subd. (b).) Antebi asserts that the language requires only that the student be enrolled at the time of the unlawful act; respondents argue it applies the law only to students enrolled at the time the action is filed.

We agree with respondents, for three reasons. First, the plain language of the statute—"any student *enrolled* . . . may commence a civil action" indicates that the student must be enrolled when the legal action begins. (Ed. Code, § 94367, subd. (b), italics added.) Second, the Legislature easily could have extended application of the statute with the words "any student enrolled or *who was enrolled*" or by a similar formulation. The inference from the fact that it did not do so is that the remedy is afforded only to currently enrolled students. Finally, this reading is consistent with the structure of the statute as a whole. "Significance should be given, if possible, to every word of an act." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) Education Code section 94367, subdivision (b) provides only injunctive and declaratory relief, which would not benefit a graduated student. If the Legislature intended to extend the applicability of the Leonard law to graduated students, such as Antebi, it would have permitted the recovery of damages to remedy past wrongs.

E

Alternatively, Antebi argues his case is an exception to the administrative mandamus rule. One of the requirements for administrative mandamus is that the party seeking that relief must exhaust his or her internal remedies. (See *Board of Medical Quality Assur. v. Superior Court* (1977) 73 Cal.App.3d 860, 862.) Antebi reasons that he is excused from this exhaustion requirement because the administrative remedy is

inadequate. "'The doctrine [of exhaustion of administrative remedies] is inapplicable where "the administrative remedy is inadequate [citation]; where it is unavailable [citation]; or where it would be futile to pursue such remedy [citation]."'" (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 620.)

The inadequacy of the administrative remedy, Antebi claims, is that the monetary damages he seeks to resolve his tort claims cannot be awarded in an administrative mandate proceeding. Since the precluded tort claims are based on his disciplinary proceedings, the real question is whether the disciplinary proceeding provides an adequate, available and satisfactory remedy to Antebi. The California Supreme Court has held that even if a plaintiff seeks monetary damages which an internal process cannot provide, he or she must exhaust his or her administrative remedies. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 323; see also *Westlake Community Hosp. v. Superior Court, supra,* 17 Cal.3d 465, 476.) Antebi cannot escape the exhaustion rule by seeking monetary damages; hence administrative mandamus is triggered in respect to the causes of action solely based on allegations arising from the disciplinary proceeding.

Antebi argues he should be excused from his requirement that he exhaust his administrative remedies because he claims he could not. As he alleges in his first amended complaint, two administrators told him that he could not have a hearing on an appeal. But, attached to the first amended complaint is a letter dated May 14, 2004 from Associate Dean of Students, Rameen Talesh. This letter advised Antebi: "If you would like to appeal this decision, you may do so following the appeals section of the Student Code of Conduct." Antebi did not allege whether he took advantage of this opportunity for review. Therefore, Antebi has failed to establish this exception to the administrative mandamus requirement because he did not pursue a hearing which he was offered.

IV

One of the causes of action is distinct from the quasi-judicial disciplinary proceeding: the claim that Cooper yelled disparaging names at Antebi in a public

hallway. Although the statements were made during the period of the disciplinary investigation, they were not a part of the administrative procedure. As we explain, Antebi has pleaded a cause of action for defamation, but not for intentional or negligent infliction of emotional distress.

In Antebi's first amended complaint, he alleged that "[o]n March 22, 2004, from the office of the General Counsel for Occidental College, Defendant Cooper yelled into a public hallway at Mr. Antebi, that he was a 'racist,' 'sexist,' 'misogynist,' 'anti-Semite,' 'homophobe,' 'unethical' and 'immoral' 'trash.' These words were published to numerous persons, both identifiable and unidentifiable." "[Defamation] involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645, Civ. Code, §§ 45, 46; 5 Witkin, Summary of Cal. Law (9th ed. 1998) Torts, § 471, pp. 557-558.) Publication consists of communication to a third person who understands the defamatory meaning of the statement and its application to the alleged victim. (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1179.) If the statement is unambiguous, a pleading needs only an allegation that the statement was made in the presence of third persons. Antebi's allegation meets this test. Cooper's alleged statement was unambiguously defamatory and was made in the presence of other people in a public hallway.

Respondents contend that Antebi, as a public figure, must make a showing of malice by Cooper. In *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, the United States Supreme Court applied its rule of requiring actual malice in a defamation action filed by a public official in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 to public figures. There are two kinds of pubic figures: (1) an "all purpose" public figure who has "achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," and (2) a "limited purpose" public figure who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351.) "Unlike the 'all purpose' public figure, the 'limited purpose' public figure

loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253-254.) Assuming that Antebi is at least a limited purpose public figure to the local community as a radio jockey on the college station, respondents are incorrect in their claim that Antebi failed to plead malice. He did so in his first amended complaint, which stated that the defamatory statement was "motivated by factors which were beyond [the individual defendant's] purview as representatives of the College, including but not limited to personal dislike of [Antebi] and ill will towards [Antebi]." The demurrer should have been overruled as to the cause of action for defamation against Cooper and Occidental.

Antebi also may use the hallway name-calling allegation to support his cause of action for intentional infliction of emotional distress (IIED) action, but his pleading is not sufficient to support that tort. IIED requires that the plaintiff allege the defendant intentionally or recklessly caused "severe emotional distress" by "extreme and outrageous conduct." (Rest.2d Torts, § 46; see also *State Rubbish Etc. v. Siliznoff* (1952) 38 Cal.2d 330, 336.) To be "outrageous," the conduct "'must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Conley v. Roman Catholic Archbishop* (2000) 85 Cal.App.4th 1126, 1133.) "[T]he court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883; Rest.2d Torts, § 46.) Name-calling in public has been held not to be outrageous as a matter of law. (*Yurick v. Superior Court* (1989) 209 Cal.App.3d. 1116, 1129.) Cooper's act of calling Antebi names within earshot of others at Occidental is not. Antebi fails to state sufficient facts for an IIED action.

Antebi also fails to state a cause of action for negligent infliction of emotional distress (NIE) even with the hallway name-calling allegation. A NIED claim cannot be based upon intentional conduct. (See *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1105.) Antebi has alleged that the conduct of Cooper and other respondents was "intentional." He has not stated a cause of action for a NEID claim.

V

Respondents claim, and we agree, that the Board of Trustees of Occidental cannot be liable for Antebi's causes of actions. The trustees of a nonprofit educational corporation are recognized as its directors, and a director of a nonprofit corporation cannot be personally liable for the debts, liabilities, or obligations of the corporation. (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 10.) Given that Antebi filed the present action against Occidental as a corporation and the trial court took judicial notice that a board of trustees of nonprofit educational organization was its directors, the action against Occidental's Board of Trustees was properly dismissed.

Because only the defamation cause of action survives the demurrer, only Occidental and Cooper, the individual who allegedly made the hallway statements, can be held liable.

DISPOSITION

The judgment is reversed as to the cause of action for defamation against Cooper and Occidental College . In all other respects, the judgment is affirmed. Each party is to bear its costs.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P. J.

We concur:

SUZUKAWA, J.

HASTINGS, J.*

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*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.