PERB
California Public Employment Relations Board

Los Angeles Regional Office
425 W. Broadway, Suite 400
Glendale, CA, 91204-1269
Telephone: (818) 551-2822

October 14, 2024

Re: *Temecula Valley Educators Association, CTA/NEA v. Temecula Valley Unified School District*
Unfair Practice Case No. LA-CE-6841-E

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions should be electronically filed using the "ePERB portal" accessible from PERB's website (https://eperb-portal.ecourt.com/public-portal/). (PERB Reg. 32110, subd. (a).)[1] Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents using the ePERB portal; however, such individuals may submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) The Board's mailing address and contact information is as follows:

PUBLIC EMPLOYMENT RELATIONS BOARD
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

Pursuant to PERB Regulation 32300, the statement of exceptions must be filed with the Board itself within 20 days of service of this proposed decision. A document submitted through ePERB after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed "**filed**" the next regular PERB business day. (PERB Reg. 32110, subd. (f).) A document submitted via non-electronic means will be considered "**filed**" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a); see also PERB Reg. 32130.)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, including footnotes, but excluding the tables of contents and authorities.

[1] PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. The statement of exceptions shall: (1) clearly and concisely state why the proposed decision is in error, (2) cite to the relevant exhibit or transcript page in the case record to support factual arguments, and (3) cite to relevant legal authority to support legal arguments. Exceptions shall cite only to evidence in the record of the case and of which administrative notice may properly be taken. (PERB Reg. 32300, subd. (c).) Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board a response to the statement of exceptions. The response shall be filed with the Board itself in the same manner set forth in this letter for the statement of exceptions (see paragraphs two and three of this letter). The response may contain a statement of any cross-exceptions the responding party wishes to take to the proposed decision. The response shall comply in form with the requirements of PERB Regulation 32300 set forth above, except that a party both responding to exceptions and filing cross-exceptions shall be permitted to submit up to 28,000 words total, including footnotes, without requesting permission. A response (with or without an inclusive statement of cross-exceptions) to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of PERB Regulation 32310.

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regs. 32300, subd. (a) and 32093; see also PERB Reg. 32140 for the required contents.) Proof of service forms are available for download on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b) and 32093.)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (PERB Reg. 32315.) All requests for oral argument shall be filed as a separate document.

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request

shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (PERB Reg. 32305.)

Sincerely,

Eric J. Cu
Interim Chief Administrative Law Judge

EJC

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TEMECULA VALLEY EDUCATORS ASSOCIATION, CTA/NEA, Charging Party, v. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-6841-E PROPOSED DECISION (October 14, 2024)

Appearances: California Teachers Association Legal Department, by Stephanie J. Joseph, Staff Counsel, for Temecula Valley Educators Association, CTA/NEA; Adams, Silva & McNally, by Laurie Kamerrer, Attorney, for Temecula Valley Unified School District.

Before Scott Miller, Administrative Law Judge.

INTRODUCTION

A complaint issued by the Public Employment Relations Board (PERB or Board) alleges that Respondent Temecula Valley Unified School District (District) engaged in unfair practices in violation of the Educational Employment Relations Act or EERA (Gov. Code, section 3540 et seq.) by unilaterally adopting, maintaining, and/or enforcing: (1) a parental notification policy requiring, inter alia, that certificated employees notify the parents or guardians of students who ask to be identified or treated as a gender other than the biological sex or gender indicated on the student's birth certificate or other official records, and (2) revising an administrative regulation governing "Ceremonies and Observances" to prohibit the display of most flags and depictions of flags anywhere on school grounds. The District admits the material factual allegations but denies

liability and asserts as affirmative defenses that it was authorized to take the disputed actions pursuant to its collective bargaining agreement with Charging Party Temecula Valley Educators Association, CTA/NEA (Association) and "long-standing past practice."

For reasons explained below, I find that the District (1) failed and refused to meet and negotiate in good faith with the Association by adopting the parental notification policy regarding transgender and gender non-conforming student conduct and thereby derivatively interfered with rights guaranteed by EERA to certificated employees and the Association as alleged in PERB's complaint; (2) that pursuant to PERB's unalleged violations doctrine, the District's unilateral adoption of a provision requiring parental notification for any verbal and physical altercations involving students also violated the District's duty to meet and negotiate in good faith and derivatively interfered or denied protected rights; and (3) that by adopting, maintaining, and/or enforcing a prohibition on displaying most flags and depictions of flags anywhere on school grounds, the District independently interfered with and denied protected rights, as alleged in PERB's complaint. As explained below, I consider it unnecessary to rule on factually identical allegations that the ban on flags and depictions of flags violated the District's duty to meet and negotiate in good faith under EERA. I also decline to consider an unalleged theory of liability urged by the Association that by inviting bargaining over the effects of the parental notification policies described above, the District proposed or insisted on an illegal subject of bargaining in violation of its duty to meet and negotiate in good faith.

PROCEDURAL HISTORY

On October 5 and 9, 2023, the Association filed an Unfair Practice Charge (UPC) and exhibits thereto, and on November 8, the District filed a position statement denying

any wrongdoing and asserting that its actions were authorized by the parties' collective bargaining agreement (CBA), past practice, and PERB precedent.

On November 17, 2023, PERB's Office of the General Counsel issued a complaint (Complaint) alleging: (1) that on August 22, 2023, and without notice and meaningful opportunity for negotiations over the decision and/or its effects on negotiable matters, the District adopted Board Policy 5020.01[1] (BP 5020.01), a "parental notification" policy requiring the District's certificated employees to notify parents or guardians that a student identified as transgender, was seeking to access educational services as transgender, and/or had requested a change to the student's official or unofficial records, which allegedly violated the District's duty to meet and negotiate under EERA and derivatively interfered with the protected rights of employees and the Association; (2) that in September 2023, the District adopted and has since maintained Administrative Regulation 6115 (AR 6115) regarding "Ceremonies and Observances" that contains vague and/or overbroad provisions banning the display of flags anywhere on school grounds, which employees and the Association would reasonably construe to prohibit EERA-protected activities; and (3) that the "Ceremonies and Observances" regulation was also unilaterally adopted without notice and meaningful opportunity for

[1] The parental notification policy was identified in PERB's Complaint as "Board Policy no. 5020.1" and in the District's Answer as "Board Policy 5020.1" or "BP 5020.1." At the hearing, it was established that the policy was numbered BP *5020.01*. The Association's brief continues to refer to the policy as BP 5020.1, while the District's brief refers to BP 5020.01. Because there is no confusion about which policy is at issue, I disregard the numerical discrepancy in the pleadings and briefs as not affecting the substantial rights of any party. (PERB Regs. 32640, 32645; *City of Montebello* (2016) PERB Decision No. 2491-M, pp. 6-8.)

negotiations over the decision and/or its effects on negotiable matters in further violation of the District's obligations under EERA and derivatively violated the protected rights of employees and the Association.

On December 7, 2023, the District filed an answer to the Complaint that admits most of the material facts, including that the District adopted the parental notification policy and the "Ceremonies and Observances" regulation without providing the Association with notice and opportunity to negotiate over these decisions. However, the Answer denies that these decisions were within the scope of representation, denies that their adoption or maintenance affects statutory, and denies the parental notification policy has been enforced. The Answer also asserts that the District provided the Association with an opportunity to meet and negotiate over the effects of both decisions and that some or all claims in the Complaint are subject to waiver or are otherwise barred by "a long-standing past practice of the parties permitting the District to engage in the challenged conduct."

After an unsuccessful informal settlement conference, a formal hearing was convened via videoconference from April 23 through 25, 2024. Both parties were represented by counsel, had the opportunity to examine and cross-examine witnesses, to present documentary evidence, and to be heard on the issues.

During its opening statement, the Association argued, among other points, that the District's parental notification policy was subject to decisional bargaining, and that by offering to negotiate only over its effects or implementation, the District was attempting to limit the Association to "negotiating exactly how unit members should go about violating the constitutional rights of students and violating clear [California

Department of Education] guidance." In its opening statement, the District asserted that this case was limited to whether the District had violated EERA, and that whether the District's parental notification policy violated students' constitutional rights of privacy or equal protection or any other provisions of external law were not properly before PERB. During the ensuing discussion, counsel for the Association appeared to agree by stating: "We are certainly not here asking PERB to rule on the legality [under external law] of what we have termed the forced outing portions of 5020.1." Based on this response, I advised counsel for the parties that I would admit into the hearing record "a limited amount of evidence" on whether BP 5020.01 violated external law but "only to the extent it bears on [the] negotiability of the [parental notification] policy itself." Neither party objected to this ruling.

Without objection, I also took administrative official notice of the contents of PERB's case file in this matter. Neither party requested administrative notice of any other documents. With the filing of post-hearing briefs on July 29, 2024, the case was fully submitted for proposed decision.

FINDINGS OF FACT

A. Parties and Jurisdiction

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). Its operations include approximately 35 schools, including grades TK through 12.

The Association is the exclusive representative within the meaning of EERA section 3540.1, subdivision (e). The Association represents the approximately 1,450

certificated employees of the District, most of whom are classroom teachers. Other certificated titles include counselors, school nurses, and school psychologists.

A. District Governance

The District is governed by an elected, five-member Board of Education (BOE) whose official acts are limited to public meetings and properly agendized closed sessions. Members of BOE have no authority to act on behalf of the District in their individual capacities and have only limited authority to speak on behalf of the District.

A primary responsibility of BOE is to set the organizational policies and standards for the District through adoption of written policies, referred to as "board policies." Board policies are abbreviated as "BP" and are numbered according to the subject addressed by the policy. For example, board policies affecting personnel matters, such as BP 4119.21 (Professional Standards), are assigned a number within the 4000 series, while policies primarily affecting student support, student services, and student health and safety are assigned a number within the 5000 series.[2] Once adopted, board policies are posted on the District's public website. BOE's bylaws state that unless otherwise specified when adopted, board policies are effective immediately and are binding on the District and its employees to the extent they do not conflict with federal or state law and/or the District's collective bargaining obligations.

The District's executive functions, including implementing board policies, are vested in the Superintendent, who is hired by and reports directly to BOE. Board Policy 2210 (Administrative Discretion Regarding Board Policy) grants discretion to the

[2] In addition to BP 5020.01, the parental notification policy at issue in this case, several other student-focused board policies in the 5000 series are discussed below.

Superintendent or designee to "act on behalf of the [D]istrict in a manner that is consistent with law and Board policies" in situations not specifically addressed by a written policy but "when immediate action is necessary to avoid any risk to the safety or security of students, staff, or district property or to prevent disruption of school operations …." Otherwise, the Superintendent is responsible for implementing and enforcing board policies as written.

The Superintendent may, in turn, delegate executive functions to various Assistant Superintendents, who report to the Superintendent rather than BOE. As of 2023, Dr. Kimberly Velez was the District's Interim Superintendent, while Dr. Gary Woods was the District's Superintendent as of summer 2024, the time of the PERB hearing. Neither Velez nor Woods testified. During the relevant period, Nicole Dayus was the District's Assistant Superintendent of Student Support Services, and Francisco "Frank" Arce was the District's Assistant Superintendent of Human Resources Development.

Once BOE has adopted a board policy, the Superintendent or designee is responsible for its implementation, which may include developing and enforcing a corresponding administrative regulation. Administrative Regulations are abbreviated as "AR" and are assigned the same numbers as the board policies they were designed to implement. Dayus explained that board policies specify *what* BOE has determined will be the District's standard or policy, while a corresponding AR specifies "*how* that policy is going to be enacted or delivered." According to the District's bylaws:

> "Administrative regulations shall be consistent with law and Board policy and shall be designed to promote the achievement of district goals and objectives. Administrative regulations may describe specific actions to be taken, roles

> and responsibilities of staff, timelines, and/or other necessary provisions."

The District's bylaws state that unless otherwise indicated at the time of adoption, board policies are effective upon adoption and are binding on the District and its employees to the extent that they do not conflict with federal or state law and are consistent with the District's collective bargaining agreements. District bylaws provide that if an administrative regulation conflicts with a board policy, the latter shall prevail. Like board policies, administrative regulations are periodically reviewed and may only be amended by further BOE action.

Arce is the District's highest-ranking official for personnel and labor relations, including recruitment, staffing, employee discipline, and collective bargaining, and was the District's lead negotiator in bargaining with the Association. He testified that if a proposed board policy or administrative regulation significantly affects terms and conditions of employment, he recommends that the District provide the employees' representative(s) with notice and opportunity to meet and negotiate over the decision and/or its effects, depending on the circumstances. Arce testified that he normally advised the Association before any newly adopted or revised board policy or administrative regulation would be used for disciplinary purposes. He acknowledged that under the District's bylaws, a newly-adopted or revised policy or regulation is effective upon adoption, and he could recall no exceptions to this rule.

B. Association Leadership and Collective Bargaining Agreement

At all times material, Edgar Diaz was the Association's President. Diaz taught elementary and then middle school students in the District from 2004 until 2021, when he took a leave of absence to serve as Association President.

During the relevant period, terms and conditions of employment for certificated employees were contained in a CBA, whose term was July 1, 2021 through June 30, 2024. The CBA contained the following provisions.

Article 2 (Unit Rights) recognized the rights of the Association and its representatives to "[u]se school mailboxes, e-mail and the District mail service to the extent authorized by law" and states that "the Association will provide the Superintendent with a copy of any such communication it feels may be of concern to the District." Article 2 also guaranteed the Association and its representatives various access and communication rights, including rights to use "[b]ulletin board space in designated areas to which bargaining unit members have access"; to "[u]se District facilities at reasonable times before and after duty hours, provided that prior approval is obtained according to District 'Use of Facilities' regulations"; and to "[t]ransact official Association business on District property during non-duty hours, so long as the transaction of such business does not interfere with the educational process or a unit member's professional duties."

Article 3 (District Rights) of the CBA contained a management rights provision asserting that the District "retains all of its powers and authority to direct, manage, and control to the full extent of the law." Article 3 also contained language asserting the District's rights, inter alia, to establish educational goals and objectives; to determine the organization, kinds and levels of educational services to be provided and methods and means of providing them; to "insure the rights and educational opportunities of students"; and to "hire, classify, assign, evaluate, promote, terminate, and discipline employees." The District Rights Article further asserted:

> **"**The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with law."

Article 5 (Hours) of the CBA governed unit members hours of work, including the definition and length of the work day. Section 5.1 contained general language limiting the length of the work day to seven hours for most unit members and to seven and one-half hours for school psychologists. The work day was defined to include a duty-free lunch period of at least 30 minutes, any relief periods provided throughout the day, and a period of at least 30 minutes before the start of the instructional day, when unit members were generally required to report to work. Section 5.2 provided that "[i]n addition to the time in Section 5.1," i.e., *in addition to* the seven-hour or seven-and-one-half-hour work day, unit members were also responsible for completing certain instructional and non-instructional duties, including but not limited to conducting "[p]arent and/or student conferences."

Article 13 (Evaluation Procedure) was concerned primarily with the timing, frequency, and other procedural aspects of the evaluation process. However, Section 13.4 also contained substantive criteria for evaluating certificated employee performance, including but not limited to: "[e]ngaging and supporting all students in learning"; "[c]reating and maintaining effective environments for student learning"; "[u]nderstanding and organizing subject matter for student learning"; "[p]lanning

instruction and designing learning experiences for all students"; and "[d]eveloping as a professional educator."

Article 17 (Due Process/Just Cause) specified the procedures for administering employee discipline. Article 17.3 establishes a progressive discipline hierarchy, beginning with a verbal warning, before escalating to a written warning, a written reprimand, and suspension. This provision stated that a verbal warning, the first step in this process, "shall not be used unless the unit member has first been made aware of the performance standard."

Article 17 included no substantive criteria or grounds for discipline. However, it is undisputed that District employees are expected to comply with all board policies and administrative regulations and that failure to do so may result in discipline.

Article 27 (Concerted Activities) prohibited the Association from calling a "strike, work stoppage, slow-down, [or] picketing of the District by the Association or by its officers or agents, during the term of the Agreement" and obligated the Association to "advise and direct" unit members to cease engaging in such activities. Article 27 did not address any other union or concerted employee activities on District property.

There was no witness testimony or other extrinsic evidence regarding the past practice or bargaining history of any provisions of the CBA. At some point in or before early September 2023, the Association and the District began meeting and negotiating over a successor agreement and continued to do so through at least early 2024.

C. Parental Notification and Other District Policies Predating BP 5020.01

The parties dispute whether provisions of BP 5020.01 are consistent with existing District policies and regulations. The District argues the parental notification

requirements in other board policies and administrative regulations demonstrate that the District has an established past practice on the subject, and that the Association has not demanded bargaining over parental notification requirements. The Association argues that BP 5020.01's parental notification requirements for students' gender non-conforming conduct are inconsistent with the District's pre-existing polices, unit members' job descriptions, and professional and certification obligations. It is therefore necessary to review the evidence regarding other, preexisting board policies and administrative regulations before turning to the facts regarding BP 5020.01's adoption.

1. BP 410 (Nondiscrimination in District Programs and Activities)

BP 410 was adopted on January 16, 2018. It prohibits discrimination against "all individuals in education" based on several characteristics, including "sex, sexual orientation, gender, gender identity or expression," the "perception of one or more of such characteristics," or "association with a person or group with one or more of these actual or perceived characteristics."

The Association contends that BP 0410 "incorporates by policy reference" two publications of the California School Board Association (CSBA)[3] that, according to the Association, expressly prohibit disclosure to students' parents or legal guardians the same categories of student information that BP 5020.01 requires certificated staff to disclose to parents and/or guardians. However, every board policy offered into evidence, including BP 410, includes a "Policy Reference Disclaimer" statement

[3] The CSBA publications referenced are "Legal Guidance on Rights of Transgender and Gender Nonconforming Students in Schools, October 2022" and "Parental and Student Rights in Relation to Transgender and Gender Nonconforming Students, Recently Asked Questions, August 2023."

indicating that the list of cross-referenced policies or authorities in the board policy "are not intended to be part of the policy itself" and "do [not] indicate the basis or authority for the board to enact this policy." Rather, according to the disclaimer language, the cross-referenced materials "are provided as additional resources for those interested in the subject matter of the policy." While BP 410 expressly prohibits discrimination based on gender identity or expression, because it does not incorporate by reference the CSBA publications cited by the Association, the contents of those publications do not address whether BP 410 prohibits non-consensual disclosure to a parent or guardian of a student's transgender or gender non-conforming conduct.

2. BP 4119.23 (Unauthorized Release of Confidential Information)

BP 4119.23 was adopted on January 16, 2018. It directs staff to maintain the confidentiality of "confidential" information acquired in the course of their employment and to disclose such information "only to the extent authorized by law." Under the policy, employees who "willfully" release "confidential" information about the District, its students, or staff are subject to discipline, while employees whose inadvertent or careless acts or omissions result in disclosure of such information are subject to documentation of the incident being placed in their personnel files and being denied further access to such information.

BP 4119.23 defines "confidential information" to include "information that is not a public record subject to disclosure under the Public Records Act, information that by law may not be disclosed, or information that may have a material financial effect on the employee."[4] BP 4119.23 contains no language addressing whether disclosure of

[4] The District also has a board policy, BP 5125, governing student records.

"confidential" student information to a student's parent or legal guardian is permitted, required, prohibited, or otherwise regulated by this board policy.[5]

3. BP 4119.21-E (Professional Standards)

BP 4119.21 was adopted on January 16, 2018. It consists of a Code of Ethics of the Education Profession, dated 1975, and attributed to the National Education Association. The Code of Ethics contains provisions stating that an educator "[s]hall not intentionally expose the student to embarrassment or disparagement" and "[s]hall not disclose information in the course of professional service unless disclosure serves a compelling professional purpose or is required by law." Another provision states that an educator shall not "unfairly … [e]xclude any student from participation in any program"; "[d]eny benefits to any student"; nor "[g]rant any advantage to any student … on the basis of … gender [or] sexual orientation …."

Diaz testified that he understood this policy to prohibit certificated staff from disclosing details about a student's gender identity without the student's consent. However, the Code of Ethics, which is dated 1975 and was adopted by the District

However, because it was not part of the PERB record, I make no findings on whether or to what extent, student records as defined by BP 5125, are "confidential" within the meaning of BP 4119.23's prohibition against disclosure of "confidential information."

[5] State and federal laws, including provisions of the Education Code and the federal Family Educational and Privacy Rights Act or FERPA (20 U.S.C., § 1232g), restrict disclosure of "pupil records." Neither party has briefed whether disclosure of transgender or gender non-conforming conduct to a student's parent or legal guardian without student consent constitutes "unauthorized" disclosure within the meaning of these statutes. I also regard it as unnecessary to decide that issue in this case.

without addition or alteration in 2018, does not mention gender expression or gender identity as a protected category.

4. BP 5131.2 (Bullying)

BP 5131.2 was adopted on November 15, 2022. It recognizes "the harmful effects of bullying on student learning and school attendance," states as its purpose to "provide safe school environments that protect students from physical and emotional harm," and directs the Superintendent or designee to "develop strategies for addressing bullying in district schools with the involvement of students, parents/guardians, and staff" and, as appropriate, in collaboration with various outside agencies and service providers. BP 5131.2 includes no single definition of "bullying." It provides a functional definition by stating:

> "No student or group of students shall, through physical, written, verbal, or other means, harass, sexually harass, threaten, intimidate, cyberbully, cause bodily injury to, or commit hate violence against any other student or school personnel, or retaliate against them for filing a complaint or participating in the complaint resolution process."

It also incorporates elements of the statutory definition of "bullying" from Education Code section 48900, subdivision (r), which is concerned with student misconduct warranting suspension. In this regard, BP 5131.2 prohibits only "*severe or pervasive* physical or verbal act or conduct … that constitutes sexual harassment, hate violence, or creates an intimidating or hostile educational environment … that [has] or can be reasonably predicted to …

> "(1) plac[e] a reasonable pupil or pupils in fear of harm [to themselves or their property];
> "(2) caus[e] a… substantially detrimental effect on the student's physical or mental health;

> "(3) caus[e]… substantial interference with the student's academic performance;
> "(4) caus[e]… a [student] to experience substantial interference with [their] ability to participate in or benefit from the services, activities, or privileges provided by a school."

(Emphasis added.)

The District's anti-bullying policy also prohibits "cyberbullying." It defines that term by reference to Penal Code 653.2, which makes it a misdemeanor "for a person to distribute personal identity information electronically with the intent to cause harassment by a third party and to threaten a person's safety or that of the student's family."[6]

Setting aside any variance in how BP 5131.2 defines the proscribed conduct, the policy directs staff who witness bullying to intervene "immediately … to stop the incident when it is safe to do so," or upon receiving a complaint from any student, parent, guardian, or other individual who has witnessed or believes that a student has been bullied. The policy requires employees to notify *the principal* within one business day, and the principal or designee is then responsible for notifying the student's parent or guardian if the student has been exposed to "bullying."

5. BP 5141 (Health Care and Emergencies)

The District adopted BP and AR 5141 in January 2018. The board policy directs the Superintendent or designee to "develop procedures to ensure that first aid and/or

[6] Unlike the Education Code definition, which prohibits only certain *student* conduct, the Penal Code prohibition against "cyberbullying" applies to "a person." It is unclear from the record and neither party's brief has addressed whether this separate definition of "cyberbullying" subjects certificated staff to discipline not only for failure to comply with any reporting requirements but also for engaging in "bullying" or "cyberbullying" prohibited by the policy by disclosing sensitive student information.

medical attention is provided as quickly as possible when accidents and injuries to students occur and that parents/guardians are notified as appropriate." The policy requires staff to "appropriately report and document student accidents," but contrary to the District's contention, BP 5141 does not expressly or even implicitly require certificated staff to notify *parents or guardians* of a student injury or illness. In fact, the corresponding regulation, AR 5141, requires *the principal or designee* to notify a parent or guardian of emergency or urgent medical treatment and makes no mention of certificated staff doing so.

The only extrinsic evidence on this subject was too incomplete to support a factual finding one way or the other. On cross examination, Diaz recalled an automobile accident involving a student that had resulted in disciplinary charges against a teacher. However, Diaz was unsure whether the teacher was charged with failing to report or document the student accident under BP 5141. Diaz was also not examined about whether in his experience as a classroom teacher or union representative, BP 5141 had ever been interpreted to require certificated staff to contact a parent or guardian directly as opposed to reporting the issue *to a site administrator or other District official*. Because BP 5141 does not expressly require certificated employees to report directly to parents or guardians, and because of the limited nature of witness testimony on the subject, the District has not met its burden of showing that BP 5141 was part of an established practice requiring certificated staff to contact students' parents or guardians.

6. <u>BP 5141.52 and AR 5141.52 (Suicide Prevention</u>)

BP and AR 5141.52 regarding suicide prevention have been in effect since January 2018. BP 5141.52 directs the Superintendent or designee to "develop

strategies for suicide prevention, interventions, and postvention and the identification of the mental health challenges frequently associated with suicidal thinking and behavior." The board policy is concerned primarily with suicide prevention, training, education, including identifying, assessing, and monitoring students deemed at risk of suicide, and responding in the aftermath of suicidal behavior. If a staff member "suspects or has knowledge of a student's suicidal intentions," the policy directs the staff member to contact one of two trained suicide prevention liaisons for intervention. Thereafter, "[t]he principal, another school administrator, school counselor, school psychologist, social worker, or nurse shall … notify, if appropriate and in the best interest of the student, the student's parents/guardians/caregivers as soon as possible and shall refer the student to mental health resources in the school or community."

However, the policy also notes: "Determination of notification to parents/guardians/caregivers should follow a formal initial assessment to ensure that the student is not endangered by parental notification." Thus, under the board policy, not even the Superintendent or designee is necessarily required *in all situations* to notify the student's parent or guardian of a student's contemplated or attempted suicide. BP 5141.52 does require school personnel to notify parent(s) or guardian(s) of an *out-of-school* suicide attempt or death by suicide, but it does not specify the title, position, or individual(s) responsible for making contacting in these circumstances.

AR 5141.52 reiterates the directive of the board policy that a staff member who suspects or knows of suicidal intentions based on a student's verbalizations or acts of self-harm must "promptly notify the principal, school counselor, school social worker, or

school psychologist, who shall implement district intervention protocols as appropriate."

Regarding *parental* notification, AR 5141.52 states:

> "Although any personal information that a student discloses to a school counselor shall generally not be revealed, released, referenced, or discussed with third parties, the counselor may report to the principal *or student's parents/guardians* when there is reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the health, safety, or welfare of the student or others in the school community. In addition, the counselor may disclose information of a personal nature to psychotherapists, other healthcare providers, or the school nurse for the sole purpose of referring the student for treatment."

(Emphasis added.)

This provision expressly contemplates that a school counselor *may*, but *is not generally required to*, disclose "any personal information" that a student has disclosed to the counselor. Thus, even in cases of contemplated or attempted suicide, parental notification of "any personal information" obtained by a school counselor from a student is not the norm but the exception, and only when "there is reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the health, safety, or welfare of the student or others in the school community."

Like the anti-bullying policy discussed above, BP and AR 5141.52 appear to contemplate at most, a two-tiered reporting procedure, in which certificated staff may, under specified circumstances, be required to report certain student conduct to an administrator, who may then be responsible for contacting the student's parent(s) or guardian(s). Thus, under BP and AR 5141.52, the "Superintendent or designee," and not certificated staff, is responsible for "follow up with the parent/guardian and student in

a timely manner to provide referrals to appropriate services as needed" and for taking additional steps, including contacting child protective services, if the parent/guardian does not access treatment for the student.

7. District Job Specifications for Teaching Positions

In addition to board policies, the record also contains several job specifications, i.e., job descriptions, including two for Elementary Teachers corresponding to primary and upper grades; one for Middle School Teacher; and four job specifications for High School Teachers with specializations in language arts, mathematics, music, and social sciences. All specifications follow a similar format and contain standardized language requiring incumbents to "[c]reate[] a flexible program and environment favorable to learning and personal growth in accordance with each student's ability."

All teacher job specifications also include some language requiring the incumbent to communicate with parents and other District personnel about "student progress" and to hold parent conferences. For example, the Middle School Teacher job specification states that the incumbent "[c]ommunicates with parents, teachers, administrators, and school counselors on student progress, and actively participates in meeting related to individual student's development," while the four High School Teacher job specifications contain language requiring the incumbent to "[c]ommunicate[] with parents and school counselors on student progress." Among the other non-exhaustive list of duties in their job specifications, high school teachers also "[e]stablishe[] and maintain[] standards of pupil behavior required to provide an orderly and productive environment."[7]

[7] The record also contains a job specification for Licensed Clinical Social

Having reviewed the District's preexisting parental notification policies and regulations, and relevant job duties for District teachers, I now turn to BP 5020.01.

D. Adoption of BP 5020.01 (Parental Notification)

The Complaint alleges, and the District admits, that before August 2023, it had no policy "requiring employees to notify parents or guardians that their student is transgender and/or seeking to access educational services as a transgender student." Union witnesses confirmed that this was their understanding before adoption of BP 5020.01. Diaz testified that before the 2023-2024 school year when BP 5020.01 was adopted, the District had accommodated requests by gender non-conforming students to use a different name and different pronouns in class, to use a different changing room for physical education classes, and to use different restroom facilities. He testified that unit members were not required to report to an administrator or notify a parent or guardian if a student requested to be identified or treated as a gender other than their biological sex, wanted to use a name that was not their legal name, asked to be identified by pronouns that did not align with the student's biological sex, wanted to access sex-segregated programs or activities that did not align with the student's biological sex, or requested a change to information in the student's official or unofficial school records.

Worker. As discussed below, there was witness testimony that licensed clinical social workers employed by the District are prohibited by their licensing and professional responsibilities from disclosing a student's transgender or gender non-conforming conduct without the student's consent. However, this requirement is not reflected in the job specification for this position.

High school Language Arts teacher Derek Heid similarly acknowledged that "[c]ommunicat[ion] with parents and school counselors on student progress" was among the required duties in his job specification, and that in addition to conducting parent-teacher conferences to discuss academic progress, social development, and any behavioral issues, he sent a weekly update informing his student's parents of "what we're reading in class, the major assignments coming that week, where we're headed, [and] how close we are to the end of the school year." However, Heid testified that students had asked him to "try out" gender non-conforming names or pronouns; that he had never reported such requests to parents; and that he was concerned that doing so pursuant to BP 5020.01 would undermine the trust of his students. According to Heid, "students have to feel that they are reasonably safe to explore ideas" and "to communicate with [their instructor] and their peers without judgment … of those ideas," whether curricular or otherwise.

Jessica Byrnes offered similar testimony. She interned with the District during the 2019-2020 school year and has worked as a social worker at Temecula Middle School since the 2020-2021 school year. Byrnes testified that in years past, students had asked her to use gender non-conforming names and pronouns; that she considered such information about a student's identity, sexual orientation, or gender preferences to be confidential and not something that her licensure requirements or the National Association of Social Workers' Code of Ethics would permit her to disclose without the student's consent; and that, before adoption of 5020.01, she knew of no District policy that required her to do so.

The Complaint further alleges, the District admits, and the parties have stipulated, that the agenda for BOE's August 22, 2023 meeting was made publicly available on Thursday, August 17, 2023, when it was posted on the District's website. The parties further stipulated that other than posting the meeting agenda on this website, the District provided the Association with no notice that BOE was considering adopting BP 5020.01 the following week.[8] The District further admits that BOE adopted BP 5020.01 at its August 22, 2023 meeting and that the District "did not afford [the Association] an opportunity to negotiate the decision to implement the change …." Diaz was one of approximately 35 individuals who spoke during the public comment section of the meeting regarding adoption of BP 5020.01. Diaz asserted that the policy was negotiable because it would change teachers' duties and working conditions.

E. Provisions of BP 5020.01 at Issue

Two aspects of BP 5020.01 are at issue: (1) the reporting requirement for students' transgender or gender non-conforming conduct, and (2) the expansion of employees' obligation to report all instances of physical or verbal altercations.

1. Parental Notification Requirement for Student Transgender and Gender Non-Conforming Conduct

Section 1 of BP 5020.01 creates reporting requirements for transgender or gender non-conforming conduct by a student. It requires the "principal/designee(s),

[8] Both Dayus and Diaz testified that they learned about BP 5020.01 when the agenda for the August 22, 2023 school board meeting was posted the previous Friday, which was August 18, 2023. I need not resolve the one-day discrepancy between their testimony and the parties' stipulation that the agenda was posted one day earlier because it would not affect the analysis or result discussed below.

certificated staff, and school counselors" to report in writing to a student's parent(s) or guardian(s) within three days of learning that a student is:

> "a. Requesting to be identified or treated as a gender (as defined in Education Code section 201.7) other than the student's biological sex or gender listed on the student's birth certificate or any other official records. [¶] This includes any request by the student to use a name that differs from their legal name (other than a commonly recognized diminutive of the child's legal name) or to use pronouns that do not align with the student's biological sex or gender listed on the student's birth certificate or other official records.
>
> "b. Accessing sex-segregated school programs and activities, including athletic teams and competitions, or using bathroom or changing facilities that do not align with the student's biological sex or gender listed on the birth certificate or other official records.
>
> "c. Requesting to change any information contained in the student's official or unofficial records."

2. <u>Parental Notification for all Incidents or Complaints of Physical and/or Verbal Altercations Involving a Student</u>

The other aspect of BP 5020.01 at issue concerns the scope of student altercations requiring parental notification.[9] Section 4 of BP 5020.01 provides:

> "The principal/designee or certificated staff shall notify the parent(s)/guardian(s) of any incident or complaint of a verbal or physical altercation involving their child, including bullying

[9] Sections 2 and 3 of BP 5020.01 include parental notification requirements regarding physical injuries to students and suicide attempts or suicidal ideation. The Association does not challenge these provisions, while the District argues that they, along with other board policies discussed above, are evidence of an established past practice requiring parental notification on various subjects. Because sections 2 and 3 were adopted at the same time as the disputed provisions in sections 1 and 4 of BP 5020.01, I do not regard them as probative evidence of any established *past* practice.

> by or against their child, within three days of the occurrence. Any student, parent/guardian, or other individual who believes that a student has been subjected to bullying or who has witnessed bullying may report the incident to a teacher, the principal, the District compliance officer, or any other available school employee. Any complaint of bullying, whether it is discriminatory or nondiscriminatory, shall be investigated and resolved in accordance with law and the District's uniform complaint procedures (UCP) specified in Administrative Regulation 1312.3."

Although this passage may include an incident or complaint of "bullying by or against [a] child," it does not necessarily *require* an incident or complaint of bullying to make the incident or complaint subject to the mandatory reporting requirement. Instead, on its face, it requires the principal/designee or certificated staff to notify parent(s) or guardian(s) "of any incident or complaint of a verbal or physical altercation involving their child …." When examined about this distinction, Arce admitted that "as written," section 4 of BP 5020.02 quoted above created new duties for certificated staff.

F. Implementing Parental Notification for Gender Non-Conforming Conduct

Dayus testified that there was an immediate and "significant unrest" among staff regarding BP 5020.01. The day after its adoption, District administrators formed a committee, known as the AR 5020.01 Committee, whose purpose was twofold: (1) to "begin the process of communicating with staff" about the policy and (2) to draft an implementing regulation. According to Dayus, who chaired the committee, the committee also included the interim and assistant superintendents, two Directors of Student Welfare and Success, the Director of Special Education, the District's Human Resource Directors and assistant superintendent.[10] Other District personnel, including

[10] Arce testified that he was not in fact a member of this committee but

the District's Business Services Assistant Superintendent and counselors represented by the Association, later joined or attended the committee's meetings on an ad hoc basis, as described below.

By the afternoon of August 23, 2023, the committee had drafted a multi-point message, which Velez e-mailed to all District staff. According to the message, the "[d]iscussion among the board members during the meeting conveyed an understanding that staff will now take steps to develop an accompanying administrative regulation … before implementing [the] board policy." It added that the AR would "provide protocols, training directives, and instruction to staff on how to implement the policy" and "provide clarification and guidance for all district employees."

Other points in Velez's message suggested that developing the regulation "will take a few weeks" for at least two reasons. First, according to Velez's message, the process may require "a thorough review of currently adopted policies and the resolution of any potential conflicts related to parent notification, rights, and student privacy laws as well as confidentiality and student services such as bullying reporting and mental health services." Her message also noted that because "this policy may potentially affect employees' working conditions, as discussed in the board meeting," the District intended to "collaborate with our employee labor groups as needed."

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confirmed that he met with Dayus within the first 48 hours after adoption of BP 5020.01 to emphasize the importance of involving the Association and the classified employees' representative when implementing BP 5020.01. Because there is no dispute that Arce met with Dayus about developing an administrative regulation shortly after adoption of BP 5020.01, I need not resolve the discrepancy in whether Arce considered himself a member of the committee or only a one-time visitor.

G. The Association's Demand to Bargain BP 5020.01

On September 7, 2023, Diaz sent a written demand to bargain BP 5020.01 to the five members of BOE. Diaz's letter asserted that some reporting requirements of the policy violated students' constitutional privacy rights and therefore conflicted with professional and credentialing requirements that unit members maintain student confidentiality; that unit members "would likely be left uncertain about how [the policy] would be applied and what their professional obligations would be if the policy were adopted; and that because the policy affected employee job duties and added to the grounds for discipline, it was subject to negotiation under EERA."

Diaz testified, without contradiction, that the District never responded to the Association's September 7, 2023 demand for decisional bargaining. The District's position in this dispute was and remains that it was not required to engage in decisional bargaining before adopting BP 5020.01. Arce testified, and Diaz confirmed, that during negotiations on September 18, 2023, the District asked the Association to negotiate over the effects of BP 5020.01 by participating in the development of the corresponding administrative regulation on the subject. At the PERB hearing, Arce recalled that he "specifically mentioned that the District would be working to create a committee and solicit input related to this" and that he "may have even discussed that some input was already underway as it pertains to people like social workers and counselors."

As discussed below, several months later, the District again offered to discuss negotiable impacts or effects of BP 5020.01. On both occasions, the Association refused to do so and explained that it considered adoption of BP 5020.01 subject to decisional bargaining.

H. Developing a Draft AR 5020.01

After drafting the District-wide message for Velez, the AR 5020.01 Committee began soliciting input from District and site administrators, parents, and other stakeholders to prepare an administrative regulation. Among other concerns, the committee sought to reconcile the language of BP 5020.01, which required "certificated staff" and more specifically "school counselors" to disclose certain student conduct in apparent conflict with a duty of confidentiality owed to students under these employees' licensure and certification requirements. Dayus and the other committee members decided that they would need input not only from administrators and parents but also from members of the District's social-emotional learning teams, which included school counselors and licensed clinical social workers.

The District's Director of Secondary Curriculum and Instruction developed a Google survey with the title "Parent Notification BP Feedback Form" which was provided to various directors who, in turn, distributed it to counselors, social workers, and school psychologists under their direction to solicit their input on how the requirements of BP 5020.01 would "impact the way you support students during counseling meetings" and what points in the previous message sent by Velez needed further clarification. Other questions in the survey asked employees to indicate if "a member of your team [was] willing to serve on the committee that will design the administrative regulation," and if so, to identify such individuals to the AR 5020.01 Committee. Dayus testified that the primary concern expressed by counselors, social workers, and school psychologists responding to the survey was that BP 5020.01 was "going to put these professionals at risk for what their own credential[s] required them to

do," an issue that the policy itself did not address. According to Dayus: "That's why we wanted the AR to address it so that they understood that they still are able to maintain the level of confidentiality that they always had."

In addition to the survey, Dayus convened a series of meetings with employees in the three certificated positions identified above. On September 27, 2023, an AR 5020.01 Committee meeting was combined with a Common Counseling Meeting, a regularly scheduled, mandatory meeting for all secondary school counselors. Dayus described the approximately 25 counselors in attendance as comprising an ad hoc "subcommittee" of the AR 5020.01 Committee. On October 4, 2023, Dayus convened a similar meeting with employees on the District's Social Emotional Learning team, including counselors and social workers.

Despite Arce's urging, Dayus acknowledged that at no point was an Association representative invited or allowed to attend these or any other meetings of the AR 5020.01 Committee. Dayus testified that she was unaware of any prohibition against the District soliciting exclusively-represented employees for feedback before making a proposal on the same subject to their representative. However, she also acknowledged that in her seven years' experience on the District's bargaining team, negotiations had "always" been conducted through the Association's negotiating team, rather than directly with the employees.

By January 13, 2024, the AR 5020.01 Committee had finalized a draft regulation for implementing BP 5020.01. Three parts of the draft regulation are relevant to the issue of parental notification for students' gender non-conforming conduct.[11] The initial

[11] Other sections, including section 5's provisions for "Notification for

(unnumbered) paragraphs contain various recitals in which the District reiterates its commitment to notifying parents and guardians of and involving them in their children's school-related activities.

A second part of the draft regulation (comprising paragraphs 1 and 2) reiterates the gender non-conforming parental notification requirements stated in BP 5020.01. However, instead of requiring certificated employees to notify parents directly, these provisions would require employees to promptly notify the principal or designee, who would in turn meet with the student to discuss the request to change a name, pronouns, or other information in school records and to inform the student of the District's parent/guardian notification procedures. The draft AR 5020.01 would provide a three-day period in which the student "may withdraw" the requested change. According to the draft regulation: "If the student's request is subsequently withdrawn within three days, the requested change and parent/guardian notification shall not occur."

A third (unnumbered) section of the draft regulation identifies several circumstances and corresponding legal authorities whereby school counselors, school psychologists, and social workers would be exempt from the above reporting requirements due to credentialing requirements or other legal or professional obligations to maintain student confidentiality. This portion of the draft AR is quoted here in full:

> "Notwithstanding the above, no notification to the parent(s)/guardian(s) will be made if such notification would violate Education Code Section 49602. Specifically, no notification to the parent(s)/guardian(s) will be made if such notification would result in the disclosure of any information of a personal nature by a pupil 12 years of age or older that

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Altercations and Bullying," are discussed below, as necessary.

was disclosed by the pupil in the process of receiving counseling as specified in Education Code Section 49600 from a school counselor, school psychologist, social worker possessing a valid credential with a specialization in pupil personnel services, unless the exception in subsection (d) or (e), below, applies. Such information shall not be revealed, released, discussed, or referred to, except as follows:

“(a) Discussion with psychotherapists as defined by Section 1010 of the Evidence Code, other health care provider, or the school nurse, for the sole purpose of referring the pupil for treatment.

“(b) Reporting of child abuse or neglect as required by Article 2.5 (commencing with Section 11165) of Chapter 2 of Title 1 of Part 4 of the Penal Code.

“(c) Reporting information to the principal or parents of the pupil when the school counselor has reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the health, safety or welfare of the pupil or the following other persons living in the school community: administrators, teachers, school staff, parents, pupils and other school community members.

“(d) Reporting information to the principal, other persons inside the school, as necessary, the parents of the pupil, and other persons outside the school when the pupil indicates that a crime, involving the likelihood of personal injury or significant or substantial property losses, will be or has been committed.

“(e) Reporting information to one or more persons specified in a written waiver after this written waiver of confidence is read and signed by the pupil and preserved in the pupil’s file.

“Notwithstanding the foregoing, a school counselor, school psychologist, or social worker possessing a valid credential with a specialization in pupil personnel services shall not disclose information subject to California Education Code

> Section 49602 to the parents of a pupil 12 years or older when they have reasonable cause to believe that the disclosure would result in a clear and present danger to the health, safety, or welfare of the pupil. In the case parental/guardian notification cannot be made because there is reasonable suspicion of child abuse or neglect, school employees, as mandated reporters, shall follow the necessary procedures of reporting as outlined by law."

Dayus testified that AR 5020.01 Committee chose to exempt elementary and secondary school counselors, social workers, and school psychologists from BP 5020.01's parental notification requirements because of the results obtained from the Google survey and the meetings with these employees. According to Dayus, whatever their different job duties and credentials, employees in these three classifications were subject to "the same requirements of confidentiality" in their dealings with students. It is unclear from the record whether these exemptions can be reconciled with BP 5020.01, which expressly identifies "school counselors" and indeed all "certificated staff" as subject to the parental notification requirements. For example, Arce testified that if a counselor, social worker, or other employee providing social-emotional or psychological support to students is required to follow some Education Code or other provision of law mandating student confidentiality, those matters would be appropriate for effects bargaining and thus could effectively be carved out from the requirements of a board policy. However, at the PERB hearing, both Dayus and Arce also conceded that under the District's bylaws, the language of a board policy supersedes any conflicting provision in an administrative regulation.

Another issue in dispute is whether the exceptions proposed for counselors, social workers, and psychologists are sufficient to address the licensing or credentialing

requirements of other certificated employees. The draft AR 5020.01 includes no exemption for classroom teachers, who comprise most of the Association's unit, and it is undisputed that unless expressly exempted, school nurses and other certificated employees would be required to report students' gender non-conforming conduct, if the regulation proposed by Dayus's committee were enforced as written. Dayus acknowledged "other complications related to teachers and their ability to follow [BP 5020.01's gender non-conforming reporting requirement] based on existing policy" such as California Department of Education licensing requirements, but she testified that "our starting point was with those three groups."

I. Uncertainty Regarding the Parental Notification Requirement of AR 5020.01 for Students' Gender Non-Conforming Requests

On February 8, 2024, Arce provided the Association's negotiators with a copy of the draft AR 5020.01 and asked to have it added to the agenda for negotiations scheduled for the following day. Arce's letter informed the Association that the AR 5020.01 Committee had met with employees exclusively represented by the Association to solicit their input on the draft regulation and that the District "greatly appreciate[d]" the employees' "assistance in the development of AR 5020.1."

During negotiations on February 9, 2024, District representatives again offered to discuss any negotiable impacts or effects of BP 5020.01. Arce also informed the Association that a memo would "likely" be sent the following week advising staff of the implementation and enforcement of AR 5020.1. The Association again refused to engage in effects bargaining, with the explanation that it considered adoption of BP 5020.01 to be subject to decisional bargaining.

The draft AR 5020.01 was shared with site administrators for feedback at a "horizontal" meeting in March 2024. Dayus testified that it has also been circulated to those groups of employees who had previously provided feedback, namely, counselors, social workers, and school psychologists, but not to other certificated staff. According to Dayus, AR 5020.01 "is in effect" but not officially implemented. There was conflicting information about whether its "official" implementation was awaiting action by the District's Superintendent or whether, like the underlying board policy, the draft administrative regulation must also be formally adopted by a vote of BOE.

District and Association witnesses expressed uncertainty regarding whether and how BP and AR 5020.01 were being enforced with regard to students' gender non-conforming requests or other conduct. Dayus testified that she had no specific information on whether site administrators were expecting or requiring certificated staff to follow the parental notification requirements of BP 5020.01 in the absence of a formally adopted regulation on the subject. However, Dayus testified that she believed that "based on the effective Board policy," site administrators might "encourage [certificated staff] to report to them" if a student asked to change pronouns or if any of the other circumstances specified in BP 5020.01 arose. She added: "I think our school administrators are following what it says [in BP 5020.01] to the best of their ability while they're waiting for an administrative regulation that involves certificated staff" and that "some" site administrators "would be following this … in the role that that they serve."

Arce also expressed some uncertainty about whether the parental notification requirements of BP 5020.01 were subject to enforcement in the absence of a final or officially adopted administrative regulation. Arce testified that he and other assistant

superintendents with whom he had discussed the issue agreed that under the CBA's due process requirements, certificated employees should not be disciplined for failing to comply with BP 5020.01 until the corresponding AR had been finalized and circulated to all affected employees. Arce testified that he had shared this view with "the top boss," but because Woods had expressed no opinion on the subject, Arce was unable to articulate the District's "official position" at the PERB hearing.

Diaz testified that he was unaware of any instances in which certificated employees had been disciplined or evaluated for their alleged failure to comply with the parental notification requirements of BP 5020.01. However, he testified that he had spoken with a probationary teacher who was concerned about non-renewal after being counseled by an administrator to follow the requirements of BP 5020.01.

Byrnes recounted her involvement in a series of events that occurred sometime between Winter and Spring breaks 2023 after a middle school student had asked a teacher to use different pronouns and a different name than the student's official name. Byrnes testified that the teacher was unsure whether BP 5020.01 was in effect and approached an administrator for guidance on how to respond to the student's request. The administrator asked Byrnes and a counselor to support the social-emotional well-being of the student and to explain to the student that the student had a three-day "grace period" to rethink and withdraw the request to use different pronouns and a different name before the District would notify the student's parents. According to Byrnes, the student's parents were never contacted about the student's request because the student withdrew it within the three-day grace period. Although portions of Byrnes's account, including events allegedly occurring before the administrator

contacted her, are objectionable as hearsay and lacking personal knowledge, Arce's testimony corroborated the essential details, including that at some point after the draft AR 5020.01 was circulated to administrators but not formally adopted, a middle school student was given three days to withdraw a gender non-conforming request and that because this request was withdrawn within three days, the student's parents were never notified of the request.

J. Classroom Management and Draft AR 5020.01 Provisions Requiring Parental Notification for Student Altercations and Bullying

Diaz described "classroom management," which entails creating "a welcoming, positive and inclusive environment to make sure that students are ready to learn" and "focused on the hard work of actually learning the material" as "the main part of the job" of being a teacher. According to Diaz, elementary and middle school students often have verbal altercations because of misinterpretations of what was said or presumed to have been said. Sometimes an incident or student interaction "doesn't lead to anything else" but requires a day or two for the students to work through the issue and realize it was just a misunderstanding.

Diaz testified that before adoption of 5020.01, teachers had discretion under BP 5131.2 (Bullying) to decide whether to report student altercations to parents and District administrators based on the teacher's sense of whether it was leading to harm or had resulted in harm. By contrast, Diaz understood BP 5020.01 and the corresponding draft AR to require that "any incident of complaint, verbal or physical, be reported" which Diaz testified "would increase the amount of reporting to parents and increasing the time commitment to be able to do so." Heid similarly testified, without contradiction, that BP 5020.01 expanded teacher's parental notification duties because before adoption of the

policy, he was not required to report every verbal altercation between students to their parent(s) or guardian(s).

Under the heading "Notification for Altercations and Bullying," paragraph 5 of the draft AR 5020.01 states:

> "The principal/designee or certificated staff shall notify the parent(s)/guardian(s) of any significant incident or complaint of a verbal or physical altercation involving their child, including bullying by or against their child, within three school days of the occurrence. Any student, parent/guardian, or other individual who believes that a student has been subjected to bullying or who has witnessed bullying may report the incident to a teacher, principal, the district compliance officer, the Let's Talk link on the website, or any other available school employee."

The draft regulation then appears to recite the same statutory definition of "bullying" from Education Code section 48900, subdivision (r), as appears in BP 5131.2. However, the draft AR 5020.01 in the record ends mid-sentence and is presumably incomplete. Because it is impossible to compare the full contents of the draft AR 5020.01 with the parental notification provisions on student altercations and bullying in the preexisting board policy, I make no findings on that subject.

K. AR 6115's Ban on Flags and Depictions of Flags on School Grounds

1. Adoption of Revised AR 6115

The Complaint alleges, and the District admits, that before September 12, 2023, the District "did not maintain a policy prohibiting the display of flags other than those of the United States of America and the State of California." The Complaint further alleges, the District admits, and the parties have stipulated, that the agenda for the District's September 12, 2023 school board meeting was first made publicly available on

September 8, 2023, when it was posted on the District's website, and that other than publicly posting this agenda on its website, the District provided the Association with no notice of its intent to adopt revisions to AR 6115 affecting the display of flags on school grounds. The District further admits that on September 12, 2023, it adopted revisions to AR 6115 affecting the display of flags on school grounds and that it "did not afford [the Association] an opportunity to negotiate the decision to implement [this] change …."

The September 12, 2023 revisions to AR 6115 stated: "Flags other than the United States of America and the State of California." They defined a "flag" as "a display representing a flag of distinct color and design used as a symbol, standard, signal, or emblem" and limited the display of flags as follows:

> "No flag other than the United States of America and State of California may be displayed on school grounds, including classrooms, unless it is a country, state, or United States military flag used solely for educational purposes within the adopted curriculum. Any other flag must be approved by the Superintendent or designee prior to displaying, if and only if, it is used for educational purposes and only during the related instructional period.
>
> "Flags of higher education institutions, school flags, pennants, and awards representing academic and extracurricular awards shall be permitted as part of the college and career program."

2. Association's Demand to Bargain Revisions to AR 6115

As of September 12, 2023, when BOE adopted the revisions to AR 6115, the parties were scheduled to meet for negotiations on September 18, 2023. At that meeting, the Association's representatives raised several questions and concerns about the text, meaning, and enforcement of the revised AR 6115. According to excerpts from

the District's bargaining notes, there was even some question about whether the language adopted by BOE was the final version or whether the AR would undergo further revisions. Arce confessed that he was unsure how to answer these questions but about offered assurances that "implementation is something that employees need to be communicated with and about" and that "further clarifications" would be forthcoming.

On September 20, 2023, the Association sent the District a demand to cease and desist and to bargain over the decision and effects of the revisions to AR 6115. On September 22, 2023, Arce responded to the Association's correspondence by stating that the District "would be happy to meet and bargain related to any negotiable impacts and effects associated with the revisions to AR 6115" and asked the Association to identify any negotiable impacts or effects it wished to discuss. District and Association witnesses alike testified that the Association declined the District's offers to engage in effects bargaining over the revisions to AR 6115.

3. Implementation of the Revised AR 6115

In the meantime, the District began implementing the revised regulation. As with the parental notification regulation, Dayus was again tasked with chairing a committee to oversee implementation of the revised AR 6115. However, she considered it "interesting" that unlike the parental notification regulation, BOE had adopted these revisions to AR 6115 without first soliciting input from administrators and staff. According to Dayus, because the AR 6115 revisions were adopted "without that level of work," the implementation committee that she chaired consisted only of Executive Cabinet members without employee subcommittees and its scope was more limited. The scope of the ad hoc Executive Cabinet Committee was therefore limited to soliciting

questions from administrators, creating a “frequently asked questions” document to assist teachers and other staff in understanding and following the newly adopted provisions of AR 6115, and developing a standardized form to obtain permission to display any flags or depictions of flags other than those authorized by AR 6115.

Although Dayus had no role in developing the revisions to AR 6115, her understanding was that these revisions were intended to specify “the allowable flags that will be displayed” not only in classrooms but anywhere “on campuses.” Pursuant to the second sentence of the above quoted passage, the ad hoc Executive Cabinet Committee developed a template document for employees to request approval to display flags “directly related to curriculum and instruction” that would otherwise be banned from displaying on school grounds under AR 6115. The template was sent to principals, assistant principals and other designated administrators at each site within the District with instructions to amend it as necessary to address the circumstances of their site and then to send it as a link to all teachers and staff. Dayus explained that a standardized approval form seemed like the way to implement the revised AR 6115 requirements most efficiently. However, she acknowledged that the revised regulation did not mention a form or specify any other approval process, and she testified that, in her opinion, employees could also obtain verbal approval to display a flag by meeting with the principal, vice principal, or other designated site administrator.

The other task of the ad hoc Executive Cabinet Committee, preparing a FAQ document for employees, was also completed within weeks. On October 6, 2023, the District sent an e-mail signed by Arce that referred staff to the FAQ document prepared by the ad hoc Executive Cabinet Committee to address questions “related to what is

allowed and what is not allowed" under BP 6115 and the revised regulation. Arce's message also advised staff that the flag approval process developed by the ad hoc committee "will be in full effect and implemented beginning Monday, October 16, 2023."

4. Removal of Flags from Classrooms under Revised AR 6115

Diaz testified that based on the "confusing conversation about what constituted a flag" at the BOE meeting when AR 6115 was revised, "everything with a rainbow is questioned," and that the District's FAQ document had not clarified such questions as whether a picture on a poster or a mug constituted a prohibited flag within the meaning of the revised AR 6115. Over the District's hearsay objection, Diaz also testified that since revision of AR 6115, teachers have told him about flags and other items, including a safe space sign with a rainbow and a CTA insignia, that teachers had removed from classrooms either at the request of administrators or on their own. Although portions of this testimony were hearsay, the general thrust of this testimony was corroborated by other, non-hearsay portions of Diaz's testimony and by the testimony of other witnesses. Diaz testified that he personally observed flags, posters, and other items that were removed from classrooms during his visits to schools in late 2023 and early 2024 after AR 6115 was revised.

Heid was one teacher who removed a rainbow flag from his classroom after the prohibition on flags was added to AR 6115. Like his testimony regarding the parental notification requirements of BP 5020.01, Heid explained that prohibiting the display of pride flags in the classroom undermined the environment of trust and mutual respect that he relied on as a teacher. Heid testified:

> "I use the [rainbow] flag as a way to demonstrate that my space is non-judgmental. There is no easy shorthand for

> that now and it's certainly not something that can come up during curriculum. So if they don't trust, they cannot learn. Right now, I have no easy way to show them that trust and so learning becomes that much more difficult."

There was no testimony or other evidence indicating that the District has repudiated Arce's October 6, 2023 message advising staff that the flag approval process developed by the ad hoc committee "will be in full effect and implemented beginning Monday, October 16, 2023." Arce also confirmed the general rule that board policies and administrative regulations are "effective" upon adoption by BOE, and he acknowledged that "technically," a teacher can be disciplined for not complying with any duly adopted board policy or administrative regulation, including AR 6115's ban on displaying unauthorized flags anywhere on school grounds. Arce was also unable to recall any instance during his tenure with the District when a board policy or administrative regulation had been adopted by BOE but not enforced.

ISSUES

I. BP 5020.01's Parental Notification Requirements

A. Did the District fail or refuse to meet and negotiate in violation of EERA section 3543.5, subdivision (c), and derivatively interfere with protected rights in violation of EERA section 3543.5, subdivisions (a) and (b), by adopting Board Policy 5020.01 (Parental Notification) without providing the Association with notice and meaningful opportunity to meet and negotiate over this decision?

B. Should PERB consider unalleged violations urged by the Association that:

1. By requiring certificated employees to report every verbal altercation among students, including those that do not result in apparent "harm" as defined by

the Education Code, did the District fail or refuse to meet and negotiate over the impacts or effects of BP 5020.01?

2. By proposing that the Association meet and negotiate over the effects of BP 5020.01, did the District insist on an illegal subject of bargaining?

II. AR 6115 Revisions Prohibiting Display of Flags on School Grounds

A. Did the District interfere with protected employee and/or organization rights in violation of EERA section 3543.5, subdivisions (a) and/or (b), by promulgating, maintaining, and/or enforcing the revised AR 6115 ("Ceremonies and Observances") which contains vague and/or overbroad provisions which employees could reasonably construe to prohibit protected activities?

B. Did the District fail or refuse to meet and negotiate in violation of EERA section 3543.5, subdivision (c), and derivatively interfere with protected rights in violation of EERA section 3543.5, subdivisions (a) and (b), by adopting Administrative Regulation 6115 (Ceremonies and Observances) without providing the Association with notice and meaningful opportunity to meet and negotiate over the effects of this decision?

CONCLUSIONS OF LAW

I. BP 5020.01 Parental Notification Requirements

As framed by paragraph 3 of the Complaint and the evidence presented at hearing, the issue here is whether BOE's admitted adoption of certain parental notification requirements under BP 5020.01 on August 22, 2023 without notice and

opportunity for bargaining over this decision and/or its effects violated the District's meet-and-negotiate obligations under EERA.

A. Parental Notification for Transgender and Gender Non-Conforming Conduct

To establish a prima facie case that a respondent employer violated its decisional bargaining obligation, an exclusive representative must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the exclusive representative and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9 (*Bellflower*).)

1. Change in Status Quo

There are three primary means of proving that an employer has deviated from the status quo: (1) deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy, or application or enforcement of existing policy in a new way. (*Kern County Hospital Authority* (2022) PERB Decision No. 2847-M, p. 10; *Bellflower*, *supra*, PERB Decision No. 2796, p. 10.)

There is no serious dispute that adoption of BP 5020.01 satisfies this element. Paragraph 3 of the Complaint alleges, and the District's Answer admits, that before August 2023, the District "did not maintain a policy requiring employees to notify parents or guardians that their student is transgender and/or seeking to access educational

services as a transgender student." The Answer also admits the material allegations in Paragraph 4 of the Complaint, and the parties stipulated that on August 22, 2023, BOE adopted BP 5020.1, a parental notification policy for certain gender non-conforming student requests which, on its face, is applicable to the District's "principal/designee(s), certificated staff, and school counselors."[12]

Although the District does not dispute the underlying facts, including its adoption of a new policy requiring parental notification, it contests the legal conclusion or mixed conclusion of law and fact that adoption of BP 5020.1 changed the status quo. The District argues that because it has an established past practice of adopting and enforcing policies requiring parental notification on various subjects without bargaining with the Association, BOE's adoption of BP 5020.01 did nothing to alter the status quo. Because this argument relies on additional facts and circumstances not alleged in the Complaint nor essential to proving the prima facie case, I address it separately in the discussion of affirmative defenses below. (Evid. Code, § 500; cf. PERB Reg. 32178; *City of Roseville* (2016) PERB Decision No. 2505-M, p. 15 [charging party only required to plead and prove facts essential for prima facie case].)[13]

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[12] Newly assigned job duties may also be used to show a deviation from the status quo where such duties were not "reasonably comprehended" by the employee's existing duties or classification. (*State of California (California Correctional Health Care Services)* (2022) PERB Decision No. 2823-S, p. 10 (*CCHCS*); *County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 7; *Cerritos Community College District* (2022) PERB Decision No. 2819, pp. 30-31.) However, because this is simply another way of saying that material changes to job duties are within scope, I address this issue in the discussion of negotiability below.

[13] Some Board decisions treat an asserted past practice as negating an element of the prima facie case of a unilateral change. (See, e.g., *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, fn. 3.) However, if an

The District also argues that the transgender parental notification policy has not been implemented because some classifications of certificated employees were exempted from its requirements and because the Human Resources and Development Department has not instructed school site administrators to discipline other certificated employees who fail to comply with BP 5020.01's parental notification requirements. However, I am not persuaded by these arguments because they rely on faulty interpretations of PERB precedent and the District's own policies.

Under PERB precedent, "[a] change in policy occurs on the date a firm decision is made even if the decision is not scheduled to take effect immediately, or even if it is never implemented." (*City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 15-16.) "[E]ven if an employer does not implement a change in policy until later, or perhaps not at all, its direct communications with employees soliciting the change demonstrates that the employer has already reached a firm decision for the purpose of demonstrating that a unilateral change has occurred." (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 35.) Thus, the operative employer action here is not whether BP 5020.01 has been fully implemented or whether it has been used to discipline employees, but whether BOE reached a firm decision to add to or change the District's parental notification policies without adequate notice to the Association. (*Id*. at p. 27; see also *County of Monterey* (2018) PERB Decision No. 2579-M, p. 13.)

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asserted past practice is extraneous to proving the prima facie case, it is more appropriately understood as an affirmative defense. (Evid. Code, § 500; *Culver City*, *supra*, PERB Decision No. 2731-M, pp. 16-17.)

There is no factual dispute on this issue. Before adoption of BP 5020.01, other board policies and administrative regulations, such as BP and AR 5141.52 regarding suicide prevention, and the District's job specifications required certificated unit employees to communicate with parents or guardians regarding students' academic progress, violent or threatening behavioral issues, or matters posing a threat to student health or safety. However, the District's admissions, the parties' stipulated facts, and other undisputed evidence, including the text board policies themselves, demonstrate that until adoption of BP 5020.01, certificated employees were not required to contact parents or guardians regarding students' use of nicknames or pronouns, students' gender identity or expression, or any other student choices not affecting academic matters or health and safety. Without deciding whether such conduct is protected from disclosure by the Education Code, teachers' credentialing and professional obligations, and/or District policies governing student records and confidential information, adoption of BP 5020.01 indisputably created a new parental notification policy where previously none had existed, and/or it expanded the District's parental notification requirements to new subjects, thereby applying existing policy in a new way.

The District also argues that by expressly exempting school counselors, psychologists, and social workers from BP 5020.01's parental notification requirements, the draft AR 5020.01 moots any argument that the District altered the status quo by requiring certificated employees to perform duties arguably in conflict with their licensing requirements or any professional obligations to maintain confidentiality of student information. The Association argues that under Assembly Bill (AB) 1955, teachers and indeed all other certificated employees are also prohibited from disclosing a student's

gender identity or expression to any person without the student's consent. AB 1955 was not signed into law until July 15, 2024, i.e., almost three months after the hearing in this matter, and almost one year after BOE adopted BP 5020.01. However, the Association argues that it applies retroactively because it states that it is declaratory of existing law. I need not decide under the circumstances whether the Legislature intended AB 1995 to apply retroactively because, as indicated above, the District's firm decision to alter the status quo in August 2023 rather than its implementation, selective implementation, or non-implementation of that decision through a subsequent regulation is the operative event for a unilateral change theory.

Moreover, regardless of whether AB 1955 was intended to apply retroactively to conduct occurring in August 2023, the District's contention that it can avoid liability through a subsequent regulation that conflicts with the board policy the regulation purports to implement is contrary to the evidence and the District's own policies. On its face, BP 5020.01 requires the District's "principal/designee(s), certificated staff, and school counselors" to notify parents or guardians if a student asks to change pronouns or a nickname, seeks to access or use sex-segregated school activities or facilities that do not align with the student's biological sex or the gender listed on the student's birth certificate or other official records, or asks to change information contained in the student's official or unofficial records. The District's bylaws state that unless otherwise indicated at the time of adoption, board policies are effective upon adoption, and there is no evidence that when BOE adopted BP 5020.01 on August 22, 2023, it intended to postpone the effective date of the policy to some later, unspecified date.

Although the draft AR 5020.01 would exempt counselors, psychologists, and social workers from some of the policy's reporting requirements, there are several factual and legal problems with this contention. First, the draft regulation has never been adopted. Because it never took effect, any argument that the District's *draft* AR could cure infirmities in the underlying board policy must fail for this reason alone.

Second, despite Arce's testimony that a valid AR could have been negotiated, he conceded, and it is undisputed that an administrative regulation is not effective to the extent it conflicts with a board policy. Because BP 5020.01 expressly requires "certificated staff" and "school counselors" to notify parents or guardians of certain student gender non-conforming conduct, it is questionable under the District's bylaws whether an AR (much less a *draft* AR) purporting to exclude employees from the board policy's requirements could supersede the plain language of the policy itself.

Third, even assuming a properly adopted administrative regulation could cure deficiencies in a board policy that the regulation purports to implement, the subsequent adoption of such a regulation might limit the scope of a PERB-ordered remedy, but it would not extinguish liability for the unilateral change. Unlike allegations of employer interference, PERB has never allowed an employer to "cure" a unilateral change by publicly disavowing or repudiating its prior conduct. (*Jurupa Unified School District* (2015) PERB Decision No. 2458, pp. 12-13 & fn. 13.)

The first element of the test for a unilateral change is therefore met.

2. Negotiability

EERA Section 3543.2, subdivision (a)(1), expressly enumerates "wages, hours of employment, and other terms and conditions of employment" as mandatory subjects of

bargaining. Where EERA expressly identifies a subject as negotiable, the issue requires no further analysis. (*Huntington Beach Union High School District* (2003) PERB Decision No. 1525, pp. 8-9.) Moreover, because EERA defines the scope of representation to include not only subjects specifically enumerated as such but also "matters *relating to*" those subjects, matters not specifically enumerated by EERA as negotiable may nonetheless be found within the scope of representation under the test announced in *Anaheim Union High School District* (1981) PERB Decision No. 177, and approved by the California Supreme Court in *San Mateo City School Dist. v. Public Employment Relations Bd*. (1983) 33 Cal.3d 850, 857-858. Where PERB and/or judicial precedent already establishes "subject-specific standards" showing how the *Anaheim* test (or the similar *Richmond Firefighters* test for negotiability under the Meyers-Milias-Brown Act) applies to a given topic, there is no need to continually "reinvent the wheel." (*The Accelerated Schools* (2023) PERB Decision No. 2855, p. 15; *City & County of San Francisco* (2022) PERB Decision No. 2846-M, p. 18, fn. 15; *State of California (Department of Personnel Administration)* (1986) PERB Decision No. 574-S, p. 10.)

The Association argues that BP 5020.01's parental notification requirements regarding students' gender non-conforming conduct are negotiable on three grounds: (a) because they potentially affect employees' hours of work; (b) because they materially change employee job duties; and (c) because they may serve as performance standards and/or as grounds for discipline. The District urges that because they are primarily concerned with student conduct and fulfilment of the District's educational mission, they are not themselves negotiable but, at best, subject only to effects bargaining.

a. The Record Fails to Show Any Material Effect on Hours or Workload

The enumerated subject "hours of work" includes the length of the workday and the amount of duty-free time during the workday. (*Cloverdale Unified School District* (1991) PERB Decision No. 911, pp. 16-17.) To demonstrate that new or changed duties affect hours of work, the charging party must show that the change has more than a purely speculative impact on the length of the workday or the amount of employees' duty-free time. (*Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, p. 6; *Imperial Unified School District* (1990) PERB Decision No. 825, pp. 9-10 (*Imperial*).)

For example, employers may alter the instructional schedule without negotiations, unless the changes affect the length of the workday or the amount of available duty-free time. (*Imperial*, *supra*, PERB Decision No. 825, pp. 7-8.) Notably, "[t]he Board will not presume an effect on [the] length of [the] workday or on duty-free time." (*Healdsburg*, *supra*, PERB Decision No. 1033. p. 6.) Rather, "the charging party has the burden of proving that the employer's change impacted negotiable terms and conditions of employment." (*Ibid*.; *State of California (Department of Youth Authority)* (1997) PERB Decision No. 1215-S, adopting dismissal letter at p. 5; PERB Reg. 32178.) Whether alleged as a violation of the employer's decisional or effects bargaining obligation, the evidence must show that the change or addition of duties had more than a minimal or purely speculative impact on employee hours. (*Imperial*, *supra*, at pp. 9-12; *Trustees of the California State University* (2012) PERB Decision No. 2287-H, pp. 12-13; *State of California (Agricultural Labor Relations Board)* (1984) PERB Decision No. 431-S, p. 7.)

Similarly, here, the evidence offered by the Association was too limited and speculative to indicate that adoption of the parental notification policy regarding student's gender non-conforming conduct would have any material effect on the length of the workday, while there was no evidence suggesting any effect on the availability or amount of teachers' duty-free time. As an initial matter, BP 5020.01's parental notification provisions for student transgender or gender non-conforming conduct have no apparent effect on class size, the number of courses assigned, or any other readily quantifiable metric of teachers' workload or hours. (cf. *Davis Joint Unified School District* (1984) PERB Decision No. 393, pp. 13-14 (*Davis*).) The only evidence presented on this subject consisted of testimony by Anthony Saavedra, the Primary Contact Staff at the California Teachers Association's Murrieta Regional Resource Center, that because BP 5020.01 requires teachers to report certain student gender non-conforming conduct within three days, if a teacher became aware of such conduct on the last day of the school year, communicating with the student's parent or guardian could effectively require the teacher to perform work duties outside the school year. There was no evidence regarding the frequency with which the District's students change their preferred pronouns or nicknames, seek to access or use of sex-segregated school activities or facilities that do not align with their biological sex or the gender listed on the student's birth certificate or other official records, or ask to change information contained in their official or unofficial records. While it is conceivable that a teacher could become aware of such student conduct on the last day of the school year, in the absence of some information suggesting this is a fairly common occurrence, it is

too speculative to suppose that such events are even likely to occur on the final day of the school year as opposed to any one of the other 180-odd days of the school year.

In such circumstances, PERB has held that occasional deviations from the standard workday are insufficient to establish a discernible change in employees' hours of work to come within scope. As explained in *Davis*, *supra*, PERB Decision No. 393:

> "In the area of professional employment, an employee frequently is charged with the obligation to fulfill certain specified duties according to professional standards. Such a professional position may have attached to it a workday of a nominally stated length. By this we mean that the position may be described or spoken of in certain contexts as having a particular workday, as from 9:00 a.m. to 5:00 p.m., while in practice the work time required of the employee will be no less than that which is required to properly discharge the assigned duties. The nominally stated length of the workday may in practice serve as a minimum requirement of job attendance, or it may have no relationship to the employee's actual work time at all."

(*Id*. at pp. 18-19.)

Thus, even in the relatively unlikely circumstances postulated by the Association, it does not appear that PERB would regard such isolated deviations from teachers' regular schedule or work year as warranting a finding of negotiability. The record is therefore insufficient to establish that teachers' reporting requirements for the student gender non-conforming conduct specified in BP 5020.01 would have anything more than a minimal and conjectural impact on employee hours of work.

b. Whether BP 5020.01 Materially Altered Employee Job Duties

PERB has long held that material changes to employee job duties are within the scope of representation, unless the change was mandated by external law. (*County of*

Santa Clara, *supra*, PERB Decision No. 2820-M, p. 7; *Cerritos*, *supra*, PERB Decision No. 2819, pp. 30-31; *Davis*, *supra*, PERB Decision No. 393, pp. 25-26 & fn. 11.) Changes mandated by external law are negotiable to the extent the employer has some discretion in how to carry out that mandate. (*County of Sacramento* (2020) PERB Decision No. 2745-M, pp. 17-18.) Even where external law establishes immutable standards that leave no discretion in how they will be implemented, to the extent they affect matters relating to wages, hours, or other terms and conditions of employment, employers and exclusive representatives may still negotiate over whether to include those immutable standards in a collective bargaining agreement. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, pp. 19-20; *Trustees of the California State University* (2003) PERB Decision No. 1507-H, adopting proposed decision at p. 21 (*Trustees*); *Healdsburg High School District* (1984) PERB Decision No. 375, p. 11.)

Here, there is no contention that the parental notification requirements of BP 5020.01 were mandated by external law. If anything, there is an issue of whether they were prohibited by external law. Again, however, I need not reach that issue because the record demonstrates that the parental notification requirements regarding gender non-conforming conduct imposed by BP 5020.01 were not reasonably comprehended by the existing duties of teachers and other certificated employees.

Newly assigned job duties are negotiable if they were not "reasonably comprehended" within the employees' prior duties or assignments. (*CCHCS*, *supra*, PERB Decision No. 2823-S, p. 10; *County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 7; *Cerritos Community College District*, *supra*, PERB Decision No. 2819,

pp. 30-31; *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, pp. 21-22; and cases cited therein.) The term "reasonably comprehended" is an objective standard that considers all the relevant circumstances, including past practice, training, and employee job descriptions. (*CCHCS*, *supra*, p. 10; *County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 6, citing *Rio Hondo Community College District* (1982) PERB Decision No. 279, pp. 17-18.) To apply this standard, PERB compares past duties or assignments to new duties or assignments through the eyes of a reasonable employee under the existing circumstances. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 8.)

The District admits that before adoption of BP 5020.01, it had no policy requiring parental notification regarding student gender identity or expression, and the uncontradicted testimony of classroom teachers was that creating this requirement, regardless of student consent, was contrary to established past practice and undermined teachers' efforts to create a "safe" learning environment based on mutual respect and trust. According to Heid, "students have to feel that they are reasonably safe to explore ideas" and "to communicate with [their instructor] and their peers without judgment … of those ideas," whether they pertain to academic matters or a student's social and personal development.

Heid's testimony was not simply uncontradicted. It was essentially corroborated by the substantive, collectively bargained standards used to evaluate employee performance. These include "[e]ngaging and supporting all students in learning"; "[c]reating and maintaining effective environments for student learning"; and [p]lanning instruction and designing learning experiences for all students." The CBA's emphasis

on inclusivity as essential for an effective learning environment further supports the uncontradicted testimony of Heid, Diaz, and Byrnes that BP 5020.01's parental notification requirements for certain student conduct imposed a new duty that was not reasonably comprehended by the District's job specifications, the collectively bargained standards for evaluating employee performance, or past practice.

As discussed above, BP 5020.01 expressly required not only "school counselors" but all "certificated staff" to report certain gender non-conforming conduct by students, and Arce admitted that adoption of the policy "potentially" imposes new job duties on certificated staff and that "as such … it should be bargained." When asked to clarify the term "potentially," Arce abandoned even this qualifier. He testified that BP 5020.01 could not be implemented without the cooperation and compliance of certificated staff.

Based on the record evidence and PERB precedent, I agree with the assessment of the District's highest labor relations official, namely that BP 5020.01 imposed new duties on certificated employees that "as such … it should be bargained." However, I disagree with the District's position that its parental notification policy is primarily concerned with the District's educational mission and its relationship with students and parents rather than its role as a public school employer or its collective bargaining relationship with the Association. Consequently, I do agree that the District's duty to bargain under EERA was limited to effects and implementation.

PERB takes a pragmatic, rather than a formalistic or reductionist approach to determining negotiability. For example, in *City of Sacramento*, *supra*, PERB Decision No. 2351-M, a departmental reorganization and resulting reduction in force were not subject to mandatory bargaining, while the employer's simultaneous and factually

interrelated decision to transfer work from one bargaining unit to another was fully negotiable. (*Id*. at p. 24; see also *City of Milpitas*, *supra*, PERB Decision No. 2443-M, pp. 16-17 [employer's managerial prerogative to lay off employees does defeat negotiability when layoffs are result of negotiable outsourcing decision based on labor costs].) In the EERA context, this duality is reflected in the adoption of a student or academic calendar, which is a managerial prerogative, versus the adoption of a work or employee calendar, which is subject to mandatory bargaining. (*West Contra Costa Unified School District* (2023) PERB Decision No. 2881, pp. 14-15; *Antelope Valley Community College District* (2023) PERB Decision No. 2854, p. 4.) Even when such decisions coincide as a single decision of the employer's governing body, for PERB's purpose of determining negotiability, they are analytically distinct decisions or actions with different legal implications.

The District's designation of the disputed policy as a primarily student-centered policy in the 5000 series of its numerical topic index rather than a labor-management issue in the 4000-series is not dispositive of its negotiability. Even if BP 5020.01 concerns educational policy, a management decision or action may have both permissive and mandatory aspects. This duality does not relegate the mandatory aspects of the employer's decision or action to effects-only bargaining. The negotiability element of PERB's test for a unilateral change is therefore satisfied insofar as BP 5020.01 material altered certificated employees' job duties by expanding the parental notification requirements.

c. BP 5020.01 Is Also Negotiable by Establishing a New or Additional Cause for Discipline of Unit Members

EERA section 3543.2, subdivision (b), designates the cause and procedures for discipline as mandatory subjects for bargaining, and thus to the extent failure to comply with BP provides a cause for disciplining certificated employees, its adoption, and not merely the effects of its adoption, was subject to negotiation. (*San Bernardino City Unified School District* (1982) PERB Decision No. 255, p. 11.) The parties dispute whether employees were subject to discipline for violating BP 5020.01 and, consequently, whether it was subject to decisional or merely effects bargaining. The Association contends that, upon adoption, BP 5020.01 constituted District policy and therefore provided grounds for discipline. The District argues that because full implementation was postponed, employees faced no reasonable fear of discipline based solely on BOE's adoption of BP 5020.01, and that it had only an obligation, upon request, to bargain over the effects of BP 5020.01. For the following reasons, I find the District's argument unpersuasive.

As discussed above, the District's bylaws state that board policies and administrative regulations are "effective" upon adoption by BOE, and while the Interim Superintendent advised employees that an administrative regulation was being developed to specify how BP 5020.01 would be implemented, there was no indication in the record that BOE intended that the parental notification policy would *not* be effective, pending adoption of the corresponding regulation.

Board Policy 2210 (Administrative Discretion Regarding Board Policy) grants the Superintendent or designee discretion to "act on behalf of the [D]istrict in a manner that is consistent with law and Board policies" in situations not specifically addressed by a

written policy and "when immediate action is necessary to avoid any risk to the safety or security of students, staff, or district property or to prevent disruption of school operations …." By specifying in detail the circumstances in which the Superintendent may act on behalf of the District without written BOE authority, the logical conclusion is that in *other circumstances*, the Superintendent must implement and enforce board policies *as written*. Thus, while the Superintendent or designee was responsible for developing and implementing regulation for BP 5020.01, it does not appear that the District's bylaws and board policies authorized the Superintendent or designee to postpone the effective date of BP 5020.01 without BOE approval. Arce confirmed this interpretation. He acknowledged that "technically," a teacher can be disciplined for not complying with any duly adopted board policy or administrative regulation. He was also unable to recall any instance during his tenure with the District in which a board policy or administrative regulation had been adopted by BOE but not enforced.

Although District administrators and employees alike were understandably uncertain about how BP 5020.01's parental notification policies would be implemented, I conclude that "technically" they were in effect, and that employees could reasonably anticipate discipline or other adverse consequence for defying those requirements. Accordingly, the policy was also negotiable insofar as it provided a new or additional cause for employee discipline.

3. Without Notice and Meaningful Opportunity for Negotiations

EERA section 3543.2, subdivision (a)(2), requires a public school employer to "give reasonable written notice to the exclusive representative of the public school employer's intent to make any change to matters within the scope of representation of

the employees represented by the exclusive representative . . .." The form and amount of notice that is "reasonable" necessarily varies under the circumstances of each case. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 29-30.)

Generally, a public meeting agenda for the employer's governing body does not provide sufficient notice unless the employer provides such documentation to a union official in a manner reasonably calculated to draw attention to a specific item and with adequate time for good faith negotiations. (*Oakland Unified School District* (2023) PERB Decision No. 2875, p. 21; *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at p. 45; *Victor Valley Union High School District* (1986) PERB Decision No. 565, pp. 5-6 & fn. 6.) Regardless of what form it takes, the employer's notice must also be provided sufficiently in advance of a firm decision to alter matters within scope, or before implementation of a non-negotiable decision having negotiable effects, to allow the representative time to decide whether to request information, demand bargaining, consult its members, acquiesce to the change, or take other action. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 29-30; *Victor Valley*, *supra*, PERB Decision No. 565, p. 5.)

The stipulated facts demonstrate that the District failed to comply with its notice obligations under EERA. The Association learned of the BOE agenda at the same time as the general public, i.e., when it was posted on the District's website approximately three business days before the meeting itself. There was no District communication to Diaz nor to any other union official with authority to request bargaining nor any other circumstances reasonably calculated to draw attention to the proposed parental notification policy, and given the controversial nature of the policy, I find that even if the

Association had actual notice of the proposal on Thursday, August 17, 2023, there was insufficient time remaining before the vote for the Association to make an informed decision on whether to request information, demand bargaining, consult its members, acquiesce to the change, or take other action.

This element of the test for a unilateral change is also satisfied.

4. Generalized Effect or Continuing Impact

Nor is there any serious dispute that the parental notification requirements had and continue to have a generalized effect or continuing impact on unit members' terms and conditions of employment. This element of the test for a unilateral change is met if the challenged decision or action alters a term or condition of employment or if the respondent asserts a non-existent right to continue or repeat the action in the future. (*West Contra Costa Unified School District*, *supra*, PERB Decision No. 2881, pp. 15-16; *Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 8.) Because the District asserts, incorrectly, that it was a managerial prerogative rather than a fully negotiable decision to adopt BP 5020.01, it effectively asserts a right to repeat the same or similar conduct, and thus its decision has continuing impact on terms and conditions of employment.

The record supports each element of a prima facie case of a unilateral change. Absent a valid defense, the District has committed a per se violation of its duty to meet and negotiate under EERA.

5. The District's Defenses Lack Merit

The District has argued two defenses: that it was authorized by established past practice to adopt and enforce parental notification policies, and that the Association

waived any interest it may have had in negotiations over BP 5020.01 by refusing repeated invitations to engage in effects bargaining. Neither argument requires extended discussion.

Although other District policies required certificated employees to communicate with parents or guardians regarding academic performance, behavioral problems, and matters posing a threat to student health or safety, as discussed above, BP 5020.01's parental notification requirements for students' choice of nicknames and pronouns or for other gender non-conforming conduct exceed reasonable expectations regarding the scope of preexisting parental notification policies or the past practice asserted by the District. A student's gender identity or expression is not a recognized metric of academic progress, and unlike the District's parental notification requirements regarding bullying, suicide prevention, or student health care and emergencies, BP 5020.01 does not address student delinquency or misconduct, nor any other issue that threatens student health or safety.

Any assertion of waiver by inaction is similarly lacking in merit. The District was only ever willing to engage in effects bargaining, while, as discussed above, adoption of BP 5020.01 was subject to decisional bargaining. The Association could not have knowingly and voluntarily relinquished a right to decisional bargaining that it never had the opportunity to exercise. (*Kern County Hospital Authority*, *supra*, PERB Decision No. 2847-M, pp. 17-18; *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 24.) Additionally, under PERB precedent, if the exclusive representative only learns of a change in the status quo after the employer has already reached a firm decision on the subject, by definition, the employer's notice was inadequate, and the defense of waiver

by inaction is unavailable as a matter of law. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 33-34.) For reasons discussed above, three business days' notice was inadequate, and any defense of waiver by inaction therefore fails.

6. Derivative Violations

A unilateral change also denies the representational rights of both the employees and the exclusive representative without proof of any additional conduct. (*Oak Grove School District* (1985) PERB Decision No. 503, p. 7.) Establishing a unilateral change thus also establishes the separate unfair practices of employer interference with employee rights and the denial of the organization's right to represent employees. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9.) Because the District has been found to have committed unexcused unilateral changes affecting negotiable matters, it is also found to have derivatively interfered with and denied representational rights in violation of EERA section 3543.5, subdivisions (a) and (b), as alleged in paragraphs 7 and 8 of the Complaint.

B. Unalleged Theories Urged by the Association

Under the unalleged violations doctrine, PERB may only consider theories of liability not appearing in the complaint if: (1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint. (*Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th

158, 192–193, affirming in relevant part, *Fresno County Superior Court* (2017) PERB Decision No. 2517-C (*Fresno Court*); see also *State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S, pp. 3–4.) Generally, "the evidence justifying application of the unalleged violations doctrine should be expressly stated, so that all parties are aware of the basis for finding that an unalleged violation can be heard without any unfairness." (*Roseville*, *supra*, PERB Decision No. 2505-M, p. 25, citing *Fresno County Superior Court* (2008) PERB Decision No. 1942-C, pp. 14-15, 17.)

1. BP 5020.01's Expanded Parental Notification Requirements for Any Verbal and Physical Student Altercations

a. Whether to Consider this Issue as an Unalleged Violation

The Association's brief argues that the District unilaterally expanded the scope of parental notification requirements for instances of bullying by requiring certificated employees to report every verbal altercation among students, including those that do not result in apparent "harm" as defined by the Education Code. Although the Complaint alleges that adoption of BP 5020.01 unilaterally imposed new or different parental notification requirements for certificated employees, it references only those requirements of BP 5020.01 section 1.a through 1.c regarding student gender non-conforming conduct and student requests to change information in student records. The Complaint contains no reference to section 4 of BP 5020.01, requiring certificated staff to notify parent(s) or guardian(s) "of any incident or complaint of a verbal or physical altercation involving their child, including bullying by or against their child, within three days of the occurrence."

However, the parental notification requirements regarding student altercations were part of the same board policy referenced in the Complaint; were intimately related

to the subject matter of the complaint and part of the same course of conduct; and occurred within the same limitations period as the matters alleged in the complaint. Under the circumstances, I conclude that the notice and other requirements of the unalleged violations doctrine have also been met. The District had adequate notice of the issue, which was presented in both the Association's unfair practice charge and its opening statement. (See *Fresno Court*, *supra*, PERB Decision No. 2517-C, p. 14; cf. *County of Sacramento*, *supra*, PERB Decision No. 2745-M, pp. 15-16.) In its opening statement, the Association asserted that adoption of BP 5020.01 "unilaterally imposed new job duties on bargaining unit members." The first example of these allegedly newly imposed duties was described as follows:

> "This new policy requires that bargaining unit members notify the parents or guardians of any incident or complaint of a verbal or physical altercation involving their child including but not limited to bullying by or against their child within three days of the occurrence.
>
> "The policy that was in place prior to the passage of this new policy only required bargaining unit members to notify the principal of such incidents if a student, parent, guardian or other individual reported to the teacher that they had been subjected to or had witnessed bullying."

As described in the Findings of Fact above, the Association also examined its witnesses extensively on this issue. Diaz testified that an important component of classroom management was knowing when to notify parents or guardians of students' verbal altercations, which were often resolved on their own once the students involved realized it was based on a misunderstanding. Both Diaz and Heid also testified that before adoption of BP 5020.01, teachers were not required to report every complaint of a verbal altercation between students to parent(s) or guardian(s). Counsel for the

District was afforded full opportunity to cross examine Diaz and Heid on these subjects. Because all requirements of the unalleged violations doctrine have been met, PERB may consider the Association's argument that BP 5020.01 section 4 imposed new duties by requiring employees to report all verbal altercations between students.

b. Merits of Unalleged Theory Regarding Reporting Requirements for Student Verbal Altercations

i. Change in Status Quo

As argued in the Association's brief, section 4 of BP 5020.01 significantly expanded the scope of certificated employees' parental notification requirements. Although BP 5131.2, the District's preexisting board policy on bullying, does not contain a uniform definition of "bullying," its incorporation by reference of the provisions of Education Code section 48900 appears to limit the proscribed conduct to "severe or pervasive physical or verbal act[s] or conduct." By contrast, section 4 of BP 5020.01 requires certificated employees to "notify the parent(s)/guardian(s) *of any incident or complaint* of a verbal or physical altercation involving their child, including bullying by or against their child, within three days of the occurrence." (Emphasis added.)

Witness testimony supported the Association's contention that section 4 of BP 5020.01 changed terms and conditions of employment. Diaz and Heid testified, without contradiction, that under BP 5131.2 they had not been required to report every verbal altercation between students. Diaz also explained why, in his experience, the discretion not to intervene in a purely verbal altercation was an important tool in classroom management. According to Diaz, non-intervention allowed students to resolve the issue themselves after realizing that the incident had stemmed from a misunderstanding.

The record includes an incomplete copy of the draft regulation specifying how the District intends to implement section 4 of BP 5020.01 requiring certificated staff to report verbal altercations between students, and the District did not address the issue in its post-hearing brief. Given the broader scope of student altercations that must be reported under BP 5020.01 as compared to the "severe or pervasive" standard articulated in BP 5131.2, the uncontradicted, unimpeached testimony of Diaz and Heid is "certainly sufficient to carry the burden of proof in an unfair practice case." (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 32, citing *Mt. Diablo Unified School District* (1984) PERB Decision No. 373c, p. 4; see also PERB Reg. 32178.) Accordingly, I find that through adoption of section 4 of BP 5020.01, the District applied existing policy in a new way by requiring certificated staff to report every verbal altercation between students, whereas previously teachers had discretion not to report such instances, if they did not involve "severe or pervasive" acts or conduct.

ii. Negotiability

I find that this change in policy was also negotiable for essentially the same reasons discussed above regarding the other parental notification requirements of BP 5020.01. Job duties and assignments generally fall within the scope of representation. (*County of Santa Clara*, *supra*, PERB Decision 2820-M, p. 7.) "[A]n employer must normally bargain a change to represented employees' job duties if it is a material change, meaning that the employer is assigning work that was not 'reasonably comprehended within the employee's existing job duties.'" (*Cerritos CCD*, *supra*, PERB Decision No. 2819, p. 30, citing *Oakland Unified School District* (2003) PERB Decision No. 1544, pp. 5-8 & adopting warning letter at p. 2.)

Association witnesses testified that before adoption of BP 5020.01, classroom teachers had discretion to decide whether to notify parents or guardians of student altercations not rising to the level of "severe or pervasive" conduct. Diaz explained that because students often resolved these misunderstandings themselves, the discretion not to involve parents in every verbal altercation between students was an effective tool for classroom management and thus a reasonable expectation or component of the position. The District neither impeached the testimony of these witnesses nor put on any contrary evidence. Because removing such discretion was a material change to the duties of the position, the expanded parental notification requirements regarding student verbal altercations was negotiable.

iii. Lack of Notice

Because the verbal altercation reporting requirement was part of the same board policy discussed above, there is no need here to repeat the discussion regarding the District's inadequate notice before BOE reached a firm decision to change or add to the District's existing parental notification requirements. The District failed to give reasonable written notice of its intent to change matters within the scope of representation of the employees represented by the Association, as required by EERA. (EERA, § 3543.2, subd. (a)(2).)

iv. Generalized Effect or Continuing Impact

Likewise, there is no serious question that this change or addition in parental notification requirements had a generalized effect or continuing impact on terms and conditions of employment. While acknowledging that BP 5020.01 "expands certain requirements of … certificated staff," including notifying parents or guardians whenever

their children “are involved in verbal or physical altercations, including bullying,” the District’s position statement and post-hearing brief variously and incorrectly argue that this change was authorized by the CBA, past practice, and PERB precedent.

I am not persuaded by any of these arguments. Because waiver by contract is an affirmative defense, I address the District’s reliance on the CBA below rather than here as part of the prima facie case. Here, it is sufficient to note that the PERB authorities cited in the District’s position statement also fail to authorize unilateral action in the present circumstances. Contrary to the District’s argument, *Modesto City and High School Districts* (1986) PERB Decision No. 566 does not speak to the issue of unilateral changes to job duties.

Likewise, the various PERB cases cited by the District regarding past practice are distinguishable because the disputed action here exceeded the scope of any existing parental notification practice, as defined by preexisting board policies on such issues as bullying, suicide prevention, and student emergencies and health care. For example, unlike BP 5020.01, the District’s preexisting anti-bullying policy does not require certificated employees to contact or report *directly* to the student’s parent or guardian. It is therefore not probative evidence of any asserted past practice requiring parental notification by certificated employees. Uncontradicted witness testimony also established that before adoption of BP 5020.01, teachers were not required to report every verbal or physical altercation between students. By asserting, incorrectly, that it had a legal right to change the status quo, the District’s position statement and post-hearing brief satisfy the generalized effect or continuing impact requirement.

The record supports each element of a prima facie case of a unilateral change. Absent a valid defense, the District has committed a per se violation of its duty to meet and negotiate over the scope of parental notification requirements under EER section 3543.5, subdivision (c).

v. Waiver by Contract Defense

An employer may lawfully take unilateral action on a matter within the scope of representation where the exclusive representative has waived its right to meet and confer over the subject. (*Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 11.) However, a waiver of the right to bargain over a particular subject must be established by "clear and unmistakable" evidence indicating an intentional relinquishment of that right. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 13; *Fullerton Joint Union School District* (2004) PERB Decision No. 1633, pp. 5-7.) A broadly worded management rights clause does not meet the "clear and unmistakable" standard for waiver. (*San Bernardino Community College District* (2018) PERB Decision No. 2599, pp. 12-14; *Regents of the University of California* (1998) PERB Decision No. 1255-H, adopting proposed decision at pp. 38-39.)

Directing the workforce is at the core of managerial control, and the District undoubtedly has the right to define its relationship with students' parents or guardians to fulfil its educational mission. (EERA, § 3540; *Davis*, *supra*, PERB Decision No. 393, p. 26.) The CBA's District Rights Article also permits the District to "hire, classify, assign, evaluate, promote, terminate, and discipline employees." However, decades of PERB precedent treat material changes to employee duties as negotiable, and the CBA contains no clear and unmistakable language authorizing the District to unilaterally alter

assignments in a manner that is contrary to job specifications, past practice, and reasonable employee expectations.

Language in Article 3 (District Rights) asserting that the District "retains all of its powers and authority to direct, manage, and control to the full extent of the law" or that the District may exercise its powers, rights, authority, duties, responsibilities, judgment and discretion unless limited by specific and express terms of the Agreement also provide no assistance to the District here. Because EERA contains no management rights clause, a contract provision cannot *reserve* to the employer a right to act unilaterally that it did not have. (*Los Angeles Unified School District* (2002) PERB Decision No. 1501, p. 4; *Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 8-9 (*Carlsbad*).)

Because the record supports all the elements for a unilateral change, and because the District has neither asserted nor argued any valid defense on this issue, pursuant to *Superior Court v. Public Employment Relations Bd.*, *supra*, 30 Cal.App.5th at pp. 192–193 and similar PERB authority, I find that the District violated its duty to meet and negotiate under EERA by unilaterally expanding certificated employees' parental notification requirements to encompass "any" student verbal altercations.

c. Whether Unalleged Derivative Theories Are Appropriate

Having found liability for an unalleged unilateral change, there remains the question of whether unalleged derivative theories of liability are also appropriate. The general rule is that because a unilateral change effectively denies the representational rights of both the employees and the exclusive representative, once an unexcused unilateral change has been established, finding derivative interference theories is also

appropriate without further proof. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9; *Oak Grove*, *supra*, PERB Decision No. 503, p. 7.) PERB precedent also directs that "[w]here the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation." (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 15, citing *San Francisco Community College District* (1979) PERB Decision No. 105.) However, the above cases involved allegations that were *alleged in the complaint*, not unalleged violations.

Moreover, the Association has not argued for finding any unalleged derivative theories of interference corresponding to the unalleged unilateral change that was asserted in its brief. Its brief asserts: "The District's unilateral changes, particularly its revision of AR 6115, constitute interference under the EERA because those changes result in harm to protected employee rights." It then explains why adoption of AR 6115, which (as discussed below) was alleged in the Complaint, *independently* interfered with protected rights. The brief does not explain how the unalleged unilateral change regarding student verbal altercations also interferes with protected rights, nor does the brief assert that it does so derivatively. Thus, in addition to being unalleged, i.e., not included in the Complaint, any derivative interference theories here were also unasserted, i.e., not urged or even mentioned in the Association's brief, even if only to identify them as independent or derivative. (See *County of Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 9.)

Under the circumstances, I regard any unalleged (and unasserted) derivative interference theories as failing to satisfy the criteria of PERB's unalleged violations

doctrine, including the requirement that unalleged matters be "fully litigated." I therefore decline to extend the unalleged violations doctrine here to include unalleged and unasserted derivative violations stemming from an unalleged unilateral change.

2. Whether to Consider the Association's Unalleged Theory That the District Proposed or Imposed a Prohibited Subject of Bargaining

Citing *City of San Jose* (2013) PERB Decision No. 2341-M, the Association's brief also argues that because BP 5020.01 violates external law, the District committed a per se violation of its duty to meet and negotiate by "impos[ing]" a prohibited subject of bargaining.[14] As an initial matter, the word "impose" is usually a term of art in labor relations, and its usage in the passage cited from *City of San Jose* appears to refer to whether and under what circumstances an employer may, after bargaining to impasse and exhausting all applicable impasse resolution procedures, lawfully impose terms and conditions of employment from its last, best, and final offer. (*Id*. at pp. 41-46; see, e.g., *City of Glendale* (2020) PERB Decision No. 2694-M, p. 59.) However, it is undisputed that the parties never bargained nor participated in impasse resolution procedures regarding BP 5020.01 or the corresponding administrative regulation. Although the parties were in negotiations throughout late 2023 and early 2024, there was no evidence that these negotiations resulted in impasse, that the District ever "imposed" its last, best, and final offer, nor that any last, best, and final offer included BP 5020.01,

[14] The Association also relies on the proposed decision in PERB Unfair Practice Case No. SA-CE-3136-E. Although PERB has no regulation analogous to the rules of court prohibiting parties from citing non-precedential decisions as authority, because the proposed decision in SA-CE-3136-E is pending before the Board on exceptions, it would be inappropriate for me to consider or comment on it, including whether it has any persuasive value for the issues in the present case.

which had already been in effect since BOE's vote on August 22, 2023. I construe the Association's argument to be not that the District "imposed" unlawful terms and conditions after bargaining to impasse but that by repeatedly inviting bargaining over the effects of BP 5020.01, the District insisted on negotiating a prohibited subject of bargaining. (*City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 44; *Berkeley Unified School District* (2012) PERB Decision No. 2268, pp. 3-9, & fn. 3.)

In either event, the issue is not alleged in PERB's Complaint. Therefore, to be considered, it must satisfy the requirements of the unalleged violations test. For the following reasons, I conclude that it fails to do so.

During its opening statement, the Association asserted the following:

> "The District is starting to point out that after it adopted this new policy it belatedly offered to bargain the effects, but this offer eliminates the meaning of the Union's role as it presumes that unit members will take on the new duties. And in the case of gender non-conforming students, it limits the unit to negotiating exactly how unit members should go about violating the constitutional rights of students and violating clear CDE guidance."

Thus, to the extent the Association raised any issue about whether BP 5020.01 violated external law, it was primarily a rhetorical point that was subordinate to the Association's claim that BP 5020.01 was subject to decisional and not merely effects bargaining. Otherwise, the Association did not assert that BP 5020.01 violated constitutional rights or any other external law. Nor did the Association indicate at any other point during the hearing that it intended to argue a per se theory of liability not alleged in the Complaint and that turned on finding that BP 5020.01 violated constitutional rights or any other provision of external law.

During the District's opening statement, counsel for the District summarized the allegations in the Complaint and then asserted: "Those are the issues properly before PERB." Counsel for the District then asserted that this case is not about whether the District's parental notification policies "are lawful outside of the requirements of EERA." According to the District's opening statement, "[t]hose questions require an analysis of state and federal laws including those communicated in [Department of Education] guidance, … Title IX, the Education Code and the California State Constitution," and "are presently being litigated in courts with appropriate jurisdiction."

During the ensuing discussion of the parties' proposed exhibits, I indicated my agreement with the District that whether the parental notification policy violated external law was "not the issue in front of me" and asked counsel for the Association for any appellate authority that this policy "violates a constitutional right of [privacy] or … equal protection" or any provision of other external law. Counsel for the Association responded: "We are certainly not here asking PERB to rule on the legality of what we have termed the forced outing portions of 5020.1." Based on this response, I advised counsel for the parties that I would admit "a limited amount of evidence" on whether BP 5020.01 violated external law but "only to the extent it bears on [the] negotiability of the [parental notification] policy itself." The Association neither objected to this ruling on the limited relevance of external law nor moved to amend the Complaint to include any claims that BP 5020.01 violated any provision of external law.[15]

[15] Among the materials initially submitted as a proposed exhibit by the Association but never offered into evidence was Legal Alert No. OAG-2024-02 issued by the California Attorney General on January 11, 2024 regarding "Forced Disclosure Policies re: Transgender and Gender Non-Conforming Students." In its post-hearing brief, the Association requests that I now take administrative notice of this document to

It is doubtful whether the Association's fleeting and apparently rhetorical reference to "negotiating exactly how unit members should go about violating the constitutional rights of students and violating clear CDE guidance" was sufficient to place the District and PERB on notice of any unalleged *violation* based on finding that BP 5020.01 violated external law. (*Burbank Unified School District* (1986) PERB Decision No. 589, adopting partial warning letter at p. 3; cf. *Fresno Court*, *supra*, PERB Decision No. 2517, pp. 14-15 [repeated and detailed explanation of unalleged claim in charging party's opening statement ensured adequate notice of the issue].) However, the ensuing discussion, my ruling limiting the relevance of external law to the issue of negotiability of BP 5020.01, and the Association's failure to object to that ruling, all indicated that the Association was "not … asking PERB to rule on the legality of … the forced outing portions of 5020.1" under external law. In similar circumstances where a party has affirmatively stated at the outset of the hearing that it does not intend to pursue a claim or defense, the Board has declined to consider the issue, regardless of

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support the unalleged claim that the District proposed or imposed a prohibited subject of bargaining. A request for administrative notice should normally be made before the end of the hearing, so that all parties have notice and opportunity to contest any debatable facts. (*Cupertino Union School District* (1989) PERB Decision No. 764, pp. 12-13, fn. 5; *Antelope Valley Community College District* (1979) PERB Decision No. 97, pp. 23-24.) The Association has offered no reason why the Attorney General Legal Alert should be administratively noticed *after the hearing*, when the District has no opportunity to object. The request for administrative notice is therefore untimely. Additionally, to be administratively noticed, the matter must also be relevant to the issues in the case. (Evid. Code, § 210; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 548.) Here, Attorney General Legal Alert is irrelevant to the extent it pertains to an unalleged theory of liability not properly before me. Alternatively, to the extent it bears on the negotiability of BP 5020.01 (or lack thereof), it is cumulative of other evidence in the record and therefore unnecessary. (PERB Reg. 32176.) For all these reasons, I deny the Association's request for administrative notice.

whether it was in fact fully litigated. (*Beverly Hills Unified School District* (1990) PERB Decision No. 789, p. 12 (*Beverly Hills USD*); *Los Angeles Unified School District* (1988) PERB Decision No. 659, pp. 3-4.)

Accordingly, the District did not have adequate notice and opportunity to defend against the unalleged matter. To the extent the District reasonably relied on my evidentiary ruling limiting the relevance of external law to issues of negotiability, i.e., to an element of the unilateral change claim that *was alleged* in the Complaint, the District was also denied an opportunity to fully litigate and to examine and be cross-examined on the issue. (*Beverly Hills USD*, *supra*, PERB Decision No. 789, p. 12.) By any measure, the Association's contention that the District insisted on or imposed an illegal subject of bargaining is not appropriate for consideration as an unalleged violation.

II. AR 6115 Revisions Prohibiting Display of Flags on School Grounds

A. Interference/Unreasonable Ceremonies and Activities Regulation

Paragraphs 9 through 11 of the Complaint allege that by maintaining a "Ceremonies and Observances" regulation containing "vague and/or overbroad provisions which employees could reasonably construe to prohibit activities protected by [EERA]," the District has independently interfered with protected rights.

1. Interference Standard

To establish a prima facie case of interference, the charging party must demonstrate that the employer's conduct tends to or does result in harm to protected rights. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.) The test is an objective one considered from the standpoint of a reasonable employee or employee organization under the circumstances and is therefore not dependent on whether the employer

harbored an unlawful motive, intent, or purpose, nor whether employees or employee organizations were in fact intimidated or discouraged from exercising protected rights. (*Ibid*.; *Contra Costa County Fire Protection District* (2018) PERB Decision No. 2632-M, pp. 18-19 & fn. 12 (*Contra Costa Fire*); *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 42 (*Petaluma*).) If a prima facie case is established, PERB balances the degree of harm to protected rights against any legitimate business interest established by the employer. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 16, citing *Carlsbad*, *supra*, at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid*.) Where the harm is inherently destructive of protected rights, the employer must show its conduct was caused by circumstances beyond its control and that no alternative action was available. (*Contra Costa Fire*, *supra*, PERB Decision No. 2632-M, p. 22.) Similarly, where the rights interfered with or denied include an employee organization's right of access, the employer must demonstrate that the restriction is: (1) necessary to the efficient operation of the employer's business and/or the safety of employees and others; and (2) narrowly drawn to avoid overbroad, unnecessary interference with protected rights. (*County of Riverside* (2012) PERB Decision No. 2233-M, p. 7.)

2. EERA Protects the Rights of Employees and Employee Organizations to Display Flags, Insignia, and Union Regalia at Work

An interference violation may be found only where a PERB-administered statute guarantees the right(s) asserted by the charging party. (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 5; *Gonzales Union High School District*

(1984) PERB Decision No. 410, pp. 29-32.) Here, there is no question that AR 6115's ban on displaying flags implicates EERA-protected rights.

EERA section 3543 guarantees public school employees the rights to "form, join, and participate in the activities of employee organizations" in matters concerning employer-employee relations and to refrain from doing so without employer interference, coercion, or restraint. EERA Section 3543.1 also guarantees employee organizations "the right to represent their members in their employment relations with public school employers," the "right of access at reasonable times to areas in which employees work," and "the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation …."

Under longstanding PERB precedent, these provisions guarantee employees and employee organizations the right to discuss wages and working conditions *at work*; to solicit one another to participate or refrain from participating in union or other organizational activities; to display union clothing, buttons, or pins in the workplace; and to distribute literature on these subjects during non-work time and in non-work locations. (*Petaluma*, *supra*, PERB Decision No. 2485, pp. 44-45; *County of Sacramento* (2014) PERB Decision No. 2393-M, pp. 21-22, 24; *East Whittier* (2004) PERB Decision No. 1727, p. 9; *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, p. 10; *State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S, pp. 4-5 (*Parks and Recreation*); *State of California (Department of Transportation)* (1983) PERB Decision No. 302-S, adopting proposed decision at p. 21, fn. 17.) Like private-sector precedent, PERB has held that the basic right of employees and employee organizations to communicate at work is not

defeasible, i.e., cannot be waived. (*Petaluma*, *supra*, at p. 40, fn. 11.) Unlike private-sector precedent, the fact that other forms of communication are also available does not diminish these rights. (*County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 7; *Parks and Recreation*, *supra*, at p. 6.)

PERB and California courts have also repeatedly held that the PERB-administered statutes guarantee employees the right to present their grievances and workplace concerns through both traditional and social media "to garner the public's support for labor's position, to demonstrate the strength and support for union demands, [and] to build solidarity among fellow employees …." (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 16; see also *Alameda Health System* (2023) PERB Decision No. 2856-M, p. 34; *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1091-92; *State of California (Department of Corrections and Rehabilitation)* (2009) PERB Decision No. 2024-S, adopting dismissal letter at p. 2.)

3. AR 6115's Ban on Displaying Flags is Presumptively Invalid

Employer rules that ban a general category of conduct encompassing both protected and unprotected activity are presumptively unlawful because of their likely chilling effect. (*Santee Elementary School District* (2006) PERB Decision No. 1822, pp. 11-13 (*Santee*).) Irrespective of its implementation or enforcement, the mere promulgation or maintenance of an over-inclusive rule banning both protected and unprotected activity is therefore invalid, absent special circumstances. (*Ibid*.; *Regents of the University of California* (2018) 2616-H, pp. 9-16; *Petaluma*, *supra*, PERB Decision No. 2485, pp. 46-47; *County of Sacramento*, *supra*, PERB Decision No. 2393-M, p 24;

EDD, *supra*, PERB Decision No. 1365a-S, p. 10; *Rio Hondo Community College District* (1983) PERB Decision No. 292, pp. 11-14, overruled on other grounds by *Oakland Unified School District* (2024) PERB Decision No. 2906.)

The portion of AR 6115 in dispute bans the display of all flags "on school grounds, including classrooms." It recognizes an exception for the U.S. flag and the state flag of California, regardless of the purpose for the display, and it creates another exception for the flag of "a country, state, or [a] United States military flag," when displayed "solely for educational purposes within the adopted curriculum." The Regulation states: "Any other flag must be approved by the Superintendent or designee prior to displaying, if and only if, it is used for educational purposes and only during the related instructional period." District communications sent to employees, including the Flag Approval Form developed by the ad hoc Executive Cabinet Committee, define a flag as "a display representing a flag of distinct color and design used as a symbol, standard, signal, or emblem."

a. AR 6115 Is Presumptively Void for Vagueness and Ambiguity

As an initial matter, the language of AR 6115 is vague and ambiguous, owing to poor draftsmanship and the ungrammatical sentence structure of the "if and only if" condition in the second sentence. The first sentence includes a broad restriction on displaying flags, except for certain content-based exceptions, such as the flags of states, countries or the "United States military." It is unclear from the second sentence whether the dependent clause "if and only if" refers to the display of flags in the previous sentence or to the need to obtain approval for exceptions to the restriction stated in the first sentence. Depending on which construction was intended, employees would either

need to seek approval “if and only if” a desired flag did not fit one of the expressly stated exceptions or “if and only if” the flag would be “used for educational purposes and only during the related instructional period.” The first construction includes a broader restriction. The second applies if special approval is needed to ensure that flags “related to the instructional period” will be used only for educational purposes, while other flags not used for educational purposes may continue to be displayed without Superintendent approval.

A separate communication to District employees indicates that the former, more restrictive construction was intended. However, Arce admitted at the hearing that the wording was reasonably susceptible to either meaning. As a result, employees would reasonably be confused about the scope of conduct prohibited by the rule, a question that cannot be resolved solely with reference to the document itself.

The ambiguity of the regulation thus makes it unclear whether employees must seek special approval for displaying, for example, union flags or insignia, or whether an exception for union flags is categorically unavailable under the rule. In either event, the rule is presumptively invalid. It either categorically bans union flags and depictions of union flags in all circumstances or places an undue burden on protected activity by requiring employees to seek an exception from the rule’s content-based restriction before displaying any flags or depictions of flags other than those specifically allowed under the Regulation. However, even assuming there is some potentially lawful application of the rule, in deciding whether to exercise protected rights, employees cannot be required to risk discipline or face uncertainty about what conduct is or is not permitted due to latent ambiguity in the employer’s rule. (*Los Angeles Community*

College District (2014) PERB Decision No. 2404, p. 6 (*LACCD*); see also *City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 14.)

b. AR 6115's Ban on Displaying Flags Is Over-Inclusive

The Regulation's general ban on displaying flags or depictions of flags is also fatally overinclusive. As interpreted by the District, the revised Regulation permits the Superintendent or designee to approve the display of a flag other than those expressly identified in the Regulation "if and only if" the flag will be "used for educational purposes and only during the related instructional period." The Regulation thus bans the display of union flags or depictions of union flags, whether on buttons, stickers, mugs, lanyards, hats, clothing, or other personal items worn or carried by employees. In *East Whittier*, *supra*, PERB Decision No. 1727, PERB held that "the right to wear union buttons attaches in instructional settings as it does elsewhere." (*Id*. at p. 11.) In subsequent decisions, PERB has reiterated this general rule that employees may display their support for (or opposition to) the exclusive representative in the workplace through buttons, clothing, or other personal items. (*City of Sacramento* (2020) PERB Decision No. 2702-M, pp. 9-10; *County of Sacramento*, *supra*, 2393-M, pp. 21-22, 24.) Because AR 6115 prohibits the display of union flags and depictions of union flags on buttons, lapel pins, lanyards, hats, clothing or other personal items, it is a presumptively invalid restriction on employees' rights to communicate with one another in the workplace. (EERA, § 3543, subd. (a); *East Whittier*, *supra*, PERB Decision No. 1727, p. 9.)

The Regulation also restricts other categories of speech besides simply those specifically concerned with support for or opposition to an employee organization.

Under the PERB statutes, employee speech is presumptively protected if it is "related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations." (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 15, quoting *Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12, internal quotation marks omitted; *Trustees of the California State University* (2017) PERB Decision No. 2522-H, p. 11.) However, unlike the other PERB statutes, EERA is not concerned solely with the employment relationship nor limited to traditional subjects of collective bargaining. One purpose of EERA is to "afford certificated employees a voice in the formulation of educational policy," and to that end, the statute guarantees public school employees the right to representation in both their employment *and professional* relationships with public school employers. (EERA, § 3540; *Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 16 (*Berkeley USD*).) Besides guaranteeing collective bargaining over wages, hours, and other terms and conditions of employment, EERA also grants the exclusive representative of certificated employees "the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent those matters are within the discretion of the public school employer under the law." (EERA, § 3543.2, subd. (a)(2); *Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 41.) Because EERA protects employee speech regarding the "autonomy and effectiveness of the exclusive representative" (*Mount San Jacinto Community College District* (2018) PERB Decision No. 2605, pp. 7-8), it necessarily also protects employee speech

regarding the subjects of consultation. Thus, "the definition of educational objectives" and "the determination of the content of courses and curriculum" are matters of legitimate concern to employees as employees under EERA, and certificated employee speech on these subjects is protected. (*Walnut Valley Unified School District* (2016) PERB Decision No. 2495, pp. 12-13; *Berkeley USD*, *supra*, at p. 19; see also *Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, p. 18, fn. 12.)

Additionally, Association witnesses testified, without contradiction, that they had a legitimate concern in displaying trans and pride flags, and that the District's categorical ban on such materials in the classroom negatively affected their working conditions and ability to perform the duties and expectations of their teaching positions. Diaz described "classroom management" as "the main part of the job" of being a teacher and testified that it entails creating "a welcoming, positive and inclusive environment to make sure that students are ready to learn" and "focused on the hard work of actually learning the material."

Heid similarly testified that "students have to feel that they are reasonably safe to explore ideas" and "to communicate with [their instructor] and their peers without judgment … of those ideas," whether curricular or otherwise. Heid previously "use[d] the [rainbow] flag as a way to demonstrate that [his] space is non-judgmental" but he testified that following the revisions to AR 6115, "[t]here is no easy shorthand for that now and it's certainly not something that can come up during curriculum." According to Heid: "[I]f [students] don't trust, they cannot learn" and with "no easy way to show them that trust … learning becomes that much more difficult."

Public school employers maintain the managerial prerogative to determine what curriculum and programs will be offered. (*Whisman Elementary School District* (1991) PERB Decision No. 868, p. 19.) However, an employer cannot exercise a managerial prerogative to restrict the scope of protected rights. (*Carlsbad*, *supra*, PERB Decision No. 89, p. 9.) Even accepting the District's characterization of AR 6115 as affecting "patriotic exercises and instructional materials provided by the District," BOE's September 12, 2023 revisions to the Regulation necessarily affect educational policy and the content of curriculum, and there is no evidence that the specific revisions to AR 6115 adopted by BOE were mandated by the Education Code or other external law. Because the District's revisions to AR 6115 categorically restricted the scope of permissible employee speech regarding educational policy, the content of curriculum, and matters affecting teachers' working conditions, they are presumptively invalid.

AR 6115's broad prohibition against displaying union flags and items depicting union flags is also a presumptively invalid restriction on the Association's statutory rights, including its right to represent employees, its right of access at reasonable times to areas in which employees work; its right to use bulletin boards, mailboxes, and other means of communication, subject to reasonable regulations; and its right to use institutional facilities at reasonable times. (EERA, § 3543.1, subds. (a), (b).) An employer's regulation of an organization's access rights is reasonable if it is consistent with the basic labor law principles of EERA, which are designed to insure effective and nondisruptive organizational communications and employee organizations' access to employees at the workplace. (*Long Beach Unified School District* (1980) PERB Decision No. 130, pp. 4, 6-7, 10.) As revised, AR 6115 prohibits the Association from

communicating its message to employees by way of flags or depictions of flags, whether they be on buttons, lapel pins, lanyards, mugs, or other personal items worn, carried, or otherwise used in the classroom or anywhere else on school grounds.

To the extent the Association wishes to communicate with employees with posters, fliers, newsletters, or other graphic or printed materials containing depictions of flags, AR 6115 prohibits it from doing so on bulletin boards, in mailboxes, and by other means of communication, despite statutory language to the contrary. (EERA, § 3543.1, subd. (b).) An employer's content-based restrictions and prior restraint on union or employee communications are also presumptively invalid. (*County of Orange* (2019) PERB Decision No. 2611-M, pp. 7-10, adopting proposed decision at pp. 38-49; *Petaluma*, *supra*, PERB Decision No. 2485, p. 48; *Desert Community College District* (2007) PERB Decision No. 1921, pp. 10-11.)

c. AR 6115 Unreasonably Bans Union Access and Employee Protected Activity in Non-Work Settings

Restrictions on union access and employee communication and solicitation during nonworking time and restrictions on distribution during nonworking time and in nonworking areas are presumptively invalid. (*Long Beach USD*, *supra*, PERB Decision No. 130, pp. 7, 9-10; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793.) Although working time is for work, employers have no legitimate interest in regulating employee speech or other non-disruptive protected activity during non-work times or *in non-work areas*. (*City of Sacramento*, *supra*, PERB Decision No. 2702-M, p. 9; *Fresno Court*, *supra*, PERB Decision No. 2517-C, p. 29; *Regents of the University of California*, *supra*, PERB Decision No. 2616-H, p. 11, fn. 9.) Upon a showing of special circumstances, an employer may reserve to itself exclusive use of a specific location or means of

communication (*Regents of University of California v. PERB* (1986) 177 Cal.App.3d 648), but no authority has ever held that an employer may restrict certain categories of non-disruptive and otherwise protected speech throughout its entire premises, including non-work areas.

AR 6115 is facially overbroad in that, without exception or qualification, it bans the display of flags and depictions of flags "on school grounds," which necessarily includes break rooms, employee lounges, bulletin boards, parking lots, and other non-work areas. In addition to impermissibly restricting buttons and other items that employees may wear or display on their person while doing so, this provision of AR 6115 effectively bans the distribution of literature or other printed or graphic materials displaying union flags by nonworking employees in non-work areas and by Association staff in non-work areas. Even assuming the presence of special circumstances in instructional settings, which the District has not shown, there would still be no justification for extending AR 6115's restrictions to break rooms, employee lounges, parking lots, District offices, unused classrooms, and other non-instructional or non-public settings. (*Fresno Court*, *supra*, PERB Decision No. 2517-C, p. 29; *Long Beach USD*, *supra*, PERB Decision No. 130, p. 22; see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 21, overruled in part by *Napa Valley Community College District* (2018) PERB Decision No. 2563.) AR 6115's restriction on the display of union flags or insignia "on school grounds," including non-work areas, therefore provides additional grounds for finding the rule presumptively invalid.

4. The District Has Failed to Demonstrate Special Circumstances

An employer has the burden of demonstrating special circumstances justifying any vague, overbroad, or otherwise presumptively invalid rule. To show special circumstances, the employer is not required to show that "actual disruption" resulted from the display of union insignia, though such evidence, or the lack thereof, may be a factor to consider. (*Regents of the University of California*, *supra*, PERB Decision No. 2616-H, p. 17; *East Whittier*, *supra*, PERB Decision No. 1727, p. 13.) However, the employer is required to produce case-specific evidence demonstrating the operational or business necessity ostensibly outweighing the statutory rights of employees or employee organizations. "General, speculative, isolated or [conclusory] evidence of potential disruption to an employer's operations does not amount to special circumstances" sufficient to rebut a presumption of invalidity. (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, p. 24, citing *Goodyear Tire and Rubber Co*. (2011) 357 NLRB No. 38.) As noted above, in *East Whittier*, *supra*, PERB Decision No. 1727, the Board held there is no presumption of special circumstances simply because the display of pro-union or anti-union messages appears in the classroom. Rather, the employer has the burden *in each case*, of demonstrating special circumstances to justify its restrictions on protected activity. (*Id*. at p. 10; see also *City of Sacramento*, *supra*, PERB Decision No. 2702-M, pp. 9-10.)

The record contains no evidence that the revised AR 6115 was necessary to ensure safe operations, maintain discipline, or prevent disruptive, obscene, violent, or otherwise unprotected speech, and the District has failed to identify any other special circumstances to warrant banning the display of union flags anywhere on school

grounds, including classrooms. Instead, the District defends AR 6115 by claiming that it is not specifically directed at union flags and that witness testimony failed to demonstrate any instance of actual enforcement against union flags.

However, as explained above, neither argument has any bearing here. The rule is a disfavored content-based restriction. The fact that it does not specifically single out union flags or depictions of union flags is not determinative, since it is undisputed that by allowing only certain, *other* flags, the revised AR 6115 would reasonably or logically have this effect. (*Superior Court v. Public Employment Relations Bd.*, *supra*, 30 Cal.App.5th at pp. 196–197.) Such "[c]ontent-based restrictions are highly disfavored, in part, because there are so few circumstances in which they are based on legitimate justification," particularly if they extend to non-disruptive union or employee communications during non-work time, in non-work areas, or other circumstances where the employer has no legitimate interest in choosing which messages to suppress. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 48; see also *El Camino Healthcare District, et al*. (2023) PERB Decision No. 2868-M, pp. 55-56, judicial appeal pending.)

Irrespective of how or whether it has been enforced, the District's adoption and maintenance of a rule banning both protected and unprotected speech is sufficient to state a prima facie case. (*City & County of San Francisco*, *supra*, PERB Decision No. 2536-M, p. 29; *LACCD*, *supra*, PERB Decision No. 2404, p. 6; *Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15.) Because the District has demonstrated no special circumstances, operational necessity, nor circumstances beyond its control, it is unnecessary here to assess whether the resulting harm was comparatively slight or inherently destructive of protected rights.

5. The District Has Also Failed to Demonstrate Waiver

Although the District's brief discusses waiver in response to the Complaint's unilateral change allegations, the defense may also apply to interference allegations. A union and employer may agree to restrict union or other protected activity of employees during paid, non-working time, if the restriction does not seriously impair employees' right to communicate about union matters. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, p. 40; *Petaluma Elementary School District/Joint Union High School District* (2018) PERB Decision No. 2590, p. 11, citing *NLRB v. Magnavox Co. of Tennessee* (1974) 415 U.S. 322, 326-327; *Trustees of the California State University* (1995) PERB Decision No. 1094-H, adopting warning letter at pp. 1-2; see also *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708.) A "waiver of statutory rights must be 'clear and unmistakable,' and the evidence must demonstrate an 'intentional relinquishment' of a given right." The party asserting waiver carries "the burdens of production and persuasion." (*County of San Joaquin*, *supra*; *Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-H, pp. 9-12; *Regents of the University of California*, *supra*, PERB Decision No. 2300-H, p. 27.)

The District claims that under Article 3 of the CBA, the District "retains all powers and authority to direct, manage, and control to the full extent of the law" unless specifically and expressly limited by the terms of the CBA, and because the Association offered no evidence showing that the CBA has limiting terms related to the display of flags, the District was authorized by the CBA to revise AR 6115 unilaterally. I am not persuaded that language of Article 3 constitutes a clear and unmistakable waiver of the rights at issue. As explained previously, because EERA guarantees employees and

employee organizations rights of access, solicitation, distribution, and basic communication in the workplace, a contract provision cannot *reserve* to the employer a right to act unilaterally that it does not have under the statute. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 1501, p. 4; *Carlsbad*, *supra*, PERB Decision No. 89, pp. 8-9 [inherent managerial interests must coexist with protected rights].)

The language of Article 3 also differs noticeably from instances in which PERB has found a clear and unmistakable waiver. In *Monrovia Unified School District* (1984) PERB Decision No. 460, the management rights clause gave the District the right to "determine, implement, *supplement, change, modify* or discontinue, in whole or in part, temporarily or permanently" the "selection, classification, direction, promotion, demotion, discipline and termination of all personnel of the District …." (*Id.*, at p. 3, emphasis added.) PERB found this language sufficiently clear and specific to give the District discretion to issue a written warning and to suspend an employee for insubordination and breach of professional responsibilities, even if the specific grounds cited in the District's disciplinary documents had not been negotiated. (*Id*. at p. 14.) By contrast, absent from the language of Article 3 of the CBA are any references to supplementing, changing, or modifying employer rules or any similar verbiage affecting the statutory rights of employee organizations and employees to reasonable access, and non-disruptive solicitation, distribution, or communication in the workplace, whether during non-work time and in non-work areas or otherwise.

Similarly, in *Trustees of the California State University*, the exclusive representative was found to have partially waived any statutory right to file grievances it may have had, where the parties' agreement defined a "grievant" to include "the Union"

but only when alleging a violation of the Union Rights Article of the Agreement. In other circumstances, where the contract language defined a "grievant" as an "employee" but did not unequivocally and uniformly preclude the exclusive representative's use of the grievance procedure, no clear and unmistakable waiver was found. (*Kern County Hospital Authority*, *supra*, PERB Decision No. 2847-M, pp. 13-17; *Omnitrans* (2010) PERB Decision No. 2143-M, pp. 7-8; *Omnitrans* (2009) PERB Decision No. 2010-M, adopting proposed decision at pp. 6-7.)

Here, Article 3 authorizes the District "to establish educational goals and objectives; to determine the organization, kinds and levels of educational services to be provided and methods and means of providing them; to "insure the rights and educational opportunities of students"; and to "hire, classify, assign, evaluate, promote, terminate, and discipline employees." This language does not address or even mention union and employee rights of access and communication in the workplace nor purport to authorize the District to establish content-based restrictions on union and employee communications. To the extent other provisions of the CBA address these subjects they reinforce or preserve these statutory rights rather than waive or limit them. Article 2 (Unit Rights) recognizes the rights of the Association and its representatives to "[u]se school mailboxes, e-mail and the District mail service to the extent authorized by law"; to use "[b]ulletin board space in designated areas to which bargaining unit members have access"; to "[u]se District facilities at reasonable times before and after duty hours, provided that prior approval is obtained according to District 'Use of Facilities' regulations"; and to "[t]ransact official Association business on District property during non-duty hours, so long as the transaction of such business does not interfere with the

educational process or a unit member's professional duties." Rather than authorizing the District to establish any prior restraint on the content of Association communications with unit members, Article 2 provides that "the Association will provide the Superintendent with a copy of any such communication it feels may be of concern to the District." Article 27 prohibits certain "concerted activities," including a "strike, work stoppage, slow-down, [or] picketing of the District by the Association or by its officers or agents, during the term of the Agreement" and subjects employees to discipline if they engage in these proscribed activities. However, the Article does not, even by implication, define the term "concerted activities" to include other union or employee rights, such as rights of access or communication in the workplace, and the District has identified no other provision of the CBA that would, even arguably, waive these statutory rights. The CBA therefore fails to support the District's waiver argument and expressly contradicts the District's asserted right to establish a content-based restriction on Association or employee communications, including those that include depictions of flags other than those authorized by the revised AR 6115.

In the absence of any viable defense, I conclude that by promulgating and maintaining the revised "Flags and Ceremonies" provisions of AR 6115, the District interfered with the protected rights of employees and the Association, in violation of EERA section 3543.5, subdivisions (a) and (b), as alleged in the Complaint.

B. Because the Interference Claims Adequately Dispose of the Issues, there Is No Need to Decide Whether Adoption of AR 6115 Was a Unilateral Change

Paragraphs 12-17 of the Complaint allege that by adopting the revised AR 6115 banning the display of flags anywhere on school grounds, the District unilaterally

changed the status quo in violation of its duty to meet and negotiate and derivatively interfered with and denied protected rights. However, I have already sustained the Complaint's allegations that promulgation and maintenance of the "Flags and Ceremonies" revisions to AR 6115 interfere with protected rights of employees and the Association. As discussed below, the standard remedy for maintaining an unlawful rule is an order to cease and desist maintaining and enforcing the rule, to rescind or "void" the rule, to make injured parties and affected employees whole, and to post electronic and physical notice to advise employees of PERB's decision and order.

Even if sustained, the Complaint's unilateral change allegations regarding the revised AR 6115 would not, as a practical matter, augment or alter the cease-and-desist, rescission, make-whole, and notice posting provisions already available because of the above findings and conclusions regarding employer interference.

At one time, the Board's position was that separate cease-and-desist orders and additional notice posting provisions were, in effect, separate remedies, and that the Board and its agents were therefore obligated to find additional unfair practices supported by the same conduct. (*State of California (Department of Corrections & Rehabilitation*), *supra*, PERB Decision No. 2282-S, p. 15, citing *San Francisco Community College District* (1979) PERB Decision No. 105.) However, in several recent decisions, the Board has moved away from that reasoning where finding additional violations based on the same conduct "would not materially alter the Board's remedy." (*City of Bellflower* (2021) PERB Decision No. 2770-M, p. 10; *County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 83; *City of Glendale*, *supra*, PERB Decision No. 2694-M, pp. 58-59.) Although resolving the Complaint's unilateral change

allegations regarding AR 6115 might, arguably, clarify the parties' respective rights and obligations regarding the scope of representation under EERA, it would also overshadow or eclipse entirely the parties' efforts to clarify and resolve such disputes in the first instance at the bargaining table (*County of Santa Clara* (2024) PERB Decision No. 2900-M, p. 12; *City of Selma* (2014) PERB Decision No. 2380-M, pp. 14-15 & fn. 9), while having the disadvantage of adding to the length of this proposed decision. I therefore decline to address the issue. The allegations in paragraphs 12-17 of the Complaint are therefore dismissed.

REMEDY

The Legislature has delegated to PERB broad powers to remedy unfair practices, including the power to direct an offending party to cease and desist its unlawful conduct and to take such affirmative action as the Board deems necessary to effectuate the policies and purposes of the statute. (Gov. Code, § 3541.3; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 12.) An appropriate remedial order seeks restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.)

In addition to PERB's standard cease-and-desist order, the Association requests that the District be ordered to rescind Board Policy 5020.01 and Administrative Regulation 6115, and to post notice regarding its unfair practices.

A. Unilateral Adoption of BP 5020.01

The normal remedy for an employer's unilateral change is to restore the prior status quo by ordering the employer to rescind its decision and by making the exclusive representative and affected employees whole for any losses suffered because of the

unauthorized change(s) to matters within scope. (*California State Employees' Assn. v. Public Employment Relations Bd*. (1996) 51 Cal.App.4th 923, 946; *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1014–1015.) The District shall be ordered to rescind BOE's adoption of BP 5020.01 and all communications with employees announcing the promulgation of AR 5020.01.

Although there was some uncertainty among District witnesses about whether or to what extent BP 5020.01 and the corresponding AR were in effect, no evidence was presented that any employees have been disciplined for failure to comply with the policy, nor that the Association or employees have suffered any other compensable harm as result of BP 5020.01's adoption, maintenance, or enforcement. The Association also did not request make-whole relief at the PERB hearing or in its brief. It is therefore unnecessary to order make-whole relief for the District's adoption of BP 5020.01 and/or AR 5020.01 at this stage of the proceedings. Pursuant to *City & County of San Francisco* (2021) PERB Decision No. 2757-M and cases cited at pages 14-15 therein, the Association may raise in PERB compliance proceedings any instances of discipline, negative employee evaluations, or other injuries allegedly resulting from BOE's adoption of BP 5020.01 and/or the corresponding AR that have occurred since the PERB hearing in this matter.

B. <u>AR 6115's Unlawful Prohibition on Flags and Depictions of Flags</u>

Where an employer promulgates, maintains, or enforces a rule that interferes with protected rights, PERB orders the employer to cease and desist from future interference, rescind or void the unlawful rule or portion of the rule, make any injured parties and affected employees whole for losses suffered as a result of the unfair

practices, and post notice to employees concerning the violation(s). (*Santee*, *supra*, PERB Decision No. 1822, p. 15; *Rio Hondo CCD*, *supra*, PERB Decision No. 292, p. 32; *LACCD*, *supra*, PERB Decision No. 2404, pp. 21-22; see also *Contra Costa Fire*, *supra*, PERB Decision No. 2632-M, pp. 56-58.)

Here, the District has interfered with the access, solicitation, distribution, and basic communication rights of the Association and employees by adopting and maintaining an unlawful content-based rule generally banning flags and depictions of flags anywhere on school grounds. In addition to PERB's standard cease-and-desist order, an appropriate remedy is therefore to order that the September 12, 2023 revisions to AR 6115 be rescinded.

Although the Association has requested that the District be ordered to rescind AR 6115 and "restore the status quo," it has not asked to expunge any disciplinary action or negative evaluations of employees, nor requested backpay, nor identified any other affirmative relief necessary to "undo" the effects of AR 6115's revision. Because the Association has neither alleged nor proven that employees were disciplined or negatively evaluated based on their non-compliance with the revised AR 6115, or that the Association or employees suffered any other compensable harm as a direct result of AR 6115's adoption, maintenance, or enforcement, it is unnecessary to order make whole relief at this stage of the proceedings. Pursuant to *City & County of San Francisco*, *supra*, PERB Decision No. 2757-M and cases cited at pages 14-15 therein, the Association may raise in PERB compliance proceedings any instances of discipline, negative employee evaluations, or other injuries warranting expungement, backpay, or

other make-whole relief allegedly resulting from the revised AR 6115 that have occurred since the PERB hearing in this matter.

C. Physical and Electronic Notice Posting Requirements

An order to post physical and electronic notice is an essential and near universal component of PERB unfair practice remedies. (*City of Commerce* (2018) PERB Decision No. 2602-M, pp. 16-18; *City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 2, 43-46.) The notice serves to inform affected employees of their rights under the statute and of the employer's willingness to comply with the law and to deter future misconduct. (*City of Sacramento*, *supra*, at p. 44; *City & County of San Francisco* (2020) PERB Decision No. 2698-M, pp. 12-13.) Finding nothing in the record or the parties' briefs to suggest otherwise, I conclude that posting physical and electronic notice to employees is also appropriate here.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that TEMECULA VALLEY UNIFIED SCHOOL DISTRICT (District) violated the Educational Employment Relations Act, Government Code sections 3543.5, (a), (b), and (c), by unilaterally adopting BP 5020.01, a board policy requiring certificated employees to notify parents or guardians of certain transgender or gender non-conforming conduct by students and to notify parents or guardians of all instances of verbal or physical altercations between students, and thereby also interfering with or denying protected rights of employees and the Temecula Valley Educators Association, CTA/NEA, which is the exclusive representative of the District's certificated employees; and by adopting, maintaining, and/or enforcing revisions to AR

6115, an administrative regulation that includes a general and overly broad ban on displaying flags or depictions of flags anywhere on school grounds and thereby interferes with and/or denies protected access, solicitation, distribution, and basic communication rights of the Association and employees.

Pursuant to sections 3541.3, subdivisions (b), (i), and (k), and 3541.5, subdivision (c), of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Adopting board policies and/or administrative regulations affecting matters within scope without providing the Association with reasonable advance notice and meaningful opportunity for the Association to request meeting and negotiating.

2. Adopting, maintaining, and/or enforcing board policies and/or administrative regulations that interfere with and/or deny protected rights of employees and/or the Association to reasonable access, solicitation, distribution, and/or basic communication in the workplace about working conditions.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind BP 5020.01 and any corresponding administrative regulations and/or communications with certificated employees implementing and/or enforcing BP 5020.01.

2. Rescind the Revised AR 6115 adopted on September 12, 2023 and any corresponding communications with certificated employees implementing and/or enforcing the revised AR 6115.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District's certificated unit are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means used by the District to communicate with certificated employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[16]

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions within 20 days after the proposed decision is served. (PERB Reg. 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Reg. 32305, subd. (a).)

[16] Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, excluding tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

The text of PERB's regulations may be found at PERB's website: www.perb.ca.gov/laws-and-regulations/.

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Reg. 32110, subd. (a).) Appeal documents may be electronically filed by registering with and uploading documents to the "ePERB Portal" that is found on PERB's website: https://eperb-portal.ecourt.com/public-portal/. To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Reg. 32110, subd. (d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via in-person delivery,

US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Reg. 32135, subd. (b).)

The Board's mailing address and contact information is as follows:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regs. 32300, subd. (a), 32140, subd. (c), and 32093.) A proof of service form is located on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b), and 32093.)

D. Extension of Time

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request

shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-6841-E, *Temecula Valley Educators Association, CTA/NEA v. Temecula Valley Unified School District*, in which all parties had the right to participate, it has been found that the Temecula Valley Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by adopting board policies and/or administrative regulations affecting matters within scope without providing the Association with reasonable advance notice and meaningful opportunity to request meeting and negotiating, and by adopting, maintaining, and/or enforcing administrative regulations that interfere with protected rights of employees and/or the Association.

Because of this conduct, we have been ordered to post this Notice and we will:

A. **CEASE AND DESIST FROM**:

1. Adopting board policies and/or administrative regulations affecting matters within scope without providing the Association with reasonable advance notice and meaningful opportunity for meeting and negotiating; and

2. Adopting, maintaining, and/or enforcing administrative regulations that interfere with and/or deny protected rights of employees and/or the Association.

B. **TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT**:

1. Rescind BP 5020.01 and any corresponding administrative regulations and/or communications with certificated employees implementing and/or enforcing BP 5020.01; and

2. Rescind the Revised AR 6115 adopted on September 12, 2023 and any corresponding communications with certificated employees implementing and/or enforcing the revised AR 6115.

Dated: _____ Temecula Valley Unified School District

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Sacramento Regional Office, 1031 18th Street, Sacramento, CA, 95811-4124.

On October 14, 2024, I served the Cover Letter and Proposed Decision regarding Case No. LA-CE-6841-E on the parties listed below by

____ I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Sacramento, California.
____Personal delivery.
_X_Electronic service (e-mail).

Stephanie J. Joseph, Staff Counsel
California Teachers Association
11745 E. Telegraph Road
Santa Fe Springs, CA 90670
Email: sjoseph@cta.org

Dean Adams, Attorney
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2888 Loker Avenue, Suite 303
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Laurie Kamerrer, Attorney
Adams Silva & McNally LLP
898 N. Pacific Coast Hwy Suite 825
El Segundo, CA 90245
Email: lkamerrer@asmesq.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 14, 2024, at Sacramento, California.

Maryna Maltseva	/s/ Maryna Maltseva
(Type or print name)	(Signature)