STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA VIRTUAL ACADEMIES, Employer, and CALIFORNIA TEACHERS ASSOCIATION, Petitioner.	Case No. LA-RR-1227-E PERB Decision No. 2484 June 28, 2016

Appearances: Jackson Lewis PC by David S. Allen and Michael A. Wertheim, Attorneys, and Gibson, Dunn & Crutcher by Eugene Scalia, Greta B. Williams and Megan Cooney, Attorneys, for California Virtual Academies; Laurie M. Burgess, Staff Attorney, for California Teachers Association.

Before Martinez, Chair; Winslow and Gregersen, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions and cross-exceptions from a proposed decision (PD) by a PERB administrative law judge (ALJ) in a representation matter. The petitioning union, California Teachers Association (CTA), seeks exclusive recognition of a single bargaining unit of approximately 700 certificated teachers employed by 11 charter schools. The threshold issue presented on appeal is whether the self-described "network" of 11 "virtual" charter schools that comprise the California Virtual Academies (CAVA, CAVA School(s) or School(s)) is a single employer for representation purposes under the Educational Employment Relations Act (EERA).[1]

[1] The EERA is codified at Government Code section 3540 et seq. Subsequent section references are to the Government Code unless otherwise specified.

CTA argued before the ALJ that the operations of the CAVA Schools are so entwined that they should be considered a single employer and, thus, a single, statewide bargaining unit is appropriate. CAVA Schools countered that each charter school is a legally separate entity and, thus, a single, statewide bargaining unit is not appropriate.

After five days of formal hearing and submission of post-hearing briefs, the ALJ concluded that the joint, not single, employer doctrine applied. The ALJ found a community of interest exists among the employees in the petitioned-for statewide bargaining unit and therefore the petitioned-for unit is appropriate. The ALJ thereby certified CTA as the exclusive representative of all employees in the unit. Timely exceptions and responses were filed by both parties.

The Board has reviewed the hearing record in its entirety and has considered fully the issues raised by the parties on appeal in light of the applicable law. We affirm the ALJ's ultimate conclusion that a single, statewide unit is appropriate and we affirm the ALJ's order certifying CTA as the exclusive representative of the employees in the petitioned-for unit. We reach this conclusion via an alternate analysis of the threshold issue.

The status of joint employers is created where two or more legally-distinct employer entities share or codetermine the essential terms and conditions of employment of the same employees. Each joint employer is required to bargain only with respect to such terms and conditions of employment within its authority to control. In contrast, under the single employer doctrine, where two or more ostensibly legally-distinct employer entities operate as one, together they constitute a single employer. A single bargaining relationship is created based on the pooled authority of the constituent entities.

We recognize that each of the 11 CAVA Schools is separately chartered and accredited, and operates under bylaws that purport to rest ultimate control over decision-making in an "autonomous" Board of Directors. We also recognize that each of the 11 CAVA Schools has declared itself, as opposed to its chartering school district, to be a public school employer for EERA purposes under the California Education Code, and that the certificated teachers in the proposed bargaining unit have entered into employment contracts with, and receive paychecks from, individually-named CAVA Schools. On close examination of the administrative, supervisory and management structure within which the CAVA Schools operate, however, we find scant evidence of true independent operations and overwhelming evidence of integration and commonality.

CAVA Schools' teachers can be required to teach students enrolled at Schools other than the School holding the teacher's employment contract. The teachers are overseen, evaluated and disciplined by supervisors and managers who typically function on a regional multi-School level and ultimately report up the chain of command to one statewide Head of Schools. The Head of Schools is identified in charter documents and on at least one state-required reporting document as acting in the capacity of "Superintendent." On that same reporting document, the "District" is identified as "California Virtual Academies." There is one Director for Elementary Education, one Director for Middle School and one Director for High School. There is one "brick and mortar" office in Simi Valley for all CAVA Schools. It serves as a statewide employee and student records retention facility and is minimally staffed by "classified" employees who provide clerical support.

While each CAVA School has a Board of Directors, these Boards meet just four times a year and typically conduct their business in less than 45 minutes. The Boards ratify personnel decisions made by managers after the personnel action has already become effective and, with very few exceptions, approve common proposed policies that have been composed by, initiated by, prepared by, and presented by the Head of Schools or other members of the Head of Schools' administrative team. Board vacancies are filled through an informal recruitment process led by the Head of Schools. Those who have been appointed to individual Boards of Directors include a CAVA School employee, family members of CAVA Schools' managers, individuals who report to the Head of Schools through their employment with other non-CAVA online schools and even the Head of School's own mother. The close reporting and familial relationships between Board members and the Head of Schools call further into question the claimed autonomy of the local governing bodies, and give further support to the existence of a unified command structure.

In all, the record evidence establishes the key factors necessary to finding that the single employer doctrine applies. The operations of the Schools are functionally integrated. The Schools share a common management structure. The conditions of employment are centrally determined across Schools. And, teachers are treated as CAVA-wide resources to be shared, allocated and moved between Schools as needed. We conclude, therefore, that the single employer doctrine applies for representation purposes under EERA, and that a single, statewide bargaining unit is appropriate.

PROCEDURAL HISTORY[2]

On or about May 9, 2014, CTA filed with "California Virtual Academies (CAVA)" a request for recognition (petition) under EERA section 3544 for a bargaining unit consisting of "[a]ll full and part-time certificated employees and all teachers hired pursuant to Education Code Section 47605(j) employed by California Virtual Academies ('CAVA')," and excluding "all mangers, supervisors, classified employees, confidential employees, and casual substitutes within the meaning of the Act." In accord with PERB regulations,[3] a copy of the petition was also filed with PERB. On or about May 10, 2014, CTA filed with PERB its original proof of majority support for the petition. The organization named in the support documents is "California Teachers Association."

After PERB's Office of the General Counsel (PERB OGC) sent correspondence to the parties requesting certain information from CAVA Schools, Attorney David S. Allen on behalf of the 11 CAVA-named charter schools filed with PERB a single response in opposition to the petition. The charter schools were identified as: California Virtual Academy at Jamestown; California Virtual Academy at Kings; California Virtual Academy at Los Angeles; California Virtual Academy at Maricopa; California Virtual Academy High School at Maricopa; California Virtual Academy at San Diego; California Virtual Academy at San Joaquin;

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[2] While the Board's analysis of the threshold issue differs from that of the ALJ, we agree with the PD in all other material respects. We have not adopted the PD as the decision of the Board itself, but we have incorporated, in many stretches wholesale, much of the PD in our decision. We credit the ALJ for a meticulous rendering of the facts, exhaustive decision and above all else, correct conclusion regarding the appropriateness of a single, statewide bargaining unit covering all certificated teachers employed by CAVA Schools.

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

California Virtual Academy at San Mateo; California Virtual Academy at Sonoma; California Virtual Academy at Sutter; and California Virtual Academy at Fresno. The opposition response contended, among other things, that the petition was deficient because it sought an inappropriate bargaining unit of employees who were not employed by a single or common public school employer.

On June 18, 2014, Allen filed with PERB on behalf of the CAVA Schools separate, alphabetized lists of employees per CAVA-named charter school, including the total number of employees employed at each School. Also throughout June and July 2014, a dispute between the parties developed over the identity of the petitioner, prompted by the filing of an amended petition and notice of appearance by CTA staff attorney Laurie Burgess on behalf of an organization named "California Virtual Educators United, CTA/NEA" (CVEU). No proof of support accompanied the amended petition. CAVA Schools contended that the employee organization named on any cards or petitions bearing employees' signatures must precisely match the name of the petitioning employee organization in order for the petitioning employee organization to achieve exclusive representative status. CVEU countered that it is common practice for a CTA-affiliated local, like itself, to select the formal name for the chapter during the time that the local is creating bylaws, a constitution, and filing its recognition request, and furthermore that PERB Regulation 33100 permits recognition petitions to be amended to correct technical errors before notices of hearing or an election are issued.

On July 15, 2014, PERB OGC issued an administrative determination finding that CTA had provided evidence of majority support in the claimed unit and requesting that the employer

submit a decision under PERB Regulation 33190.[4] The administrative determination did not acknowledge the amended petition filed by CVEU or otherwise refer to CVEU.

CAVA Schools timely filed a denial of recognition under dual grounds. It asserted that CTA, not CVEU, had provided proof of support. It also asserted that "California Virtual Academies" is not a legal entity; therefore, it is not a single employer or joint employer with the 11 CAVA-named charter schools at issue, and a statewide unit of employees employed by separate public school employers is not appropriate. CAVA Schools requested that PERB conduct an investigation pursuant to EERA section 3544.5, subdivision (a). On September 17, 2014, CVEU filed its own request for Board investigation. CAVA Schools opposed CVEU's request for lack of standing based on CVEU's lack of showing of support.

On November 6, 2014, the parties appeared at the PERB Los Angeles Regional Office for an informal settlement conference, but were unable to resolve their dispute. The case was then transferred to PERB's Division of Administrative Law. CVEU requested that the hearing process be expedited, but that request was denied by the PERB Chief ALJ. A formal hearing was set for March 2 through March 4, 2015.

On January 30, 2015, CAVA Schools filed a motion to dismiss the petition and/or to stay proceedings because PERB had not determined that CVEU had demonstrated majority support. On February 11, 2015, CVEU filed its opposition to the motion.

On February 13, 2015, a pre-hearing conference was held to hear argument and rule on CAVA Schools' motion. Burgess appeared on behalf of both CVEU and CTA, and Allen

[4] On account of a clerical error, PERB's internal records incorrectly identified the employer that was named on the petition. As a result, PERB OGC wrongly captioned the employer as "California Virtual Education Partners" in the administrative determination. That initial error has been corrected.

appeared on behalf of CAVA Schools. A written, tentative ruling was issued finding that: (1) CTA and CVEU were not the same organization for recognition purposes; (2) PERB had only made a majority support determination for the original petition filed by CTA; thus, the amended petition filed by CVEU without support was deficient; and (3) the case record did not demonstrate that CAVA Schools had posted the Notice of EERA Representation Petition as required by the statute and PERB regulations; accordingly, a hearing to resolve unit appropriateness could not take place unless and until all threshold requirements had been satisfied. The proposed order in the tentative ruling granted leave to CTA and CVEU to perfect their filings or take other action consistent with the tentative ruling.[5] CAVA School's motion to dismiss/stay was therefore denied as premature.

During the pre-hearing conference, all disputed procedural issues addressed in the tentative ruling were satisfactorily resolved as follows. CAVA Schools and CTA provided adequate assurance that notice of the original petition was posted in accordance with legal requirements. CVEU agreed to, and subsequently did, withdraw the amended petition, and CTA confirmed its desire to proceed with the request to be exclusively recognized under the original petition. Therefore, the ALJ ruled that the formal hearing in the matter could proceed as scheduled. The parties agreed that CTA would present its case first at hearing without any stipulation regarding the proper allocation of ultimate burdens of proof.

The formal hearing took place over five non-consecutive days in March 2015. The parties filed post-hearing briefs by May 22, 2015. At that time, the record was closed and the matter was submitted for decision.

[5] Although not included in the proposed order, the tentative ruling also required CAVA Schools to post the Notice.

FACTUAL BACKGROUND[6]

The Founding and Organization of the Schools

1. Origins

The first CAVA School came into existence sometime in 2002, providing online instruction to home-schooled students in grades Kindergarten through 12. Four or five CAVA Schools opened between 2002 and 2003. Other CAVA Schools were added and subtracted over time until the current compliment of 11 was reached.[7] The record does not make explicit when that occurred, nor does it provide context for the circumstances that led multiple online charter schools to be branded with the CAVA name. According to Katrina Abston, the current Head of Schools for all 11 CAVA Schools, the impetus for forming an online charter school originates with a group of parents and teachers who, for various reasons, desire a public school offering that is different than what is available within their home school district. They may want a more tailored educational experience for their special needs or academically advanced

[6] CAVA Schools filed 28 exceptions to the proposed decision (CAVA Exception(s)). CAVA Exception Nos. 1 through 4 except to factual findings contained in the PD under Findings of Fact. Because we have appropriated the ALJ's factual findings as the foundation for our fact section, we address those four exceptions in footnotes to that section, explaining why a correction was or was not needed. CAVA Exception Nos. 5 through 8 raise "Issue[s] of Fact" based on statements in the ALJ's legal analysis of the single employer issue contained in the PD under "Conclusions of Law." As those exceptions are arguably factual in nature, we address them in the same fashion. CAVA Exception Nos. 9 through 15 also raise "Issue[s] of Fact," but those are based on statements in the ALJ's legal analysis of the joint employer issue, and therefore need not be addressed given our differing analysis. CAVA Exception Nos. 17 through 28 except to issues of law (as does the "Issue of Fact" raised in CAVA Exception No. 16). Because we agree the joint employer doctrine does not apply, we address only those legal issues of continuing consequence later in the discussion section of this decision.

[7] According to a charter document for CAVA at Los Angeles dated January 23, 2013, there were 12 CAVA Schools at that time. In addition to the 11 named CAVA Schools involved in this case, the founding group described in the charter document for CAVA at Los Angeles includes CAVA at Santa Ysabel. This discrepancy is not explained in the record.

students. They may need a more convenient public school option for students living in remote areas. Or, they may want to shield students from bullying situations.

The CAVA Schools' "founding groups" all were familiar with, and supportive of, the curriculum offered by K12, Inc. (K12), a Virginia-based curriculum and management company that has relationships with charter schools and school districts across the country.[8] Abston, for example, learned of K12 when, in around 2002, she attended a conference catering to small school districts and saw K12's presentation introducing the concept of online education. People involved with founding CAVA Schools learned of K12 in a similar manner and/or by word of mouth. No founding group members testified, but one of them, from CAVA at Fresno, is Abston's mother.[9] Abston began her affiliation with CAVA when she was initially employed by CAVA at Jamestown in 2003 as a Special Education teacher. Since July 2004, Abston has been employed by K12.[10] As discussed in greater detail below, each CAVA School has a contractual relationship with K12. In fact, the California Virtual Academies, i.e., "CAVA" name itself is owned and trademarked by K12.

2. The Charter Documents, Bylaws, and Boards of Directors

a. Charters

The next step in the process of establishing a CAVA School was that the founding group would approach a local school district representative, usually the superintendent, to

[8] Several of the charter documents that are discussed in greater detail below specifically note: "The founding group was made up of individuals, parents and teachers, who are familiar with the California Virtual Academies using K12 Inc. services."

[9] Abston's mother also served for a time on the CAVA at Fresno Board of Directors, but no longer is affiliated with that or any other CAVA School. She now works for K12 in connection with "IQ Academy," a K12-affiliated online school outside the CAVA system.

[10] Abston works with K12 as Head of Schools not just for CAVA Schools but also for "Insight," another K12-affiliated online school outside the CAVA system.

discuss whether the school district was willing to approve and authorize a charter school application. When mutual interest existed for an online charter school to operate, a presentation to the school district's governing board was prepared. Such presentation included a charter application that was discussed and voted upon during a public meeting of the governing board. The Charter Schools Act[11] establishes criteria that a school district considers when evaluating whether to authorize or deny a charter application.[12] After approval of the charter application by the authorizing school district's governing board, the final step in the process was submission of the locally-approved application to the California Department of Education (DOE) for final approval of the charter, issuance of a charter school number, and issuance of a County District School (CDS) code. The CDS code is a unique numerical identifier for each public school in the state to track fiscal and performance issues. After the state approves a charter application and supplies a CDS code, a charter school may lawfully operate in the county within which it is chartered and in all contiguous counties. So, for example, CAVA at Los Angeles may operate within Los Angeles, Orange, San Bernardino,

[11] The Charter Schools Act of 1992 (Charter Schools Act) is codified at Education Code section 47600 et seq. In 1999, the Legislature enacted amendments to the Charter Schools Act through Assembly Bill (AB) 631. (Added by stats. 1999, c. 828 (AB 631), § 2; amended by stats. 2000, c. 135 (AB 2539), § 45.) AB 631 applied EERA to charter schools and required the charter school to declare whether it or the authorizing school district shall be the public school employer for purposes of EERA. (See *Chula Vista Elementary School District* (2004) PERB Decision No. 1647, p. 3, fn. 2 (*Chula Vista*).) The Charter Schools Act expressly requires PERB to take its provisions into account when deciding cases involving charter schools. (*Chula Vista, supra,* at p. 19; Ed. Code, § 47611.5, subd. (d).)

[12] The criteria include, among others, whether the charter school has declared itself to be the public school employer for EERA purposes, the governance structure of the charter school, and the qualifications of employees to be employed by the charter school. (See Ed. Code, § 47605, subd. (b)(1)-(6).)

Kern, and Ventura counties.[13] Each of the CAVA Schools at issue has its own CDS code and charter school number.

Eleven current charter documents, one for each of the 11 CAVA Schools, were received in evidence. Some were entitled Charter Renewals and others Charter Proposals. Charters are typically issued and operative for one to five years. After such time, they must be renewed and again approved by an authorizing school district for another five-year period through a Charter Renewal. A Charter Proposal is required whenever the authorizing school district changes, which happened here several times according to the record,[14] or upon the initial founding of a charter school. Abston signed each of these 11 charter documents as the "Authorized Representative[]" of the applicant charter school.

All of the Charter Renewal documents are nearly, if not completely, identical in substance. The same is also true for all of the Charter Proposal documents. The Charter Proposals are more detailed and therefore roughly double the number of pages of the Charter Renewals. All of these documents express common academic goals and requirements for students. Both categories of documents contain a heading entitled, "Governance Structure," with virtually indistinguishable statements under that heading in each document. The following is an excerpt of the statement appearing in all of the Charter Proposals,[15] which describes in detail how a CAVA School will operate:

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[13] The authorizing school district for CAVA at Los Angeles is the West Covina Unified School District, which is located within the county of Los Angeles.

[14] For example, there have been three different authorizing school districts for CAVA at Jamestown and the authorizing school districts for CAVA at San Joaquin and CAVA at Sutter also have changed over the years.

[15] The Charter Renewal documents also contain most of the language quoted here, including the description of the role of the Head of Schools, but with less detail about the founding group appointing the initial Board of Directors.

> Upon approval of this charter, the California Virtual Academy @ [name of School] will constitute itself as a nonprofit California Public Benefit Corporation pursuant to California law. The school will be governed pursuant to the By-laws adopted by the Incorporators and subsequently amended pursuant to the amendment process specified in the By-laws. Please see attached By-laws produced by legal council [*sic*] for the petitioner.[16] The By-laws clearly indicate the roles and responsibilities of the California Virtual Academy governing board and clearly spells out the autonomous nature of the board. The applicants for the Charter School chose the structure of a nonprofit public benefit corporation to ensure a seriousness of purpose and adequate protection for its members, and the District. A Head of Schools will act in the same capacity as a Superintendent in implementing the actions of the Board of Directors. . . .
>
> The School's Founding Group appointed a five (5) member Board of Directors ("Board of Directors"). The founding group was made up of individuals, parents and teachers, who are familiar with the California Virtual Academies using K12 Inc. services. Subject to the limitations of this charter and of the corporate By-laws, the governance of the school will be under the authority of the Board of Directors and it's duly appointed representatives. In accordance with Education [Code section] 47604(b), the District shall be entitled to a single representative on the Board of Directors. After the initial Board appointment, Board elections, terms, term limits, resignation, removal and vacancies will all be handled in accordance with the corporate By-laws.
>
> [¶…¶]
>
> The Board of Directors will meet regularly to oversee the management, operation, activities, and affairs of the charter school. The Board of Directors will define, compose, and revise (as needed) the policies of CAVA and ensure compliance with its charter agreement and applicable laws and regulations.
>
> All Board meetings will be held in compliance with the Brown Act. The Board, at its discretion, may vote to expand its membership and/or create subcommittees. Specific responsibilities of the Board are defined in the By-laws.

[16] The documents referred to in this quoted text as "attached" were all separately received in evidence for each of the CAVA Schools.

> The decision making authority vested with the governing board is contained in the By-laws and the Services Agreement that are established to make a matter of public record the operational relationship of the California Virtual Academy @ [name of School] Governing Board, K12Inc and any other entity that will do business on behalf of the virtual academy. See attached By-laws and sample Services Agreement.

(Emphasis added.)

The Charter Renewal and Charter Proposal documents also contain a heading entitled "Human Resources," with the substantive content under that heading in both categories of documents setting forth identical educational and licensing requirements for teachers. A separate subheading entitled "Employee Representation" appears only in the Charter Proposals. This section states: "The Charter School shall be deemed the exclusive public school employer of the employees of the Charter School for the purposes of the Educational Employment Relations Act."[17] (Emphasis added.) Although it seems that the above-quoted statement is not repeated in the Charter Renewals, it is undisputed that each of the 11 CAVA Schools has declared itself to be the public school employer of its employees for EERA purposes.

b. Bylaws and the Boards of Directors

As the charter documents express, each CAVA School has been incorporated as what is known as a 501(c)(3)[18] public benefit corporation under state and federal law and currently

[17] As discussed previously, Education Code section 47605, subdivision (b)(6), allows an authorizing school district to consider a declaration of whether or not the charter school shall be deemed the exclusive public school employer under EERA when determining whether to approve or reject a charter application. If a charter school does not declare itself to be the public school employer, the authorizing school district is considered to be the public school employer for EERA purposes. (Ed. Code, § 47611.5, subd. (b).)

[18] This number refers to the section of the Internal Revenue Code that permits a corporation to enjoy tax-exempt status under federal law.

operates as what Abston described as an "independent" and "direct funded" charter school.[19] Because CAVA Schools are founded as a 501(c)(3) public benefits corporation, members are appointed, not elected, to the Schools' Boards of Directors.[20] The authorizing public school district is entitled to a single representative on the Board of Directors.[21] Each Board of Directors has adopted bylaws as referred to in the charter documents. These bylaws govern the conduct of Board business. They provide, among other things, that Board members carry staggered terms and are seated and removed according to a majority vote by the sitting Board of Directors. In practice, when vacancies on the Boards have arisen, an informal recruitment process headed by Abston and/or members of her administrative team has yielded potential candidates. Abston testified that when there is a vacancy, she and other staff communicate over whether they know a parent, teacher, or community member who may be interested in and suited to serving on a Board. Outreach to these potential new members is done by e-mail. Some of the individuals serving on the Boards either ultimately report to Abston through their employment relationships with non-CAVA K12-afiliated online schools where Abston also serves as Head of Schools, or because they are currently employed by a CAVA School. For

[19] The difference between a dependent and independent charter school is not explained in great detail in the record, and those two terms are not defined under the Charter Schools Act. Abston described a dependent charter school as being a district-run program rather than an "autonomous entity." The Charter Schools Act states that a "direct funded" charter school receives its state funding directly. (Ed. Code, § 47651, subd. (a)(1).) An indirect funded charter school receives state funding on a pass-through basis from the authorizer. (Ed. Code, § 47651, subd. (a)(2).)

[20] Some individuals serve on more than one Board. For example, the same individuals serve on the Boards of Directors for CAVA at Maricopa and CAVA High School at Maricopa.

[21] See Education Code, section 47604, subdivision (b), of the Charter Schools Act. A chart listing all the Boards' members for each of the CAVA Schools was received in evidence. A "District Representative" is identified for some Schools, i.e., CAVA at Jamestown (Tami Ethier), CAVA at Kings (Johnny Baltierra), CAVA at Los Angeles (Rhonda Lusk), CAVA High School at Maricopa (Stacey Oglesby), CAVA at Maricopa (Stacey Oglesby) and CAVA at San Joaquin (Jeff Tilton), but not all. (See Employer's Exh. C.)

example, a member of the CAVA at San Joaquin Board of Directors is employed by CAVA at Sonoma. Other individuals serving on Boards are family members of management employees who report to Abston either through CAVA Schools or other K12 schools.

Most of the CAVA Schools' bylaws appear identical to each other, except for the name of the CAVA School and roster of members on the Boards of Directors.[22] All of the Boards' bylaws are prepared by the same law firm. According to Abston, "[t]hat firm is our general counsel that we use, each of the Boards have employed." (Reporter's Transcript (R.T.), Vol. V, p. 127.)[23]

The bylaws contain a common statement of general and specific powers of the Board of Directors, which provides, among other things, that the Board of Directors may delegate

[22] Seven bylaws appear identical to each other. They are 17 pages in length and belong to the following CAVA Schools: CAVA at San Joaquin, CAVA at Maricopa, CAVA High School at Maricopa, CAVA at Los Angeles, CAVA at Sutter, CAVA at Fresno, and CAVA at Kings. The CAVA at San Diego bylaws are 13 pages in length and have a truncated section describing the roles and responsibilities of its Board of Directors. There is no evidence in the record that the CAVA at San Diego Board functions any differently than the others, however.

[23] Abston testified in terms of "we" and "our," raising the question whether CAVA employs one CAVA-wide general counsel or each CAVA School employs the same firm under separate approval processes and retainer agreements. Regarding the retention of counsel in these proceedings, Abston testified:

> [Q] Prepared. Okay. So in her capacity, whatever, preparing the Board agendas, my question is, is she aware of whether each School Board approved the retention of this law firm [Jackson Lewis] for these proceedings.
>
> [ALJ] All right. I'm going to let her answer, if she knows.
>
> [A] They're employed by K12. They're not employed by a Board, so not one cent of public money is being spent.

(R.T., Vol. V, p. 136.)

It is not improper for parties with common interests to enter into joint defense agreements. Abston's "public money" reference is nonetheless puzzling. The service fees paid to K12 by CAVA Schools *are* paid for out of public coffers.

management of the corporation's activities to any person, committee, or company, but all corporate powers remain under the ultimate direction of the Board of Directors. The process for seating and removing members of the Board of Directors by vote of the sitting Board of Directors is also set forth.

Most of the bylaws also contain a detailed statement of the "Specific Powers" of the Board of Directors, including appointing and removing officers, agents, and employees of the corporation. They also contain the following Board of Directors' "Roles and responsibilities":

- Meeting regularly to oversee the management, operation, activities and affairs of the California Virtual Academy at [name of School];
- Define, compose, and revise (as needed) the California Virtual Academy at [name of School] policies and ensure compliance with its Charter and applicable laws and regulations;
- Financial development and management;
- Fiduciary duties (duty of care and loyalty) owed to the California Virtual Academy at [name of School];
- Program oversight;
- Coordination and long-term planning;
- Overseeing and evaluating the work of the Head of Schools;
- Setting a framework for the budget process and authorizing the annual budget;
- Approving large resource expenditures, significant program changes, expansion into new program areas, and building and facility issues;
- School calendar;
- Appointing or dismissing administrators;
- Adopting the annual budget;
- Purchasing or selling of land;
- Locating new buildings or changing the location of the school's administrative offices;
- Creating or increasing indebtedness;
- Adopting online and offline education programs;
- Designating depositories for school funds;
- Entering into contracts where the amount exceeds $5,000;

- Approving salaries or compensation of administrators, teachers, or other employees of the California Virtual Academy at [name of School];
- Entering into contracts with and making appropriations to local school districts, professional service providers, or education service centers; and
- Hold meetings in compliance with the Brown Act.

(Fn. omitted.)

Most of the bylaws list the same address in Simi Valley as the location of the Schools' corporate offices. Abston described the office in Simi Valley as a records retention facility, with only a handful of clerical employees physically working out of that location. All other employees of the CAVA Schools and employees of K12 who provide services for the CAVA Schools are remote employees who work out of their homes. The Simi Valley office stores student and employee records for all CAVA Schools.[24]

What was received in evidence purporting to be the CAVA at Jamestown bylaws differs in form and substance from all of the others previously discussed. (See Employer's Exh. D6, tab 5.) This document does not contain any statement regarding the general or specific powers of the Board of Directors. It appears, but is not entirely clear, that the document received at tab 5 of Employer's Exhibit D6 is not actually the CAVA at Jamestown bylaws. For example, the first page of the document begins with a heading entitled "Articles of Incorporation," and includes an item numbered "7," which states that the CAVA at Jamestown Board was presented with and adopted bylaws that were purportedly attached to that original document as

[24] According to the bylaws, the corporate offices of CAVA at Sonoma and CAVA at San Diego are not located in Simi Valley, and instead the corporate offices for these two Schools are located at a similar address in Oakland (same street address, but one includes a suite number and the other a floor number). There is no evidence in the record, however, that student and employee records from those two CAVA Schools are not also retained in the Simi Valley office, or that those two CAVA Schools are not also supported by the classified employees who work out of the Simi Valley office, as is true for the other CAVA Schools.

an "Exhibit 'B'." No bylaws, however, are found anywhere in or attached to the documents included in Employer's Exhibit D6.[25] Despite the fact that the CAVA at Jamestown bylaws appear to be missing from the record, there is no evidence that the CAVA at Jamestown Board of Directors functions any differently than the other Boards of Directors.

3. The Relationship Between the CAVA Schools, K12, and Insperity

All 11 CAVA Schools have a contractual relationship with K12 through individual Educational Products and Services Agreements (EPSAs).[26] In addition to supplying uniform technology platforms and curriculum to all of the Schools, the EPSAs also dictate that K12 will furnish to the CAVA Schools "administration services, teacher recruiting, training and management," including an administrative team consisting of the Head of Schools (currently Abston), a financial officer (currently Mark Galang), and clerical support staff. This same K12 administrative team services all 11 CAVA Schools. Each CAVA School pays K12 directly for these services according to the terms of its EPSA.

The EPSAs provide that K12 will "take the lead to help recruit, set the terms of employment, hire, supervise, discipline and terminate Teachers and Student Support Staff and such activities will be performed in consultation with the Board (or its designees)." Under the EPSAs, the CAVA Schools, not K12, are responsible for paying teachers' salaries, and the Boards of Directors retain final decision-making authority over all personnel matters. It is also

[25] Employer's Exhibit D6 was presented in a binder containing 10 tabs that house various documents relating to the structure and organization of CAVA at Jamestown. Similar exhibits for the other 10 Schools were also received in evidence numbered as Exhibits D1-D5 and D7-D11. The bylaws for all of the other CAVA Schools are contained at tab 5 of the exhibits in this series.

[26] Eleven EPSAs, one for each CAVA School, were received in evidence. They are not identical to each other in form, but are substantially similar enough in content to discuss as though they are one document. The quoted provisions here are taken from the CAVA at San Diego EPSA.

noted in the EPSAs that the CAVA Schools are responsible for adopting and approving their own budgets. No K12 employee may sit as a voting member on a Board of Directors.

Under the terms of the EPSAs, K12 also provides advertising and marketing services for all of the CAVA Schools, provides and licenses the CAVA logo (a bear), supplies all employees' business cards (with the Simi Valley mailing address), and provides employees e-mail addresses that share a common domain. K12 hosts one website for all CAVA Schools, which, in most respects, presents the CAVA Schools to the public as a single entity. There is one Parent-Student Handbook distributed to all families enrolled in any of the CAVA Schools that also presents the CAVA Schools as a single entity.

All 11 CAVA Schools also have a contractual relationship through individual Client Services Agreements (CSAs) with Insperity,[27] a Texas-based company that supplies payroll and other human resources support services to its clients. Abston testified that there is no relationship between Insperity and K12. Unlike the relationship between the CAVA Schools and K12, which is memorialized in the charter documents, the circumstance that led all 11 CAVA Schools to contract with the same human resources support and payroll services company was not explained in the record.[28] According to the CSAs and Abston's testimony, Insperity handles all employees' payroll and benefits administration, including reporting

[27] Insperity was formerly known as "Administaff." Thus, some of the CSAs received in evidence were entered into by that named entity.

[28] It is noted, however, that, unlike the EPSAs, none of the CSAs entered in evidence was signed by a Board member. Four of the CSAs entered in evidence were signed by Nancy Hauge. Hauge is identified as "SVP HR" with an address at 2300 Corporate Park Drive, Herndon, VA 20171, K12's corporate office. Another two are signed by Hauge, using the Simi Valley address. Another two are signed by K12-employed Abston, using the Simi Valley address. One is signed by James Konantz, whose title or position is not identified in the CSA but is identified in one of the EPSAs as K12 Vice President of Western Regional School Management, using the Simi Valley address. Two of the CSAs were identified in the record, but never received in evidence.

information to the California State Teacher Retirement System (CalSTRS) and California Public Employees Retirement System (CalPERS).[29] The CSAs also state that Insperity and the CAVA Schools are considered "co-employers" of employees of the Schools. As further discussed below, Insperity also is available to consult with CAVA management when employees need to be disciplined and/or terminated from employment.

In addition to those supplied by K12, the CAVA administrative team also includes individuals employed by CAVA Schools. There is a Human Resources Administrator, Casey Johnen, who is employed by one School but is responsible for preparing payroll for Insperity, issuing teacher contracts and assisting with job offers, all on a CAVA-wide basis.[30] Johnen sends out teacher contracts for all CAVA teachers at the same time every year. After Abston

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[29] Florabelle Ruanto serves as CAVA's statewide CalSTRS Payroll Administrator.

[30] CAVA Exception No. 1 takes issue with the ALJ's finding that human resources support, including Johnen, is "furnish[ed]" by K12. While it is true that Johnen is not employed by K12, Johnen does report to Abston who testified as follows:

> Q . . . Who exactly are you referring to when you say the current California Virtual Academies administrative team? Who is that team comprised of?
>
> A It would be comprised of the administrative team that is allowed for under the service agreement with K12. So that would be included of [sic] the Head of School. It would be the Finance Manager. It would be HR support. It would be clerical back office support, the receptionist, any other that are provided for in that service agreement.
>
> Q And when you say HR support, can you please identify what individuals you're referring to?
>
> A I wouldn't be able to list them all for you, but we've discussed, obviously Casey Johnen would be one of those supports provided <u>for the School</u>.

(R.T., Vol. II, pp. 117-118, emphasis added.)

and the financial department determine the merit increases for CAVA teachers each year, Johnen sends out amendments to teacher contracts to be signed by the teacher and returned to the Simi Valley office. In the Simi Valley office, the amendments are placed in the teachers' personnel files where their signed employment contracts are also maintained.

4. Student Enrollment

As mentioned above, the Schools take students from the county in which the School is chartered or any contiguous county. According to Abston, enrollment documents are processed online "through the enrollment team document processors, either at K12 or K12 employees that are based either in Herndon or California or wherever they're based." (R.T., Vol. II, p. 18.) Abston further testified: "Once they've completed that process, they would be considered to be enrolled at California Virtual Academy and then would be assigned to a teacher there." (R.T., Vol. II, p 18, emphasis added.) There is an Associated Student Body, referred to as CAVA ASB. The purpose is to enable CAVA Schools' High School students to participate in student government on a statewide basis. (R.T., Vol. III, p. 231.)

5 Budgeting, Decision-Making of the Boards, and Billing for Allocated Services

a. Budgeting

The CAVA Schools are funded in the manner customary for most, if not all, public schools in California—i.e., primarily through average daily attendance (ADA) funds provided by the state, local property tax revenues, and federal title monies for specific programs.[31] Each School has a distinct amount of funding available dependent upon, in large part, its own

[31] Funds for Special Education programs are channeled, in part, through the Special Education Local Planning Agency (SELPA) to which each CAVA School belongs. For example, CAVA at Los Angeles belongs to the San Gabriel SELPA. Other local school districts also belong to that SELPA.

student enrollment levels and local fiscal conditions.[32] The amount of ADA money per student that each CAVA School receives, however, is the same.

The CAVA Schools' proposed budgets are typically prepared and presented to the Boards of Directors in a common format by K12 financial officer Galang after local Site Councils for each CAVA School, comprised of parents and teachers, have been afforded an opportunity to provide input. After presentation of the budgets to each Board of Directors, the Boards then vote on and ultimately approve their own budgets. While each CAVA School has its own budget that is approved by its own Board of Directors,[33] Abston testified that fiscal policies and procedures are "the same." (R.T., Vol. II, p. 78.) Abston also testified that CAVA follows the financial calendar of the State of California. (R.T., Vol. V, p. 81.)

b. Decision-Making of the Boards

Meeting minutes from five quarterly meetings of the Boards of Directors for all 11 CAVA Schools held between September 2013 and September 2014 (55 meetings) were

[32] In the PD, this sentence is followed by, "Therefore, each School's Board develops and approves its own budget," to which CTA excepts. We agree with CTA's exception, and therefore do not incorporate this statement into our decision. It is true as CTA asserts that the CAVA financial officer prepares the budget documents for all CAVA Schools. All CAVA Schools use the same auditors, at Abston's recommendation. Abston testified that instead of presenting individual budget items to each CAVA School Board, she seeks approval for "buckets" of money and then she, along with her team, decide how the funds will be spent. (R.T., Vol. I, p. 196.) Abston knows of no instance in which a budget presented to a CAVA School Board had been rejected. Meeting minutes that were received in evidence show that budget-related action items on the agenda are routinely approved by CAVA Schools' Boards with "[n]o questions asked." While the Boards typically are responsible under their bylaws for "[f]inancial development and management" and "[s]etting a framework for the budget process," there is no evidence of that in the record. The Boards appear to exercise little to no independent judgment over fiscal policy and therefore cannot be said to "develop[]" their own budgets.

[33] Each CAVA School also purchases and inventories its own equipment, such as the computers that are issued to employees.

received in evidence.[34] Meetings of the Board of Directors for each CAVA School are held once per quarter by teleconference, with a physical location available at the authorizing school district's offices, so that members of the public wishing to participate by teleconference at a common location may do so. At least two teachers, Danielle Hodge and Stacie Bailey, testified regarding their attempts at attending various meetings of the Boards at the local authorizing school district's offices. Bailey was able to attend meetings of several different Boards, and Hodge was not able to do so because the staff at the authorizing school district in that instance was unaware of the meeting. Members of the public may also request and receive from the CAVA Simi Valley office a phone-in code to participate remotely in the teleconference meetings. The meetings typically last 25 to 40 minutes,[35] and are all scheduled on or around the same dates. A K12 employee is the record keeper of the meetings. Action items on the agenda are stamped "APPROVED" in the Simi Valley office.

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[34] These meetings took place in September 2013, December 2013, March 2014, June 2014, and September 2014. CTA also introduced testimony by one of its employees who examined the meeting minutes and prepared a chart purporting to summarize the School Boards' actions. The chart was received in evidence. During the employee's testimony, he first asserted it was accurate but later admitted to noticing an error. Neither the ALJ nor the Board itself has given his testimony regarding the School Boards' actions, or the summary chart, any evidentiary weight.

[35] Based on the meeting minutes received in evidence, the longest meeting lasted 45 minutes, the shortest lasted five minutes. Using only the longest four meetings for each Board from the five sets of meetings, the average total time spent *per year* by each School Board in meetings conducting Board business was 114.63 minutes, or less than two hours.

The five-minute Board meeting referred to above was a CAVA at Maricopa High School Board meeting held on December 13, 2013. All four members attended. The meeting was called to order by the Board Chair at 2:16 p.m. and adjourned at 2:21 p.m. During the meeting, the Board approved with "[n]o questions asked" the following agenda items: three items under "Business" entitled FY 2012-13 Audit Certification, FY 2013-14 First Interim Budget Update, and FY 2013-14 Education Protection Account Budget; one item under "Personnel" entitled 2013-14 Employment Agreements; one item under "Instruction and Curriculum" entitled Document Retention Policy; and one item under "Pupil Services" entitled Single School District Plan.

According to Abston, the records pertaining to all CAVA Board meetings are maintained at the CAVA Simi Valley office. Meeting agendas are posted online on the CAVA website and physically at the authorizing school district. Abston attends and presents information to the Boards at each meeting.

At the Board meetings, the Board is presented with a list of employees who have resigned or been terminated, with no differentiation between the two. The list is presented to the Board and the Board ratifies the list "as a whole." (R.T., Vol. III, p. 241.) Although Abston testified that the Boards go into closed session to discuss employee terminations, minutes from the 55 meetings of the 11 Boards held over the course of five consecutive quarters show that no Board went into closed session once.[36]

[36] Proposed policies are presented to the CAVA Board in "Board Reports." Board Report # 03, prepared in connection with a June 11, 2014, regularly-scheduled CAVA at Sutter Board meeting was received in evidence. That meeting, which was attended by all four Board members, lasted 28 minutes. In addition to approving the prior meeting's minutes, the Board approved five proposed policies presented in Board Report # 01 (FY 2014-15 Preliminary Budget), Board Report # 03 (2013-14 Employment Agreements), Board Report # 04 (Instruction and Curriculum), Board Report # 05 (Application for Federal Categorical Programs) and Board Report # 06 (Local Control Accountability Plan).

Board Report # 03 was presented by Human Resources Administrator Johnen during the Personnel portion of the meeting, with "[n]o questions asked." The subject of Board Report # 03 is entitled 2013-2014 Employment Agreements. The report proposed that the Board "ratify the following 2013-2014 Employment Agreements." The Background section of the report states that "California Virtual Academy at Sutter offered contracts to teachers to meet the enrollment demands of the 2013-2014 school year." The section that follows is a chart of "New Hires," which contains the name of only one new high school math teacher. That chart is followed by a "Terminations/Resignations" chart, which identifies the first and last name of two employees, their title and their FTE (full-time equivalent) status. The "Terminations/Resignations" chart does not specify whether the employee resigned or was fired. The next section of the report is entitled Budget Implications, and simply states: "Funding for these positions is provided through State apportionment based on Average Daily Attendance as reported by the school." The final section entitled Recommendations states:

> It is recommended the Governing Board:
> 1. Ratify the offered 2013-2014 Employment Agreements

In regard to hiring, all of the Schools use the same employment contracts that set forth identical employment terms for teaching positions at the same grade levels. These contracts all state that employees will report to the Head of Schools (Abston), and that employment is at-will. The contracts for all CAVA teachers are signed by the Head of Schools (Abston) as "agent for the [School's] Board of Directors." The employment contracts further state that an employee's at-will status cannot be altered without written confirmation by the Head of Schools that the parties desire to amend the contract, and notes: "The [Head of Schools] does not have authority to alter or amend this Agreement without the approval of the Board."

Abston testified that Board ratification is required for a hiring to be "official," but a hiring decision becomes effective when communicated to the successful candidate by CAVA

> 2. Authorize CAVA Head of School to sign the 2013-2014 Employment Agreements on behalf of California Virtual Academy at Sutter

(Petitioner's Exh. 149.)

During the Personnel portion of the meeting, the Board approved the 2014-2015 Employment Agreements and the 2014-2015 Salary Schedule. The Board did not go into closed session. There is no indication that the Board approved any terminations.

In addition, Employer's Exhibits D1-D11, as discussed in footnote 25, *ante*, are binders containing 10 tabs housing various documents relating to the structure and organization of the 11 CAVA Schools, one binder per School. Tab 8 in each binder is identified in the table of contents as "Board Minutes Ratifying Terms/Hires." Nine of the 11 binders contain no Tab 8 documents. The Tab 8 documents for CAVA at Kings include Board Report # 03 for a regularly-scheduled meeting on September 9, 2014, containing a "Terminations/Resignations" chart like the one described above. There are eight employees listed on that chart, again with no distinction between those who resigned and those who were fired. The meeting minutes state that no closed session was held and contain no indication that the Board approved any terminations. Similarly, the Tab 8 documents for CAVA at Los Angeles include what appears to be one page of a Board Report for a regularly-scheduled meeting on September 12, 2014, containing a "Terminations/Resignations" chart like the ones described above. There are 32 employees listed on that chart, again with no distinction between those who resigned and those who were fired. And, again, the meeting minutes state that no closed session was held and contain no indication that the Board approved any terminations.

management, not when the Board approves the hiring decision at the next regularly-scheduled Board meeting. As Abston testified:

> Q All right. Is the employee – Is the teacher considered hired without Board approval?
>
> A They would start, yes, correct.

(R.T., Vol. IV, p. 204.)

Proposed policies, be they regarding employees or students, were often, but not always, presented to each School's Board at the same time. As one example, the meetings from March 2014 show that the Boards of CAVA at Los Angeles and CAVA at Fresno considered and approved an "Action Plan for Implementation of the Common Core State Standards." This same proposal was tabled at CAVA at Jamestown, but was not presented at that time to any of the other Boards.[37] Based on review of the minutes from all 55 meetings during this time period, it appears that whether or not action items were presented to the Boards at the same time, eventually all of the same,[38] or at least similar, items were presented to each School's Board.[39]

There was marked similarity in the approval rate of common agenda items by the individual Boards. For example, over the course of these 55 meetings, only one item that was

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[37] One likely reason that the Boards were not all presented with Common Core funding proposals at the same time is because of the variances in each School's budget for those and other federal categorical funds.

[38] A set of Board Reports containing proposed policies on sexual harassment was entered in evidence. The proposals were presented to the Boards at around the same time between December 10 and 12, 2014, and were identically numbered and identified as "Board Report # 05" across all Boards.

[39] An example of similar proposals occurred during the December 2013 meetings. Under the category "Pupil Services," some Schools approved a proposal entitled "Single Plan for Student Achievement," and others approved a proposal entitled "Single School District Plan." Abston explained regarding these types of proposals that the specific demographics of a particular School dictate what is presented to the Boards as an action item.

presented to all of the Boards was rejected by one School's Board. The rejected proposed policy was over Kindergarten Early Admittance. It was rejected by CAVA at San Joaquin and accepted by all of the other Schools that considered it.[40] Abston could only recall three instances of rejection of proposed agenda items by any of the Boards, with the Kindergarten Early Admittance policy being one of those three. The other two rejected items were a proposal for a field trip applicable to only one School and for a variance in an individual student's course work also applicable to only one School. As relevant here, all of the Boards approved the same certificated salary schedule.

c. Billing for Allocated Services

Teachers sign employment contracts with one CAVA School, but can and do perform services at their appropriate grade levels for any of the CAVA Schools. They are evaluated based on the services they perform for all CAVA Schools, not just for the one with which they have an employment contract. Abston explained that the sharing of teachers by the Schools is done to contain costs, and that a smaller School, like CAVA at Jamestown, is more likely to need assistance from teachers with employment contracts elsewhere. In fact, it appears the norm[41] for CAVA Schools' teachers to have students from multiple Schools, rather than to have assigned students only from the CAVA School with which they have an employment

[40] As this proposed policy pertained to only Kindergarten, it had no applicability and therefore was not presented for consideration to the CAVA High School at Maricopa Board.

[41] In CAVA Exception No. 2, CAVA takes issue with the ALJ's characterization of teacher-sharing amongst CAVA Schools as "the norm." In support of this exception, CAVA Schools asserts that CAVA Schools' teachers at each grade level are responsible for a home room group of students that predominately consist of students enrolled by the CAVA School holding the teacher's contract. Those same teachers, however, have other teaching responsibilities ("caseload") besides homeroom. Moreover, CAVA Schools admits that more than half of all CAVA teachers teach at two CAVA Schools. Whether characterized as the norm or in some other similar way, it is not uncommon for teachers to have employment contracts with one CAVA School while providing services to multiple Schools within the CAVA system.

contract. None of the teachers who testified taught students enrolled only at the CAVA School with which they had an employment contract. Rather, they all taught students enrolled at various Schools throughout the state.

Abston testified that it is the "goal" to hire locally at all levels, especially for Elementary Education level teachers who are required to hold more in-person meetings with students and parents than are teachers in the upper grades. The practice of sharing employees among the Schools becomes most common at the High School level where it is quite difficult in some subjects, such as Physics, for instance, to recruit and hire qualified teachers. Thus, for Physics, there is only one teacher that serves all CAVA students in the state.

Each School is billed proportionally for teacher services based on the percentage of students that a teacher is assigned from that particular School.[42] For example, in the case of

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[42] The proportional billing practice is described in the record as follows:

> Q Any idea? Okay. So just to clarify, so the High School allocation chart that we just finished, those percentages that we went and discussed across the line, and Ms. Shilen as a fine example, is it your testimony that each one of those Charter Schools pay proportionately for her salary?
>
> A Are billed proportionately?
>
> Q Yes. Are billed proportionately to pay for her salary?
>
> A Based on their class size or their class, their students, correct.
>
> Q All right. So again, not to be dense here, but even though she gets a paycheck that says Sutter, all of the Schools in which she has students end up being billed proportionately based on the number of students she has to go towards the paycheck.
>
> A Correct.

(R.T., Vol. I, pp. 177-178.)

teacher Nancy Neal, which was discussed during Abston's testimony, if 2 percent of her students are enrolled at CAVA at Jamestown, then CAVA at Jamestown is billed and pays for 2 percent of Neal's salary. This is so even though CAVA at Jamestown does not hold her employment contract. Other Schools are similarly billed proportionally for their students who are being taught by Neal, so that funds from multiple Schools contribute to her salary. This proportional billing for teacher services is the standard practice across the CAVA system.

Once per month, Abston reviews allocation reports or charts that purportedly show each teacher's percentage of students from each School. Department directors, who are employed by individual CAVA Schools,[43] are responsible for preparing them. Allocation charts from September 2014 were received in evidence showing student distributions per teacher for K-8, High School, Special Education, and Intervention.[44] The Boards are not furnished with copies

[43] The role of department directors within the management structure is discussed at page 38, *post.*

[44] The allocation charts introduced in the record were furnished to employees by Human Resources Administrator Johnen. The employees who received them were working as members of a committee formed to prepare for the Schools' accreditation review process. That process is discussed in the section that follows.

In CAVA Exception No. 3, CAVA excepts to a finding, based on the allocation chart for grades Kindergarten through 8 for the month of September 2014, that more than half of the Elementary Education and Middle School teachers were assigned to teach students in multiple Schools. CAVA is correct that this allocation chart identifies 198 out of 225 employees as "teachers" and that, of the 198 teachers, 132 of them (more than half) received paychecks that were funded entirely by one School. It should also be noted, however, that there are 27 other employees identified on the chart in classifications other than "teacher" including: Attendance Coordinator, Director of Community [Day], Director of Attendance, Lead Teacher, Academic Administrator, Family Support Coordinator, Director of Middle School, Regional Program Coordinator (RPC), Regional Lead Teacher (RLT), New Teacher Mentor, Curriculum Specialist and Student Demographic. Of the 27 employees so listed, multiple Schools were billed for the services of all but one RLT and one New Teacher Mentor.

of the allocation charts. Abston testified that a teacher's highest allocation of students is supposed to determine the School that issues the employment contract, and that "teachers will be issued a new School depending on where the students fall versus ending employment with a teacher and hiring someone over there. We can reassign them to a new School." (R.T., Vol. I, p. 165.) Thus, if student enrollment changes at the School where a teacher has an employment contract to a level that no longer justifies the teacher's employment contract being at that School, his or her employment contract can apparently be re-issued by another CAVA School. This is evidently deemed preferable to having to lay off or fire an employee and rehire them elsewhere in the CAVA system.

It is not clear that the Special Education and/or Intervention allocation charts entirely reflect teachers' distribution of students per School. High School math intervention teacher Kelly Walters testified that upon reviewing the allocation chart that was received in evidence regarding her department, she was surprised to learn that it showed 100 percent of her student allocation belonging to CAVA at San Diego during September 2014. According to Abston's testimony regarding the purpose of the allocation charts, CAVA at San Diego should have been responsible for paying 100 percent of Walters's salary. It was unrefuted, however, that during the fall of 2014, Walters had students from CAVA at Los Angeles, CAVA High School at Maricopa, CAVA at San Joaquin, CAVA at San Mateo, CAVA at San Diego, CAVA at Sonoma, CAVA at Kings, and CAVA at Jamestown. Given this student distribution, it was not explained during the hearing why the allocation chart from the same time period showed Walters servicing 100 percent of students from CAVA at San Diego. Special Education teacher Hodge testified similarly about the inaccuracy of her student distribution on the relevant allocation chart.

Schools are also separately billed for and pay for required teacher professional development. When teachers must travel to regional or statewide meetings, all Schools are billed proportionally for teachers' travel expenses. The Schools pay these expenses out of their individual budgets set aside for professional development. At least one professional development meeting for management discussed during Abston's testimony was paid for entirely by one School. Abston explained that the reason for this was because the School received services from all of those management employees or at least received common benefits.

6. Accreditation and Reporting

a. Accreditation

The Schools' academic programs are individually accredited by the Western Association of Schools and Colleges (WASC). In 2014, the Schools prepared a lengthy, written "self-study" as part of the WASC review process. That year, all of the Schools prepared a combined self-study report in one document. Teachers and administrators across the CAVA system worked together in committees assigned to report on specific areas of the review process. In previous review cycles by WASC, each School prepared its own self-study report. Abston explained that this change was initiated by WASC officials to cut costs and time, and the Schools agreed with that objective.[45]

[45] On January 4, 2013, Dr. Lee Duncan, WASC's Associate Executive Director, sent Abston a message by e-mail regarding the WASC accreditation plan, which was received in evidence. It states:

> All nine academies went through separate initial visits and full accreditation visits in November 2009. They were treated as separate schools because they had separate CDS #s. Because the schools were all directed from one site in Simi Valley, a team of

b. Reporting

Once per year, each School must individually submit data to the DOE about the condition and performance of the School through a report called the School Accountability Report Card (SARC). Thus, 11 SARCs are submitted each year, one for each of the CAVA Schools. All 11 are prepared by Laura Terrazas, CAVA's Dean of Student Services. The SARC is filed under a School's unique CDS code and tracks, among other things, the School's academic progress, student enrollment and demographics, standardized testing results, and financial and employee data.

Abston is referred to on each SARC as the "superintendent" of the School, even though that is not her official title. This nomenclature is consistent with the Schools' charter documents that note that the Head of Schools performs duties consistent with that of a public school superintendent. The physical address, e-mail address and phone number for each School is the same on all 11 SARCs. The District contact information for each School, including the phone number and the website, is the same, and the District for each School is identified as "California Virtual Academies" on all 11 SARCs. The School Description and

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> 10 WASC educators was gathered to perform 9 separate accreditation visits on the same site at the same time.
>
> [¶ …¶]
>
> Even though there are nine different chartering districts, the school operates as one school, with one administration, one curriculum, one instructional program, and one assessment process.

On cross-examination, Abston disagreed with Dr. Duncan's statement that the Schools are directed from one site. She countered that there are no instructional programs that occur at that site, i.e., the Simi Valley office. She also disagreed with the statement that the Schools operate as one with one administration. While we have not relied on the statements in the above-quoted e-mail message in reaching our conclusion, we observe that WASC and PERB view CAVA Schools similarly, as presenting as a single entity from an administrative and operational standpoint.

Mission Statement, containing information about the school, programs and goals, is the same on all 11 SARCs as are the sections on parental involvement, curriculum and instructional materials, and instructional planning and scheduling. Each of the 11 SARCs describes school facilities as follows: "CAVA is a non-site based facility," rather than referring to an individually-named CAVA School. The sections of the SARC that differ from School to School, generally speaking, pertain to student matters, such as standardized testing and student performance results, academic performance index growth and student enrollment and class size.

For Special Education, each School has multiple reporting requirements that are submitted to the state by the Schools through the SELPAs to which they belong.

7. Management Structure

a. Chain of Command

All 11 Schools have a common, CAVA-wide management structure that is organized by content divisions and grades as follows: General Education (High School Department, Middle School Department, and Elementary Education Department), and Special Education (K-8 and High School).[46]

[46] There was some reorganization within both General and Special Education programs during the year preceding the formal hearing. These changes were accomplished without the approval or involvement of Abston or the Boards, and were initiated by department directors and/or coordinators, whose roles are discussed further below. What is described here is the current organizational structure. The record contains somewhat more detailed information regarding the organization of the General Education program than it does for Special Education.

Abston, who, as a reminder, is a K12 employee, is the person to whom every employee across all divisions of every CAVA School ultimately reports.[47] Abston is the only K12 employee who is included in the management chain of command for the Schools. Abston signs employment contracts for all CAVA teachers. Abston and the financial department

[47] In CAVA Exception No. 4, CAVA disputes that Abston is "the only person" to whom every CAVA School employee ultimately reports, citing examples of "decisionmaker[s]" below her in the chain of command. The ALJ did not find that Abston is "the only person" to whom CAVA Schools' employees report, or the only decision-maker in the chain of command. While managers and supervisors below Abston in the chain of command have decision-making authority over certain personnel and other matters, Abston is nonetheless at the top of the *reporting* hierarchy. Teachers, the lowest in the chain of command, sign employment contracts, which state:

> II. DUTIES, RESPONSIBILITES AND QUALIFICATIONS
>
> A. Reporting. Employee shall report to the Head of School ("HOS") or designee and will perform the duties set forth in this Agreement and such other duties as may be assigned from time to time by the HOS or designee. The HOS maintains the discretion to take all necessary employment actions.

CAVA Schools interposes a similar exception in CAVA Exception No. 5, asserting that each CAVA School is "managed" and "govern[ed]" not by Abston, but by its own Board of Directors pursuant to charter documents, bylaws, employment contracts and service agreements. In determining that, as a matter of law, there is a single employer relationship between CAVA Schools and the employees in the petitioned-for bargaining unit, there is ample evidence that CAVA Schools operate in a centrally managed way, rather than independently and autonomously, as suggested by statements and recitals in the documents relied on by CAVA. CAVA Exception Nos. 7 and 8 are rejected for the same reason.

CAVA Exception No. 6 is similar. It excepts to the ALJ's finding that "*some* kind of centralized control" over labor relations "may be presumed" given that all CAVA Schools have adopted the exact same terms and conditions of employment. CAVA mischaracterizes the PD. After observing the unbroken chain of uniformity in employment conditions across all CAVA Schools, the ALJ stated: "If there were not *some* kind of centralized control, one would expect to see some variance in employment terms between the Schools. But there is none." (PD, p. 62, emphasis in the original.) This statement is neither ambiguous nor unsupported by the evidence, as CAVA asserts.

determine the merit increases for all CAVA teachers each year based on the scores they received from their evaluators.

For the General Education program, April Warren is the "Academic Administrator" for all 11 Schools.[48] Warren reports directly to Abston. Warren did not testify, but Abston described her as being responsible for analyzing the "[e]valuation of scores for each School . . . [¶] . . . and disaggregation . . . [¶] . . . of scores" but clarified she was not responsible for overseeing curriculum. (R.T., Vol. I, p. 42.) The scores that Warren evaluates were not further described in the record nor were her other duties described in great detail.[49] Warren has an employment contract with CAVA at San Diego.

Directly reporting to Warren are the two Directors of High School, Cathy Andrew and Mina Arnold; the Director of Middle School, Deanna Haynie; and the Director of Elementary Education, Amy Maxwell. These directors have employment contracts with particular Schools, but provide services to all of them as applicable to the grade-level offerings at each School. Directors are generally responsible for overseeing the academic program covering all staff and students. Within each department, several RPCs report to the appropriate directors of their departments. As discussed in more detail below, RPCs have wide discretion to make hiring and firing decisions. RPCs also determine teachers' assignments to regional teams, which in turn determine lines of supervision. RPCs assign students to teachers for homerooms and content areas. RPCs are required to attend several Board meetings per year. RPCs, like

[48] Warren also has some oversight responsibility over Special Education programs, but as discussed below, Special Education has a distinct chain of command from General Education.

[49] In December 2014, Warren presented a new "Parent-Student Handbook" to the Boards for approval and she was also involved in drafting the 2014 WASC self-study report.

other management employees (except Abston) and teachers, have employment contracts with a particular School. RLTs report to RPCs. Teachers report directly to RLTs.

The titles of positions in the Special Education program differ from those discussed above. For the Special Education program, statewide Dean of Students Terrazas, is the lead administrator for all 11 Schools. Terrazas reports to Abston, and also has some reporting responsibilities to Warren. Abston described Tearrazas's reporting requirement to Warren as a "dotted line," but the specifics were not explained. Reporting to Terrazas are two Directors of Special Education (K-8 and High School) and a Director of Categorical Programs. Program Specialists report to the Directors of Special Education, and Regional Education Specialists report to Program Specialists. Special Education teachers report to Regional Education Specialists. Reporting to the Director of Categorical Programs is the Coordinator of Intervention. Intervention Lead Teachers report to the Coordinator of Intervention. Intervention Teachers report to Intervention Lead Teachers. All of the Special Education management and supervisory employees, again except Abston, are employed by particular Schools.

b. Regional Campus Organization, the Community Day Program, and Teachers' Supervision

The CAVA statewide Elementary Education Department, headed by Director Maxwell, is organized into North, Central, and South Campuses. Each Campus consists of multiple Schools that are in close regional proximity to one another and has one RPC overseeing its operations. Four RLTs report to the RPC assigned to North Campus, and five RLTs report to each of the RPCs assigned to Central and South Campuses.

The CAVA statewide Middle School Department, headed by Director Haynie, is similarly organized into North, Central, and South Campuses. Each Campus has one RPC, with four RLTs reporting to each RPC.

The CAVA statewide High School Department, headed by Directors Andrew and Arnold, is organized into four regional Campuses. "Campus 1" includes CAVA at Sonoma, CAVA at San Mateo, and CAVA at San Joaquin. "Campus 2" includes CAVA at Jamestown, CAVA at Kings, and CAVA High School at Maricopa. "Campus 3" consists of CAVA at Los Angeles, and "Campus 4" consists of CAVA at San Diego. Director Arnold oversees Campuses 1 and 3, and Director Andrew oversees Campuses 2 and 4. Each Campus has one RPC with three RLTs reporting to each RPC. The High School Department also has four Curriculum Specialists and two Teachers of Training and Support that provide oversight and assistance for all campuses. Approximately eight Guidance Counselors serve all CAVA High School students in the state.

The Community Day program provides an option for CAVA students to meet in-person, once per week, with other CAVA students and a teacher, and to have the remainder of their instruction provided online. Leah Fellows is the Director of Community Day. Three RLTs report directly to Fellows. Bailey, employed by CAVA High School at Maricopa, was formerly an RPC and is currently a Community Day teacher.[50] Bailey's content area specialization is science. She testified that there are approximately 15 sites throughout the state hosting Community Day students, and that all sites accommodate at least K-8 students. Bailey's Community Day site is located in Redlands and includes High School students. Students are grouped into classrooms by grade level as follows: K-1; 2-3; 4-5; 6-8; and 9-12.

[50] Bailey was an RPC for several years. In late October 2014, Bailey decided to voluntarily demote from a management position to a teaching position.

Her students are split between those from CAVA High School at Maricopa (two-thirds) and CAVA at San Diego (one-third). Students come to the Redlands location on Tuesdays and Thursdays.

The regional Campus organization described above typically, but not always, determines the lines of supervision for teachers based on the campus to which the teacher's contract-holding School is assigned. The Schools' common management teams have the ability to assign a teacher to report to a different RPC and/or RLT than would be determined by the teacher's contract-holding School's campus placement. While reviewing a document (Petitioner's Exh. 5) showing the High School Department's regional campus structure, and trying to determine from the document to whom teacher Jennifer Shilen would report, Abston described the inherent flexibility in the process of determining supervision:

> Q Okay. So at least based on P-5, and I really don't mean to confuse things. I really am trying to understand, because I'm fairly new to this as well. But looking at P-5, if I understand how CAVA functions, Jennifer Shilen is -- has a contract out of Sutter. According to P-5, Sutter is Campus Two, correct, a Campus Two assignment?
>
> A Correct.
>
> Q Okay. So according to the High School structure, Jennifer Shilen should be supervised by [one of the Campus Two RLTs,] either Francine Bailey, Loretta Gilbert, or Nick Stecken, correct?
>
> A If it was based on the students, correct. This is not a Board-adopted document or anything. So again, there's complete autonomy within what is going on here for them to do what best suits the students.
>
> Q Them who?
>
> A The teachers, the administrators, the RLTs, the RPCs. I'm not going to tell them, like, I'm sorry, you have a

> contract from here, you must be here. It's going to be the best suited for what's needed for those students.
>
> Q Okay. So what you're telling me, and I think we're getting somewhere, what you're telling me is that P-5 may not actually be correct with respect to matching up teacher assignment to a campus.
>
> A I think that's what I just said, yes.

(R.T., Vol. I, pp. 168-169.)

Because each teacher, supervisor, and manager (except Abston) holds an employment contract with a particular CAVA School, it is often the case that the RLT and RPC to whom a teacher reports has an employment contract with a different School than the teacher. Especially in smaller Schools, according to Abston, it would be "fiscally irresponsible" for them to hire all of the positions that are needed to offer the instructional program, "so they share services just like small districts outside of our schools share services all the time." (R.T., Vol. IV, p. 208.) Teachers in smaller Schools will also have assigned homeroom students outside of their geographic area and contract School because otherwise they may be considered part-time. For example, there is only one Middle School teacher holding an employment contract with CAVA at Jamestown because there are only 15 Middle School students enrolled at that School, which is under the minimum threshold required for full-time employment. Thus, the Middle School teacher there takes homeroom students from CAVA at San Joaquin and CAVA at Jamestown to maintain full-time status.

Terms and Conditions of Employment for Teachers

At the time of the formal hearing, the CAVA Schools collectively employed approximately 700 teachers. The shared employment conditions of all CAVA teachers statewide as discussed below are essentially undisputed.

1. Hiring

Teachers desiring to work at a CAVA School complete an online application through the website EdJoin. Some CAVA job postings advertised on EdJoin denote a specific School at which there is a vacancy, while most others do not indicate a specific school. Teacher Shilen testified that when she applied for employment in the CAVA system she was not aware that she was to be employed by a particular School, or that multiple Schools existed. Rather, she believed that she was applying to work for CAVA in general. The only requirements she remembered were that applicants for CAVA teaching positions be appropriately credentialed and live in California. She later learned that she had been hired by CAVA at Sutter when she received her employment contract and pay checks. In September 2014, only 1.53 percent of Shilen's students were enrolled at CAVA at Sutter. Similarly, Special Education teacher Hodge testified she only learned that she was employed by CAVA at San Joaquin when the authorizing school district holding the School's charter changed. Hodge did not believe that her initial employment contract stated it was between her and a particular School. Hodge's initial employment contract was not introduced in the record.

Abston explained why some EdJoin job postings list a specific CAVA School and some do not as follows. If it is a larger school (like CAVA at Los Angeles or CAVA at San Diego, for example) that can afford a full-time staff person or if there is a specialty program within a School, then the posting would specify it was for that School. Otherwise, the teacher applicant goes into a "candidate pool to service one of the [CAVA Schools] or one of the other K12 managed schools." (R.T., Vol. IV, p. 202.) A teacher candidate's placement in an eligibility pool is largely based upon the county in which the candidate resides. Middle School Director Haynie testified that once a candidate had been selected, "[w]e ask[ed] that they be placed in a

particular school depending on where they live and the need of the students in that area." (R.T., Vol. III, pp. 114-115.)

Bailey testified to her experience regarding hiring decisions when she served as an RPC. The RPCs and department directors determine, based on student enrollment, when a teacher needs to be hired. Sometimes RLTs consult in this process as well. The School's Board did not have to pre-approve an RPC's recommendation to create a job posting. From EdJoin applications, Insperity created a spreadsheet of eligible candidates categorized by subject matter. If Bailey needed to hire a math teacher, she could view all of the candidates who were qualified to teach math, and then select those candidates from the list that she wanted to interview. Bailey would typically ask an RLT to sit in on interviews of the candidates. After Bailey made a decision to hire one of the interviewed candidates, she would notify Insperity and Human Resources Administrator Johnen to process and complete the new employee's paperwork. Johnen extends written job offers on behalf of an RPC, but Johnen herself does not participate in the hiring decision-making process. A School's Board approves the RPC's hiring decision after an employee has been hired and already has started working. As discussed previously, all 11 Schools utilize the same employment contract for teachers, with the only differences being found in the rate of pay based on experience level and in the duty statements by grade level and content area. Returning teachers must sign a new contract every year. Johnen handles that process for all CAVA Schools' teachers.

2. Pay and Benefits

There is one certificated salary scale that has been adopted by the Boards of all 11 Schools. The levels of teachers' health and welfare benefits were not specifically described in

the record, but the identical employee contracts used by all Schools describe the benefits offered to teachers by the Schools in the same terms.

3. Work Year and Hours

There is a common academic calendar for all 11 Schools, which determines, uniformly, the number of days per year teachers are expected to work. Hours of work for all teachers are 8:30 a.m. to 4:00 p.m., Monday through Friday. When a teacher needs to be absent from work, they use a "Sub Tool Kit" to alert CAVA's Human Resources department, which then arranges a substitute teacher. Holidays are uniformly set forth in the common employment agreements utilized by all of the Schools.

4. Equipment and Technology, Employment Handbooks and Forms

All teachers are issued a computer that is paid for by the School issuing their employment contract. There is one online technology support contact statewide: westhelp@k12.com, and one technology support manual. Real-time virtual meetings and instructional sessions are accomplished using "Blackboard Collaborate" software. "SharePoint" is a website that all teachers may access to view information regarding employment policies and procedures, training, required forms and notifications from Human Resources, and some student records. All employment-related forms, such as the form for requesting time off, are the same across the Schools.

All teachers are issued a common employee handbook, compiled by Insperity, which instructs employees regarding policies and procedures. All employment policies and procedures are the same in all Schools. Receipt of the handbook must be acknowledged in writing by employees. The handbook notes that only the Head of Schools or an Insperity

officer has the authority to change an employee's at-will status or enter into employment agreements for specified time periods.

5. Duties

a. Staff Meetings/Professional Development

A series of mandatory, online staff meetings are customarily held every Monday for all teachers. Typically, one of these meetings per month is an all-staff meeting by department. The all-staff meeting can be run by Directors, RPCs, and/or RLTs, working in conjunction with each other. There are more frequent regional meetings with an RLT and teachers assigned to the RLT.[51] Approximately once per month, Curriculum Specialists conduct a content meeting for teachers. During periods of standardized state testing, teachers meet within their regional teams to prepare.

Teachers are also periodically required to attend, in-person, Professional Development meetings/trainings. In 2013, for the first time, all CAVA teachers gathered together in one location for a Professional Development meeting. In 2014, all teachers participated in separate regional Professional Development meetings at the beginning of the school year. When the Schools are preparing for mandatory state testing periods, teachers are required to attend virtual and in-person meetings by Departments and regions.

b. Homeroom Attendance Records

Student attendance is calculated separately per School. All teachers who have a "caseload" (i.e., students for whom they are responsible for providing instruction) are required to submit weekly attendance reports. All teachers, whether employed in the General or Special

[51] The discussion here pertains to the General Education program, but Special Education teacher Hodge also testified to equivalent meeting requirements within the Special Education program.

Education programs, have assigned Homeroom students. Teachers only need to take attendance for their Homeroom students.

c. Instruction

Abston testified that there is little direct, day-to-day supervision regarding the manner in which teachers determine to deliver instruction to their students. All CAVA teachers use the same K12 curriculum. Teachers have academic freedom to supplement the K12 curriculum as they see fit. Certain number of hours of live (real-time), virtual instruction are required to be provided per day. Even when not performing periods of live instruction, a teacher is nonetheless required to be available for professional duties during the contract hours of 8:30 a.m. to 4:00 p.m., Monday through Friday. All teachers are required to hold Individualized Learning Plan conferences at the beginning of each school year with their students to discuss and plan academic goals.

d. In-person Meetings with Students and Parents

Teachers are required to meet, from time-to-time, with their students and/or with parents.[52] All teachers are also required to be physically present with students during periods of state standardized testing. For this reason, CAVA administrators try to assign teachers to students that are located within close geographic proximity to each other. The frequency with which teachers are required to hold in-person meetings varies widely based on grade-level, and also by the specific needs of students. For example, there was testimony that teachers at the Elementary Education level are required to meet in-person with students four times per year, but there have been more frequent in-person meetings, even weekly, where a particular student required it. Middle School teachers are required to meet in-person with students three times

[52] This discussion does not apply to the Community Day program, which, as previously stated, has unique in-person components.

per year. High School teacher Cara Bryant testified that she only meets in-person with students during state testing periods. Abston testified that High School teachers are expected to hold outings with students and their families, but not all do. High School teachers are asked to attend any one of five graduation ceremonies held across the state. In-person meeting requirements are suspended and a "remote" teacher is assigned if there are no qualified teaching candidates that can be hired within a close distance to students in a particular area.

e. Submitting Grades and Access to Students' Records

Semester grades are submitted at the same time by teachers across all Schools. Some of the information in the record regarding teachers' ability to access student records, including grades, was slightly inconsistent. According to Bryant, through SharePoint, teachers can view student enrollment data, including student identification numbers, personal contact information, and class assignments for all Schools in the CAVA system, but teachers' access to grades is usually limited to their own students. According to Bailey, however, teachers can also view student grade information for any of the other teachers assigned to their own RLT. Bailey had some responsibility in the year preceding the hearing for setting access level permissions in SharePoint. Special Education teacher Hodge testified that she has access to the grades of every Special Education student statewide, even for those students over whom she does not have any responsibility.

6. Performance Evaluations

Elementary Director Maxwell, Middle School Director Haynie, and Bailey, because of her experience as a former-RPC in the High School Department, all testified regarding the process of evaluating teachers' performance. First, a teacher completes a self-evaluation, including recording a video segment of live instruction and providing a lesson plan for that

instruction session, self-rating their overall performance (including the video segment), and summarizing student data. The teacher's RLT then rates the teacher's self-evaluation video segment. An RPC, or in some cases, a Curriculum Specialist, completes the final evaluation rating after receiving the teacher's self-evaluation and the scores from the RLT. RPCs decide whether to assign Curriculum Specialists' evaluation duties. According to Haynie, an RPC's evaluation of a teacher is final and those ratings are not disturbed by Department Directors. Maxwell confirmed the formal evaluation process described above, but added that teachers are also informally evaluated throughout the year including observations and feedback by RLTs, RPCs, Curriculum Specialists, or Directors. All of the forms and protocols used in evaluations are the same for the Elementary Education, Middle School, and High School departments.[53] The teacher evaluation process is the same across Schools within each department.

7. Discipline/Firing

Bailey testified that when she was an RPC, teacher misconduct usually first came to her attention through an RLT. She and the RLT then conducted an investigation as warranted by the situation. Progressive discipline was always issued unless the conduct was something particularly egregious. She would consult with Insperity if she was unsure of what level of discipline was appropriate. Insperity would then advise her, but she made the final call in that regard. As an example of this, Bailey believed in one instance that a teacher should receive a written warning, where Insperity was recommending only a verbal warning. Insperity deferred to her judgment and Bailey issued written discipline to the teacher. Haynie also testified

[53] The evaluation process for Special Education was not specifically described in the record.

regarding the discipline process, and confirmed that RPCs are the initial decision-makers regarding employee discipline matters and that they may consult with her and Insperity over the process as needed. Haynie said that RLTs do not make discipline decisions. There is also no evidence in the record that Abston was ever a decision-maker in a teacher termination or disciplinary case, although she did testify to participating in phone calls delivering news to employees that their employment was terminated.

Bailey personally terminated the employment of around four or five teachers during her time as an RPC. In a specific case discussed during the formal hearing, she communicated the termination decision to the teacher in a conference call with Insperity and CAVA's Human Resources Administrator Johnen also participating. For the first year or two that Bailey was an RPC, Johnen was the one who actually delivered the termination news, but during her final year in the position she was informed that RPCs had to take over that responsibility. That directive was discussed during a weekly RPC/Director teleconference. Bailey understood that employees were terminated from employment as of the date of the phone call informing them of the decision. Fired employees ceased providing services to the Schools, received their final paychecks, were paid out any leave balances, and had to return their computers and all other School-issued equipment at that time. Bailey also understood based on her attendance at Board meetings that the School's Board ultimately ratified the termination decision after-the-fact. There is no appeal process for employment termination across all CAVA Schools.

Because of the degree of shared services among all of the Schools, including the common management teams by department, Abston admitted during discussion of a hypothetical scenario that the School's Board holding a teacher's employment contract can take action to approve an employment termination decision even though none of the

circumstances surrounding the termination involve the services provided by that teacher to that particular school. The hypothetical supposed that teacher Shilen, who is an employee of CAVA at Sutter, was accused of misconduct involving one of her students from CAVA at Kings. The hypothetical further presumed that Shilen's RLT (who holds an employment contract with CAVA at Sonoma) discovered the misconduct and reported it to Shilen's RPC (who holds an employment contract with CAVA at San Diego). Abston confirmed that under this scenario, if it was determined that employment termination was warranted, only the CAVA at Sutter Board would take action to ultimately approve the termination decision. The CAVA at Kings Board would have no role or input, despite that the alleged misconduct involved one of its students. (See R.T., Vol. II, pp. 33-41.) Incidentally, while the alleged misconduct was entirely fictional, the employment status of Shilen and those to whom she reports is the same in reality as it was posed in the hypothetical.

DISCUSSION

Before reaching the representation issue of whether the petitioned-for bargaining unit is appropriate, we must first decide the threshold issue whether the 11 CAVA Schools operate as part of a single integrated enterprise, as CTA posits, or as 11 legally separate entities governed by their own local governing bodies, as CAVA posits. CTA argues that the single employer doctrine applies because CAVA Schools share a common management structure with Abston at the top of the hierarchy, the operations of the Schools are functionally integrated and the terms and conditions of employment are uniform and centrally controlled.[54] CAVA argues that the single employer doctrine does not apply because each CAVA School is locally

[54] All but the first of CTA's eight exceptions concern the ALJ's rejection of CTA's single employer analysis. CTA Exception No. 1 is addressed in footnote 32, *ante*. Because we agree that the single employer doctrine applies, we need not describe or address the remainder of CTA's exceptions.

controlled by an autonomous Board of Directors as reflected in the charter documents, bylaws and contract documents, and disagrees that the factors required for establishing single employer status have been met.

Preliminarily, we clear from our path two main side issues that were raised before, and addressed by, the ALJ concerning the burden of proof and the Charter School Act.[55]

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[55] In the category of other side issues, CAVA Schools argue that CTA's petition for recognition by "California Virtual Academies" is deficient on its face, and should be dismissed, because "California Virtual Academies" does not meet the definition of a legally recognized employer under EERA. As the ALJ found, CTA named the "Academies" in the petition, which reasonably can be read to encompass the network of the 11 Schools, each of which falls within EERA's definition of employer. (PD, p. 40, fn. 41; EERA, § 3540.1, subd. (k) ["'Public school employer' or 'employer' means . . . a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code."].) CAVA Schools, through its counsel of record, responded to CTA's petition for recognition expressly on behalf of all 11 Schools. There appears to be no confusion concerning the identity of the "eleven employers [CTA] sought to organize." (CAVA Schools Opening Brief, p. 16.)

CAVA Schools also argue that CTA "improperly seeks to enmesh a private company and its employees in the Board's processes" by naming K12-employed Abston in the petition rather than CAVA School Board members. CAVA Schools warn, "[a]ssertion of jurisdiction over non-public entities is to be carefully avoided by the Board." (CAVA Schools Opening Brief, pp. 15-16.) Abston is named on the petition as "Employer's agent to be contacted," not as employer. Our jurisdiction over this matter is a non-issue. As the ALJ found:

> There is no question that Abston is an agent of all of the Schools, as the record is replete with evidence that she possesses both actual and/or apparent authority to act on the Schools' behalf, *e.g.*, she executes employment contracts for the Schools and was the authorized representative on each of the Schools' charter documents. The test for agency was recently framed by PERB this way: "in *Compton Unified School District* (2003) PERB Decision No. 1518, the Board described the test as 'whether the perception of agency is reasonable under the Circumstances' and cited with approval National Labor Relations Board (NLRB) case law: 'whether under all circumstances, employees would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 9; citations omitted.) Employees would reasonably believe in this case

EERA section 3545, subdivision (a), requires PERB, in each instance where the appropriateness of the sought-after unit is at issue, to decide the question based on "the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same organization, and the effect of the size of the unit on the efficient operation of the school district." The same section at subdivision (b)(1) establishes a statutory presumption that all certificated employees of a "public school employer" should be included in a single bargaining unit. (Emphasis added.) The Board in *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*) interpreted these sections of EERA as follows:

> There seems to be little doubt that the Legislature meant to minimize the dispersion of school district faculty into unnecessary negotiating units. It is apparent that unit configurations based on geographical, or campus considerations, or split along lines of academic disciplines and teaching specializations are proscribed by subsection (b)(1). But that is not to say that the Legislature rejected the possibility that critical, negotiation-related differences between groups of teachers might compel unit separation. We believe that to reduce those possibilities the Legislature directed this Board to combine all classroom teachers into a single unit except where an issue of

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> in all circumstances that Abston was reflecting company policy and speaking and acting for management.

(PD, p. 71, fn. 59.)

CAVA Schools did not except to this finding. Exceptions not specifically urged are waived. (PERB Reg. 32300, subd. (c).) Moreover, the ALJ's finding is fully supported in the record, and no further commentary is necessary except to make perfectly clear that the mere presence of K12, a private company, in this controversy is no impediment to PERB's exercise of jurisdiction. Whether the representation petition involved one CAVA School or all 11, the role played by K12, particularly through Abston, is the same by design, and key to understanding the employer status issue. K12 is a purveyor of services, not the employer of the certificated teachers in the proposed bargaining unit.

> appropriateness is raised and the requirements of subsection (a), which are then invoked, leave the Board with no other option.
>
> Reading subsection 3545 (b) together with its companion subsection (a) gives rise to the presumption that all teachers are to be placed in a single unit save where the criteria of the latter section cannot be met. In this way, the legislative preference, as the Board perceives it, for the largest possible viable unit of teachers can be satisfied. Thus, we would place the burden of proving the inappropriateness of a comprehensive teachers' unit on those opposing it.

(*Id.* at pp. 9-10, emphasis added.)

In this case, in order to reach the question of whether the "statewide" unit is appropriate and to apply the attendant burden of proof under *Peralta* on the Schools who oppose it, it must first be determined whether CAVA meets the statutory definition of an employer under EERA. In answering the latter question, the burden of proof rests on CTA as the petitioner under EERA section 3544. (See *Turlock School Districts* (1977) EERB[56] Order No. Ad-18 (*Turlock*), pp. 3-4 [the burden of proof on the issue of whether two school districts could be considered a single employer or joint employer of a common group of employees so that a single unit of those employees could be determined appropriate was on the petitioning unions seeking recognition under EERA section 3544].)

EERA section 3540.1, subdivision (k) includes in its definition of public school employer: "a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code." As discussed previously, Education Code section 47611.5, subdivision (b), of the Charter School Act, provides in part:

> A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive

[56] Prior to 1978, PERB was known as the Educational Employment Relations Board or EERB.

> public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code. . . .

(Emphasis added.) PERB must take into account the mandates of the Charter Schools Act when deciding cases under EERA involving charter schools. (Ed. Code, § 47611.5, subd. (d); *Chula Vista, supra,* PERB Decision No. 1647.)

CAVA Schools argue that each School's status as an "exclusive public employer" under the Charter Schools Act precludes PERB from applying judicially-developed doctrines that allow ostensibly separate employer entities to be treated as a joint or single employer. CAVA School's argument is unpersuasive for several reasons.

CAVA Schools is correct that each School has the status of an "exclusive public employer" under the Charter Schools Act. Under Education Code sections 47605, subdivision (b)(6), and 47611.5, subdivision (d), of the Charter Schools Act, a charter petition must elect whether the charter school or the authorizing public school district shall be considered the exclusive public school employer of the charter school's employees for purposes of EERA. It takes no particular expertise in the Education Code to understand that this designation is intended to determine which entity — the charter school or the authorizing district — will carry the responsibility for complying with the requirements of EERA, i.e., the duty to bargain the terms and conditions of employment with the exclusive representative of the employees' choosing. There is no indication that the Legislature, by requiring this designation in the charter petition, intended to impede PERB in its determination of matters uniquely within its own expertise, such as the issue here whether the 11 CAVA Schools together under the single employer doctrine operate as a single integrated enterprise and meet EERA's definition of "[p]ublic school employer" for representation and collective bargaining purposes. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983)

33 Cal.3d 850, 856 [the expertise of quasi-judicial labor agencies such as PERB entitle those agencies to considerable deference]; *Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 [PERB is one of those agencies presumed equipped or informed by experience to deal with a specialized field of knowledge].)

CAVA Schools relies on *Mississippi v. Louisiana* (1992) 506 U.S. 73 in support of its argument. In *Mississippi v. Louisiana*, the United States Supreme Court held, "[t]hough phrased in terms of a grant of jurisdiction to this Court, the description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court." (*Id.* at p. 77, emphasis added.) Borrowing certain words from this holding, CAVA asserts: "[T]he Education Code's designation of a charter school as the 'exclusive' employer 'necessarily denies' that status 'to any other' entity." (CAVA Schools Responsive Brief, p. 8.) While true that CAVA Schools' exception contains some of the same words found in the Supreme Court holding, all of the remaining words in *Louisiana v. Mississippi* provide the missing context.

Mississippi v. Louisiana involved a lawsuit in the United States District Court for the Southern District of Mississippi between private parties concerning title to land riparian to the Mississippi River in which the State of Louisiana intervened and filed a third party complaint against the State of Mississippi seeking to determine the boundary lines between the two states in the vicinity of the disputed land. The Supreme Court held that the District Court had no jurisdiction over the State of Louisiana's third party complaint because United States Code, title 28, section 1251(a) grants the United States Supreme Court original and exclusive jurisdiction over all controversies between two or more states.

"[E]xclusive" in *Louisiana v. Mississippi* refers to the jurisdiction of the United States Supreme Court over boundary disputes between the states. The Supreme Court's exclusive

jurisdiction deprives other courts from exercising their jurisdiction over such matters. "Exclusive" in the Charter Schools Act does not speak to a jurisdictional grant of authority. It refers to the designation made in a charter petition as to whether the charter school or the authorizing public school district will be the public school employer for purposes of EERA. CAVA Schools' attempt to analogize a charter school's collective bargaining obligations under the Charter Schools Act to the United States Supreme Court's jurisdiction over the states' boundary disputes is of no avail.

Further, as the ALJ explained, in *Alameda County Board of Education and County Superintendent of Schools of Alameda County* (1983) PERB Decision No. 323, the Board found that EERA's definition of public school employer:

> like section 2(2) of the National Labor Relations Act (NLRA)[57] is a jurisdictional definition identifying the types of agencies subject to PERB jurisdiction. To determine whether an agency so listed is an employer in a given instance, it is appropriate to consider whether the alleged employer has such "sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." See National Transportation Service, Inc. (1979) 240 NLRB 565 . . . .

(*Id*. at p. 14, emphasis in original.) Thus, the Board recognizes its duty to determine, as a threshold matter when employer status is at issue, if an employer is properly subject to PERB's jurisdiction by analyzing the degree of control it exercises over its putative employees. That is in large part the analysis required here.

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[57] The NLRA is codified at 29 U.S.C. section 151 et seq. Although PERB is not bound by the decisions of the National Labor Relations Board (NLRB) or the federal courts interpreting federal law, cognizance of these authorities may be taken where appropriate as an aid in interpreting identical or analogous provisions of the statutes administered by PERB. (*Office & Professional Employees International Union, Local 29, AFL-CIO & CLC* (*Fowles*) (2012) PERB Decision No. 2236-M, p. 14, fn. 10.)

Furthermore, Member Whitehead, in his concurrence in *Ravenswood City Elementary School District* (2004) PERB Decision No. 1660 (*Ravenswood*), recognized PERB's responsibility in determining employer status in the charter school context:

> It is this Board's responsibility to determine the identity of the public school employer for purposes of compliance with EERA. With the recent proliferation of charter schools, this task has been made more complicated. How a charter school complies with the requirements discussed above may vary significantly from one charter school to the next. Given that each charter school has its own charter, it would be impossible to write a general rule that would govern all occasions. I believe that each case must be judged on its own merits to determine whether the "declaration" was made in a manner that satisfies the Legislature's requirements.

(*Id.* at p. 5, emphasis added.) Notably, the majority opinion in *Ravenswood* did not actually craft a bright-line rule that applies to determining employer status in charter schools; rather, Member Whitehead was cautioning against doing so in reaction to the majority's statements that since it was "uncontested" that the charter school employer in the case had declared itself to be the EERA employer (rather than the authorizing school district), and it had also asserted that it had the sole ability to hire and fire, that the purposes of EERA were served by concluding that it was, in fact, the employer. (See *Id.* at p. 3.) Member Whitehead opined that since Education Code section 47611.5, subdivision (b), of the Charter Schools Act, does not proscribe a particular manner in which a charter school is to go about its declaration of employer status, it is PERB's responsibility to determine whether the declaration is or is not materially inconsistent with the charter to ascertain the proper EERA employer. (*Id.* at p. 5.)

Courts and PERB itself have recognized that PERB has the power and duty to determine whether multiple employers meet EERA's definition of a public school employer over the same group of employees. In *United Public Employees v. Public Employment*

Relations Bd. (1989) 213 Cal.App.3d 1119, the court found that PERB's internally inconsistent determinations of whether a community college district and the City and County of San Francisco were joint employers was clearly erroneous and directed PERB to revert to its own earlier finding of joint employer status of those entities. (*Id.* at pp. 1125, 1131-1132.) Thus, the joint employer and single employer doctrines would be wholly unwarranted if it were not possible to determine that, consistent with recognized tenets of statutory interpretation, more than one public school employer can meet the definition of "employer" of the same group of employees under EERA. (See *Id.* at pp. 1127-1128 for statutory construction analysis; see also *Plumas Unified School District and Plumas County Superintendent of Schools* (1999) PERB Decision No. 1332 (*Plumas*), p. 2, fn. 2 [although finding that the employers at issue were separate, also making clear that "EERA section 3540.1(k) does not preclude the possibility of two entities acting as a single employer or joint employer within the meaning of the EERA"].) Accordingly, EERA's definition of public school employer does not bar application of the single or joint employer doctrine in the appropriate case.

The Single Employer Doctrine

A. Background

The distinct doctrines of single employer and joint employer are sometimes confused as being interchangeable but they require distinct analyses. (*Plumas*, *supra*, PERB Decision No. 1332, proposed dec. at p. 17.)[58] In a seminal decision, the federal Third Circuit court observed:

[58] See, *e.g.*, *Turlock*, *supra*, EERB Order No. Ad-18; *Plumas*, *supra,* PERB Decision No. 1332. The single and joint employer doctrines are raised both in the context of representation matters, as in *Turlock* and *Plumas*, and in the context of unfair practice cases. (See, *e.g. San Jose/Evergreen Community College District* (2007) PERB Decision No. 1928 (*San Jose/Evergreen*).)

> [A]s the Supreme Court itself has recognized, the two concepts approach the issue of "who is the employer," from two different viewpoints. As such, different standards are required for each—that enunciated in *Radio Union v. Broadcast Service of Mobile, Inc., supra,*[59] to apply in the "single employer" context and that set out in *Boire v. Greyhound Corp., supra,*[60] to apply in the "joint employer" context.

(*NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.* (3d Cir. 1982) 691 F.2d 1117, 1122 (*Browning-Ferris-Pennsylvania*).)

CTA urges that we apply the single employer doctrine. CAVA Schools urges that we find each of the 11 CAVA Schools to be separate and distinct employers not subject to either the single employer doctrine or the joint employer doctrine. Neither party advocates in favor of the joint employer doctrine as its primary argument. Because we find that the single employer doctrine applies, we turn our focus to that analysis, rather than also analyzing the joint employer doctrine and our view of its inapplicability to the facts of this case.

It suffices to say that we do not view each individually-name CAVA School as an independent entity that shares or codetermines, *in any real sense*, the terms and conditions of employment of its own certificated teachers, let alone as an independent entity that shares or codetermines the terms and conditions of employment of certificated teachers employed by other individually-named CAVA Schools. We reject the joint employer doctrine for that reason. Instead, we view the 11 CAVA Schools as collectively pooling the authority they ostensibly possess under the aforementioned operative documents into a single integrated enterprise that functions as the de facto employer of the entire certificated teacher workforce.

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[59] *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.* (1965) 380 U.S. 255 (*Radio Union*).

[60] *Boire v. Greyhound Corp.* (1964) 376 U.S. 473.

For this reason, and the explanation that follows, we conclude that the single employer doctrine applies.

Citing *Radio Union*, the *Browning-Ferris-Pennsylvania* court explained the standard for determining single employer status:

> A "single employer" relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer." . . .
>
> In answering questions of this type, the Board considers the four factors approved by the *Radio Union* court. (380 U.S. at 256, 85 S.Ct. at 877): (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. Thus, the "single employer" standard is relevant to the determination that "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise." . . .

(*Browning-Ferris-Pennsylvania*, *supra*, 691 F.2d at p. 1122.)

The issue of single or joint employer status was first considered by PERB in *Turlock*, *supra*, EERB Order No. Ad-18. *Turlock* involved the following essential facts. Two school districts—Turlock Joint Union High School District and Turlock Joint Union School District—had operated for many years under a "common administration district" model. The districts shared several high-level administrators, including a superintendent, but separately paid their salaries. The terms and conditions of employment, including salary and benefits, were largely the same, but were independently adopted by each governing board. There was a policy to facilitate the inter-district hiring of certificated employees, but only a handful of certificated and classified employees (16 out of 525) performed simultaneous duties in both districts. Some facilities, equipment, and modes of student transportation were shared between them. Before EERA was enacted, the districts had acted jointly in matters of labor relations. The districts had different physical boundaries, separately elected and independent governing

boards, and separate budgets and tax bases funding those budgets. The Board considered those facts under both federal doctrines of single employer and joint employer, and held that neither finding was warranted because of the "plain meaning" of employer in EERA section 3540.1(k). The Board stated:

> [I]t is obvious that both the Turlock Joint Union High School District and the Turlock Joint Union School District must be viewed as separate employers under the plain meaning of the Act. Where the language of a statute is clear, there is no room for interpretation; it must be followed and effect must be given its plain meaning. The Turlock School Districts are clearly separate legal entities with separate governing boards. The fact that they have chosen to share some administrators and a small number of certificated and classified personnel can hardly lead one to conclude that they are one employer. In fact, since the certificated and classified employees customarily receive separate checks from each school district, that is evidence of the separate status of each governing board. Any other arrangements made mutually and cooperatively by the two boards seem more a matter of convenience than the result of any compelling legal authority to do so.

(*Id.* at p. 14, fn. omitted, emphasis added.)

But even setting aside its statutory interpretation analysis and considering the material facts, the Board in *Turlock* concluded that the districts there were not so interrelated as to be considered either a single employer or joint employer under federal precedents. (*Turlock*, *supra*, EERB Order No. Ad-18, p. 17.) The Board explained that it would be justified in imposing higher standards than the NLRB for setting aside the districts' separate legal status since public sector employment involves "political entities that the Legislature has seen fit to clothe with certain incidences of sovereignty" (*Id.* at p. 20), and emphasized that the separate funding sources through separate tax bases of the two districts especially militated against the Board finding in favor of single employer status. (*Id*. at pp. 25-26.) The Board also noted that although the superintendent and top level administrators were common in both districts, they

possessed no ultimate authority regarding personnel matters but always acted under the control of the independent governing boards. (*Id.* at p. 19.) The Board further explained:

> In the final analysis the existence of certain common administrative facilities and equipment, a common salary schedule, a common transportation system, and the employ of 16 common personnel, simply does not compare to the overwhelming number of employees who are not employed by both districts, who are not involved in any interchange or interaction, who are not engaged in joint committees, who perform services in totally separate environments, and who are under separate fringe benefit programs. As stated quite perceptively in the decision below, "The bargaining relationship must be between employees and the employer who has control over them."

(*Turlock, supra,* at p. 24, fn. omitted.)

The Board's next consideration of this issue came in *Paso Robles Union School District, et al.* (1979) PERB Decision No. 85 (*Paso Robles*).[61] This was actually two cases consolidated on appeal regarding whether two school districts operating in Paso Robles, and two school districts operating in San Rafael, should each be considered a single employer of its respective employees. The districts in Paso Robles shared 41 employees and had separate and independent governing boards that had, at times, consisted of the same members. The Paso Robles districts operated from separate budgets with separate tax bases. There was a common administration, including one superintendent. The San Rafael districts had a single governing board because of a provision in the San Rafael city charter, but they operated from separate budgets that were not comingled. A handful of common employees were shared between them. The Board found that although NLRB case law would favor finding single employer status in both instances, those authorities did not provide "appropriate guidelines" in this area. (*Id.* at p. 8.) The Board explained:

[61] A joint employer analysis was not explored in this case.

> Meaningful negotiation can only occur where the employer has the authority and ability to reach agreement with the duly selected representative of its employees about those matters within the scope of representation. In the instant cases, each district is confined to the framework of its own tax base, budget and revenue limits. The budgets of each district are kept strictly separate and there is no comingling of funds. In each case, where the districts share staff, facilities or equipment, there is a strict apportionment of the expense between them. Each governing board is a separate policy-making body responsible to different constituencies. . . .
>
> In the final analysis it is this separate economic status of each district coupled with the exclusive policy-making authority of each district which determines its ability to negotiate about those matters within the scope of negotiations. . . .

(*Id.* at p. 10.) The Board then found each district to be separate employers. (*Ibid*.)

In *Plumas*, *supra*, PERB Decision No. 1332, the Board wholly adopted the proposed decision of a hearing officer finding that an existing certificated bargaining unit should be modified to remove employees employed by the county superintendent's office from a unit that also included employees of a school district, because the two employers could not be considered either a single employer or joint employers. (*Id.* at p. 2, see also, proposed dec. at p. 25.) The school district, in that case, exercised "some control" over approximately one-half of the county superintendent's certificated workforce. (*Id.*, proposed dec. at p. 24.) The hearing officer distilled PERB and NLRB precedent to conclude that the single employer doctrine could not be used to find a single unit appropriate in that case, explaining:

> Reading Turlock and Paso Robles together, the inescapable conclusion is that the District and the County Superintendent are two separate public school employers and do not constitute a single employer for purposes of representation under EERA. As in Turlock, the District and County Superintendent are separate legal entities with separate governing boards or authority who have chosen to share some personnel, but shared personnel receive separate paychecks from each entity. As in Paso Robles, the two governing authorities (Governing Board and County

> Superintendent) have separate and exclusive policy-making authority and the funding sources and budgets of the two entities are separate, distinct and not comingled. These factors, under *Turlock* and *Paso Robles*, require finding that the District and County Superintendent do not constitute a single employer.
>
> Further, application of the four factors utilized by the NLRB does not result in a finding of single employer status. While there is some evidence of functional integration of operations, it is also true that at least half of the programs of the County Superintendent take place separate and apart from operations of the District. More importantly, the separate and exclusive policy-making authority of the District's Governing Board and the County Superintendent, combined with the separately maintained budgets of the two, defeat a finding of the other three factors (centralized control of labor relations, common management and common financial control).

(*Plumas, supra*, adopting proposed dec. at pp. 23-24, emphasis added.)

In *El Camino Hospital District* (2009) PERB Decision No. 2033-M (*El Camino*), the Board concluded that a hospital district and a hospital were a single employer under the four-part test discussed above, because, among other reasons, the hospital was largely governed by the hospital district as the hospital district appointed five of the hospital's governing board members and had authority to remove the sixth appointee. (*Id.* at pp. 19-21.) The Board concluded that the joint employer analysis did not apply in that case because the hospital district had, in fact, assumed control over the operations of the hospital. (*Id*. at p. 23.)

One last point is warranted regarding the applicability of NLRB decisional law. Notwithstanding *Turlock* and *Paso Robles* expressing doubt about the applicability of the single employer doctrine in the public sector employment context due to potential infringement on political sovereignty, these discussions do not bar consideration of NLRB decisional law. Even though the *Turlock* Board opined that it "would" be justified in applying a more stringent standard than the NLRB for finding separate employers to be acting as one employer in the

public sector, neither it nor any Board decision after that, not even *Paso Robles*, actually adopted more stringent standards than those in the federal cases for determining single employer status. Instead, every other Board decision discussed above from *Plumas* to *El Camino* continued to look to federal authorities for guidance and to cite with approval the tests discussed in *Browning-Ferris-Pennsylvania*. Thus, it is appropriate to also do so here.

B. Analysis of Employer Status in This Case

To review, "single employer status exists where two [or more] nominally separate entities are actually part of a single integrated enterprise so that there is, in reality, only a single employer." (*El Camino, supra,* PERB Decision No. 2033-M, p. 18.) The Board looks to the following four factors to determine the existence of a single employer relationship: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. (*Ibid.*; *Browning-Ferris-Pennsylvania*, *supra*, 691 F.2d at p. 1122.)

It is well recognized that many cases involving single employer status involve evidence of commonality as well as evidence of independent operations. (Higgins, The Developing Labor Law (6th ed. 2012) vol. II, ch. 27.III.B.I., p. 2363.) Such issues require a fact-intensive, case-by-case analysis. (*Ibid*.) We proceed with the following guiding principles in place. Single employer status does not require the presence of all four factors. (*The Regents of the University of California* (1999) PERB Order No. Ad-293-H (*UC Regents*), adopting proposed dec. at p. 15.) While no single factor is controlling, the first three are more critical than the fourth. (*El Camino, supra*, PERB Decision No. 2033-M, p. 19.)

At the outset of our analysis, we address an argument underlying CAVA Schools' position on the employer status issue. Using a similar argument made by CAVA Schools in

urging that we dismiss the CTA petition for having named Abston as the employer representative instead of a CAVA School Board member, CAVA Schools argues that the ALJ's findings and conclusions concerning K12, a private company, were improper. (See discussion, *ante*, fn. 55.) According to CAVA Schools, the ALJ erred in having "bottomed her Proposed Decision on a discussion of K12, rather than of the CAVA schools as to which the PERB has jurisdiction." (CAVA Schools Opening Brief, p. 33.) Included as an example of the ALJ's improper reach is the following passage from the PD:

> It is through their relationships with K12/Abston, and her administrative team, that all of the Schools are able to consider, and have ultimately adopted, the same proposals that govern essential terms and conditions of employment of all certificated employees. Without such a common thread, it is very unlikely that there would be a "network" of Schools to consider as a potential employer for recognition purposes, or in any other way.

(PD, p. 71.)

PERB is called on in a variety of contexts to make factual findings that involve private entities, such as when PERB is called on to determine whether the contracting out of governmental services is an unlawful unilateral change. (See, e.g., *Lucia Mar Unified School District* (2001) PERB Decision No. 1440 [Board found unilateral change where public school employer failed to negotiate decision to replace transportation services employees with those of a private contractor and ordered a make-whole remedy including restoration of bargaining unit positions with termination of contract].) That unfair practice and representation matters may require analysis of contractual or other relationships between public sector employers and private entities is not new, is not an impermissible intrusion into private corporate affairs and is not an infraction of PERB's jurisdictional rules.

K12's relationship with the CAVA Schools is relevant to every factor under consideration, especially functional operational integration of the Schools, because the K12 model of doing charter school business predetermines exactly how a School will operate. In finding that the CAVA Schools operate as part of a "single integrated enterprise" under the single employer doctrine, we do not conclude that the employer of the certificated teachers is K12, a private company. Single employer status is a legal construct imposed on nominally separate entities. A finding of single employer status enables CAVA Schools and CTA to have one set of negotiations instead of 11 sets of separate negotiations for each one of the 11 CAVA Schools. If the two sides reach agreement on terms and conditions of employment, it will be memorialized in one collective bargaining agreement that applies across CAVA Schools. In no manner would the outcomes that flow from a finding of single employer status include K12 ever becoming the employer of the certificated teachers in the proposed unit, or a party to contract negotiations and a subsequent collective bargaining agreement. Nor would the outcomes include K12 falling within PERB's jurisdiction.[62] CAVA Schools cites to the Board's decisions in *UC Regents, supra,* PERB Order No. Ad-293-H and *Los Angeles Unified School District* (2001) PERB Decision No. 1469 for the principle that PERB cannot assert its jurisdiction over a matter involving the question whether two entities constitute a single employer where one of the entities is a private entity because private entities do not fall within EERA's definition of public school employer. That principle is good law, but has no bearing here. The constituent employer entities sought by CTA to constitute a single employer in this case are the 11 CAVA Schools, each of which falls within EERA's definition of a public school employer. Unlike the

[62] Under the single employer doctrine, the respondent in a PERB unfair practice charge filed by CTA, and the employer in a PERB representation matter, is the CAVA network of 11 charter schools, not K12.

cases cited by CAVA Schools, CTA has not named K12 as an employer in these proceedings, nor is there any suggestion that the certificated teachers in the petitioned-for bargaining unit have any type of employment relationship with K12. Under the single employer doctrine, employees are indeed employed by the entities that are part of the single integrated enterprise, just like the certificated teachers in this case are employed by the 11 CAVA Schools. That K12 sells its services to these Schools does not mean that K12 has acquired the status of employer of the certificated teachers, or party to these proceedings, any more than any other vendor the Schools may have in common would render that company the employer.

CAVA Schools asserts that "CTA's brief is riddled with references to 'CAVA'—which is not a legal entity, but rather a trade name associated with K12—as the 'employer' of the teachers." (CAVA Schools Responsive Brief, p. 20.) As noted on the first page of this decision, CAVA is a shorthand reference to the "employer" party in this matter, California Virtual Academies. "Academies" is in the plural and encompasses the 11 charter schools in the network. (See discussion, *ante*, fn. 55.) CAVA at Kings, for example, is one of the Academies within the CAVA network. When the shorthand "CAVA" is not accompanied by "at [name of School]," it is simply a reference to the entire network of Academies or Schools. Whether CAVA is a trade name or a legally-recognized entity in itself is not of import to these proceedings. Under the single employer doctrine, the "single employer" is not necessarily a legally distinct entity. It is an analytical construct that is imposed under judicially developed doctrines on legally distinct but nominally separate and functionally integrated entities *solely* for the purpose of representation and collective bargaining. It is not imposed for any other purpose. As Abston herself testified concerning the student enrollment process: "Once they've completed that process, they would be considered to be enrolled at California Virtual

Academy and then would be assigned to a teacher there." (R.T., Vol. II, p. 18, emphasis added.)

Factor 1: Functional Integration of Operations

The operation of the CAVA Schools is functionally integrated at inception by design. Every School has formed itself in the same exact way, starting with a founding group of individuals who desire the K12 model of virtual education, and continuing with a presentation of the charter application signed by K12-employed Abston, the Head of Schools for all CAVA Schools, to the authorizing district. Every School uses the same "general counsel" to prepare the charter documents[63] and bylaws. Every School uses the same auditor to examine the financial records.

By predetermined design, all CAVA Schools enter into the same contractual relationships with K12 (EPSAs) and the same contractual relationships with Insperity (CSAs). Through these contractual relationships, the K12 model produces absolute functional integration in curriculum, operations and management: The K12 model also ensures absolute functional integration in human resources, payroll and benefits administration. Abston testified that there is no relationship between K12 and Insperity, but each of the 11 CSAs was signed by K12 associates including Abston herself. As Head of Schools, Abston signs all employment contracts and approves all merit increases. "[N]ear-identical policies, employee

[63] Abston testified: "The original petition template, clearly, there's amazing similarity between all of them, . . ." (R.T., Vol. V, p. 124.)

handbooks, and compensation structures for certificated employees" have been adopted across all CAVA Schools. (CAVA Schools Opening Brief, p. 5.)[64]

Functional integration is achieved through the creation of an organizational structure akin to a school district. There is one Head of School for all Schools who is at the top of the reporting hierarchy and acts in the capacity of "Superintendent" over a "District," which is identified on the SARC as "California Virtual Academies." There is one administrative team consisting of human resources, financial and clerical staff. They function on a CAVA-wide basis providing operational administrative support to all the Schools in a uniform manner. Within the California Virtual Academies "District," there is one CAVA-wide High School Department, one CAVA-wide Middle School Department and one CAVA-wide Elementary Education Department in addition to one CAVA-wide Special Education Department. Meetings of the certificated teachers are by department, by region and by content, but are never School-based. Similarly, teachers attend professional development days on a regional or statewide basis.

There is one brick and mortar office in Simi Valley, which serves as a central repository for all student, employee and Board records. The classified employees who work there service the entire network of CAVA Schools. The Simi Valley address is also the corporate office for all but two Schools. Those two Schools have their corporate offices in Oakland at what appears to be the same address. (*American Theater Corp*. (1975) 220 NLRB 295, enforced (8th Cir. 1976) 542 F.2d 1178, cert. denied *sub nom. Global Industries, Inc. v. NLRB* (1977) 430 U.S. 967 [single employer status found where corporate offices of all the

[64] While there were some variations in the proposals that were presented to each Board, especially over School-specific financial items like common core funding, there is marked correspondence in the approval rate of commonly proposed items.

entities were located in the same building, which was owned by the parent company, and a common accounting service was used by all the entities].

K12 hosts one website for all CAVA Schools, which, in most respects, presents the CAVA Schools to the public as a single entity. "Welcome to CAVA!" is the opening message on the website. The website allows parents to enroll their children in a CAVA School through a central online enrollment process that determines student placement by geography. There is one Parent-Student Handbook distributed to all families enrolled in any of the CAVA Schools that also presents the CAVA Schools as a single entity. Once enrolled, students can take advantage of all CAVA-wide grade and content appropriate educational resources. In terms of the educational program, all of the "programs," i.e., academic offerings of the Schools, are shared in common, which is notably distinguished from the facts in *Plumas, supra,* PERB Decision No. 1332, where at least half of the programs were not shared. An educational program that has only one high school physics teacher must by definition be part of a single integrated enterprise in order that it ensures that every student in the CAVA Schools has equal educational opportunities.

The strong relationship one would typically expect to find between teacher and school in an actual, not virtual, public school setting is nonexistent. Both students and teachers can attend whatever graduation(s) they want anywhere in the network of the 11 CAVA Schools. The strongest bonds appear to be between teacher and student and between teacher and supervisor/mentor/trainer/content specialist, not between teacher and School holding the teacher's contract. A teacher may be employed by one School, but have a caseload of students from multiple other schools. Lines of supervision are not determined by School, but by region. Teachers are evaluated and disciplined at a regional and department level, not at the School

level. Teachers are evaluated for the work they perform across Schools, not just for work they perform for the School that holds the teacher's employment contract. A teacher from one School may be disciplined for misconduct occurring at a different School by supervisors from yet another School.

And, most tellingly, if Abston and her administrative team decide that a teacher's employment contract should be transferred to another School to address changing enrollment conditions, that change is made. Teachers are tethered to a School by contract and paycheck only until they are untethered from that School and re-tethered to another School for administrative and operational convenience. Because the CAVA Schools operate primarily as an online virtual educational program, there are no physical barriers to this fluidity and integration. In fact, not all teaching positions are for an individually-named CAVA School. After a candidate is chosen, the candidate is placed where the need exists within the system. The teachers who testified at hearing did not realize that they had been placed at any particular School until they received their first paycheck.

NLRB cases emphasize the importance of the interchange of employees between employers as indicative of an interrelationship of operations. (*Turlock, supra*, EERB Order No. Ad-18, p. 22, fn. 23, citing *Central Dairy Products Co.* (1955) 114 NLRB 1189; *Orkin, "The Rat Man," Inc.* (1955) 112 NLRB 762; *Metco Plating Co*. (1954) 110 NLRB 615; *National Mattress Co.* (1955) 111 NLRB 890.) In *Central Dairy Products Co., supra*, 114 NLRB 1189, the NLRB denied single employer status where: (1) the record was devoid of evidence that would show centralized control of labor relations with respect to hiring and discharging employees, setting wage rates and establishment of vacation and other benefits; and (2) there was no indication of interchange of employees among the employers.

In contrast here, the sharing of employees across all of the Schools is systemic and pervasive, and part and parcel of the model by which the Schools operate. Abston admitted that especially for the smaller Schools, they must share employees with the other Schools or they would be acting in a "fiscally irresponsible" manner. Teacher sharing is only possible because CAVA Schools operate as a single integrated enterprise. This organizational structure allows operational decisions — such as whether to transfer a teacher's contract to another School or whether to assign a teacher employed by one School to students enrolled at one or several other Schools — to be made at the top by common administrative decision-makers for the sake of the enterprise as a whole.

Factor 2: Centralized Control of Labor Relations

We agree with the ALJ that centralized control over labor relations is demonstrated by the fact that all of the Schools have adopted the exact same terms and conditions of employment for all teachers at every School. All terms and conditions of employment: from hiring to hours of work, the salary schedule and benefits, job duties (including in-person meeting requirements by department), lines of supervision (by department), evaluation of performance, and discipline up to and including termination, are uniform across the CAVA network.

Factor 3: Common Management

We also agree with the ALJ that although "dispersed" regionally, the management structure here is rigidly hierarchical and statewide, with Abston at the top and several levels of management beneath her organized by department. This is certainly indicative of "centralized control," namely that each School has determined that "control" over employment conditions will be "centralized" under the Head of Schools. Similarly, the Schools argue that there is no

"common management" because each School is ultimately managed by an independent governing board. This again ignores the fact that Abston is the "common management" across all Schools, and further that RPCs and RLTs manage and supervise employees at multiple Schools, regardless of where they themselves are employed, and this happens statewide. Thus, the management of the Schools is shared in common between them.

Factor 4: Common Ownership or Financial Control

Of the four factors, the common ownership and financial control factor is least translatable to public sector employment. In private sector employment, this factor involves considerations of private enterprise ownership configurations, e.g., a wholly-owned subsidiary and its parent corporation (*Royal Typewriter Co. v. NLRB* (8th Cir. 1976) 533 F.2d 1030); a conglomerate consisting of one holding company and five subsidiaries (*United Telegraph Workers, AFL-CIO v. NLRB* (D.C. Cir. 1978) 571 F.2d 665, affg. (1976) 224 NLRB 274); several corporations owned by a single family (*Soule Glass & Glazing Co. v. NLRB* (1st Cir. 1981) 652 F.2d 1055, enforcing in part (1979) 246 NLRB 792).)

These same considerations do not apply to public sector employment. Instead, *Turlock*, *Paso Robles*, and *Plumas*, have injected into the single employer analysis additional considerations unique to public sector employment. As the Board in *Turlock* recognized, public sector employers are not just employers, they are "political entities that the Legislature has seen fit to clothe with certain incidences of sovereignty." (*Turlock, supra*, EERB Order No. Ad-18, p. 20.) *Turlock* held that "[t]reating these two districts as a single employer would dilute each voter's influence on the district's personnel relations programs." (*Id.* at p. 25.) The Board in *Paso Robles* rejected single employer status where administrators common to two public school districts had no ultimate authority over personnel matters and always acted under

the control of the independent governing boards. (*Paso Robles, supra*, PERB Decision No. 85.) *Paso Robles* emphasized the two districts' separately maintained budgets and the exclusive policy making authority of each school district.

The sovereign nature of a public school district may be an appropriate consideration in cases involving public school districts and their governing boards. *Turlock* is a good example. In *Turlock*, members of the school board were elected by the voters within the boundaries of each district. Each district established its own budget and levied its own taxes. Each district had its own federal employer identification number. These facts informed the Board's decision.

The sovereign nature of public school districts is not, however, an appropriate consideration here because this case does not involve the question of whether two or more public school districts may be considered to be a single employer. Here, the role played by the public school district is not that of employer.[65] The public school district's limited role is to authorize the charter at the local level, through official action taken by its governing board, and to fill a reserved seat on the Boards. In contrast to these cases involving public school districts, the CAVA Schools are non-profit corporations, not sovereign powers. They have declared themselves public school employers *solely for purposes of EERA*.

Unlike *Turlock*, members of the Boards are not elected by voters. The initial Board is nominated or appointed by the founding group, and Board vacancies are filled through an informal recruitment process led by Abston. There is no risk of diluting voter influence, as the voters have no say in the nomination or selection process and no means by which to enforce

[65] Each of the 11 charter petitions declared the charter school to be the employer, for collective bargaining purposes, thereby rejecting the option of naming the public school district as the employer.

accountability and transparency akin to local voter control. Unlike in *Turlock*, the budgets for the CAVA Schools are developed by the K12-employed financial officer. Budgets presented to the CAVA Schools' Boards are always approved, typically with "[n]o questions asked." Unlike *Turlock,* CAVA Schools do not levy taxes. Although each CAVA School receives a separate employer identification number from the Internal Revenue Service with approval of their applications for tax exempt status, the employer identification number on employee W2 forms is the same. Therefore, considerations of sovereign power, local tax base and local voter control are simply not relevant here, let alone justification for rejecting single employer status.

CAVA Schools relies on *Turlock* and *Plumas* to argue that the fact that each CAVA School operates under an independent governing board trumps satisfaction of the other factors. As the Board held in *Plumas*:

> [T]he separate and exclusive policy-making authority of the District's Governing Board and the County Superintendent, combined with the separately maintained budgets of the two, defeat a finding of the other three factors (centralized control of labor relations, common management and common financial control).

(*Plumas, supra,* PERB Decision No. 1332 , p. 24.)

The evidence in the record demonstrates, however, that the CAVA Schools' Boards do not operate independently in any kind of policy-making capacity, or with respect to labor relations. The EPSAs provides: "The Board shall provide K12 written copies of all policies adopted by Customer and must notify K12 promptly in writing of any changes to such policies adopted by Customer and shall provide K12 with copies thereof." The bylaws provide that it is the responsibility of the Boards to define, compose and revise policies. The Boards, however, do not make their own policies as alluded to in the EPSAs, or engage in any of their policy-making responsibilities under their bylaws. The Boards typically meet for less than 45 minutes four times per year. The Boards are presented with policies, which are already defined and

composed. The Boards typically approve common policies across Schools with "[n]o questions asked."[66]

The bylaws give the Boards responsibility for "[f]inancial development and management" and "[s]etting a framework for the budget process." The evidence in the record establishes that the Boards do not carry out these responsibilities, or do anything other than approve budget-related action items on the agenda, typically with no questions asked.

Regarding the expenditure of funds, Abston and her administrative team determine where teachers will be placed, and whether they will be moved from one School to another. The regional and departmental management team determines the placement of students with teachers, and the placement of teachers with RLTs and RPCs. The Schools are then "billed" based on allocation charts showing the distribution of teachers, supervisors, administrators and managers across all 11 Schools. These allocation charts are not, however, given to the Boards for their review or approval, nor are they necessarily reflective of the actual distribution of teacher services among the Schools.

The bylaws give the Boards responsibility for approving significant program changes. There was some reorganization within both General and Special Education programs during the year preceding the formal hearing. High School supervision changed from subject matter based to region based. These changes were accomplished without the approval or involvement of the Boards.

The bylaws give the Boards responsibility for entering into contracts with professional service providers. None of the CSAs with Insperity were entered into by Board members.

[66] Abston could recall only three instances in the history of Board meetings of rejection of proposed agenda items by any of the Boards.

They were entered into by K12 associates, and only two were entered into by Abston, the Boards' authorized representative.

The bylaws give the Boards responsibility for "Personnel." The evidence establishes that personnel decisions become effective when they are made by CAVA management, not when they are subsequently "approved" at the next regularly scheduled Board meeting. A decision to fire an employee is communicated to the employee by the appropriate manager. Termination is effective immediately. The fired employee's pay and benefits are terminated at that time.

The bylaws give the Boards responsibility for overseeing and evaluating the work of the Head of Schools. There is no evidence in the agendas or the minutes of the 55 meetings that were received in evidence that the Boards do this. It is questionable whether this function can be carried out by, for example, a Board whose directors include the Head of School's mother or a subordinate in the chain of command, without running afoul of irreconcilable conflicts of interest.

The bylaws give the Boards responsibility for "Program Oversight." There is no evidence of any program oversight by the Boards.

Each Board typically meets for less than two hours each year to conduct Board business. One such Board meeting lasted five minutes. It is not possible to conclude based on the infrequent meetings of the CAVA Schools' Boards of Directors, their length and the typically unquestioning nature of the approval process, that these Boards have sufficient independence to defeat a finding of single employer status.

As stated earlier, questions of single employer status usually involve evidence of both independence and commonality. CAVA Schools' responsive brief highlights one example of

one Board's independence. At a regularly-scheduled Board meeting, a Board member asked for staff to insert an extra column on a chart. Instances of even that bare showing of independence are rare. More typically, the Boards approve what is put before them with no questions asked.

CAVA Schools also points to language in the charter documents, bylaws and contracts stating that the Boards of each School have final decision-making authority over finance, policy and personnel matters. When distinguishing the significance of the conduct between the parties from mere recitals in operational documents, PERB has held:

> Although the District intended that the academy instructors would not be considered its employees, the Board is not bound by the District's intent nor the provisions of the Agreement in determining whether the academy instructors are "employees" for purposes of EERA. (Goleta Union School District (1984) PERB Decision No. 391 at p. 16 (Goleta).) The Board is also not bound by any acknowledgement that the academy instructors may have signed agreeing not to be considered employees of the District. (Goleta at p. 16.) The rights guaranteed to employees by EERA cannot be abrogated unilaterally by an employer through a cleverly written contract with a third party. . . .

(*Ventura County Community College District* (2003) PERB Decision No. 1547, pp. 20-21.)

As noted in *San Jose/Evergreen*, *supra*, PERB Decision No. 1928, the way the operating documents are drafted does not take precedence over the parties' actual practices. As demonstrated above, there is a profound chasm between the recitals in the operative documents and the actual practices of the CAVA Schools' Boards. Whether operating off of express or assumed delegations, implied pre-approvals, blanket authority, expediency or a desire for efficiency, the CAVA Schools operate with minimal direction, governance or leadership from their respective Boards. Accordingly, we conclude that the CAVA Schools' Boards of Directors are not sufficiently independent from Abston and her administrative and

management team to defeat a finding of single employer status. The factors supporting single employer status include a functionally integrated operating model, identical terms and conditions of employment, a common and highly hierarchical management structure, and the interchangeability of the Schools' most valuable asset, the certificated teachers in the petitioned-for unit. These factors weigh heavily in favor of single employer status. (See *Soule Glass & Glazing Co. v. NLRB, supra,* 652 F.2d 1055, enforcing in part 246 NLRB 792 [single employer status found based on interlocking relationship among several family-owned corporations demonstrated by the meshing of various operations, the commonality of labor relations and the interchangeability of employees and equipment].) Through that common management structure, the CAVA Schools operate as "part of a single integrated enterprise so that there is, in reality, only a single employer." (*El Camino, supra,* PERB Decision No. 2033-M, p. 19.)

Community of Interest

As it has been concluded that the Schools are considered a single employer for EERA purposes of all of the employees in the sought-after unit, under *Peralta, supra*, PERB Decision No. 77, the burden is on CAVA Schools, the party opposed to a comprehensive unit, to demonstrate that all employees of the public school employer should not be included in the same unit. (*Orcutt Elementary Union School District* (2011) PERB Decision No. 2183, pp. 7-8 [*Peralta* presumption applies to charter schools].)

In finding a community of interest to exist among employees, PERB typically considers as persuasive evidence whether there are common conditions, such as method of compensation, wages, hours, employment benefits, supervision, qualifications, training and skills, contact, and

interchange with other employees. (*Office of the Santa Clara County Superintendent of Schools* (1978) PERB Decision No. 59.) Here, all of those factors are demonstrated.

CAVA Schools argues that a community of interest is lacking because teachers are employed in geographically disperse areas of the state. First, even in settings where employees work in physical rather than virtual locations, statewide bargaining units do exist and have done so for a very long time. (See, e.g., *Unit Determination for the State of California* (1979) PERB Decision No. 110-s; *Id.* (1980) PERB Decision No. 110b-S; *Id.* (1980) PERB Decision No. 110c-S; *Id.* (1981) PERB Decision No. 110d-S; *Unit Determination for Employees of the California State University and Colleges)* (1981) PERB Decision No. 173-H; *Unit Determination for Technical Employees, Clerical Employees, Service Employees, Professional Scientists and Engineers, Lawrence Livermore National Laboratory, Professional Librarians, and Professional Patient Care Employees of the University of California* (1982) PERB Decision Nos. 241-H, 244-H, 245-H, 246-H, 247-H and 248-H, respectively; *Unit Determination for Skilled Crafts Employees of the University of California* (1982) PERB Decision No. 242-H; *Id.* (1983) PERB Decision No. 242a-H; *Id.* (1983) PERB Decision No. 242b-H; *Id.* (1983) PERB Decision No. 242c-H; *Id.* (1984) PERB Decision No. 242d-H; *Unit Determination for Printing Trades Employees of the University of California* (1982) PERB Decision No. 243-H; *Id.* (1983) PERB Decision No. 243a-H; *Id.* (1983) PERB Decision No. 243b-H.) Second, except for the Community Day program, CAVA Schools' teachers teach in a virtual environment. Geography is no impediment to community of interest in a virtual environment.

CAVA Schools argues that most teachers lack any connection with other schools and teachers. As already discussed, there are ample opportunities *and requirements* for teachers

employed by one School to interact with teachers employed by another School. Lines between teachers are not divided by School, but by grade level and curriculum content area. CAVA Schools argues that virtual meetings do not provide the degree of interaction required for community of interest. That is plainly absurd. CAVA Schools operate primarily in the virtual realm. There is no office, no breakroom, no hallways, no cafeteria, no water coolers, no yard. Using CAVA Schools' logic, even teachers employed by only one School share no community of interest given the virtual environment that inherently limits their interaction.

Finally, CAVA Schools argues there is only limited shared supervision. While true that the approximately 700 certificated teachers in the petitioned-for unit are not all directly supervised by the same person, the more salient fact is that the lines of supervision are based on region and department, not individual School. And, matters of discipline and performance evaluation are handled in the same way across all CAVA Schools. Teachers have direct supervisors, who report to regional coordinators, who report to department heads, who report to one academic administrator, who reports directly to one Head of Schools. That unified supervisorial and management structure supports, not defeats, a community of interest finding.

CAVA Schools offers three additional bases for its argument against community of interest.

First, CAVA Schools asserts that a comprehensive bargaining unit would impair the efficient operations of the CAVA Schools because each School is separately funded and maintains its own budget and expenditures, as authorized by its own Board of Directors. CAVA Schools argues that the PD fails to take into account the different financial conditions of each School due to local tax revenue.

The impact of the petitioned-for unit configuration on the operations of the employer is a factor considered by PERB when determining unit appropriateness. (*San Diego Community College District* (2001) PERB Decision No. 1445, p. 13 [rejecting employer's argument for lack of proof that having continuing education counselors in existing counselor's unit would impair efficient operations].) In balancing the impact on the efficient operations of an employer with the employees' right to effective representation in appropriate units, the Board has never found the efficiency factor to outweigh representation rights. (See *Los Angeles Unified School District* (1998) PERB Decision No. 1267; *Sweetwater Union High School District* (1976) EERB Decision No. 4.)

CAVA Schools offers no facts in support of its efficiency argument. The materiality, if any, of the Schools' different financial conditions to the community of interest analysis remains unproven. The terms and conditions of employment for all certificated teachers in the proposed unit are *identical* across Schools. Despite whatever differing financial conditions there may be amongst the Schools, all teachers go through the same hiring process, teach the same curriculum, work the same hours of work, have the same academic calendar, receive the same pay and benefits, and are bound by the same employee policies and manuals. Employment contracts are signed by the same Head of Schools, who also approves all merit increases. CAVA Schools presented no evidence that the CAVA Schools' different funding sources, budgets or expenditures, or their responsibility to their respective sponsoring school districts, impact any of the certificated teachers' terms and conditions of employment.

As the ALJ observed:

> The Schools have chosen to unify every employment condition across all of the Schools, so it is curious why they desire separateness in collective bargaining. In fact, the 11 separate units suggested by the Schools as more appropriate are what

> would have likely resulted in a cumbersome and confusing bargaining process, especially as applied to employees on a day-to-day basis. Under that scenario, a single employee could have been simultaneously subjected to the terms of up to 11 separate collective bargaining agreements. That would be a less than desirable situation. As it stands, other than the injection of a collective bargaining agent with whom they must collectively deal, there are no facts to suggest that the Schools will be forced to consider or approve proposals any differently than the way they do now. As the Schools presented no facts to show that their operations would be impaired under the sought-after unit configuration, and there are no other arguments to consider against finding sufficient community of interest between the certificated employees in the Schools, the petitioned-for unit is appropriate. (*San Diego*, *supra*, PERB Decision No. 1445; *Peralta*, *supra*, PERB Decision No. 77.)

(PD, p. 75.)

Second, CAVA argues that strong support for CTA's representation petition at the larger of the CAVA Schools could "force unionization at *all* the schools." (CAVA Opening Brief, p. 38, emphasis in original.) CAVA Schools fails to appreciate the bedrock principle upon which collective bargaining rests — majority rule. In a large public school district, certificated teachers at a small school might oppose representation, but if a majority of certificated teachers in the district as a whole support representation, the bargaining unit is entitled to the bargaining power of an exclusive representative.

As the United States Supreme Court explained:

> Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. 29 U.S.C. §§ 157, 158(a)(3). In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be

> subordinated to the interest of the majority. Vaca v. Sipes, 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842 (1967); J. I. Case Co. v. NLRB, 321 U.S. 332, 338—339, 64 S.Ct. 576, 580, 88 L.Ed. 762 (1944); H.R.Rep.No.972, 74th Cong., 1st Sess., 18 (1935). As a result, '(t)he complete satisfaction of all who are represented is hardly to be expected.' Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953).

(*Emporium Capwell Co. v. W. Addition Community Organization* (1975) 420 U.S. 50, 62, fn. omitted.)

Last, CAVA Schools argues that compulsory multi-employer bargaining is prohibited under the NLRA, and not contemplated under EERA, citing *Frito Lay, Inc. v. Teamsters* (9th Cir. 1980) 623 F.2d 1354, 1358-1359 (*Frito Lay*).

In *Frito Lay*, Frito-Lay, Granny Goose, Inc., and Laura Scudder's, competing manufacturers, sellers and distributors of potato chips, corn chips and other snack food products in California and elsewhere, joined together as an employer organization to bargain for and enter into collective bargaining agreements with fifteen local unions that represented route salespersons and warehousepersons employed by each of the companies. The employer organization negotiated on behalf of the employers for five successive collective bargaining agreements before giving notice of their intent to withdraw from multi-employer bargaining and to bargain separately, thereby dissolving the multi-employer bargaining unit. Unable to obtain sufficiently similar contract provisions through individual bargaining, the locals commenced a strike against all three companies. The question was whether the locals had committed an unfair labor practice under the NLRA's section 8(b) (4)(A) prohibition, which provides that it shall be an "unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike . . . where . . . an object thereof is . . . [to] forc[e] or requir(e) any employer . . . to join any . . . employer organization." (29 U.S.C. § 158(b)(4)(A).)

The court answered that question in the affirmative, concluding that section 8(b)(4)(A) prohibits coercive union conduct with the object of forcing employers to engage in multi-employer bargaining, whether as a formal association or informal group. (*Frito-Lay, supra,* 623 F.2d 1354, 1356-1359.)

Multiemployer bargaining units and the single employer doctrine are distinct conceptually. In multi-employer bargaining, there is no issue of employer status. Employers in multiemployer bargaining arrangements are completely independent employers. In *Frito Lay*, they were competitors. They have no other relationship to each other relevant to the labor law issues under consideration apart from the fact of their voluntary association with one another for collective bargaining purposes. Under the single employer doctrine, two or more nominally separate employers are found to constitute a single employer for collective bargaining purposes precisely because of their close relationship to one another, common management and labor conditions and functionally integrated operations. The constituent entities comprising a single employer under the single employer doctrine are not equivalent to completely independent employers in multiemployer bargaining units.

If CAVA Schools is correct in equating employers found to operate as part of a single integrated enterprise to employers in multiemployer bargaining units, the consequence would undermine the important policy objectives underlying the single employer doctrine. Imposing a multiemployer bargaining unit construct atop a single employer analysis would mean that a group of employers found to constitute a single employer would have the unfettered power to defeat the creation of a common bargaining unit desired by a majority of unit members simply by withholding their agreement.

The single employer doctrine, especially in public sector employment, is called for only in the most unique of circumstances. The circumstances here qualify. Public schools are no longer cut out of the same mold. Although we are in uncharted waters, we are not without the analytical tools necessary to arrive at the appropriate result. As observed in *In Re H.S. Care L.L.C.* (2004) 343 NLRB 659, 667 (dis. opn. of Liebman and Walsh):

> Because the scope of the unit is basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

CONCLUSION

Because the 11 CAVA Schools are "actually part of a single integrated enterprise so that there is, in reality, only a single employer" (*El Camino, supra,* PERB Decision No. 2033-M, p. 19), CTA may seek a single, statewide bargaining unit of certificated teachers employed by all 11 CAVA Schools. The Schools did not meet their burden of proving that the single, statewide unit sought by CTA was inappropriate under the *Peralta, supra,* PERB Decision No. 77, presumption or community of interest criteria. Therefore, the unit sought in the petition is appropriate.

ORDER

Because California Virtual Academies (CAVA Schools) has not granted recognition, and California Teachers Association has demonstrated proof of majority support in a single, statewide bargaining unit of certificated teachers employed by all 11 CAVA Schools, it is HEREBY CERTIFIED, as of the date of this decision, that the California Teachers Association is the exclusive representative of all employees in the unit set forth below:

Certificated Unit

Shall Include: All full and part-time certificated employees and all teachers hired pursuant to Education Code Section 47605, subdivision (j), employed by the "California Virtual Academies," i.e.: California Virtual Academy at Jamestown; California Virtual Academy at Kings; California Virtual Academy at Los Angeles; California Virtual Academy at Maricopa; California Virtual Academy High School at Maricopa; California Virtual Academy at San Diego; California Virtual Academy at San Joaquin; California Virtual Academy at San Mateo; California Virtual Academy at Sonoma; California Virtual Academy at Sutter; and California Virtual Academy at Fresno.

Shall Exclude: All managers, supervisors, classified employees, confidential employees, and casual substitutes within the meaning of the Educational Employment Relations Act.

Pursuant to PERB Regulation section 33450 (Cal. Code Regs., tit. 8, § 31001 et seq.), within ten (10) days following issuance of a notice of decision on the parties, California Virtual Academies shall post a copy of the notice of decision conspicuously on SharePoint and send the notice of decision via e-mail to all bargaining unit members. The notice of decision shall remain posted on SharePoint for a minimum of fifteen (15) workdays.

Members Winslow and Gregersen joined in this Decision.

APPENDIX

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

CASE: Case No. LA-RR-1227-E

EMPLOYER: California Virtual Academies
2360 Shasta Way, Suite A
Simi Valley, CA 93065

EMPLOYEE ORGANIZATION
PARTY TO PROCEEDING:

California Teachers Association
1211 Embarcadero, Suite 204
Oakland, CA 94606

FINDINGS:

The Board finds the following unit is appropriate for meeting and negotiating:

Unit Title: Certificated Employees

Shall Include: All full and part-time certificated employees and all teachers hired pursuant to Education Code Section 47605, subdivision (j), employed by the "California Virtual Academies," i.e. : California Virtual Academy at Jamestown; California Virtual Academy at Kings; California Virtual Academy at Los Angeles; California Virtual Academy at Maricopa; California Virtual Academy High School at Maricopa; California Virtual Academy at San Diego; California Virtual Academy at San Joaquin; California Virtual Academy at San Mateo; California Virtual Academy at Sonoma; California Virtual Academy at Sutter; and California Virtual Academy at Fresno.

Shall Exclude: All managers, supervisors, classified employees, confidential employees, and casual substitutes within the meaning of the Educational Employment Relations Act.

Pursuant to PERB Regulation section 33450 (Cal. Code Regs., tit. 8, § 31001 et seq.), within ten (10) days following issuance of a notice of decision on the parties, California Virtual Academies shall post a copy of the notice of decision conspicuously on SharePoint and send the notice of decision via e-mail to all bargaining unit members. The notice of decision shall remain posted on SharePoint for a minimum of fifteen (15) workdays.

Dated:_____ CALIFORNIA VIRTUAL ACADEMIES

By_____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR A MINIMUM OF FIFTEEN (15) WORKDAYS. REASONABLE STEPS SHALL BE TAKEN TO ENSURE THAT THIS NOTICE IS NOT REDUCED IN SIZE, ALTERED, DEFACED OR COVERED WITH ANY OTHER MATERIAL.