STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OXNARD FEDERATION OF TEACHERS AND SCHOOL EMPLOYEES, LOCAL 1273, Charging Party, v. OXNARD UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6627-E PERB Decision No. 2803 January 26, 2022

Appearances: Bush Gottlieb by Dana S. Martinez and Adrian R. Butler, Attorneys, for Oxnard Federation of Teachers and School Employees, Local 1273; Lozano Smith by Darren C. Kameya and Angela J. Okamura, Attorneys, for Oxnard Union High School District.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) for a decision based on the evidentiary record from a hearing before an administrative law judge (ALJ). After Oxnard Federation of Teachers and School Employees, Local 1273 (the Federation or OFTSE) filed an unfair practice charge alleging that Oxnard Union High School District violated the Educational Employment Relations Act (EERA), PERB's Office of the General Counsel (OGC) issued a complaint against the District.[1]

[1] EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

The complaint alleged that the District repudiated collectively bargained policies, implemented new policies, and/or applied or enforced existing policies in a new way, while failing to bargain in good faith with the Federation over these decisions and/or their negotiable effects. While the complaint also alleged that the same conduct constituted unlawful interference, the facts do not suggest an interference claim that can be proven without establishing a bargaining violation, meaning that the interference claims are purely derivative.

The parties stipulated to bifurcate proceedings into an initial liability phase and, if warranted, a later remedy phase. We have reviewed the record and briefs in the present liability phase. In the below factual findings and legal analysis, we explain our basis for finding several EERA violations, as well as our basis for dismissing certain other complaint allegations. We remand the matter to the Division of Administrative Law for proceedings consistent with this decision.

PROCEDURAL HISTORY

The Federation filed this charge, together with a request for injunctive relief and supporting materials, on April 13, 2021. Over the next 10 days, the District filed opposition papers, the Federation filed reply papers, OGC issued the complaint, and the Board denied the injunctive relief request. The Board also directed that:

> "[T]he Division of Administrative Law shall expedite this matter, and the parties and the assigned ALJ shall develop a complete record containing evidence on all liability issues and on potential make-whole relief that can be ordered based upon an employer's contract repudiation, unilateral implementation of a new policy, or unilateral application/enforcement of existing policies in a new way, including but not limited to: any lost compensation, reduced leave balances, or discipline that employees may

> experience; employees' out of pocket expenses related to child care or other costs (see, e.g., *County of Ventura* (2021) PERB Decision No. 2758-M); and reimbursement of staff or attorney costs the Federation expended outside of PERB unfair practice proceedings (see, e.g., *Sacramento City Unified School District* (2020) PERB Decision No. 2749; *City of Palo Alto* (2019) PERB Decision No. 2664-M)."

After the District answered the complaint and PERB accepted the parties' stipulation to bifurcate proceedings, the ALJ held a four-day liability hearing in June and July 2021. Due to the COVID-19 pandemic, the ALJ, as well as the parties' representatives, witnesses, and attorneys, participated in the hearing by video conference. The parties filed simultaneous post-hearing briefs in September 2021. We then transferred the case to the Board itself for decision pursuant to PERB Regulations 32215 and 32320, subdivision (a)(1).[2]

FACTUAL FINDINGS

The record reflects the following relevant facts, as well as certain additional factual findings that we incorporate into our analysis, *post*, at pages 31-40 and 51-53.

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k), and it is a school district within the meaning of PERB Regulation 32001, subdivision (c). The District largely serves students in grades 9-12, and it oversees approximately 10 schools in Ventura County.

The Federation is an employee organization within the meaning of EERA section 3540.1, subdivision (d) and PERB Regulation 32001, subdivision (a). The

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

Federation is the exclusive representative, as defined in EERA section 3540.1 subdivision (e), of three District bargaining units: certificated employees, paraeducators, and classified employees. The Federation and the District have entered into separate collective bargaining agreements (CBAs) for the three bargaining units.

As of the formal hearing in June and July 2021, the most recent CBAs had expired for each bargaining unit represented by the Federation, as follows: the classified unit in June 2018, the paraeducator unit in June 2019, and the certificated unit in June 2021. The parties began negotiating new CBAs for the three units after providing public notice of their opening proposals in May and June 2021.[3]

I. In March 2020, the District Shifted to Distance Learning.

In March 2020, the District transitioned all students to distance learning due to the COVID-19 pandemic. Distance learning combines synchronous lessons (in which students log into live virtual classes at an established time) with asynchronous lessons that students can complete at any time (such as watching a recording or completing a written assignment or activity). For the remainder of the 2019-2020 school year, the District did not require bargaining unit employees to report to any school site.

Also in March 2020, the District formed a Learning Redesign Coalition (LRC), comprising teachers, administrators, counselors, intervention specialists, and other District stakeholders. The LRC held virtual meetings on a weekly basis until June 10,

[3] The term "CBA," as used in this decision, refers to a multi-year comprehensive agreement. As discussed below, the parties also reached multiple COVID-specific memoranda of understanding (MOUs).

2020. These meetings attracted approximately 100-250 attendees, who had the opportunity to provide input on the District's pandemic response.

II. During Summer 2020, the Parties Negotiated their August MOU.

On July 6, 2020, Federation Executive Director Tim Allison e-mailed District Superintendent Thomas McCoy to follow up on discussions regarding the 2020-2021 school year. The e-mail stated the Federation's position that every District employee should have the option to continue working remotely, at least for the first two quarters of the year.[4]

The parties' discussions continued thereafter and led to an MOU that the District's Board of Trustees (Trustees) adopted on August 12, 2020. This August MOU covered only the school year's first quarter and therefore expired on October 23, 2020. Among the August MOU's critical provisions was a statement that the District would follow its distance learning model in the first quarter and move to hybrid learning (a mix of distance instruction and in-person instruction) or full in-person learning only when permitted by the California Department of Public Health (CDPH) and Ventura County Public Health (VCPH), and after consulting with the Federation. As to the latter point, the parties agreed to bargain "weekly or as needed" and to negotiate an MOU addressing the impacts of any transition to hybrid learning or full in-person learning.

[4] In an initial reopening plan dated July 2, 2020, the District divided the 2020-2021 school year into four nine-week quarters. The District never altered this schedule thereafter, even as pandemic developments, new public health guidelines, and collective bargaining changed or rendered obsolete other parts of the District's initial reopening plan.

III. During the First Quarter, the Parties Negotiated their October MOU.

Because the August MOU covered only the school year's first quarter, almost immediately after the District and Federation ratified it, they began to bargain over a new MOU covering the remaining three quarters. The parties exchanged numerous e-mails and met weekly by video conference or telephone.

On August 28, 2020, CDPH issued a "Blueprint for a Safer Economy" that established four tiers of infection risk (yellow, orange, red, and purple) based on each county's COVID-19 statistics. At that time, Ventura County was in the riskiest tier, purple, which required the highest level of restrictions. The District and Federation knew that if the County moved to the red tier, then public health guidelines would permit—but not require—the District to begin transitioning away from full distance learning.

Federation leaders were aware that school employee unions elsewhere in California were negotiating for benefits such as hazard pay and equipment that employees could use to teach from home. The Federation's leaders learned, however, that the employees they represented had one overriding concern—any transition to hybrid learning must be voluntary and safe—and Federation negotiators repeatedly emphasized to the District that this was the Federation's priority. One element of the Federation's position on safely reopening was that instructional cohorts should be limited to 14 students and 2 adults to reduce the number of individuals in a classroom at any time.

The District, in a proposal dated September 25, 2020, offered to meet the Federation's core priorities, offering that "[p]articipation in a Hybrid instructional program is voluntary for Students, Families, Teachers, and Staff" and that "[h]ybrid instructional

cohorts will consist at a maximum of 14 students and 2 adults." The Federation agreed to the District's proposed language on these core priorities, and those provisions formed the basis for the parties' October MOU. Allison testified that there was no need for the Federation to make counterproposals on those critical issues, because "the District heard us. Those proposals reflect the bargaining that we had done up until that point. They reflected the interests of the Union."

Around the same time, the parties agreed that the District would only transition to hybrid learning or in-person learning effective at the beginning of a quarter, irrespective of when health conditions might change. As McCoy reported to the Trustees on September 23, 2020 (according to a stipulated transcript of his remarks): "We cannot be fair [sic-unfair] to students, families and teachers and change our distance learning plan in the middle of our terms of instruction, so we've committed to going one quarter at a time and then once we make a commitment for that quarter, to stay with that commitment regardless of the permissions we receive from Public Health."

On October 5, 2020, the District e-mailed all employees in anticipation that Ventura County might soon enter the red tier. The District's e-mail first notified employees that even were that to occur, the District would remain in distance learning in the second quarter, which would run from October 26, 2020, to January 11, 2021. Furthermore, although the parties had not yet finalized the October MOU covering quarters two through four, the District's e-mail reflected one of the critical provisions noted above—that all teachers would be permitted to choose whether they wished to participate in hybrid instruction.

Nine days later, at a public meeting on October 14, 2020, the Trustees unanimously approved the October MOU. McCoy presented a series of PowerPoint slides to the Trustees before they approved the MOU. One slide McCoy presented, entitled "Hybrid Instruction," stated that "Participation in a Hybrid instructional program is voluntary for Students, Families, Teachers, and Staff[.] Hybrid instructional cohorts will consist at a maximum of 14 students and 2 adults."

The October MOU, in 16 detailed pages, afforded District employees dozens of new rights and created dozens of new or changed duties. The central provisions included, but were not limited to, the following:

> "Unless otherwise noted below, the provisions of this MOU shall supersede any provisions of the Collective Bargaining Agreements . . . Further, the Parties affirm that all provisions of [EERA] apply and remain in effect.
>
> [¶] . . . [¶]
>
> "**1.0 DEFINITIONS**
>
> [¶] . . . [¶]
>
> "1.10 'Hybrid Learning' — Any combination of live in-person class meetings, and Asynchronous Learning Activities.
>
> "1.11 'In-Person Learning' — In person class meetings live on the school campus[.]
>
> [¶] . . . [¶]
>
> "**2.0 PERSONAL PROTECTIVE EQUIPMENT ('PPE')**
>
> "2.01 The District shall provide PPE (consisting of a face covering) to all unit members . . .
>
> [¶] . . . [¶]

“**Face Covering Requirements**
“2.05 As recommended by public health officials, face coverings are required to be worn properly at all times by all individuals on a school campus indoors or outdoors during school hours. . . .

[¶] . . . [¶]

“**3.0 HEALTH AND SAFETY CONSIDERATIONS**

“. . . The District may transition to a hybrid or full in-person learning only when allowed by CDPH and VCPH, and only after consulting with stakeholders, including, but not limited to labor representatives, the governing board, employees, students, and parents.

“Both parties agree to follow the guidance outlined in the COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California. 2020-2021 School Year as a minimum level of safety.

“3.01 The District shall adhere to the COVID-19 guidelines and orders issued by [CDPH, VCPH, and other government agencies].

[¶] . . . [¶]

“3.03 The Parties agree to meet as soon as possible to negotiate the impact and effects of any revisions or updates to the guidelines in section 3.01.

“**Meetings and Gatherings**
“3.04 In-person meetings shall be voluntary during COVID-19 related school closures (including but not limited to, staff meetings, 504s, IEPs, SSTs, . . . and parent-teacher conferences). All meetings shall have a virtual option . . .

“3.05 Back-To-School Night, Open House, and any similar in-person meetings shall be offered in a virtual format . . .

“**Daily Cleaning and Disinfecting**
“3.06 The District shall ensure that all [spaces] in use are cleaned and disinfected daily. . .

[¶] . . . [¶]

“**Air Ventilation and Filtration**

[¶] . . .[¶]

“3.12 The District shall provide ‘Air Scrubbers’ in classrooms and workspaces without HVAC. The ‘Air Scrubbers’ will include HEPA filters.

“**4.0 DISTANCE LEARNING**

“The District will conduct instruction in Distance Learning in Quarter 2 and may transition to a hybrid or in-person learning model when public health conditions allow. Any transition in the instructional program will occur only at the beginning of an established Quarter of instruction within the 2020-2021 school calendar and only after consulting with District stakeholders including, but not limited to, the District Learning Redesign Coalition, the Oxnard Federation of Teachers and School Employees, as well as students and parents.

“4.0.1 Unit members providing service in Distance Learning have the option to work either remotely or may access and work from their assigned classroom/office workspace during regular school hours.

“4.0.2 When a unit member reports to a district worksite, they shall be responsible for following all safety and health requirements in [this MOU].

[¶] . . . [¶]

“**Learning Loss Recovery**
“4.06 The State of California currently has a waiver in place for Districts to provide live tutorial meetings on campus for students with Learning Loss.

“4.06.1 Learning Loss Recovery is particularly focused on English Learners and Students with Disabilities.

“4.06.2 Participation in Learning Loss Recovery tutorials is voluntary for Students, Families, Teachers, and Staff[.]

“4.06.3 Learning Loss Recovery tutorial cohorts will consist at a maximum of 14 students and 2 adults.

[¶] . . . [¶]

“**Hybrid Instruction**
“4.07 The District may transition to a hybrid instructional program when public health conditions allow. Any transition in the instructional program will occur only at the beginning of an established Quarter of instruction within the 2020-2021 school calendar and only after consulting with District stakeholders including, but not limited to, the [LRC], the [Federation], the Governing Board as well as students and parents.

“4.07.1 Participation in a Hybrid instructional program is voluntary for Students, Families, Teachers, and Staff[.]

“4.07.1.1 Prior to a transition to Hybrid instruction, a survey will be sent to staff, students, and families to determine the intent to return in Hybrid instruction[.]

“4.07.2 Hybrid instructional cohorts will consist at a maximum of 14 students and 2 adults.

[¶] . . . [¶]

“4.07.7 Hybrid instructional cohorts may meet zero to four times per week depending on cohort size and course activities.

[¶] . . . [¶]

“**In Person Instruction**
“4.08 The District may transition to an in person instructional program when public health conditions allow. Any transition to an in person instructional program will occur only at the beginning of an established Quarter of instruction within the 2020-2021 school calendar and only after consulting with District stakeholders including, but not limited to, the [LRC], the [Federation], the Governing Board as well as students and parents.

[¶]…[¶]

“**14.0 ACCOMMODATIONS**

[¶]

“14.02 The District agrees to engage in an interactive process to determine reasonable accommodations to protect and support employees who are at higher risk for severe illness or who cannot safely distance from household contacts at higher risk by providing options such as distance learning or working remotely.

“14.03 The District shall work with an employee impacted by COVID-19 who is unable to work remotely to develop a leave plan that endeavors to avoid exhausting the employee’s earned paid leave. A medical note and an Interactive Process meeting may be required.

[¶] . . . [¶]

“**16.0 CONSULTATION RIGHTS AND RESERVE RIGHT TO FURTHER NEGOTIATE**

> "16.01 The District and Federation agree to meet and confer weekly or as needed during the pandemic to discuss issues of concern to the District or the Federation regarding the implementation of [distance] or hybrid learning and its impact on unit members.
>
> "16.02 Due to the evolving nature of the pandemic, the Federation reserves the right to negotiate safety and/or any impacts and effects related to the COVID-19 pandemic that may arise after this MOU becomes effective.
>
> "**17.0 DURATION**
>
> [¶] . . . [¶]
>
> "17.02 This MOU shall expire in full without precedent on June 16, 2021 unless extended by mutual written agreement of the Parties. All provisions of this MOU are subject to the negotiated grievance procedure in the CBA."

(Emphasis in original.)

As of the close of the first quarter on October 23, 2020, pandemic conditions in Ventura County were improving and the County briefly moved from the purple tier to the red tier. When the parties negotiated the October MOU, they reasonably believed that at least hybrid instruction might be possible later in the year. The likelihood of full in-person learning was much less clear, and the parties agreed to "punt" on discussing full in-person learning and to negotiate over that topic later if needed.

Soon thereafter, the pandemic worsened in Ventura County. In the months immediately following adoption of the October MOU, the District continued full distance learning.

IV. Before Commencing Hybrid Learning, the Parties Negotiated their March MOU.

In late February 2021, as the prospect of vaccine availability came closer to a reality and the pandemic began to ease in Ventura County, the District approached the Federation about transitioning to hybrid learning.[5] School districts transitioning to hybrid learning by April 1 were eligible for additional state funding and District leaders believed students would benefit from hybrid instruction.

The parties had already negotiated detailed provisions on transitioning to hybrid learning, which contributed to an efficient further negotiation over additional provisions. Specifically, the Federation urged the District to use some of the additional state funding to offer stipends that would incentivize teachers to choose to participate in hybrid learning. The District agreed, building on this suggestion in a February 25 e-mail from Assistant Superintendent Deborah Salgado to the Federation. The e-mail first stated: "we agree on **all** being volunteers" (emphasis in original); it then offered stipends for employees who agreed to work in-person on logistics and training during the remaining weeks of the third quarter; and it indicated that hybrid learning would begin on April 12, the first day of the fourth quarter. In addition to this written commitment, Salgado also orally assured Federation negotiators that staff and students would both have the choice whether to participate in hybrid learning.

On March 1, the Federation e-mailed its bargaining unit members. The e-mail notified employees in relevant part: "The [Federation]'s negotiated MOU is in place until the end of the school year. **In part, the MOU states that participation in a Hybrid**

[5] All further dates refer to 2021 unless otherwise specified.

instructional program is voluntary for Students, Families, Teachers, and Staff. The Union is also negotiating a stipend for all employees who return to school with students present." (Emphasis in original.)

As the parties worked to finalize further terms and conditions of employment related to hybrid learning, the District again acknowledged and asserted that returning to work on-site was entirely voluntary, and the District amended its stipend offer. Under the new stipend offer, employees could receive one $500 stipend if they chose to work on-site during the remaining weeks of the third quarter and a later $500 stipend if they chose to work on-site during the fourth quarter. On March 4, Allison e-mailed Salgado and floated the Federation's possible acceptance of these terms. Regarding the transition to hybrid learning, Allison's e-mail read: "If you can get us answers and we can feel comfortable that safety is being addressed at the sites, the rest of the issues are straightforward. Return is voluntary for all and we will accept your counter-proposal of a $500 stipend for March and a $500 stipend for Q4."

The District again emphasized that employees would have the choice whether to return in-person in a March 4 e-mail to all employees that also aimed to commence voluntary hybrid learning as early as the week of March 15-19:

> "All,
>
> "As Ventura County approaches the Red Tier of COVID-19 we are *tentatively* scheduling the following calendar for a voluntary return to in person learning in Oxnard Union High School District.
>
> [¶] . . . [¶]
>
> "All employees who voluntarily return in person in Quarter 3 will receive a $500 dollar stipend, paid at the end of April;

> "All employees who voluntarily return in person in Quarter 4 will receive a $500 dollar stipend, paid at the end of June;
>
> [¶] . . . [¶]
>
> "Teachers inform students if classes will be held in person - **March 10 - March 12**
>
> "**Tentative Voluntary start date - week of March 15***
>
> **"**In person dates - Tuesday March 16; Wednesday March 17; Thursday March 18
>
> "**assumes Red Tier begins week of March 8 and seven day waiting period begins*"

(Emphasis in original.)

The parties ultimately executed a supplemental MOU on March 10. This March MOU reiterated that all bargaining unit employees had the choice whether to return to work on-site, and it further provided that all employees electing to do so would receive the stipends noted above:

> "[T]he District desires to offer an **incentive** for bargaining [unit] members who return to In-person instruction/work;
>
> "The district and [Federation] desire to memorialize their agreement concerning compensation that will be offered to bargaining [unit] members for returning to on-site/In-person instruction/work.
>
> "THE PARTIES AGREE TO THE FOLLOWING:
>
> "1. Program Agreement: The parties agree that on a **voluntary** basis, **employees may choose to return to In-person instruction/on-site work** that is described below.
>
> "2. Purpose: The purpose of this program is to compensate employees who to [sic] return to In-person instruction/on-site work. . . .

[¶] . . . [¶]

"4. Return to School Stipend: For each eligible member that satisfies all conditions of this incentive program, the district will pay **$500 in the April pay warrant**, and **$500 in the June pay warrant**."

(Underlining in original; other emphasis added.)

Also on March 10, the Trustees approved the March MOU at a public meeting. McCoy presented a series of PowerPoint slides to the Trustees before they approved the MOU. One slide McCoy presented, entitled "Hybrid Instruction," stated that:

"Participation in a Hybrid instructional program is voluntary for Students, Families, Teachers, and Staff[.]

"Hybrid instructional cohorts will consist at a maximum of 14 students and 2 adults[.]

"Hybrid in person Distance Learning groups[6] will meet in cohorts of 24 students to 1 adult[.]"

Another slide in McCoy's March 10 presentation included four hypotheticals that collectively reaffirmed not all employees would be on campus:

"Student is present; Teacher is present – Student attends their in person class[.]

"Student is present; Teacher is not present – [Student] attends a Distance Learning Pod (24:1)[.]

[6] The District used the phrase "hybrid in person distance learning group" to refer to a class in which the students are together on-site, but the teacher is remote. This possibility represented a release valve that the District could use for various eventualities, including if the number of teachers choosing to come on-site was small compared to the number of students choosing to participate in on-site instruction. As part of this option, the District determined that students could congregate in groups of 24 if their teacher was teaching them remotely.

> "Student is not present; Teacher is present – Student does Distance Learning from home[.]
>
> "Student is not present; Teacher is not present - Student does Distance Learning from home[.]"

Furthermore, the March 10 Trustees' meeting minutes reflect that McCoy noted the District might not have enough teachers for all students to have in-person classes, but there would be enough adults on campus to allow students to at least come to campus, even if they had to be instructed by teachers working remotely. McCoy also told the Trustees that he expected a "core group of staff and students to return first" and with time, he hoped for increases. Meanwhile, during the public comment portion of the March 10 Trustees' meeting, parents spoke in favor of full in-person learning and made anti-union statements.

On March 18, McCoy e-mailed all employees and defended the fact that employees and students would each have a choice whether to return to campus that school year: "District stakeholders have asked me why we are returning in a voluntary, instead of mandatory program. . . . We believe [the hybrid program provides] a fair opportunity for all students and staff to return voluntarily in areas of the District that are experiencing different rates of virus transmission."[7] McCoy then stated that the District's approach permitted "flexibility for students and staff to join us each week," and he shared his hope that "we will see more and more staff and students returning" in the fourth quarter.

[7] Different cities within the District experienced very different levels of COVID-19 infection.

Ventura County moved into the red tier on March 17. This change meant that public health guidelines permitted the District to begin transitioning away from full distance learning.[8]

The District allowed teachers and students to opt-in to hybrid instruction beginning in the last seven days of March. Out of the District's 17,000 students, between 350 and 450 (between two and three percent) chose to participate during those days. The District placed these students into one of three cohorts and assigned each cohort one day per week for their in-person instruction for the remainder of the third quarter, while capping instructional cohorts at 14 students and 2 adults. The District scheduled one hybrid cohort for its in-person instruction on Tuesdays and scheduled the other two cohorts for Wednesday and Thursday, respectively. No students were scheduled to be on-site Mondays or Fridays. Accordingly, the first three days with any cohort of students on-site were Wednesday, March 24, Thursday, March 25, and Tuesday, March 30.

On the evening of March 24, the Trustees held their next scheduled public meeting. Recognizing that the union representing campus supervisors had a "me-too" arrangement giving it the right to benefits the Federation negotiated for its units, the Trustees approved "$500 Stipends for Voluntary Return to Campus" for the supervisors' unit (as well as for unrepresented employee groups). During public comment, parents

[8] Prior to Ventura County moving into the red tier, public health guidelines had afforded leeway, as to whether to reopen for in-person instruction, to districts with students in grades Kindergarten through 6, but the District educates students in 9th grade and older. Effective April 7, Ventura County moved to the orange tier, and effective June 2 it moved to the yellow tier. The state discontinued the tier system in mid-June.

commented that the Trustees should not listen to the Federation, should amend the District's MOUs, and should require all teachers to return to work in-person.

V. The District Required Most Teachers and Paraeducators to Work On-Site.

On March 29, Salgado e-mailed Allison and Federation President Robert Kadin, claiming that McCoy wanted "to talk about the stipend timelines" and asking the Federation to schedule a video conference for 6:00 p.m. the next evening. At that point, there had been just two school days—March 24 and 25—with any students on-site.

On March 30, the Federation participated in a 6:00 p.m. video conference as Salgado had requested. McCoy, Salgado, and District attorney Darren Kameya participated for the District, while Allison, Kadin, and Federation Vice President Julie Cole participated for the Federation. At no time during the meeting did the District discuss "stipend timelines." Instead, McCoy announced that certificated employees and paraeducators could no longer choose whether they wished to work on-site during hybrid learning. McCoy said he was sending the Federation an e-mail right at that moment, and at 6:04 p.m. he e-mailed the Federation a lengthy letter. In the letter, McCoy alleged that "the conditions set forth in Section 3.0 of the [October MOU] have been met, and the District is therefore transitioning to an in person hybrid learning model . . . . Starting on April 26, 2021 and with limited exceptions, all employees will return to work in-person at their regular worksites." The letter then offered to bargain "any impacts or effects" and stated that certificated employees and paraeducators could

remain working remotely only if they sought and obtained a medical exemption or agreed to retire or resign their employment in June.[9]

Kadin responded to the District orally, telling McCoy, "you know, we actually have a contract, and that contract says that you cannot do what you're trying to do." Meanwhile, Allison responded by e-mail at 6:13 p.m., requesting to bargain and noting that the District's conduct violated the parties' agreement.

Later during the March 30 video conference, the Federation told McCoy that another problem with the District's decision to require employees to work on-site was that April 26 was not the beginning of a quarter. McCoy responded that maybe he would need to do it sooner, effective April 12 (the first day of the fourth quarter). The Federation reiterated that the District's plan involved hybrid learning, which by contract had to be voluntary for employees. McCoy responded that maybe he would need to make it in-person learning.[10]

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[9] McCoy's March 30 e-mail at 6:04 p.m. also attached a letter requesting to bargain successor CBAs for each of the three units the Federation represents. While the District asserts the Federation had previously sought to delay such bargaining until January 2022, the record does not contain adequate information for us to assess this claim and in any event it does not appear to be relevant to any material conclusion.

[10] Allison also told the District that he had personally been helping employees make vaccine appointments, that it was not easy to do so, and that many employees would not be fully vaccinated by April 26. Furthermore, Allison asked McCoy if he had gotten out in front of the Trustees in requiring employees to work from their school sites. McCoy answered that he takes direction from the Trustees, and Kameya said the Trustees had given this directive. Allison said he had watched the Trustees' meeting, just six days earlier, "gavel to gavel," and seen no such directive. After taking a caucus, the District returned to the video conference and said that the Trustees gave this directive during a closed session portion of their March 24 meeting, pertaining to "labor

The parties' March 30 video conference lasted several hours. For a lengthy period before the parties logged off from the video conference, McCoy pressured the Federation to commit that it (a) would not yet send employees any communication about the District's decision, and (b) would meet with the District the next afternoon and offer a counterproposal. McCoy threatened that if the Federation could not make these commitments, he would immediately send all employees notice of their obligation to return to work in-person on April 26. The Federation largely agreed to McCoy's procedural demands to keep him from carrying out his threat. The Federation promised it would e-mail the District its counterproposal before their meeting the next day. The Federation did so at 1:26 p.m. on March 31, maintaining that employees had the right to decide whether to return on-site during hybrid instruction, and again proposing that the District should use some of its additional state monies to incentivize teachers to return.

McCoy testified that March 24 was the first day he began internal discussions with Salgado and other District leaders over the decision to require staff to work on-site, and that he made this decision prior to giving notice to the Federation on the evening of March 30. McCoy testified that he made the decision for only a single reason: because the District thought it "didn't have enough teachers in the preview days [March 24, 25, and 30] to accommodate the number of students who wanted to return to school." When asked about the percentage of teachers who chose voluntarily to teach on-site, McCoy testified: "I would say about 20 percent of the certificated workforce." This phrasing

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negotiations." While the record contains extensive evidence on these issues, they are not relevant to any material conclusion.

indicated a lack of certainty, and neither McCoy nor the District provided data to back up McCoy's claim. Notably, in Salgado's sworn declaration submitted by the District on April 15 in opposition to the Federation's request for injunctive relief, she stated that between 37.1 percent and 41.6 percent of teachers chose voluntarily to teach on-site starting in the last week of March 2021. Because it is more precise and was given closer in time to the events at issue, we credit Salgado's declaration over McCoy's testimony.[11] Thus, while only two or three percent of students had chosen to participate in hybrid instruction as of the date the District made its decision, a much higher percentage of teachers had chosen to participate.

VI. After March 30, the Parties Largely Maintained Their Positions.

Resuming on March 31, the parties met by video conference at 1:30 p.m. and rehashed many of their statements from the previous night. The Federation began by reiterating that the District had promised "over and over and over" that if the District implemented hybrid instruction that school year, employees would not be forced back on-site against their will. In response, the District pointed to two parts of the October MOU. First, McCoy said that section 3.0 permitted him to require staff to return on-site

[11] As the ALJ informed the parties, the record in this case includes the documents filed in support of and in opposition to the Federation's request for injunctive relief. Salgado did not testify. Her declaration is hearsay evidence that "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (PERB Reg. 32176.) It is undisputed that Salgado was authorized to speak on behalf of the District when she made the sworn statements in her declaration. Those statements therefore are authorized admissions under Evidence Code section 1222. (*Alliance Environmental Science and Technology High School* (2020) PERB Decision No. 2717, pp. 21-22 [judicial appeal pending].) We therefore find that between 37.1 percent and 41.6 percent of teachers chose voluntarily to teach on-site starting in the last week of March 2021.

when health conditions improved. Second, McCoy said the District was calling employees back to in-person learning as allowed under section 4.08.[12] When the Federation offered its contrary legal view and said this was heading toward a legal process, the District responded that "the legal process is slow and in the meantime we will reopen."

Also during the March 31 video conference, the Federation orally proposed to increase incentives to employees and postpone the April 26 mandatory return date. McCoy testified that the District did not respond because collective bargaining proposals must be in writing and therefore oral proposals such as the Federation's do not "exist."

As part of the March 31 discussion, the District clarified that hybrid learning would remain voluntary for students, but not for teachers and paraeducators. The District also told the Federation that it had decided to increase hybrid instructional cohorts to a maximum of 18 students and 1 teacher. The meeting ended with the District indicating it would notify employees of its decisions and the Federation indicating it would pursue legal action.

By letter dated April 2, the Federation notified the District that even though the District's firm decision to deviate from the parties' MOUs precluded any possibility of good faith negotiations, the Federation was always willing to meet. The parties met at least ten times between March 31 and April 20, including a full day mediation on

[12] The District later relied on the same two MOU provisions in an April 7 e-mail, characterizing its decision as "implementation of sections 3.0 and 4.08 of our October 2020 MOU."

April 17.[13] Throughout these discussions, the Federation maintained its position that while it was willing to meet to discuss mitigating harms, the District's course of conduct was illegal.

On April 6, the District made a written proposal that included the following provisions:

> "From Monday April 12, 2021 through Friday April 23, 2021 certificated and paraeducator employees will be voluntary to return and may remain in remote work.
>
> "Certificated and Paraeducator employees who have already submitted or will submit a notice of retirement or resignation from the District . . . will remain voluntary to return to in-person work and will not need to use any personal leave or sick leave to remain in a remote assignment.
>
> "Certificated and Paraeducator employees who have a medical need to remain in a remote assignment may submit a note from a qualified medical professional as the need exists or arises. Each case will be evaluated per the information in the note from the qualified medical professional that exempts the employee from their in-person assignment. Any employee not approved for a medical remote assignment may appeal through the Federation and a joint committee representing the District and the Federation will review the case with permission from the employee.
>
> "Certificated and Paraeducator employees may request an unpaid leave of absence from April 2021 through June 2021
>
> [¶] . . . [¶]

[13] McCoy testified that the Federation indicated no interest in continuing negotiations after April 20, and Allison testified that neither side requested further meetings. No material conclusion turns on whether only the Federation discontinued negotiations after April 20 or both sides lacked such interest.

> "Certificated and Paraeducator employees not qualifying for any other exemption may file for a hardship exemption to stay in remote work. . . . The Federation shall recommend hardship exemptions, based on criteria jointly developed by the Federation and the District, to a joint committee of the Federation and the District for consideration during the week of April 19, 2021. . . .
>
> "The District shall recall all non-exempt certificated employees and paraeducators to return to work on Monday April 26, 2021 at school sites and other facilities used by the District ***to offer in-person instruction*** to enrolled pupils.
>
> [¶] . . . [¶]
>
> "In the Orange Tier - the District shall limit daily class size to 18:1 (4ft Social Distancing); Any Teacher may include up to 24:1 at their discretion (4ft Social Distancing).
>
> "In the Orange Tier - the District shall assign students to one of two cohorts (Mon/Wed or Tues/Thurs) with Friday as an option for the Teacher to assign: In-person tutorial; remote tutorial; In-person learning. Student Cohorts that total less than 18 over two days shall be combined into a four day cohort.
>
> "In the Yellow Tier student cohorts that are less than or equal to 30:1 (3ft Social Distancing) shall attend five days a week including Friday."

(Emphasis supplied.)

Although Salgado orally stated on April 6 that the parties' negotiations related to a "successor" or "replacement" MOU, she followed up with an e-mail later that day clarifying the District's position that it was not proposing a new MOU and instead was "negotiating the effects of bringing employees back to the work site to in person instruction per the current MOU."

On April 7, the Federation made a written counterproposal that would, among other items, continue giving employees a choice whether to work on-site, increase monetary incentives for on-site work, and establish the following joint effort to make sure the number of students seeking in-person teaching did not outstrip the number of staff on-site:

> "On or after the start of Quarter 4 on April 12, 2021, the District and the Federation shall meet to review the return to school numbers of students, paraeducators and teachers.
>
> "Outreach Phase: If the numbers for paraeducators and/or teachers fall short of district needs in the period between 4/12 and 4/26/21, the District and the Federation will jointly work to encourage greater numbers of returning employees as they become fully vaccinated and feel safe to return.
>
> "On or after the start of the Recall to Sites phase on April 26, 2021, the District and the Federation shall meet to review the return to school numbers of students, paraeducators and teachers.
>
> "Incentive Phase: If the numbers for paraeducators and/or teachers fall short of district needs after 4/26/21, the District and the Federation will jointly work to contemplate incentives which may encourage more employees to return to onsite work and find ways to remove barriers to employee concerns.
>
> "On or after May 17, 2021, the District and the Federation shall meet to review the return to school numbers of students, paraeducators and teachers.
>
> "Enhanced Phase: If at any time after May 17, 2021[,] the ratio of students returning to teachers returning is higher than 28 to 1, the district and Federation will meet to consider implementing an enhanced return to work order for Certificated and Paraeducator staff, exclusive of those who have received prior exemptions from the district."

The Federation's April 7 proposal also provided: "This MOU shall expire in full without precedence on June 16 unless extended by mutual written agreement by both parties. The parties anticipate a successor agreement to handle issues regarding fall school reopenings. The parties agree that any disputes to the terms herein will be submitted to an expedited arbitration process with shared costs upon the request of either party."

On April 8, the District made a written proposal that stated, among other items: "Unless exempted, all employees are recalled to work at school sites and other facilities used by the District to offer in-person instruction to enrolled pupils on Monday April 26, 2021[.]" The District made additional written proposals containing this sentence on April 12 and 16.

The concluding paragraph of the District's proposals dated April 8, April 12, and April 16 contained the following sentences: "These effects shall expire in full without precedence on June 16 unless extended by mutual written agreement by both parties. The parties agree that any disputes to the terms herein will be submitted to an expedited arbitration process with shared costs upon the request of either party."

When the parties discussed exemptions to mandatory in-person work for health issues, caretaking needs, or other hardships, the District insisted on more narrow definitions than the Federation proposed, and at one point the District indicated that it needed at least 609 certificated staff working on-site. In addition to advocating that the District should freely grant exemptions, the Federation also disagreed with putting non-medical personnel in charge of granting medical exemptions.

Effective April 26, the District required teachers and paraeducators to work on-site absent an approved exemption. The District also implemented, at least in

limited circumstances, its decision to go beyond the parties' agreed-upon maximum cohort size of 14 students and 2 adults; thereafter, the District discontinued doing so and instead adhered to the maximum cohort size.

McCoy testified that even though the District required most certificated employees and paraeducators to return on-site effective April 26, teachers could nonetheless bar students from their classrooms and instead engage in purely distance instruction. According to McCoy, in this instance, those students attending school in-person would participate from an on-site tent. Allison testified that the District did not give teachers that option after April 26. We weigh these competing claims *post* at pages 36-39 and conclude that all available evidence undercuts McCoy's claim and corroborates Allison's testimony.

McCoy testified that students' on-site attendance generally increased after April 26 (while later decreasing during a period in which students took state-mandated and advanced placement tests). The District did not provide any further information regarding McCoy's general assertion. In the absence of such information, we make no findings as to the nature of any alleged attendance increase following April 26 or any subsequent decrease.

In April, the Federation filed a grievance alleging that the District had violated the October MOU, the District denied the grievance, and the Federation appealed to the next grievance level. In May, the District denied the appeal, and the Federation requested expedited arbitration. The District refused to expedite the matter, and the parties therefore proceeded according to non-expedited arbitration procedures. At the

time of the PERB formal hearing on liability issues, the parties had scheduled an arbitration date.

DISCUSSION

To establish a prima facie case that a respondent employer violated its decision bargaining obligation, an exclusive representative must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the employees' union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9 (*Bellflower*).)[14]

The District does not dispute that the decisions it announced on March 30-31 had a generalized effect or continuing impact on employees, nor could the District plausibly raise such a dispute given that it substantially altered employees' working conditions from April 26 through the end of the school year and asserted a potentially far-reaching right to reinterpret contractual terms as public health conditions improved. (*Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, p. 8 [continuing impact shown if change either alters a term or condition of employment or

[14] To "bargain" has the same meaning as to "meet and confer" or to "negotiate," and we use the terms interchangeably. (EERA, § 3540.1, subd. (h); *County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 15, fn. 9.)

involves employer assertion of non-existent right that could be relevant to future disputes].) We therefore focus our analysis on the primary disputed issues, which include the first, second, and fourth unilateral change elements, several issues relevant to the complaint's alternate effects bargaining claim, and several affirmative defenses upon which the District relies.

I. The District changed or deviated from the status quo.

There are three primary means of establishing that an employer changed or deviated from the status quo. (*Bellflower*, *supra*, PERB Decision No. 2796, p. 10.) Specifically, a charging party satisfies this element by showing any of the following: (1) deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Ibid*.)

One set of changes alleged in the complaint have effectively been withdrawn, though some explanation is warranted. Specifically, the complaint alleged that the District altered the status quo (as measured by the October MOU and policies and practices implementing that MOU) by transitioning its instructional program mid-quarter, by doing so without surveying staff, students, and families, and by doing so without consulting with the LRC, the Federation, the Trustees, students, and parents. Both parties now agree that: sections 4.0, 4.7, 4.07.1.1, and 4.8 of the October MOU barred the District from transitioning to hybrid learning or in-person learning in the middle of an instructional quarter, or without surveying and consulting the aforementioned stakeholders; the District remained in distance learning from the beginning of the school year through March 23; the District transitioned from distance

learning to hybrid learning on March 24, which was in the middle of the third quarter , but the District did not violate EERA because it did so with the Federation's approval; the District continued in hybrid learning for the remainder of the school year; and the District's April 26 transition did not constitute a transition to in-person learning.[15] In sum, the Federation does not challenge the District's shift to hybrid learning on March 24, and we dismiss the complaint allegations related to that transition.

However, it is important to note why the charge and complaint alleged violations related to a change in instructional program. When the Federation repeatedly reminded the District in March and April that it was violating the parties' agreements by requiring staff to participate in hybrid learning, the District responded by arguing that sections 3.0 and 4.08 of the October MOU authorized it to transition to in-person learning. Thus, because it had agreed to allow employees to choose whether to participate in hybrid learning, the District initially made it appear that it was transitioning the instructional program to in-person learning effective April 26. But the record shows—and the parties' positions now reflect—that the District never progressed beyond hybrid learning, which is a mix of distance instruction and in-person instruction.[16]

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[15] For instance, McCoy characterized the April 26 change as follows: "The District had already implemented the hybrid model. The decision was to change our program from an opt-in to an opt-out."

[16] Although the District's brief is clear that it only changed the instructional program once in the school year, effective March 24, McCoy provided inconsistent testimony on this topic. For instance, when asked why the District chose to notify the Federation on the evening of March 30 that employees must work on-site beginning April 26, McCoy answered that: "The starting of quarter four was Monday, April 12th"

We turn now to the alleged changes or deviations from the status quo that remain in dispute.

A. The District's decision to require in-person work.

PERB applies traditional rules of contract law to interpret the parties' MOUs. (*Lodi Unified School District* (2020) PERB Decision No. 2723, p. 12 (*Lodi*).) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "[T]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning. (*Lodi*, *supra*, PERB Decision No. 2723, p. 13.) Where contract terms are ambiguous, we may look to bargaining history and past practice to discern the parties' intent. (*Ibid*.) Regarding the latter, the parties' past practice under the contract before the dispute arose, i.e., "[t]he parties' practical construction of a contract," provides "important evidence of their intent." (*Ibid*.)

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and "to be respectful of the requirement in MOU number two where no changes in program except at the beginning of the quarter, we wanted to notify the Federation before the start of quarter four of our intent to recall employees beginning April 26th, 2021." We find this to be one of several areas where McCoy was an unreliable witness, and we do not credit his testimony where it conflicts with other evidence.

In the October MOU, section 4.0.1 provides that employees engaged in distance learning can choose to work from home or from school,[17] and section 4.07.1 provides that employees may choose whether to engage in hybrid instruction or remain in distance learning.[18] Paragraph 1 of the March MOU reinforces this clear intent: "The parties agree that on a voluntary basis, employees may choose to return to In-person instruction/on-site work that is described below." (Emphasis supplied.) Thus, the plain language of the MOUs leaves no doubt that for the second, third, and fourth quarters of the 2020-2021 school year, the District had agreed not to require employees to work on-site unless it transitioned to full in-person learning.

While the MOU provisions are clear on this point, even if they were ambiguous, other evidence belies the District's strained contract interpretation. First, as detailed at length above, the District itself made repeated oral and written statements confirming that employee participation in hybrid learning was voluntary; the record strongly supports Allison's testimony that the District made this promise "over and over."

Furthermore, the District did not attempt to rebut the unequivocal bargaining history noted above, in which the Federation clearly articulated core priorities, the District agreed with those priorities and put them into writing, and on that basis the Federation ratified the October MOU and held off from seeking many other types of pandemic-related benefits that other educational unions were seeking at that time.[18]

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[17] "Unit members providing service in Distance Learning have the option to work either remotely or may access and work from their assigned classroom/office workspace during regular school hours."

[18] Only the Federation submitted competent evidence of what the parties discussed while bargaining the October and March MOUs. The District could have

Indeed, the parties' negotiations regarding monetary incentives for employees to work on-site only make sense in light of the unequivocal MOU provisions allowing all employees to opt out of hybrid learning.

McCoy's main effort to harmonize the District's conduct with its contractual obligations centered on an argument for which we can find neither legal nor factual support. McCoy testified that even after April 26, teachers could still engage in wholly distance learning by teaching from their classrooms and requiring any of their students who were on-site to participate in class from tents on the school grounds. Assuming that teachers were in fact allowed to do so, the District would still have significantly deviated from the October MOU. As noted above, section 4.0.1 of that MOU states that "Unit members providing service in Distance Learning have the option to work either remotely or may access and work from their assigned classroom/office workspace during regular school hours." Thus, while teachers could choose to continue distance learning according to McCoy's testimony, they no longer could choose to do so remotely, as MOU section 4.0.1 allowed.

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called its chief negotiator, Salgado, to testify, but instead presented witness testimony solely through McCoy, who was not at the bargaining table. To the extent McCoy sought to offer evidence about contractual meaning, much of his testimony was hearsay and/or irrelevant because it related to the District's subjective understanding of the MOUs that it never shared across the bargaining table while negotiating the agreements. (PERB Reg. 32176 ["[h]earsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions"]; *Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 617 [a bargaining party's subjective understanding is irrelevant if it was never disclosed to the other party]; *California Teachers' Ass'n. v. Governing Bd. of Hilmar Unified School Dist.* (2002) 95 Cal.App.4th 183, 189, fn. 3 [undisclosed subjective intent is irrelevant to determining contractual meaning].)

In any event, we credit Allison's testimony over McCoy's and conclude the District never told teachers that even after April 26 they had full authority to bar all students from their classrooms and thereby continue to engage in 100 percent distance instruction. Corroborating information on this point and others showed Allison to be a reliable witness and McCoy to be an unreliable witness. On this topic, for instance, we consider multiple strands of evidence beyond testimony from McCoy and Allison.

First, the District failed to introduce into evidence any written communication informing teachers that even after April 26 they had full authority to bar all students from their classrooms, and the District also failed to adduce testimonial evidence that it ever informed teachers of this right, either orally or in writing. In other words, McCoy testified that teachers had this right, but he did not testify that the District ever told teachers they had such a right.[19] Moreover, several District communications—including those to the Federation on the evening of March 30—indicated that teachers who did not fall into one of the exceptions the District offered would have to report on-site and teach students in-person.

Second, McCoy's testimony conflicted significantly with his own explanation as to the "only reason" the District required employees to work on-site: the allegedly insufficient number of teachers to accommodate the number of students who wanted to return to school. As McCoy explained in an e-mail dated April 21, the District's goal

[19] Because McCoy never testified that the District communicated to teachers about this supposed right, his testimony technically does not conflict with Allison's testimony.

was to give students "a meaningful chance to receive in-person instruction." If teachers were in fact permitted to continue distance learning from their classrooms, this would not satisfy the District's alleged need.[20]

Third, McCoy's testimony is contradicted by his declaration dated April 15, in which he stated that "Due to the lack of significant employee attendance on-site during the District's Preview Period from March 22 to the present, the District determined that instructional employees would need to be recalled to provide in-person instruction as of April 26, 2021 to provide meaningful in-person instructional opportunities for District students. . . . the District representatives informed OFTSE representatives that the District would be recalling employees as of April 26, 2021 to offer in-person instruction to all students."[21]

Fourth, Salgado's sworn declaration, also dated April 15, similarly left no doubt that the District was requiring staff to provide in-person instruction and would not permit them to engage in distance learning from their classrooms with no students present. Indeed, dozens of Salgado's assertions, found in each of eight separately

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[20] As noted above, McCoy informed the Trustees that up to 24 students could be together in a "hybrid in person distance learning group," which would be appropriate when "Student is present; Teacher is not present." All contextual evidence, including the slideshow's references to the voluntary nature of hybrid learning for teachers and students as well as section 4.0.1 of the October MOU, indicates that "not present" referred to a teacher choosing to engage in distance teaching either from their homes or from their classrooms, at their option.

[21] The District also attempts to rely on the fact that it permitted employees to apply for health-related and hardship exemptions from in-person work. While this undoubtably narrows the group of employees impacted by the District's change, the fact remains that the District deviated from the parties' written agreement.

numbered paragraphs and covering nearly three full, detailed pages, leave no question as to the true nature of the District's decision. In arguing otherwise, the District simply attempts "to escape the consequences" of its action. (*County of Riverside* (2006) PERB Decision No. 1825-M, p. 8.)

Fifth, numerous other contemporaneous documents further belie McCoy's testimony. The District's March 30 letter announcing its decision said it was recalling employees to provide "in-person instruction/services." The District's proposals dated April 6, 8, 12, and 16 were also clear that unless a certificated employee or paraeducator fell into one of the exempt categories, they were being recalled "to offer in-person instruction to enrolled pupils." As noted above, McCoy's April 21 e-mail proves the point as well.

Sixth, the District's opposition to the Federation's injunctive relief request similarly includes numerous statements leaving no doubt that the District was requiring most employees not only to work on-site but to do so in the classroom with students choosing to participate in hybrid learning.

Seventh, the District has used nebulous language to cover its shifting positions. In its March 30 letter, the District stated that it was recalling employees to provide "in-person instruction/services" but would remain in hybrid learning, and the District coined a new term to describe what it was doing: "in person hybrid learning." While the parties did not include that term in any of their MOUs,[22] nor have they otherwise used

[22] In negotiations over the October MOU, the parties specifically differentiated between hybrid learning under section 4.07, which would be voluntary, and full in-person learning under section 4.08.

it, the District used the new term six times in its March 30 letter to refer to a set of conditions that clearly violated the parties' agreements—requiring employees to work on-site during hybrid instruction, while students had a choice whether to remain in full distance learning or hybrid learning. Thus, the District coined a new term because using the terms the parties defined in their MOUs would reveal that the District was deviating from the parties' agreements. By the time of the formal hearing, however, the District abandoned the "in person hybrid learning" term and instead largely focused on the untenable argument that it complied with the MOU by permitting employees to engage solely in distance learning even after they were required to work on-site.

Finally, even if the record were less clear that the District deviated from written contractual provisions, the record would still demonstrate that the District changed or deviated from the status quo by altering its established past practice of permitting employees to choose whether to work from home when hybrid instruction began, as well as by creating a new "in person hybrid learning" policy requiring most employees to work on-site where previously there had been no such policy, and/or by applying its existing policies in a new way. (*Bellflower*, *supra*, PERB Decision No. 2796, p. 10.)

B. The District's decision to exceed the maximum hybrid cohort size.

Section 4.07.2 of the October MOU plainly required that hybrid instructional cohorts "will consist at a maximum of 14 students and 2 adults." In its response to the Federation's grievance, the District admitted that it implemented, at least in limited circumstances, its decision to exceed this maximum cohort size. Thereafter, the

District discontinued exceeding the maximum, and on that basis the District asserted that the issue is moot.

PERB precedent leaves little doubt as to the import of the District's admitted deviation from the status quo and its apparently prompt return to the status quo. In such circumstances, an employer is liable for a unilateral change, but if the return to the status quo is permanent, PERB may eschew any remedies that are no longer needed. (*County of Sacramento* (2008) PERB Decision No. 1943-M, p. 8.)

C. The District's deviations from MOU sections 16.01 and 16.02.

The complaint alleged that the District altered the status quo by failing to bargain "weekly or as needed" regarding implementation of hybrid or distance learning (as required under section 16.01 of the October MOU) and by failing to honor the reservation of additional bargaining rights found in section 16.02 of the October MOU. By the time the parties finished presenting evidence and argument, it was clear that the gravamen of the dispute was that the District unilaterally decided to repudiate its commitment that hybrid learning was voluntary (and, to some degree, its commitment to a maximum hybrid cohort size). As we discuss *post*, no number of meetings would have been sufficient to permit these unilateral actions given the District's repeated binding agreements on those subjects throughout the pandemic, and in fact the Federation would have been within its rights to refuse to meet about those unlawful decisions. However, as an alternate holding—which we discuss further below at pages 49-53—we conclude that the District deviated from sections 16.01 and 16.02 of the October MOU when it told the Federation that it was instituting new employment

terms as a fait accompli, without first having raised its staffing concern and bargained in good faith over alternative ideas.[23]

II. Work-from-home policies and class size are mandatory bargaining topics.

The "scope of representation," i.e. the group of mandatory bargaining topics under EERA, is "limited to matters relating to wages, hours of employment, and other terms and conditions of employment." (EERA, § 3543.2, subd. (a)(1).) The same provision explicitly identifies class size as a term or condition of employment. (*Ibid*.) EERA also establishes a separate category of educational decisions—those regarding educational objectives, curriculum, course content, and textbook selection—over which an exclusive representative may "consult." (EERA, § 3543.2, subd. (a)(3).)[24] By including class size as a mandatory bargaining subject, and by providing the right to consult over educational objectives, the Legislature implemented EERA's goal of providing certificated employees with "a voice in the formulation of educational policy." (EERA, § 3540; *Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 17.)

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[23] The Federation first learned of the District's decision during the March 30 video conference, when McCoy e-mailed Federation negotiators a letter announcing the decision. When the exclusive representative first learns of a change after the decision has been made, "by definition, there has been inadequate notice." (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 33.)

[24] The duty to consult requires a public school employer to "exchange freely information, opinions, and proposals; and to make and consider recommendations under orderly procedures in a conscientious effort to reach agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations." (*San Dieguito Union High School District* (1977) EERB Decision No. 22, p. 12, fn. 11. [Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB].)

EERA provides that "matters not specifically enumerated are reserved to the public school employer." (EERA, § 3543.2, subd. (a)(4).) However, the Legislature balanced this restrictive language with the expansive language noted above, which requires bargaining over "matters relating to wages, hours of employment, and other terms and conditions of employment." (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 857-860.) The California Supreme Court, noting that these EERA provisions are in tension with one another and that the Legislature authorized PERB to apply its expertise to make close calls on matters that "relate to" employment terms and conditions, has specifically endorsed PERB's three-part test for distinguishing between mandatory and non-mandatory bargaining topics. (*Ibid*.) Pursuant to that test, which the Board adopted in *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), an employer must bargain over a decision if:

> "(1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge [its] freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of [its] mission."

(*San Bernardino Community College District* (2018) PERB Decision No. 2599, p. 8 (*San Bernardino*), quoting *Anaheim*, *supra*, PERB Decision No. 177, pp. 4-5.)[25]

[25] In cases involving the Meyers-Milias-Brown Act, PERB and the California appellate courts do not apply the *Anaheim* test. (*San Bernardino*, *supra*, PERB

Turning to the facts of this case, no significant analysis is required to determine that a cohort maximum is a mandatory bargaining subject. A cohort maximum is a form of class size, which is within the scope of representation. (EERA, § 3543.2, subd. (a)(1).)

We similarly have no trouble finding that work-from-home policies satisfy the first two elements of the *Anaheim* test. Looking to the third element, in normal circumstances bargaining over changes to a work-from-home policy would not unduly infringe on managerial freedom, as delay in finalizing a new policy is unlikely to significantly frustrate any essential public education goal. (*Anaheim*, *supra*, PERB Decision No. 177, pp. 4-5.) While time may be of the essence during a pandemic, that consideration goes to the limitations on bargaining obligations when an emergency compels an employer to act rapidly, which we discuss in the following section; it does not, however, turn the topic into a non-mandatory subject of bargaining under *Anaheim*.

Before turning to standards on bargaining in emergency circumstances, we pause to explain why bargaining over a work-from-home policy for educational

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Decision No. 2599, pp. 11-12.) Rather, if there is no prior precedent determining whether a topic falls within the scope of representation, we apply the test set forth in *County of Orange* (2018) PERB Decision No. 2594-M, pp. 18-20 (*Orange*), and *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272-273. Our inquiry in such cases is fundamentally akin to our inquiry under *Anaheim*, as it considers the extent to which collective bargaining is likely to be valuable as well as the extent to which a bargaining obligation may limit management's ability to act rapidly on an important managerial prerogative. (*Orange*, *supra*, PERB Decision No. 2594-M, pp. 18-20; *San Bernardino*, *supra*, PERB Decision No. 2599, pp. 11-12.)

employees is not identical to bargaining over bringing students back on-site. The Federation admits that the District has no duty to bargain before deciding when to require students to learn from home, when to allow them the option to return for some instruction on-site, or when to require them to return to full in-person instruction. Under normal circumstances (again, temporarily setting aside the extent to which a pandemic excuses certain employer obligations), the corresponding set of conditions for employees would satisfy the *Anaheim* test. For instance, PERB has applied *Anaheim* to distinguish "between student attendance dates and employee work dates." (*Oakland Unified School District* (1983) PERB Decision No. 367, p. 34.) Thus, the Board has noted that teacher service does not coincide precisely with instructional dates, and it is possible that accommodations can be made at the bargaining table to insure maintenance of the school year through "innovative planning." (*Palos Verdes Peninsula Unified School District/Pleasant Valley Unified School District* (1979) PERB Decision No. 96, pp. 31-32.) The instant record shows the same is true with respect to work-from-home policies, as there are multiple respects in which student participation on-site and employee work performance on-site depart from one another. For instance, as noted above, a "hybrid in person distance learning group" could permit students to be together with one another on-site, while their teacher works from home.

III. COVID-19 was a sufficient emergency to curtail certain bargaining duties, but it did not permit the District to unilaterally disregard the commitments it made in the October MOU and thereafter.

An employer is temporarily excused from its normal bargaining obligation when a sudden emergency resulting from circumstances beyond its control leaves it no alternative but to take immediate action, allowing no time for meaningful negotiations

before it must act. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed decision at pp. 46-47; *Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed decision at p. 20.) Because an emergency is not a static event, changes taken in good faith reliance on a necessity defense should be limited to the timeframe that the emergency requires, and there remains an obligation to bargain in good faith as time allows. (See, e.g., *Pittsburg Unified School District* (1983) PERB Decision No. 318, pp. 17 & 20-21 [one aspect of employer's unlawful conduct was failure to limit its unilateral change to the period necessitated by the alleged emergency].) For instance, when a devastating earthquake forced two hospitals to close and "swamped" the only functioning hospital in West Los Angeles, the Board found there was time to bargain in good faith over staffing needs that developed over the ensuing weeks and months, and an employer violated its bargaining obligation by failing to do so. (*Regents of the University of California* (1998) PERB Decision No. 1255-H, adopting proposed decision at pp. 8, 35-37.)

The onset of the COVID-19 pandemic presented an emergency that temporarily curtailed the District's bargaining obligations because the District had to act almost overnight to protect staff, students, and their families from a transmissible, life-threatening virus. Accordingly, the District was permitted to require its employees to work from home in March 2020, provided it bargained in good faith as time allowed.

The right to respond to a public health emergency by instituting distance learning must logically include, as a general proposition, the right to return to the status quo in stages, while providing employee unions with advance notice and

opportunities to bargain when time allows. (*Regents of the University of California*, *supra*, PERB Decision No. 1255-H, adopting proposed decision at p. 37.) Thus, had it not made the binding commitments in the October and March MOUs, the District may have been within its rights to notify the Federation on March 30 that it had decided to expand the extent of its in-person offerings as of April 26. While we need not reach that question and do not express any opinion on it, we note that in such a scenario the parties would still have a bargaining obligation. For instance, depending on the circumstances, the parties might bargain over a partial return toward status quo employment terms from March 30 to April 26, with continued bargaining even after implementation if bargaining was not complete by April 26.

Nothing required the District to reach an agreement with the Federation that allowed employees the right to work from home for the remainder of the school year unless the District required students to return to in-person instruction. Yet the District's decision to accede to the Federation's proposal on that issue caused the Federation to forego alternate proposals it could have made and brought negotiations to a prompt and amicable conclusion. Having made binding commitments via the October MOU seven months into the pandemic, and then reaffirming and expanding on those promises repeatedly thereafter (including via the March MOU), it was per se illegal for the District to repudiate its commitments. (*County of Tulare* (2015) PERB Decision No. 2414-M, pp. 29-30 ["a statute that encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede rather than promote good-faith bargaining"]; *Standard School District* (2005) PERB Decision No. 1775, adopting proposed decision

at p. 16 ["[t]he repudiation of an agreement (explicit or implied) is virtually the definition of an unlawful unilateral change"].)

The District has no tenable argument that new circumstances arising after the October MOU permitted it to deviate from its commitments. Rather, the pandemic began to ease somewhat in the second half of the school year, just as the parties had anticipated. That provides no cause for the District to breach its commitments.

Although the District does not explicitly raise an emergency defense, McCoy testified that there "had been a change in the Education Code in late February in [Assembly Bill] 86 requiring districts to provide in-person instruction to the extent possible given the public health conditions and guidelines." While a truly new and binding legal requirement can limit an employer's duty to bargain, there are three reasons this argument fails.

First, the provision McCoy referenced, Education Code section 43504, subdivision (b), was added in the prior legislative session via Senate Bill 98. The Assembly and Senate passed the bill in June 2020, and the Governor signed it into law on June 29, 2020. Assembly Bill 86, which the Governor signed into law on March 5, 2021, referenced the previously enacted section 43504, subdivision (b) and stated the Legislature's intent that "starting in the 2020-21 school year" and continuing thereafter, schools should "expand in-person instructional time and provide academic interventions and pupil supports to address barriers to learning and accelerate progress to close learning gaps." (Ed. Code, § 43520.) Thus, well before executing the October MOU, the law already required the District to offer in-person instruction to the greatest extent possible.

Second, an employer bears a "heavy burden" if it "wishes to repudiate a collective bargaining agreement" based on a newly enacted law and cannot do so if the new statutory provisions "give the employer discretion." (*Fountain Valley Elementary School District* (1987) PERB Decision No. 625, p. 27.) Here, the Legislature gave each school district discretion to determine what level of in-person instruction was possible and how to focus its efforts on those students most in need of in-person instruction. The District thus was not faced with a legislative mandate to immediately return to in-person instruction.

Third, even had the Legislature passed a new law after October 2020 that took away the District's discretion, the District reached its decision after just three days of hybrid instruction. At that time, only two or three percent of District students had chosen to participate in the on-site portion of hybrid learning, while between 37.1 percent and 41.6 percent of teachers had chosen voluntarily to teach on-site. There was, in short, no cause for the District's precipitous decision even had McCoy been correct in his mistaken understanding of the law.

To the extent the District argues that requiring most teachers to work on-site would encourage more students to participate in the in-person part of hybrid learning—and particularly those students most in need of that instructional mode—we do not rely on that conjecture for several reasons. It conflicts with McCoy's testimony, in which he stated the "only reason" the District required teachers to work on-site was that the District "didn't have enough teachers in the preview days [March 24, 25, and 30] to accommodate the number of students who wanted to return to school." And even if we were inclined to look beyond this singular reason, we cannot evaluate the

"if we build it, they will come" idea in the absence of a more complete record. Moreover, that rationale does not qualify as a sudden emergency resulting from circumstances beyond the District's control that left it no alternative to the action taken and allowed no time for meaningful negotiations before it needed to act.

In sum, the District repudiated section 4.07.1 of the October MOU by requiring employees to participate in hybrid instruction as of April 26. Under these circumstances, the Federation was not required to meet with the District regarding implementation of the decision. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 20 [employer's fait accompli obviates any requirement that union pursue negotiations]; *Standard School District*, *supra*, PERB Decision No. 1775, adopting proposed decision at p. 16 [bargaining party had no duty to pursue negotiations from position the other party unlawfully changed].) Nonetheless, as explained below we hold in the alternative that when the parties met on and after March 30, the District did not comply with its bargaining duties under MOU sections 16.01 and 16.02; and even to the extent the District claims it only had an effects bargaining obligation, the District did not satisfy the necessary preconditions for implementing an allegedly non-bargainable decision before effects bargaining is complete.

IV. The District violated its effects bargaining obligations and deviated from MOU sections 16.01 and 16.02.

Even when an employer has no obligation to bargain over a particular decision, it nonetheless must provide notice and an opportunity to meet and confer over any reasonably foreseeable effects the decision may have on matters within the scope of representation. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, pp. 11-12.) The employer violates this duty if it fails to provide adequate advance notice, and in

such circumstances the union need not request to bargain effects as a prerequisite to filing an unfair practice charge. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 30-32.) However, where an employer does provide adequate notice, the union must request to bargain any reasonably foreseeable effects on negotiable matters. (*Id*. at p. 30.) The union's request to bargain need not be formalistic or burdensome, nor anticipate every imaginable effect a proposed change may have, but rather must only identify negotiable areas of impact, thereby placing the employer on notice that it believes the employer's proposed decision would affect one or more negotiable topics. (*County of Sacramento* (2013) PERB Decision No. 2315-M, p. 9*; Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 13.)

An employer may implement its decision before completing effects bargaining if it can establish each of three elements: (1) the implementation date was based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) the employer gave sufficient advance notice of the decision and implementation date to allow for meaningful negotiations prior to implementation; and (3) the employer negotiated in good faith prior to and after implementation. (*Compton Community College District* (1989) PERB Decision No. 720, pp. 14-15 (*Compton*).)

Here, assuming that the employment terms and conditions in dispute were no more than effects of a decision involving a non-mandatory topic of bargaining, the District still fell short of meeting the three-part *Compton* standard. Moreover, even setting aside the fact that the Federation had no obligation to bargain given the

District's decision to repudiate the October and March MOUs, the District's bargaining conduct unilaterally deviated from MOU sections 16.01 and 16.02. We explain.

Neither party declared impasse in effects negotiations—much less exhausted the post-impasse procedures found in EERA sections 3548-3548.8.[26] Therefore, any claimed right to implement an allegedly non-negotiable decision before exhausting such impasse procedures would be contingent on evidence of an immutable deadline or important managerial interest, as well on the employer negotiating in good faith prior to and after implementation. (*Compton*, *supra*, PERB Decision No. 720, pp. 14-15.) But as discussed above, the District did not do so. Rather, the District provided no advance notice, and, in any event, it breached binding commitments it had made well into the pandemic, without any new emergency requiring it to do so unilaterally.

Moreover, after making its recall decision unilaterally, the District was unwilling to bargain in good faith over alternative means of meeting any on-site staffing needs that might arise. An employer must meet and confer over alternatives to the decision as part of effects bargaining. (*County of Sonoma* (2021) PERB Decision No. 2772-M, p. 54 (*Sonoma*) [judicial appeal pending]; *Anaheim Union High School District* (2016) PERB Decision No. 2504, pp. 10-11, 15 & adopting proposed decision at p. 41; *City of*

[26] Under EERA, when parties reach impasse, they must participate in mediation. (EERA, § 3548.) If mediation is unsuccessful, either party may request advisory factfinding. (EERA, § 3548.1, subd. (a).) Only once the parties have considered in good faith the factfinder's recommendations may the employer "implement policies reasonably comprehended within previous offers made and negotiated between the parties." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 32-33.)

Sacramento, *supra*, PERB Decision No. 2351-M, p. 22.) Thus, one purpose of effects bargaining is to permit the exclusive representative an opportunity to persuade the employer to consider alternatives that may diminish the impact of the decision on employees. (*Sonoma*, *supra*, PERB Decision No. 2772-M, p. 55; *San Mateo City School District* (1984) PERB Decision No. 383, p. 18.) Here, for instance, the parties might have considered any combination of: monitoring whether collectively-bargained incentives would have their intended effect and entice a sufficient number of teachers to work on-site; increasing such incentives; defining specific levels of student participation that would trigger recalls; spreading out on-site work using a rotation; or implementing some version of what McCoy later claimed, post hoc, had occurred—allowing on-site staff to bar students from their classrooms and, in essence, continue with distance learning. The District frustrated good faith negotiations by stating it had no duty to bargain over alternatives to its decision and refusing to do so, even when data showed that incentives were leading a much higher percentage of teachers to opt into hybrid learning compared to the number of participating students.[27]

This conduct also deviated from sections 16.01 and 16.02 of the October MOU, which required the parties to meet and confer as needed regarding further pandemic-related employment terms and conditions. The District repudiated this commitment in the last week of March. Rather than notify the Federation of its undisclosed and questionable concern that the incentives it had negotiated in March

[27] The District further violated its duties under *Compton* when it unilaterally imposed a ground rule by refusing to respond to oral proposals. (*Orange*, *supra*, PERB Decision No. 2594-M, pp. 8-16 [ground rules are equivalent to a mandatory subject of bargaining].)

were not leading enough teachers to agree to work on-site, the District reached a unilateral decision to breach its prior commitments, announced that decision to the Federation as a fait accompli, and then steadfastly denied that it had any duty to bargain over alternatives.[28]

V. This case does not warrant deferral to arbitration.

PERB may defer an unfair practice charge to arbitration if the respondent carries its burden to establish that: (1) the dispute arises within a stable collective bargaining relationship; (2) the respondent is willing to waive procedural defenses and to arbitrate the merits of the dispute; (3) the contract and its meaning lie at the center of the dispute; and (4) no recognized exception to deferral applies. (*Bellflower*, *supra*, PERB Decision No. 2796, pp. 19-20; *County of Santa Clara* (2021) PERB Order No. Ad-485-M, pp. 6-7 (*Santa Clara*).)

[28] The District compounded the practical effects of its bad faith conduct by not only deciding to require in-person work before discussing the matter with the Federation, but also steadfastly avoiding any hint it was considering such a decision in numerous communications and forums away from the bargaining table, including all-staff e-mails dated March 4 and 18, YouTube Live meetings for employees and parents on March 5 and 11, an LRC meeting on March 8, a Superintendent's Student Advisory Council meeting on March 12, and the open session parts of the Trustees' meetings on March 10 and 24. In these communications and forums, far from suggesting that it was considering whether to require employees to work on-site, the District reiterated its prior commitments. While these facts gave rise to the complaint allegations that the District failed to consult with stakeholders before transitioning the instructional program, we have dismissed those allegations based on the parties' agreement that the District only made one such transition, on March 24. The District raised that transition in the above forums, and in any event the Federation does not challenge that transition.

In *Santa Clara*, *supra*, PERB Order No. Ad-485-M, we explained how the deferral test applies if an unfair practice charge contains multiple claims. Three principles are paramount. First, if a claim is purely derivative—meaning that a charging party cannot establish it without also establishing another claim—then we defer the derivative claim if and only if the claim it derives from satisfies the deferral test. (*Id*. at pp. 9-10.) Second, if multiple claims can be established independently of one another but they are factually or legally interrelated, then we do not defer any of them unless each claim meets the deferral test. (*Id*. at pp. 10-12.) This rule serves to prevent unnecessary piecemeal litigation. (*Ibid*.) Finally, if multiple independent claims are neither factually nor legally interrelated, then we apply the deferral test separately to each claim and may defer any of them depending on how the test applies to each respective claim. (*Ibid*.) Thus, a charging party cannot avoid deferral of one claim by choosing to include in the same charge an unrelated, non-deferrable claim.

Here, as noted *ante*, the interference claims are purely derivative of the bargaining claims, so we need only consider whether to defer to arbitration the claims that the District unilaterally repudiated or changed collectively bargained policies, applied existing policies in a new way, or implemented new policies covering employment terms that were not fully established by any existing policy, in violation of an obligation to bargain over its decisions or the effects thereof. These claims are interrelated, as they arise from the same core set of facts. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 12.) Accordingly, no part of the charge may be deferred unless each independent claim meets the deferral test. (*Ibid*.)

The most critical prong of the deferral test is often whether the contract and its meaning "lie at the center of the dispute." To meet this prong, the respondent must show, first, that the parties' agreement prohibits the alleged unfair practice. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 8.) "[I]t is not sufficient for the agreement to merely cover or discuss the matter. The conduct alleged to be an unfair practice must be prohibited." (*Ibid*.; *Fremont Union High School District* (1993) PERB Order No. Ad-248, p. 5.) Second, resolution of the contractual issue must necessarily resolve the merits of the unfair practice allegation. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 8.) This condition may be met if the contract incorporates the statutory legal standard, or if the parties ask the arbitrator to resolve the statutory unfair practice issue. (*Id*. at p. 8, fn. 6.) If resolution of the alleged unfair practice requires application of statutory legal standards, and "there is no guarantee that an arbitrator will look beyond the contract and consider statutory principles," deferral is not appropriate. (*Id*. at p. 8.)

In this case, the parties' MOUs are important enough to the outcome of the unilateral change case that, at first blush, the matter appears potentially deferrable. Closer examination reveals, however, that the parties' CBAs permit an arbitrator to find a contract violation only if the employer violated an "express term" in an "arbitrary, capricious or discriminatory manner." That deferential standard unduly puts a thumb on the scale in favor of the employer's contract interpretation and contravenes the neutral contractual interpretation standards we apply in a unilateral change case (see *ante* at pp. 33-35 & fn. 19.). This anomaly precludes deferral. (See *Santa Ana Unified School District* (2013) PERB Decision No. 2332, pp. 25-26 (*Santa Ana*) [deferral

inappropriate both because contract limited arbitrator from providing full make-whole remedy and because contract limited arbitrator from fully considering the issues at stake].) Additionally, the parties' CBAs limit the arbitrator to only the interpretation or application of a contract term, which would not resolve the issues arising from the District's failure to bargain the effects of its decisions. (See *Pleasanton Joint School District* (1986) PERB Decision No. 594, pp. 2-6 [deferral inappropriate where contract limited arbitrator to finding violation of "express terms," thereby preventing arbitrator from considering full breadth of issues at stake in unilateral change case].)

Based on the CBAs' language, the arbitrator is not authorized to decide the crux of the parties' statutory dispute in a fair manner, nor fully consider or remedy all of the alleged bargaining violations. The CBAs' inequitable standard is particularly problematic given that the District asserts considerable discretion to interpret the MOUs flexibly, claiming that it did so "consistent with the parties' intent to negotiate a guiding document that would be reasonably applied in a dynamic and evolving public health crisis," and "within the legal and medical or epidemiological context in which the MOU was negotiated."[29] For the foregoing reasons, the District has not carried its

[29] The complaint alleges that the District committed all three types of unilateral changes: (1) deviation from a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. While at least the first category of unilateral changes should normally be arbitrable if the written agreement is in effect and contains an arbitration clause, in the present circumstances even the first category is arbitrable only under a standard that is antithetical to EERA.

burden of establishing that deferral is appropriate.[30] (*Santa Ana*, *supra*, PERB Decision No. 2332, p. 27.)

CONCLUSION

COVID-19 created significant new challenges for public entities, public employees, and public employee unions. Nowhere was this more apparent than in public education. It is a testament to the skill of district administrators and union representatives that hundreds of districts across the state achieved labor agreements covering both pandemic-related issues and more standard topics. We commend these efforts and are glad that in some cases PERB's State Mediation and Conciliation Service and Office of the General Counsel were able to help bargaining parties maintain or restore stable labor relations in a difficult time. We equally admire the dedication of millions of school employees, parents, guardians, and students handling the immense pressures the pandemic created.

While the past two years illustrate EERA's continuing durability as an effective means for improving employer-employee relations and affording certificated employees a voice in educational policy (EERA, § 3540), it is perhaps unsurprising that at least one district's path would deviate from EERA's directives. In this case, the District made promises that few, if any, other districts made. It then breached those promises. And it is still, many months later, attempting to obfuscate that obvious fact. We understand that unusual circumstances led to these missteps, but we lament the

[30] We express no opinion as to other potential grounds for declining to defer to arbitration, such as under what circumstances repudiation of a contract may rise to such a level as to destabilize the collective bargaining relationship and thereby bar deferral.

significant public resources the District has diverted from public education to defend what should have been an acknowledged error.

It is well past time to bring this matter to a conclusion and preserve public resources for their critical, intended purposes. Accordingly, we direct the ALJ to convene settlement discussions or require the parties to engage in such discussions with another appropriate Board agent. A formal hearing regarding appropriate remedies should proceed only if settlement discussions fail to produce a resolution after a reasonable period of time.

ORDER

This matter is REMANDED to the Division of Administrative Law for further proceedings consistent with this Decision.

Chair Banks and Member Shiners joined in this Decision.