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ROCKLIN UNIFIED SCHOOL DISTRICT

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

ROCKLIN TEACHERS PROFESSIONAL ASSOCIATION,

Petitioner,

vs.

ROCKLIN UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SA-CE-3136-E

RESPONDENT'S OPENING BRIEF

Administrative Law Judge: Camille K. Binon

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SUMMARY OF ARGUMENT

This case arises from the Rocklin Teachers Professional Association's ("RTPA" or "the Association") Unfair Practice Charge ("Charge") alleging that the Rocklin Unified School District ("District") violated the Educational Employment Relations Act ("EERA") by failing to provide RTPA adequate notice and an opportunity to bargain before voting to adopt revisions to two existing District policies, Board Policy ("BP") 5020 – Parent Rights and Responsibilities and Administrative Regulation ("AR") 5145.3 – Nondiscrimination/Harassment. (Charge, ¶ 9-12.) Together, these policy revisions trigger a notification to parents/guardians if their child requests certain accommodations specified in the policy (i.e., "Parent Notification Policy" or the "Policy".) (See Joint Exhibit ["JX"] 2 and JX 3.)

Based on RTPA's Charge, the Public Employment Relations Board ("PERB") issued a Complaint against the District alleging that it unlawfully adopted the Policy without providing notice to RTPA and "without having afforded [RTPA] an opportunity to negotiate the decision to implement the change in policy and/or the effects of the change in policy." (Complaint, ¶ 5.) The Complaint further alleges that the District's conduct constituted a failure to bargain in good faith, in violation of Government Code section 3543.5, subdivision (c). (Complaint, ¶ 6.) Finally, the Complaint states that the District's conduct interfered with the rights of unit members and denied RTPA its right to represent its unit members, in violation of Government Code sections 3543.5, subdivision (a) and 3543.5, subdivision (b), respectively. (Complaint, ¶ ¶7-8.)

While the Complaint frames up this case as a garden variety labor issue, subject to PERB's jurisdiction, PERB precedent does not support this characterization. As undisputed facts and Joint Exhibits demonstrate, the District gave ample notice to RTPA regarding the proposed policy revisions, repeatedly requested to negotiate the Policy's effects and impacts on matters within the scope of representation prior to the Policy's implementation, and refrained from implementing the policy altogether. (See JX 6 and JX 8; District Exhibit ["DX"] 1.) When RTPA initially requested to negotiate the Policy's impacts and effects, the District provided a list of dates to do so. (See JX 6.) RTPA refused to engage. (See JX 7.) From there, RTPA's position "evolved:" in each and every subsequent instance that the District requested to negotiate effects and impacts, RTPA flat out refused to negotiate at all, instead reasoning that the Policy itself was unlawful. (See RT 59: 1-4 [Union President Travis

Mougeotte confirming that the Association's "view of [its] legal obligations has evolved over the last several months"]; RT 154: 7-16 [Assistant Superintendent Dr. Tony Limoges recalling the Association's refusal to bargain the effects of the Policy during the Parties' September 29, 2023 bargaining session]; DX 2 [Mr. Mougeotte writing on October 2, 2023 that RTPA would "not engage in the negotiation of any policy that is in violation of student safety and the law"]; JX 9 [Association Counsel writing on October 12, 2023 that the Association would "not acquiesce to the District's unilateral change by engaging in bargaining over its effects"]; RT 154: 23-155: 18 [Dr. Limoges testifying to the Association's refusal to bargain the effects of the Policy during the Parties' October 18 bargaining session].) RTPA has failed to provide any evidence that the District, at any time "failed and refused to bargain in good faith," as alleged in the Complaint. (Complaint, ¶ 6.) To the contrary, the facts and testimony from RTPA's single witness shows that RTPA, not the District, refused to negotiate the Policy. (See RT 147: 1-6 [Dr. Limoges noting that this in the first time in his history with the District that the Association has flat out refused to negotiate]; RT 19: 24-20: 3 [RTPA Counsel confirming it was the Association's "decision not to engage in any sort of bargaining over (an) unlawful policy"].)

Because the facts do not support a prima facie case of any labor violation, the Association attempts to obtain a favorable decision from PERB by alleging that the *real* issue is that the Policy itself is allegedly unlawful, and that the Board's adoption of this policy thus "requires" unit members to break the law. (See DX 2; JX 5; JX 9.) However, a determination as to whether the Policy itself is lawful relies on principles of law wholly beyond PERB's jurisdiction: matters of parent rights, student privacy and equal access guaranteed by the California Constitution. (See Gov. Code, § 3541.3 [generally setting forth the scope of PERB's jurisdiction as limited to matters of employer-employee relations].) To date, the scope of a student's privacy rights with respect to their gender identity, when balanced against a parent's federal constitutional right to direct the upbringing of their child, has not been definitively ruled upon by any legal authority binding on the District. As demonstrated by RTPA's admitted Exhibits for judicial notice, this specific issue is currently pending in San Bernardino Superior Court, pursuant to a lawsuit filed by the State Attorney General against the Chino Valley Unified School District ("Chino Valley"). (See Charging Party's Proposed Exhibit for Judicial Notice ["Proposed Exhibit"] 1.) The Ninth Circuit is also poised to review a case on appeal that examines these very issues. (*Regino v.*

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Staley (E.D. Cal., Mar. 9, 2023, No. 223CV00032JAMDMC) 2023 WL 2432920 [involving a challenge to the Chico Unified School District's AR 5145.3].) Additional legal challenges on this issue are pending in other courts as well. Nonetheless, instead of permitting the courts or the Legislature to resolve these open questions of law, RTPA reframes the adoption of the Policy as a *labor* issue in order to obtain a favorable ruling from PERB.

And, while RTPA may argue that the Policy is properly in front of PERB on the basis that it imposes additional duties on unit members without adequate notice, a would-be labor violation, there is no PERB precedent to support their argument that a teacher's responsibility to communicate with parents constitutes a mandatory subject of bargaining. RTPA has also offered no evidence that the District failed to provide notice before the decision to adopt the revisions. To the contrary, RTPA presented evidence at hearing that the District provided notice to RTPA the week prior to the Board's adoption of the Policy. (See RT 43: 20-44: 3.) In any case, as a permissive bargaining topic, the Policy is subject only to *impacts or effects* bargaining, as RTPA originally acknowledged in its request to negotiate on September 4, 2023. (JX 4 ["RTPA demands that RUSD bargain with RTPA regarding its ***impacts and effects*** that are within the scope. . . ."], emphasis added.) Finally, even assuming *arguendo* that the Policy itself is subject to bargaining, RTPA cannot state a prima facie case under this theory of wrongdoing either because the Association concedes that the District provided notice of its decision prior to implementation, as noted above.

STATEMENT OF THE CASE

The vast majority of the facts in this case are uncontradicted and relatively straightforward: the disagreement instead arises from questions of law. On September 6, 2023, the District's governing board of trustees ("Board") voted in favor of adopting revisions to BP 5020 – Parent Rights and Responsibilities to confer a new right upon District parents: the right to be informed by a teacher, counselor or administrator if their child request specified accommodations at school related to their gender identity (e.g., to participate in a sex-segregated athletic team). (JX 1, JX 2, and JX 3.) In order to effectuate these revisions, the Board also voted in favor of adopting revisions to AR 5145.3 – Nondiscrimination/Harassment to carve out an exception that permits disclosure to parents/guardians about information that is otherwise confidential. (See JX 2 and JX 3.) On multiple occasions

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throughout the fall of 2023, the District requested dates to bargain the impacts of the Policy with RTPA, but each time the Association instead requested that the District rescind the Policy revisions altogether. (JX 6; JX 7; RT 59:1-4; RT 154: 7-16; DX 2; JX 9; RT 154:23—155:18.)

The Association's insistence that the District rescind the Policy arises from its position that the Policy is unlawful because it contradicts the California Department of Education's ("CDE") written guidance as well as the State Attorney General's stated position that a student's trans or gender-nonconforming status should not be disclosed to their parents without consent. (See RT 20: 4-7.) However, while the Attorney General filed a lawsuit against the Chino Valley for adopting *its own version* of a parent notification policy, which differs significantly from that adopted by the District, the matter remains in litigation.[1] In any case, as of today's date, the District has not implemented the Policy because the Parties have not completed their respective bargaining obligations. (RT 99: 11-22; RT 101: 7-25; RT 129: 13-23.)

A. RTPA'S UNFAIR PRACTICE CHARGE

On or about September 8, 2023, RTPA filed an Unfair Practice Charge with PERB, alleging the District violated Government Code section 3543.5, subdivisions (a), (b), and (c) of the EERA when its Board adopted the Parent Notification Policy. The Charge focused on the District's alleged failure to bargain the effects of the Policy on mandatory subjects of bargaining. (Charge, ¶ 9.)

B. THE DISTRICT'S RESPONSE TO THE CHARGE

Upon receipt of the Charge and RTPA's written demand to bargain the effects of the Policy, on September 8, 2023, Dr. Limoges contacted RTPA Bargaining Chair Emily Thomas via e-mail. (JX 6.) In his e-mail, Dr. Limoges provided the District's available dates to bargain the effects and impacts of the Policy. (JX 6.) Ms. Thomas replied on behalf of RTPA that she would follow up with available dates as well. (JX 6.) However, that did not occur. (See DX 2.)

C. COMPLAINT AND THE DISTRICT'S ANSWER

On October 11, 2023, PERB issued a Complaint against the District stating that the Association had made a prima facie case for a violation of the EERA for failure to negotiate "the decision to

[1] The Parties in Chino Valley have a trial setting conference on May 3, 2024.

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implement the policy." (Complaint, ¶ 5.) In other words, the PERB-issued Complaint characterized the case as a failure to bargain over the District's *decision,* whereas the Association's underlying Charge characterized the District's alleged wrongdoing as a failure to bargain over the Policy's *impacts*. (Charge, ¶ ¶ 9-12.) On October 31, 2023, the District filed an Answer denying all substantive allegations against it.

D. THE HEARING

While initially set for two days, the entirety of the hearing took place on February 13, 2024. The Association presented one witness in support of its case in chief, Union President Travis Mougeotte. The District presented three witnesses in support of its rebuttal: Superintendent Roger Stock; Assistant Superintendent Dr. Tony Limoges; and Trustee Julie Hupp.

STATEMENT OF FACTS

A. DEVELOPMENT AND ADOPTION OF THE PARENT NOTIFICATION POLICY

1. A subcommittee of the Board drafts revisions to BP 5020 and AR 5145.3, and the Board votes in favor of the proposed revisions.

On August 9, 2023, during a regularly scheduled public board meeting, Trustee Derek Counter brought forward the idea to form a subcommittee whose purpose would be to "review and revise the current RUSD Board Policy and Administrative Regulations that address parent notification with the goal of increasing communication with families and increasing parent notification." (JX 1; RT 121: 12-17.) Then-Board President Julie Hupp volunteered to be a member of the subcommittee, and together the two of them prepared proposed revisions to BP 5020 and 5145.3 with assistance of the Superintendent and legal counsel. (RT 123: 2-126: 2.) Mr. Mougeotte recalled the Board's discussion to form such a committee and its stated purpose as to strengthen "parents' rights." (RT 41: 5-42: 2.)

Prior to the September 6, 2023Board meeting, the proposed revisions, described in detail below, were attached to the publicly posted online Board Meeting Agenda. (JX 2 and JX 3; RT: 140: 13-25.) At hearing, Mr. Mougeotte testified that the District's practice is to "post the Board agendas with any [accompanying] documents on a public website" on the "Friday before a Board meeting." (RT 44: 6-8.) Thus, "[t]he official notification" of the Board's intention to vote on the revisions "would have been the Friday prior to the September 6th meeting when the Board docs went public." (RT 44: 1-5.) And, Mr.

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Mougeotte confirmed that he viewed the proposed revisions on that date. (RT 44: 1-23.) Mr. Mougeotte further testified that Superintendent Stock also called him to "recommend [he] probably look at the Board docs when they're made public." (RT 44: 24-45: 6.) Thus, based on Mr. Mougeotte's testimony the Association received notice before the Policy's adoption on September 6, 2023, and far before the Policy's implementation, which has not yet occurred to this day.

On September 4, 2023, Counsel for RTPA sent a Cease and Desist letter to Superintendent Stock stating that the Board's proposed policy revisions "violate the law" and demanding that the District withdraw the item from the agenda. (JX 4.) In support of its contention that the policy revisions were unlawful, the Association pointed to a lawsuit filed by the State Attorney General against Chino Valley for adopting its own version of a parent notification policy. (See JX 4.) Even believing the Policy to be unlawful, Counsel for RTPA demanded that the District "bargain with RTPA regarding [the Policy revisions'] impacts and effects that are within the scope. . . ." (JX 4 at 014.) On September 5, 2023, Counsel for RTPA followed up on its concerns, this time contacting the Board directly. (See JX 5.) In its correspondence, RTPA expressed its position that the proposed revisions violate students' rights and warned that the District could not "implement any such policy until it has given the Association proper notice and an opportunity to bargain over the policy's negotiable effects." (JX 5 at 015.)

As expected, on September 6, 2023, at a regularly scheduled Board meeting, Trustee Counter and then President Hupp brought forth the proposed policy revisions to the rest of the Board. The Board voted in favor of adopting the proposed revisions. (RT 30: 19-22.)

2. Revisions to BP 5020 and AR 5145.3 effectuate a new parent right to be notified when their child requests specific accommodations related to gender identity at school.

The adopted revisions made two primary changes to existing Board Policy to afford a new right of notification to parents: one change to BP 5020 – Parent Rights and Responsibilities and one change to AR 5145.3. (JX 2 and JX 3.) First, BP 5020 – Parent Rights and Responsibilities, originally adopted in 2005, identifies twenty rights of parents, including items such as "to be notified on a timely basis if their child is absent from school without permission;" "to be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child;" and "[t]o question anything in their child's record that the parent/guardian feels is inaccurate or

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misleading or is an invasion of privacy." (JX 2 at 002-004 [item no. 4, item no. 9, and item no. 19].) The proposed revisions, as adopted by the Board, added a twenty-*first* item to the list of parent rights and responsibilities:

> To be notified within three (3) school days when their child requests to be identified as a gender other than the child's biological sex or gender; requests to use a name that differs from their legal name (other than a commonly recognized nickname) or to use pronouns that do not align with the child's biological sex or gender; requests access to sex-segregated school programs and activities, or bathrooms or changing facilities that do not align with the child's biological sex or gender. Notification shall be made by the classroom teacher, counselor, or site administrator. Such notification shall only be delayed up to 48 hours to fulfill mandated reporter requirements when a staff member in conjunction with the site administrator determines based on credible evidence that such notification may result in substantial jeopardy to the child's safety.

(JX 2.) In other words, the Policy, as revised, specifies an additional right of parents to be notified if their child requests specified accommodations at school consistent with their gender identity.

Second, AR 5145.3 – Nondiscrimination/Harassment sets forth the District's stated commitment to ensuring a campus free from discrimination and harassment. (JX 3.) AR 5145.3 contains a comprehensive section regarding "Transgender and Gender-Nonconforming Students." (JX 5 at 009-012.) This section sets forth the rights of trans and gender-nonconforming students, such as the rights to access sex-segregated facilities and to participate in sports teams that are consistent with their gender identity. (JX 5 at 011.) AR 5145.3 also provides a statement regarding trans and gender nonconforming students' right to privacy. (JX 5 at 010.) The proposed revisions, as adopted, added language to this portion of AR 5145.3, stating that a student's trans or gender-nonconforming status must remain private and confidential "with the exception of parental notification." (JX 5 at 010.) As revised, the Policy now reads:

> Right to privacy: A student's transgender or gender-nonconforming status is the student's private information **with the exception of parental notification**, and the district shall only disclose the information to others with the student's prior written consent, except when the disclosure is otherwise required by law or when the district has compelling evidence that disclosure is necessary to preserve the student's physical or mental well-being. In any case, the district shall only allow disclosure of a student's personally identifiable information to employees with a legitimate educational interest as determined by the district pursuant to 34 CFR 99.31. Any district employee to whom a student's transgender or gendernonconforming status is disclosed shall keep the student's information confidential to all **other persons except the student and their parent(s)**. When disclosure of a student's gender identity is made to a district employee by a

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> student, the employee shall seek the student's permission to notify the compliance officer. If the student refuses to give permission, the employee shall keep the student's information confidential, unless the employee is required to disclose or report the student's information pursuant to this administrative regulation, and shall inform the student that honoring the student's request may limit the district's ability to meet the student's needs related to the student's status as a transgender or gender-nonconforming student. If the student permits the employee to notify the compliance officer, the employee shall do so within three school days[2]

(JX 3.) In other words, the revisions to AR 5145.3 clarify that there is an exception to confidentiality only for notification to parents in order to make its provisions consistent with the language set forth in the newly adopted language from BP 5020. Together, the revisions constitute the "Parent Notification Policy" at issue.

B. THE DISTRICT'S OFFERS TO BARGAIN THE EFFECTS OF THE POLICY AND THE ASSOCIATION'S INSISTENCE ON FULL RETRACTION

On September 8, 2023, Dr. Limoges responded to RTPA's request to bargain impacts and effects via an e-mail to RTPA Bargaining Chair Emily Thomas. (JX 6.) In his correspondence, Dr. Limoges informed Ms. Thomas that the District "fully intends to Bargain the impacts and effects" of the Parent Notification Policy and offered four dates to negotiate. (JX 6.) Instead of responding with available dates, RTPA contacted Superintendent Stock on September 20, 2023, refusing to bargain "after the fact" and insisting that the District "rescind" the Policy. (JX 7.) On September 29, 2023, when the Parties met for a contract negotiations session, the District placed the Parent Notification Policy on the agenda. (DX 3 at 000012, ¶ 52.) However, RTPA refused to engage. (RT 154: 7-17.) On October 2, 2023, Mr. Mougeotte contacted Dr. Limoges to reiterate RTPA's position that RTPA "will not engage in the negotiation of any policy that is in violation of student safety and the law." (DX 2.)

On October 6, 2023, Counsel for the District responded to RTPA, explaining that, pursuant to well-established PERB precedent, bargaining impacts must occur before *implementation* of the Policy, not adoption. (JX 8.) The District's correspondence further informed that the Policy had not yet been implemented and again requested to bargain the impacts with RTPA. (JX 8.) On October 12, 2023, in its final response to the District, RTPA made its position clear: the Association would not agree to bargain the impacts and effects because it now understood that the Policy would require unit members

[2] Emphasized language represents language added by the Board's proposed and adopted revisions.

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"to engage in conduct which the State of California has said violates state law.". (JX 9.) Finally, during a subsequent bargaining session on October 18, 2023, the District again placed the Parent Notification Policy on the Contracts Negotiations Agenda, but RTPA refused to engage in bargaining. (See DX 3 at 000011, ¶ 43; RT 154: 23-155: 18.) To date, the Policy has not been implemented. (DX 1; RT 99: 11-22.)

GOVERNING LAW

According to the Complaint, the District unlawfully adopted the Parent Notification Policy "without having afforded Charging Party an opportunity to negotiate the decision to implement the change in policy and/or the effects of the change in policy" in violation of sections 3543.5(a)—(c) of the EERA.

A. GOVERNMENT CODE SECTION 3543.5, SUBDIVISION (A).

Government Code section 3543.5, subdivision (a) prohibits public school employers from imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of their exercise of rights guaranteed by the EERA. Under this subdivision, employees have the right to, among other things, "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer employee relations." In order to prove a violation of this provision, it is the charging party's burden to establish, by a preponderance of the evidence, that the alleged conduct tends to, or does result in, some harm to employee rights granted under the EERA. (*Clovis Unified School Dist.* (2002) PERB Dec. No. 1504.) In this case, Charging Party has not set forth a single piece of evidence demonstrating that the Board's adoption of the Policy has harmed unit members' rights. Nor *can* the Association demonstrate that its unit members have experienced any such harm because the District has yet to implement the Policy.

B. GOVERNMENT CODE SECTION 3543.5, SUBDIVISION (B).

Under Government Code section 3543.5, subdivision (b), it is unlawful for a public school employer to "[d]eny to employee organizations rights guaranteed to them by this chapter." (Gov. Code, § 3543.5, subd. (b).) Employee organizations have the right to, among other things, represent their members in their employment relations with public school employers, enjoy the right of access at

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reasonable times to areas in which employees work, receive a reasonable period of release time, and to have membership dues deducted from employee salaries. (Gov. Code, § 3543.1.)

In order to prove a violation of Government Code section 3543.5, subdivision (b), the charging party must establish an *actual denial* of the statutory rights guaranteed to the employee organization itself under Government Code section 3543.1 and that such harm is separate and apart from that alleged with respect to any employee's rights. (*Cal. Franchise Tax Bd.* (1992) PERB Dec. No. 954, p. 4.) A mere theoretical impact is insufficient. (*Id.*)

Here, RTPA's case tenuously rests on imagined scenarios that, *if* materialized, *might* result in harm to a unit members' rights *if and only if* a court with binding authority or the State Legislature creates law that would render the Policy unlawful. (RT 24: 9-21 [arguing that the California Commission on Teacher Credentialing is "likely to" take direction from the State Attorney General, that the California Commission on Teacher Credentialing "could" discipline a teacher for violating a student's constitutional rights and that the District is "forcing" teachers to risk jeopardizing the maintenance of their credential(s) by adopting the Policy].) Such speculation cannot bolster a finding of unlawful unilateral change under EERA. (*Cal. Franchise Tax Bd.* (1992) PERB Dec. No. 954.)

C. GOVERNMENT CODE SECTION 3543.5, SUBDIVISION (C).

Government Code section 3543.5, subdivision (c), prohibits a public school employer from doing the following:

> Refus[ing] or fail[ing] to meet and negotiate in good faith with an exclusive representative. Knowingly providing an exclusive representative with inaccurate information, whether or not in response to a request for information, regarding the financial resources of the public school employer constitutes a refusal or failure to meet and negotiate in good faith.

In order to prove a violation of this provision, a charging party must establish that the alleged conduct constituted a per se violation or a refusal to bargain under the "totality of the conduct" test. (*Stockton Unified School Dist.* (1980) PERB Dec. No. 143; see also *Santee Elementary School Dist.* (2006) PERB Dec. No. 1822.) As described throughout, RTPA concedes that the District repeatedly requested to bargain. (See e.g., RT 19: 24—20: 3 [Counsel for the Association testifying to the reasons why the Association made "the decision not to engage in any sort of bargaining over [the Policy]"].) Thus, RTPA cannot prove any contention that the District refused to bargain.

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D. RTPA BEARS THE BURDEN OF PROOF.

A charging party must prove the allegations of a complaint by a preponderance of the evidence. (*Cal. State University* (1986) PERB Dec. No. 559-H, p. 4; Cal. Code Regs., tit. 8, § 32178.) Proof by a preponderance of the evidence requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence. (*Los Angeles Unified School Dist.* (2014) PERB Dec. No. 2359, fn. 22, citing Evid. Code, § 500, Law Revision Commission comments.) Here, RTPA carries the burden of proof as to all elements set forth in the Complaint allegations. (*City of Alhambra* (2010) PERB Dec. No. 2139-M, citing *Riverside Sheriffs Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) As discussed throughout, RTPA has failed to set forth evidence sufficient to show that the District committed an unfair labor practice. Rather, the crux of Association's case relies on their inaccurate contention that the policy is unlawful simply because the CDE believes it to be unlawful and the State Attorney General filed a lawsuit against another school district alleging that their very different version of a parent notification policy is unlawful. (RT 23: 1-24: 8.)

LEGAL ARGUMENT

I. THE UNDISPUTED FACTS DEMONSTRATE THAT THE DISTRICT MET ITS OBLIGATION UNDER THE EERA TO BARGAIN IMPACTS AND EFFECTS OF THE PARENT NOTIFICATION POLICY.

PERB precedent distinguishes between two types of bargaining: effects bargaining and decision bargaining. (See e.g., *Oakland Unified School District* (2023) PERB Decision No. 2875 ["*Oakland Unified School Dist.*"].) Acts that involve a mandatory subject of bargaining trigger negotiating over the decision, while acts that involve a nonmandatory subjects of bargaining trigger negotiating over the *effects* of the decision. (See *The Accelerated Schools* (2023) PERB Decision No. 2855, pp. 13-14.) In other words, an employer's duty to bargain their decision is triggered "[i]f an employer wishes to change terms or conditions of employment for represented employees." (*Oakland Unified School Dist.* at 10.) In such instances, "[the employer] must provide the employees' union with adequate notice and opportunity to bargain before making its decision, and the employer must then bargain in good faith upon request." (*Id.*) By contrast, "if the decision falls outside the scope of bargaining, the employer must provide adequate notice and opportunity to bargain in good faith *over the implementation and effects of that decision*, to the extent such implementation and effects are reasonably likely to impact

represented employees." (*Id.*, emphasis added.) While "the effects bargaining obligation is not an inferior duty," the distinction is important for purposes of determining when an employer's duty is triggered and the scope of that duty. (*See id.* at 11.)

A. Pursuant to PERB precedent, the Policy concerns nonmandatory subjects of bargaining.

"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.'" (*Oxnard High School District* PERB Decision No. 2803-E, p. 41 [citation omitted].) To determine whether a specific issue amounts to a "mandatory bargaining topic" PERB utilizes a three-part test commonly known as the *Anaheim* test. (*Id.* at 43.) Under the *Anaheim* test, "a subject falls within the scope of representation" if: (1) it is logically and reasonable related to hours, wages, or an enumerated term and condition of employment; (2) the topic 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 . . . essential to the achievement of [its] mission." (*Oxnard High School District* at 42 citing *San Bernardino Community College District* (2018) PERB Decision No. 2599, p. 8.)

Regarding the first prong of the *Anaheim* test, PERB has found items such as employee workloads, peer review programs, and employee evaluations to be logically and reasonably related to hours, wages, or other terms and conditions of employment. (*Trustees of California State University* (2012) PERB Decision No. 2287-H, pp. 13-14; *Standard School District (2005)* PERB Decision No. 1775, pp. 11-12; and *Jefferson School District* (1980) PERB Decision No. 133.)

Here, RTPA contends that the Policy is logically and reasonably related to terms and conditions of employment because it confers a "new duty" on teachers. (RT 23: 2-5.) However, unit members are already expected to communicate with parents about the goings on of their children at school. (See Charging Party Exhibit ["CPX"] 1 and CPX 2.) In fact, the Job Description for classroom teachers states as a "typical duty" that teachers will "communicate with students and parent on the . . . social progress of the student." (CPX 1 at 025.) Similarly, the Job Description for guidance counselors

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identifies as a "typical duty" that counselors will "consult with parents . . . in helping to develop the best educational programs for children." (CPX 2 at 028.) Indeed, teachers are already expected to communicate with parents, with or without the consent of the student, if their student is in danger of failing a class or if the student is being disciplined. (RT 82: 14—83: 4.) Moreover, PERB has accepted a union's concession that communicating certain information to parents falls outside the scope of bargaining. (See *Beverly Hills Unified School District* (2008) PERB Decision No. 1969, overruled in part on unrelated grounds.) In *Beverly Hills Unified School District*, the Beverly Hills Educators Association challenged their employer's directive to provide parents with their children's written examinations upon request. (*Id.*). There, the union conceded that "the decision to adopt the test release policy was not negotiable." (*Id.* at p. 5.) Reviewing the facts *de novo*, PERB did not disagree with the union's contention. (See generally *id.* (examining the scope of the District's duty to bargain effects, not whether the decision itself was negotiable.)

Additionally, state and federal law guarantee parents broad rights with respect to information about their children, including information that may otherwise be confidential. California state law requires that parents be notified of a variety of matters pertaining to their students: Education Code section 51101 provides that "parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children … to be informed by the school and to participation in the education of their children." (See Ed. Code, § 51101.) Consistent with Education Code, District teachers regularly communicate with parents to relay sensitive or confidential information about their children, including sudden changes in a student's behavior, suspected mental health issues, or lack of academic progress. (RT: 104: 20—105: 8-24.) Likewise, the federal Family Educational Rights and Privacy Act ("FERPA") provides parents the absolute right to access their child's education records. (See 34 C.F.R. §§ 99.3-99.4; Ed. Code, § 49069.7.) Thus, to the extent a student's records contain information related to a request for accommodations under the Policy, such as changing their name or pronouns, federal law entitles parents to that information. (See *id.*) For these reasons the Policy cannot reasonably be characterized as conferring a "new duty" that logically and reasonably relates to the terms and conditions of employment.

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Regarding the second prong of the *Anaheim* test, the Association bears the burden to show that the Policy 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." (*Anaheim Union High School District* (1981) PERB Decision No. 177, p. 4., emphasis added.) While the District does not deny that the Policy is likely to yield conflict, as evidenced by the current dispute, collective negotiations cannot be the appropriate means of resolving this conflict. As the Eastern District recently acknowledged when reviewing a challenge to another school district's AR 5145.3, which *prohibited* parent notification, the issue as to whether a student's right to privacy in their gender identity may overcome a parent's right to direct the upbringing of their child is a question "better suited for deliberation by the legislature." (*Regino v. Staley* (E.D. Cal, Jul. 11, 2023) WL 4464845, p. 5.)

Finally, to meet the third prong of the *Anaheim* test requires that a mandatory subject cannot "significantly abridge" any of the managerial prerogatives that are central to carrying out the District's mission. Here, permitting the Association to negotiate over the terms of parents' rights to be informed of the goings on of their children would significantly abridge the District's ability to carry out its managerial prerogative as well as its legal obligations. To rule otherwise would invite serious consequences on a public school district's ability to carry out its duties because communication with parents is central to the operation of every school district, including Rocklin Unified. Thus, the Association cannot meet the third prong of the *Anaheim* either. Because the Policy fails to meet any prong of the *Anaheim* test, let alone all three, it constitutes a nonmandatory subject of bargaining. As such, the Policy necessitates effects bargaining. (*Oakland Unified School District* (2023) PERB Decision 2875, p. 10.)

B. RTPA concedes and the facts demonstrate that the District repeatedly contacted RTPA to bargain the impacts before implementation: thus, the District has met its obligation under EERA.

"In an effects bargaining case, the threshold issue is whether the employer provided adequate advance notice to allow meaningful negotiations before implementation. Absent adequate notice, a union has a valid unfair practice charge irrespective of whether it requests to bargain effects." (*Oakland Unified School District* (2023) PERB Decision 2875, p.18.) Specifically, "the duty to bargain effects arises 'when a firm decision is made.'" (*California Faculty Association v. Trustees of the University of*

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California PERB Decision No. 2287-H p. 10.) 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." (*Oxnard Union High School District* PERB Decision No. 2803, p. 52.) Further, "[b]ecause bargaining over effects contemplates that negotiations will occur prior to implementation of the non-negotiable decision, the parties must assess the effects of the decision *prospectively*, without the benefit of hindsight." (*Trustees of the California State University* (2012) PERB Decision No. 2287H, p. 15.)

Here, the "firm decision" occurred on September 6, 2023, when the Board voted to adopt the revisions to BP 5020 and AR 5145.3. Thus, the duty to bargain effects was triggered on that date, and the District could not lawfully implement the Policy until it fulfilled its duty to do so. Consistent with this duty, Dr. Limoges contacted Mr. Mougeotte on September 8, 2023 to provide a list of dates to engage in effects bargaining. (JX 6.) After that, representatives for the District requested to bargain effects on multiple occasions: on October 6, 2023 the District's legal counsel requested dates to bargain (JX 8); on September 29, 2023, Dr. Limoges raised the issue for negotiations during a regularly scheduled bargaining session (DX 3 at 000012); and again on October 18, 2023, Dr. Limoges placed the item on the agenda for negotiation during another bargaining session (DX 3 at 000011). Each time the Association refused to engage in negotiations. However, the fact remains that the District met its obligation to provide notice and an opportunity to bargain over the effects of the Policy before implementation, and to date, the Policy has not been implemented. (See e.g., DX 1.)

II. EVEN ASSUMING *ARGUENDO* THE POLICY CONCERNS A MANDATORY SUBJECT OF BARGAINNING, RTPA CANNOT MAKE OUT A PRIMA FACIE CASE FOR VIOLATION OF THE DISTRICT'S DUTY TO BARGAIN UNDER THE EERA.

In order to establish a *prima facie* case for a unilateral change claim under Government Code section 3543.5, subdivision (c), the charging party must establish that: (1) the employer breached or altered the parties' written agreement or established past practice concerning a matter within the scope of representation; (2) the change ***was implemented*** before the employer notified the exclusive representative and gave it an opportunity to bargain; and (3) the change has a generalized effect or continuing impact on terms and conditions of employment of bargaining unit members. (See *Pajaro Valley Unified School Dist.* (1978) PERB Dec. No. 51; see also *Grant Joint Union High School Dist.*

(1982) PERB Dec. No. 196; *Walnut Valley Unified School Dist.* (1981) PERB Dec. No. 160; *Stockton Unified School Dist.* (1980) PERB Dec. No. 143; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 811-19.) Assuming *arguendo* that the first part of the prima facie case is met here, we turn to the second prong: whether the change was implemented before the employer notified the exclusive representative and gave it an opportunity to bargain. (*Pajaro Valley Unified School Dist.* (1978) PERB Dec. No. 51.)

Here, Mr. Mougeotte unequivocally testified that the Association was "officially" noticed "the Friday prior to the September 6th Board meeting when the Board docs went public." (RT 43: 20—44: 3.) To date, the Policy has not been implemented. (See DX 1.) Thus, the Association cannot meet its burden to meet the second threshold question for unilateral change: that the District failed to notice RTPA prior to implementation. Consequently, the Association also cannot meet the final threshold question to state a prima facie case for unilateral change because no change has been implemented: therefore, there is no continuing or generalized effect or impact on the terms and conditions of employment.

III. THE POLICY IS CONSISTENT WITH EXISTING LAW.

Because RTPA is aware that the District met its obligations to bargain under the EERA, it alternatively argues that the District violated the EERA by requesting that RTPA bargain over an "unlawful policy." (RT 26: 1-4.) In support of its argument that the Policy is unlawful, RTPA offers three irrelevant pieces of "evidence," including a Preliminary Injunction issued by the San Bernardino Superior Court against the Chino Valley Unified School District on a wholly different policy. (Proposed Exhibits 1, 2, and 3.) There, the State Attorney General filed a lawsuit against Chino Valley alleging that the district's recently adopted parent notification policy violates principles of privacy and equal protection guaranteed by California's Constitution as well as the Education Code's general prohibition on discrimination based on gender identity. (See *California v. Chino Valley Unified School District*, Complaint for Declaratory and Injunctive Relief pp. 1-2 and 19, https://edsource.org/wp-content/uploads/2023/08/082723.Complaint.pdf.) However, the Policy adopted in Chino Valley differs from the Policy adopted by the District, and even if the two policies were identical, a San Bernardino Superior Court ruling would not have any binding effect on the District. (See Proposed Exhibit 1.)

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Moreover, as described below, *several* federal courts in California have reviewed versions of AR 5145.3, and they have reached different conclusions. Thus, any assertions that the District's Policy "violates the law" are simply not true. As such, the District urges ALJ Binon to give no weight to the Association's Proposed Exhibits 1, 2, and 3 for purposes of determining lawfulness of the District's policy at issue here.

A. While RTPA may disagree with the Policy that the Board adopted, the Policy is consistent with existing law.

RTPA moved three Exhibits into evidence in support of its argument that the Policy is unlawful over objection by the District: a Preliminary Injunction issued against the Chino Valley Unified School District by the San Bernardino Superior Court; an online "Legal Alert" issued by the State Attorney General; and an Investigation Report issued by the California Department of Education ("CDE"). (Proposed Exhibits 1-3; RT 19: 24—20: 3.) However, the District maintains that none of the Association's Proposed Exhibits are relevant to the resolution of the instant matter because none of them concerns a single provision of the EERA, and as such, they do not implicate PERB's expertise. (See Proposed Exhibits 1-3; see also Objections to Rocklin Teachers Professional Association's Request for Judicial Notice and Proposed Exhibits.) Nevertheless, the District addresses the merits of RTPA's request that ALJ Binon give these Exhibits weight for the purposes of demonstrating the Association's "state of mind" and "decision not to engage in any sort of bargaining over this unlawful policy." (RT 19: 24—20: 3.)

While the "Legal Alert" and the CDE Investigation Report both maintain the position that parent notification policies violate the law, neither is a binding source of law: a "legal alert" posted online by the Attorney General does not constitute a provision of law, and the CDE's investigation report also does not constitute a provision of law. With regard to the preliminary injunction issued in Chino Valley, the District concedes that the San Bernardino Superior Court found Chino Valley's parent notification policy to be discriminatory; however, the superior court's opinion is not binding on the District. (See generally Proposed Exhibit 1.) Moreover, other courts that have dealt with these issues of student privacy and parental rights in the context of an AR 5145.3 or its functional equivalent, and they have reached differing conclusions. (*See e.g., Regino v. Staley*, Slip Copy [E.D. Cal. 2023] 2023 WL

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4464845 ["*Regino v. Staley*"]; *Konen v. Spreckels* [N. D. Cal.] Case No. 5:22-cv-05195-EJD ["*Konen v. Spreckels*"]; *Mirabelli v. Olson* [S.D. Cal.] 2023 WL 5976992 ["*Mirabelli v. Olson*"]; and *Mae M. v. Komrosky* [Riverside Sup. Ct. 2023] Case No. CVSW2306224] ["*Komrosky*"].)[3] **Most pertinently, a group of plaintiffs in Temecula Valley recently filed a lawsuit because *its* governing board adopted a parent notification policy *that is identical to that of Chino Valley*, but the Riverside Superior Court *denied* their Motion for a Preliminary Injunction finding the policy constitutional.[4]**

In *Komrosky*, a coalition of students and teachers sued the Temecula Valley Unified School District ("Temecula Valley") after its board adopted a parent notification policy.[5] Just as the Attorney General motioned for a preliminary injunction to halt enforcement of the parent notification policy in Chino Valley, the plaintiffs in *Komrosky* filed preliminary injunction to halt the policy's enforcement in Temecula. (*Komrosky*.) The Attorney General even filed an amicus brief in support of the *Komrosky* plaintiffs, arguing that the policy violates state law, just as his office did with respect to Chino Valley's policy.[6] **However, despite the fact that Temecula Valley's policy is *identical* to Chino Valley's policy and despite the backing from the State Attorney General, the Riverside Superior Court *denied* the plaintiffs' motion for a preliminary injunction on the basis that the plaintiffs were unlikely to succeed on the merits.** (*Komrosky* at 8-13.) More specifically, in issuing its tentative ruling, the Riverside Superior Court reasoned that Temecula Valley's parent notification policy "applies equally to cisgender and transgender/gender noncomforming students" and that the Policy does not violate the plaintiffs constitutional rights. (*Id.* at 13.) Therefore, two California superior courts have reached inconsistent conclusions as to whether the Chino Valley/Temecula Valley policy violates students' rights. (See Proposed Exhibit 1.)

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[3] All citations to *Komrosky* refer to the tentative ruling issued by the Riverside Superior Court, which is available online via https://static1.squarespace.com/static/5460e86be4b058ea427aec94/t/65d8ed8c47073d184f060a82/1708715404427/2024.02.22+Tentative-PI.pdf.

[4] Public Counsel, Press Release, *Ruling in Temecula Valley School District Case Indicates Case Will Proceed* (Feb. 16, 2024), https://publiccounsel.org/press-releases/ruling-in-temecula-valley-school-district-case-indicates-case-will-proceed/.

[5] Compare the parent notification policy (i.e., BP 5020.1) adopted by Chino Valley Unified School District (https://www.chino.k12.ca.us/cms/lib/CA01902308/Centricity/domain/693/series_5000/BP%205020.1.pdf) with the parent notification policy adopted by the Temecula Valley Unified School District (https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=36030186&revid=gAJJfnplus4WHWTqN1lQwHslshMA==&ptid=amIgTZiB9plushNjl6WXhfiOQ==&secid=9slshUHzTHxaaYMVf6zKpJz3Q==&PG=6&IRP=0&isPndg=false).

[6] Office of the Attorney General, *Attorney General Bonta Files Amicus Brief in Support of Temecula Valley Unified Students' Constitutional Rights* (Dec. 11, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-files-amicus-brief-support-temecula-valley-unified.

In *Regino v. Staley*, out of the U.S. District Court for the Eastern District of California, parent-plaintiffs challenged their school district's AR 5145.3. (*Regino v. Staley* at 1.) Specifically, the plaintiffs alleged that Chico Unified School District's AR 5145.3 amounted to a "Parental Secrecy Policy" because it prohibited disclosure—including to parents—of a student's trans or gender-nonconforming status. (See *Regino v. Staley*, Verified Complaint, p. 1 [Case 2:23-cv-00032].) Ultimately, as RTPA pointed out, the Eastern District "ruled that there is no constitutional right" to parent notification. (JX 5 at 016; see *id*.) However, the court also did not rule that parent notification *violated* students' rights either. (*Regino v. Staley* [E.D. Cal. 2023] 2023 WL 4464845.) Plaintiffs appealed to the Ninth Circuit where it currently awaits review.

Third, in *Konen v. Spreckels Union School District*, out of the U.S. District Court for the Northern District of California, plaintiffs similarly alleged that the Spreckels Union School District maintained an unconstitutional "Parental Secrecy Policy" that permitted teachers and staff to "keep secret from parents that their minor children had articulated confusion about their gender identity. . . ." (See *Konen v. Spreckels Union School District* (5:22-cv-05195-EJD) Complaint, Demand for Jury Trial, p. 4). There, the Parties entered into a settlement agreement, in which the Court ordered defendants to award plaintiffs $100,000. (*Konen v. Caldeira*, Slip Copy (July 17, 2023) 2023 WL 4595143.) As such, the court did not rule on the merits of the policy at issue. (*Id.*)

Finally, in *Mirabelli v. Olson* out of the U.S. District Court for the Southern District of California, two teachers challenged the Escondido Unified School District's AR 5145.3 alleging that the Policy's prohibition on parent notification violated their sincerely held religious beliefs. (*Mirabelli v. Olson* at 3-4.) In other words, the policy at issue in *Mirabelli v. Olson*, like Rocklin Unified School District's *unrevised* AR 5145 in the instant matter, prohibited the disclosure of a student's trans or gender-nonconforming status to parents. (*Id.* at 3 ["*Parents* were specifically identified (in AR 5145.3) As individuals who do not have a legitimate need for the information (a student's transgender status)."], emphasis in original.) The court granted a preliminary injunction prohibiting the enforcement of the policy against the teachers. (*See id.* At 18.) In so ordering, the Court reasoned that "[a] request to change one's own name and pronouns may be the first visible sign that a child or adolescent may be dealing with issues that could lead to gender dysphoria" and that the school district's prohibition on

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presenting parents with this information had "little medical or factual connection to actual discrimination or harassment." (*Id.*) Litigation in *Mirabelli* remains ongoing.

Due to the varying conclusions reached by state and federal courts across the state, the question of the lawfulness of parent notification or prohibition thereof in general remains an open question. The District's policy at issue is legally defensible based upon the court decisions thus far. For this reason, to the extent the Association offers Exhibits 1, 2, and 3 for purposes of demonstrating the unlawfulness of the Policy, they should be given no weight.

B. PERB cannot make a ruling that the Parent Notification Policy will cause unit members to violate the law, as alleged by RTPA, without also ruling that the Policy itself is unlawful.

RTPA's case rests on the premise that the Policy confers "unlawful" duties on unit members. However, as described above, their assertions are without merit. And, to rule that the District's adoption of the Policy requires unit members to violate the law would effectively require PERB to rule that the Policy itself is unlawful: a conclusion that PERB does not have the authority to reach. PERB is without jurisdiction to direct or interpret compliance with statutory obligations outside of the EERA. (*Lake Elsinore Unified School District* (2018), PERB Dec. No. 2548.) The EERA specifies that mandatory provisions of the Education Code (such as the notification requirements of Education Code section 51101) are outside the purview of the board. (Gov. Code, §3540.) Further, PERB does not have the authority to rule on Constitutional issues. (*Alliance Marc & Eva Stern Math and Science School et. al.* (2021) PERB Decision No. 2795 [judicial appeal pending]; see also *State of California (Department of Consumer Affairs)* (2005) PERB Decision No. 1762-S, p. 10 [noting that PERB lacks jurisdiction to adjudicate gender discrimination claims].) Thus, it is clear that the question of law at the heart of this matter requires interpretations of student privacy and parental rights under state and federal law, questions that PERB is not authorized to examine. Thus, PERB cannot rule that the Policy is unlawful and, as a direct result, cannot rule that the District imposed "unlawful" duties on certificated unit members.

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CONCLUSION

The Association failed to meet its burden to demonstrate that the District committed an unfair labor practice. For the foregoing reasons, the District respectfully requests that the Complaint and Charge against the District be dismissed and that all relief sought by the Association be denied in full and the District be awarded reasonable attorney's fees.

Dated: March 29, 2024

Respectfully submitted,

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PROOF OF SERVICE

I, **Lindsey Soares**, am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is One Capitol Mall, Suite 640, Sacramento, CA, 95814. My e-mail address is lsoares@lozanosmith.com.

On March 29, 2024, I served the attached:

RESPONDENT'S OPENING BRIEF

on the interested parties in said cause, by causing delivery to be made by the mode of service indicated below:

Brian Schmidt, Staff Attorney
California Teachers Association
1705 Murchison Drive
Burlingame, CA 94010
Email: bschmidt@cta.org

Brendan P. White, Senior Regional Attorney
Public Employment Relations Board
Sacramento Regional Office
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[X] (***By Electronic Filing Service Provider***) By transmitting a true and correct copy thereof by electronic filing service provider (EFSP), ePERB, to the interested party(s) or their attorney of record to said action at the e-mail address(es) of record and contained within the relevant EFSP database listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication from the EFSP that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 29, 2024, at Sacramento, California.

Lindsey Soares

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