PERB
California Public Employment Relations Board

Sacramento Regional Office
1031 18th Street
Sacramento, CA, 95811-4124
Telephone: (916) 324-0143

June 24, 2024

Re: *Rocklin Teachers Professional Association v. Rocklin Unified School District*
Unfair Practice Case No. SA-CE-3136-E

Dear Parties:

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

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

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

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

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, including footnotes, but excluding the tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding

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

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

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

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

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

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

32132.)

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

Sincerely,

Shawn Cloughesy
Chief Administrative Law Judge

SPC

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROCKLIN TEACHERS PROFESSIONAL ASSOCIATION, Charging Party, v. ROCKLIN UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-3136-E PROPOSED DECISION (June 24, 2024)

Appearances: California Teachers Association, by Brian Schmidt, Staff Attorney, for Rocklin Teachers Professional Association; Lozano Smith, by Michelle L. Cannon and Sinead M. McDonough, Attorneys, for Rocklin Unified School District.

Before Camille K. Binon, Administrative Law Judge.

INTRODUCTION

Rocklin Teachers Professional Association (RTPA) alleges that the Rocklin Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally, without notice and an opportunity to bargain, adopted changes to the District's administrative regulations governing parental rights and nondiscrimination/harassment. The District denies any wrongdoing.

PROCEDURAL HISTORY

On September 8, 2023, the RTPA filed an unfair practice charge with the Public Employment Relations Board (PERB) against the District.

[1] EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code, unless otherwise specified. Public Employment Relations Board (PERB) Regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

On October 11, 2023, the PERB Office of General Counsel issued a complaint alleging that the District violated EERA sections 3543.5, subdivisions (a), (b) and (c), when it changed the status quo by revising AR 5020 (Parents Rights and Responsibilities) and AR 5145.3 (Nondiscrimination/Harassment) thereby establishing a new policy that requires RTPA bargaining unit employees to notify parents/guardians of the student's gender identity, non-legal name, pronoun usage, and transgender or gender-nonconforming status.

On October 31, 2023, the District filed its answer to the complaint, admitting some allegations and denying others, denying any violation of EERA, and asserting multiple affirmative defenses.

On November 16, 2023, an informal settlement conference was held, but the matter was not resolved.

A prehearing videoconference was held on January 10, 2024, for the Administrative Law Judge Camille K. Binon and the parties to discuss the mechanics of conducting a formal hearing by videoconference and to agree upon a deadline for mutually exchanging exhibits prior to hearing.

On February 6, 2024, RTPA filed a request for judicial notice requesting the following documents to be judicially noticed: (1) the preliminary injunction issued by the San Bernardino County Superior Court on January 11, 2024 in *People ex rel. Banta v. Chino Valley Unified School District* (Case No. CIVSB2317301); (2) the January 11, 2024 legal alert issued by California Attorney General Rob Bonta concerning "Forced Disclosure Policies re: Transgender and Gender Nonconforming Students"; and (3) the February 1, 2024 investigation report issued by California

Department of Education concerning the Rocklin Unified School District's discrimination on the basis of gender identity and expression.

On February 12, 2024, the District filed an objection to RTPA's request for judicial notice.

A formal hearing was held on February 13, 2024. Post-hearing briefs were submitted on March 29, 2024, along with RTPA's second request for judicial notice of: (1) Rocklin Unified School District Administrative Regulations 5020 and 5145.3; and (2) Chino Valley Unified School District's Board Policy 5020.1. The parties submitted reply briefs on April 26, 2024, along with RTPA's third request for judicial notice of: the March 27, 2024 decision issued by California Department of Education denying Rocklin Unified School District's request for reconsideration of the Department's finding that the District's policy unlawfully discriminated against students on the basis of gender identity and expression.

FINDINGS OF FACT

Jurisdiction and Background

RTPA is an employee organization within the meaning of EERA section 3540.1, subdivision (d) and the exclusive representative of an appropriate unit of certificated employees within the meaning of EERA section 3540.1, subdivision (e). The District is a public employer within the meaning of Government Code section 3555.5, subdivision (a) and a public school employer within the meaning of EERA section 3540.1, subdivision (k).

Job Duties

The typical job duties listed in the Classroom Teacher K-12, are provided in pertinent part:

- “Provide a learning environment that allows for individual differences and respect for the dignity and worth of each student.
- “Identify, prescribe, and select materials; meet the instructional needs of assigned students.
- “Establish standards of student performance which can be quantitatively and qualitatively evaluated.
- “Assist specialists in the identification, assessment, and resolution of special student problems.
- “Administer group tests in accordance with district or school testing programs. Utilize the results of the testing program for identifying student needs and provide appropriate instructional activities.
- “Develop goals and prepare and implement specific objectives for class according to Board Policies and Administrative Regulations. Goals are to be consistent with the philosophy of goals for the district.
- “Develop and implement lesson plans which are consistent with district policy and guidelines.
- “Develop knowledge and skills essential to effectively teach students in the grade assigned.
- “Participate in the development and implementation of district and school curriculum.
- “Attend district workshops and college classes to keep up-to-date on changing methods and procedures.
- “Attend required meetings called by administrators or grade level chairmen.
- “Maintain a behavioral climate in the classroom conducive to learning.
- “Communicate with students and parents on the educational and social progress of the student; interpret the school program to parents and students.
- “Adhere to the California Education Code, Title V, and carry out Board Policies and Administrative Procedures.

- “Abide by professional ethics standards established by Board Policy.
- “Demonstrate mutual respect and dignity.
- “Work cooperatively with the entire school staff to promote effective student learning experiences.
- “Plan and coordinate the work of teacher aides, teacher assistants, and para professionals.
- “Maintain punctuality for all prescribed functions.
- “Prepare required forms, maintain accurate pupil academic records, attendance records, and cumulative student progress and achievement records and reports.
- “Maintain functional learning environments, including orderliness of equipment and materials assigned to the classroom.
- “Exercise supervision and care over books, supplies, and equipment; instruct pupils in the proper use and preservation of school property; and maintain records which establish student accountability for assigned school property.
- “Assume the responsibility for the safety and welfare of students.
- “Assume the responsibility for the safety and welfare of students whenever a danger is observed on or about the campus.
- “Be responsible for immediate interior and exterior supervision during passing periods, recess, before and after school.
- “Be accountable for supervision as assigned by the principal/designee.
- “Actively participate in extra curricular activities.
- “Supervise pupils in extra curricular activities as designated by the administrator.
- “Share in sponsorship of student activities.
- “Participate cooperatively in the development of the school and grade level budgets.”

The job duties of a Guidance Counsel are provided in pertinent part:

- “Advises students, parents, and guardians for the purpose of providing information of students’ academic progress.
- “Coordinates with teachers, resource specialists and/or community (e.g., courts, child protective services, etc.) for the purpose of providing requested information, gaining needed information, and/or making recommendations.
- “Counsels students, parents, and guardians for the purpose of enhancing student success in school.
- “Monitors student records for the purpose of developing plans and/or providing information regarding students’ goals.
- “Prepares documentation (e.g., observations, progress, contacts with parents, teachers, outside professionals, etc.) for the purpose of providing written support, developing recommendations and/or conveying information.
- “Presents information on various topics (e.g., behavior management, etc.) for the purpose of providing information to assist in decision making.
- “Schedules student classes for the purpose of securing appropriate placement and meeting their promotion requirements.
- “Consults with parents, school and community resources, and students in helping to develop the best educational programs for children.
- “Coordinates Student Assistance Program.
- “Chairs/attends Student Study Team meetings.
- “Participates in planning, executing, and assessing programs of education and re-education for pupils.
- “Assists in developing the best possible learning programs for all children and in evaluating the product of the educational effort.
- “Provides appropriate consultive services to assist school staff members to better understand behavior and learning patterns of children and to apply these

understandings in promoting an improved climate for learning.

- “Provides and coordinate staff inservice training programs.
- “Provides individual and group counseling as needed.
- “Develops a master schedule and completes scheduling of all students.
- “Registers and schedules all incoming new students.
- “Explains to parents the assessments and procedures for placement of a child into special education programs.
- “Provides career and vocational counseling.
- “Coordinates student assessment programs.
- “Coordinates Peer Helper Program.
- “Administers various proficiency tests for the purpose of assisting in determining student’s placement and/or eligibility for potential course of study.
- “Assists other personnel as may be required for the purpose of supporting them in the completion of their work activities.
- “Participates in various extra curricular school and/or community activities for the purpose of providing supervision and/or representing school at such events.
- “Supervises assigned programs (e.g., peer counseling, special education, Student Assistance Program, etc.) for the purpose of monitoring performance and achieving overall curriculum objectives.
- “Other duties as assigned.”

Administrative Regulations

Before September 6, 2023, the District had Administrative Regulations (AR) 5145.3, which provided:

“**Transgender and Gender-Nonconforming Students**

“Gender identity of a student means the student's gender-related identity, appearance, or behavior as determined from the student's internal sense, whether or not that gender-related identity, appearance, or behavior is different

from that traditionally associated with the student's physiology or assigned sex at birth.

“Gender expression means a student's gender-related appearance and behavior, whether stereotypically associated with the student's assigned sex at birth. (Education Code 210.7)

“Gender transition refers to the process in which a student changes from living and identifying as the sex assigned to the student at birth to living and identifying as the sex that corresponds to the student's gender identity.

“Gender-nonconforming student means a student whose gender expression differs from stereotypical expectations.

“Transgender student means a student whose gender identity is different from the gender assigned at birth.

“The district prohibits acts of verbal, nonverbal, or physical aggression, intimidation, or hostility that are based on sex, gender identity, or gender expression, or that have the purpose or effect of producing a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment, regardless of whether the acts are sexual in nature. Examples of the types of conduct which are prohibited in the district and which may constitute gender-based harassment include, but are not limited to:

“1. Refusing to address a student by a name and the pronouns consistent with the student's gender identity

“2. Disciplining or disparaging a student or excluding the student from participating in activities, for behavior or appearance that is consistent with the student's gender identity or that does not conform to stereotypical notions of masculinity or femininity, as applicable

> “3. Blocking a student's entry to the restroom that corresponds to the student's gender identity
>
> “4. Taunting a student because the student participates in an athletic activity more typically favored by a student of the other sex
>
> “5. Revealing a student's transgender status to individuals who do not have a legitimate need for the information, without the student's consent
>
> “6. Using gender-specific slurs
>
> “7. Physically assaulting a student motivated by hostility toward the student because of the student's gender, gender identity, or gender expression[.]”

AR 5145.3 also provided a privacy right to a “student's transgender or gender-nonconforming status” as “the student's private information” and prohibited the District from disclosing that information to others without the student’s prior written consent, with the exception of when required by law or to preserve the student’s physical or mental well-being.

On August 9, 2023, at the public meeting of the District Board, a trustee suggested that a subcommittee be formed to investigate the issue of parents’ rights and did not mention transgender or gender-nonconforming students. A subcommittee of two trustees, including District Board Trustee Julie Leavens-Hupp, was created even though the matter did not appear on the agenda and no formal Board action was taken.

At some point prior to or on September 4, 2023, the District Board posted the agenda for the next Board meeting. It contained a proposed resolution to amend AR 5020, “Parent Rights & Responsibilities”; and AR 5145.3, “Nondiscrimination/

Harassment." The District did not give RTPA notice that the District Board was considering changing these policies nor offered to bargain.

The proposed amendment to AR 5020 added the following language to give parents in the District the following right:

> "[t]o 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."

The proposed amendment to AR 5145.3 was to add the following underlined language:

> "Right to privacy: A student's transgender or gender-nonconforming status is the student's private information <u>with the exception of parental notification</u>, 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 gender-nonconforming 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 student, the employee shall seek the student's 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 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."

On September 4, 2023, RTPA sent the District a letter informing the District that the proposed amendments to AR 5020 and 5145.3 were unlawful and demanded that the District Board withdraw the resolution. RTPA also demanded, if the District refused to withdraw the resolution, that it meet and negotiate the effects and impacts of the policy change on unit members.

On September 5, 2023, RTPA followed up with a similar letter from its attorney directly to the District's trustees. The District did not respond to either letter before the District Board met on September 6.

The attendance at the September 6 District Board meeting was "exponentially higher" than typical; the meeting lasted until the early hours of the morning due to the number of public comments about the proposed policy. The majority of speakers spoke against the policy and included teachers, students, parents, counselors, lawyers, and community members. These comments did not persuade the Board, and it passed the resolution, which approved to amend AR 5020, "Parent Rights & Responsibilities," and 5145.3 "Nondiscrimination/Harassment," shortly after public comment concluded, without making any amendments.

Superintendent Roger Stock testified that the amended policies have not been implemented because the District intended to bargain over the effects of the policy change with RPTA. District Board Trustee Leavens-Hupp testified that the District Board requested that a notice be posted on the District's website that the policies had not been implemented. She also testified that the policies could not be effectively implemented unless RTPA unit members report a student's transgender or gender-nonconforming status to either an administrator or parent.

On September 8, 2024, District's Human Resources Director Dr. Tony Limoges, e-mailed the Association's bargaining chair:

> "This email is the District's acknowledgement of receipt regarding the Cease and Desist sent via email on September 4, 2023 and the Unfair Practice Charge sent to PERB on September 8, 2023.
>
> "The District fully intends to Bargain the impacts and effects of the amendments to Administrative Regulations 5020: Parents Rights & Responsibilities and 5145.3 Nondiscrimination/Harassment."

In the e-mail, Dr. Limoges offered several dates to meet for negotiations.

On September 20, 2023, counsel for CTA Brian Schmidt responded:

> "On behalf of the Rocklin Teachers Professional Association, I write to respond to the Rocklin Unified School District's September 8, 2023 offer to bargain the negotiable impacts and effects of its new "forced outing" policy. The Association demanded to bargain the effects of this policy before it was adopted, but the District nonetheless rushed to adopt the policy on September 6, 2023 before any bargaining could take place. Now that this policy has been unlawfully passed, the District must restore the status quo by rescinding the policy entirely before the Association will agree to bargain its effects. Bargaining after the fact would

put the Association at a disadvantage, would enable the District to benefit from its unlawful unilateral change, and does not comply with the duty to bargain under the Educational Employment Relations Act (EERA).

"The Association has asked PERB to order the new policy rescinded and to order the District to bargain with the Association before adopting it again, if that is what the District wishes to do. If the District is serious about wanting to bargain in good faith, it will follow this same process as required by EERA, and immediately rescind the policy so that the parties can bargain its negotiable effects."

On October 6, 2023, the District's counsel sent a response:

"This letter is in response to your September 20, 2023, letter to Roger Stock, Superintendent of the Rocklin Unified School District ("District"). I am legal counsel to the District and respond to your letter on their behalf.

"In your letter you respond to the District's written offer to bargain the negotiable impacts and effects of the recent revisions to AR 5020 on behalf of the Rocklin Teachers Professional Association ("RTPA"). In your letter you state RTPA's position that it will not meet with the District to bargain the negotiable impacts and effects until and unless the District first rescinds the policy revisions. This is apparently based on the belief that the policy could not lawfully be revised until the District gave RTPA notice and opportunity to bargain impacts first. If this is in fact RPTA's (and CTA's) position, this is incorrect.

"The duty to bargain extends to the **implementation** and effects of a decision that has a foreseeable effect on matters within the scope of representation, even where the decision itself is not negotiable—such as revisions to a parental notice policy. The employer must provide notice and opportunity to bargain over the reasonably foreseeable effects of its decision **before implementation**. Even then, under certain circumstances, an employer, prior to agreement or exhaustion of impasse procedures, may

implement a non-negotiable decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. Implementation is permissible when:

“1. The implementation date is not an arbitrary one, but is based on either 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 nonnegotiable decision;

“2. Notice of the decision and implementation is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and

“3. The employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.

“(*Salinas Valley Memorial Healthcare System* (2015) PERB Dec. No. 2433-M; citing *Compton Community College Dist.* (1989) PERB Dec. No. 720.)

“Here, the District has not yet implemented the revisions to AR 5020. Instead, the District reached out to RPTA on September 8—less than 48 hours after the Board action to revise the policy. The District expressed that it “fully intends to Bargain the impacts and effects of the amendments to Administrative Regulations 5020: Parents Rights & Responsibilities and 5145.3 Nondiscrimination/Harassment.”

“The District then offered four potential dates for bargaining to occur before the end of September and asked RTPA to provide alternative dates if none of the proposed dates worked. On September 11, 2023, RTPA acknowledged the District’s offer to bargain and said it would get back to them. Instead, your letter was sent to Superintendent Stock.

> "The District has offered to bargain the negotiable impacts and effects with RTPA prior to implementation and did so in a timely and good faith manner. RTPA at this time is refusing to bargain. If RTPA will not come to the table to bargain any negotiable impacts and effects, that is bad faith bargaining. RTPA cannot in good faith hold up implementation of the revised policy by simply refusing to bargain. The District provided notice of the decision sufficiently in advance of implementation to allow for meaningful negotiations prior to implementation.
>
> "To avoid further unfair labor practice charges and delay, we request RTPA immediately provide the District dates to meet to bargain any negotiable impacts."

On October 12, 2023, CTA responded to the District's letter:

> "On behalf of the Rocklin Teachers Professional Association, I write in response to your October 6, 2023 letter demanding that the Association bargain the negotiable effects of the Rocklin Unified School District's new "forced outing" policy.
>
> "As the Public Employment Relations Board found when issuing a complaint against the District, both the decision to adopt the policy and the effects of the policy are negotiable. The new policy explicitly imposes a new reporting duty on classroom teachers and counselors, both of which are bargaining unit members. This duty was not reasonably comprehended by the Association or unit members as falling within the scope of existing job duties. In particular, it was not reasonably comprehended that, as part of their official duties, unit members would be required to engage in conduct which the State of California has said violates state law. Accordingly, the District was not entitled to adopt the forced outing policy.
>
> "The Association will not acquiesce to the District's unilateral change by engaging in bargaining over its effects, and will not agree to new job duties that would require unit members to violate the law and unreasonably expose them

> to liability. The District must rescind the policy and refrain from adopting any similar policy without an agreement with the Association."

Preliminary Injunction

On January 11, 2024, the Superior Court of the County of San Bernardino issued a Preliminary Injunction Order in *The People of the State of California, ex rel., Bob Bonta, Attorney General of the State of California v. Chino Valley Unified School District*, Case No. CIVSB2317301, against Chino Valley Unified School District (Chino Valley) enjoining it from enforcing its Board Policy (BP):

> "BP 5020.1: Parental Notification
>
> [¶ . . .¶]
>
> "This parental notification policy requires the following:
>
> "1. Principal/designee, certificated staff, and school counselors, shall notify the parent(s)/guardian(s), in writing, within three days from the date any District employee, administrator, or certificated staff, becomes aware that a student is:
>
> "(a) Requesting to be identified or treated, as a gender (as defined in Education Code Section 210.7) other than the student's biological sex or gender listed on the student's birth certificate or any other official records. This includes any request by the student to use a name that differs from their legal name (other than a commonly recognized diminutive of the child's legal name) or to use pronouns that do not align with the student's biological sex or gender listed on the student's birth certificate or other official records.
>
> "(b) Accessing sex-segregated school programs and activities, including athletic teams and competitions, or using bathroom or changing facilities that do not align with

> the student's biological sex or gender listed on the birth certificate or other official records.
>
> "(c) Requesting to change any information contained in the student's official or unofficial records."

The court found that subdivisions 1.(a) and 1.(b) of the BP, on their face, discriminate on the basis of sex citing *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17, and *Woods v. Horton* (2008) 167 Cal.App.4th 658, 674. The court also found that Chino Valley failed to provide a compelling interest under the strict scrutiny standard and the BP was not narrowly tailored because Chino Valley did not consider any gender-neutral alternatives. The court concluded that Chino Valley's BP subdivisions 1.(a) and 1.(b) violated equal protection. Thus, the court ordered Chino Valley and its agents, employees, assigns, and all other persons acting in concert be restrained and enjoined from adopting, implementing, enforcing or otherwise giving effect to the BP subdivisions 1.(a) and 1.(b).

Attorney General's Legal Alert

On January 11, 2024, Attorney General Bonta issued a statewide legal alert to all school boards concerning "forced disclosure policies":

> "[These policies] require schools to inform parents and guardians, with minimal exceptions, whenever a student requests to use a name or pronoun different from that on their birth certificate or official records, even when the student does not consent. Such policies also require notification if a student requests to use facilities or participate in school programs that do not align with their sex or gender on official records, and tracking and recording of requests made by transgender and gender nonconforming youth. Some districts' policies require such disclosures even when revealing the student's gender

> identity or gender nonconformity to their parents could put them at risk of physical, emotional, or psychological harm."

The Attorney General informed school boards that these policies violate the Equal Protection Clause of the California Constitution; statutory prohibitions on discrimination; and students' constitutional right to privacy. The District Board received this legal alert, and even though its own policy falls into the category of requiring "disclosures even when revealing the student's gender identity or gender nonconformity to their parents could put them at risk of physical, emotional, or psychological harm," at the hearing District Trustee Leavens-Hupp testified the Attorney General's legal alert is just "his opinion."

California Department of Education Investigation Report

On February 1, 2024, CDE issued a report following an investigation of the District's new policy. The Department concluded that AR 5020's amendment to paragraph 21:

> "*on its face* singles out and is directed exclusively toward one group of students *based on* that group's legally protected characteristics of identifying with or expressing a gender other than that identified at birth. And the application of that policy adversely impacts those students. Finally, [AR 5020's amendment to paragraph 21] does not expressly or implicitly provide any educational or school administrative purpose justifying either form of discrimination."

The CDE ordered the District to take the following corrective action:

> "Within 5 school days of receipt of this Investigation Report:
>
> "1. The Superintendent or the Superintendent's designee must inform all school personnel subject to [AR 5020's amendment to paragraph 21] in writing that the CDE has

> determined the policy is inconsistent with *EC* Section 220 and for this reason the mandatory notification requirements set forth in P-21 may not be implemented.
>
> "2. The Superintendent or the Superintendent's designee must provide written notification to all students within the District that the mandatory notification requirements of P-21 will not be implemented.
>
> "Within 10 school days of receipt of this Investigation Report:
>
> "3. The Superintendent or the Superintendent's designee must provide CDE's [Education Equity Uniform Complaint Procedures Office] with evidence of compliance with these corrective actions, which must include copies of the writings referred to in 1 and 2 above."

Rather than comply with this order, the Board decided at its February 7, 2024 meeting to seek reconsideration. At the hearing, Trustee Leavens-Hupp testified the Department of Education's report was merely "their opinion."

On March 27, 2024, the California Department of Education issued a decision denying the District's request for reconsideration of the Department's finding that the District's policy unlawfully discriminated against students on the basis of gender identity and expression.

RTPA President Travis Mougeotte testified that the District has stated it did not intend to implement the policy until this unfair practice charge has been resolved. Mougeotte testified that one concern about the AR 5020 and 5145.3 was that employees have faced consequences from the California Commission on Teacher Credentialing (CTC) for following district policies that were in violation of state laws. The CTC has the authority to revoke or suspend a member's credential, which means

that the member cannot teach and thus is unemployed. Mougeotte also testified that forcing members to disclose students' private information over their objection to their parents not only breaks the trust formed between them but also could jeopardize the students' safety.

ISSUE

Did the District fail to meet and confer in good faith when it amended AR 5020 and 5145.3 without notice and the opportunity to bargain in good faith?

CONCLUSIONS OF LAW

I. Requests for Official Notice

RTPA requests official notice of the following documents: (1) The preliminary injunction issued by the San Bernardino County Superior Court on January 11, 2024 in *People ex rel. Banta v. Chino Valley Unified School District* (Case No. CIVSB2317301); (2) The January 11, 2024 legal alert issued by California Attorney General Rob Bonta concerning "Forced Disclosure Policies re: Transgender and Gender Nonconforming Students"; (3) The February 1, 2024 investigation report issued by the California Department of Education (CDE) concerning the Rocklin Unified School District's discrimination on the basis of gender identity and expression; (4) Rocklin Unified School District Administrative Regulations 5020 and 5145.3, as they are currently published on the District's website; (5) The Chino Valley Unified School District's Board Policy 5020.1 ("Parental Notification"); (6) The March 27, 2024 decision issued by the CDE denying the Rocklin Unified School District's request for reconsideration of the Department's finding that the District's policy unlawfully discriminated against students on the basis of gender identity and expression.

As with evidence generally, any matter to be officially noticed must be relevant, meaning it must have some "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also Evid. Code § 350 [only relevant evidence is admissible]; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 548.)

A. Acts of the Executive Department

RTPA has requested official notice of the Attorney General's January 11, 2024 legal alert, the February 1, 2024 investigative report by the CDE and the March 27, 2024 CDE decision denying the District' request for reconsideration.

In ruling on requests to take "administrative" or "official" notice, PERB follows California Evidence Code sections 451 and 452 on judicial notice. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 7, fn. 5.) Under Evidence Code section 452, "[j]udicial notice may be taken of . . . [o]fficial acts of the legislative, executive and judicial departments of . . . any state of the United States." There is no dispute that the January 11, 2024 legal alert, the February 1, 2024 investigative report by the CDE and the March 27, 2024 CDE decision denying the District' request for reconsideration are official acts of the executive department of this state. RTPA argues that the amendments to AR 5020 and 5145.3 would require teachers and counselors to violate a separate law or constitutional provision to comply with the changes to the District's regulations. Therefore, it's arguably a prohibited subject of bargaining and thus relevant to the scope of representation analysis. Thus, administrative notice is appropriate because it is an official act of the executive department of a state. (See Evid. Code § 452, subd. (c).)

B. Administrative Notice of Documents after Hearing

Official notice may be taken after submission of a case for decision, provided that notice and opportunity for additional argument on the matters officially noticed was given to the opposing party. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 24.) PERB may take official notice of matters within its own files and records. (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 6, fn. 4; *West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, p. 3, fn. 4; see also, *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, pp. 16 & fn. 14 [describing standards for "administrative notice," alternatively "official notice"].)

RTPA filed its second request for judicial notice on March 29, 2024, along with its post hearing brief requesting notice of the Chino Valley Board Policy 5020.1 ("Parental Notification"). The District did not mention the second request for judicial notice in its reply brief nor did it file an objection. However, the District did argue that the Chino Valley BP is not the same as the District's policy and thus is irrelevant. The Chino Valley BP and AR 5020's amendments both require teachers and counselors to notify within three days a student's request to be identified as a gender other than their biological sex or gender listed on the student's birth certificate, use pronouns that do not align with the student's biological sex or gender, access sex-segregated school programs or activities, use bathrooms that do not align with the student's biological sex or gender. It is evident that each element of items (1)(a) and (1)(b) of the Chino Valley policy is contained in the District's own policy. In fact, the only substantive differences between the two policies are: 1) item 1(c) of the Chino Valley policy

extends to requests “to change any information contained in the student’s official or unofficial records”; and 2) unlike the Chino Valley policy, the District policy specifies that educators must disclose the students’ transgender or gender-nonconforming status even when there is credible evidence that doing so would result in substantial jeopardy to the child’s safety. Thus, the policies are substantially similar for the purposes of analyzing this decision. Also, The Chino Valley policy is relevant to whether the District’s policy is lawful and assists in the analysis of whether these policies are negotiable and may be recognized by judicial notice. (See *Physicians Committee for Responsible Medicine v. Los Angeles Unified School Dist*. (2019) 43 Cal.App.5th 175, 183, citing Evid. Code, § 452, subds. (a) & (c).)

RTPA also filed its third request for judicial notice on April 26, 2024, along with its reply brief requesting judicial notice of the March 27, 2024 decision issued by CDE denying the District’s request for reconsideration of the Department’s finding that the District’s policy unlawfully discriminated against students on the basis of gender identity and expression. The District did not object or file an opposition. Because the CDE decision confirms its stance of the illegality of the District’s actions and it is an official act of the executive department of a state, official notice is appropriate.

II. Unilateral Change

To establish a prima facie case that a respondent employer violated its 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.)

A. Change in or Deviation from the Status Quo

There are three primary means of showing that a party changed or deviated from the status quo. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 31 (*Oxnard*).) 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*.)

By adopting a policy that created new expectations for bargaining unit members to disclose information to parents, the District changed a written policy, implemented a new written policy, and/or enforced an existing policy in a new way. (See, e.g., *Oakland Unified School District* (2023) PERB Decision Number 2875-E, p. 13; citing *Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 345 [employer's duty to bargain over change in policy does not turn on whether policy was contained in a collective bargaining agreement].) The District deviated from the previous version of a written policy when it enacted the amendments to AR 5020 and 5145.3.

B. Generalized Effect or Continuing Impact

A change of policy has a "generalized effect or continuing impact" if it either "changes a policy or employment term applicable to future situations," or the employer's unilateral action is "based upon an incorrect legal interpretation or insistence on a non-existent legal right that could be relevant to future disputes." (*Bellflower Unified School District*, *supra*, PERB Decision No. 2796, p. 15.) Because the District asserts a right to unilaterally amend AR 5020 and 5145.3, it may repeat such conduct in the future, which establishes the requisite generalized effect or continuing impact.

C. Adequate Notice and Opportunity to Bargain

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.) Notice is inadequate when a union first learns of a decision or change as a fait accompli. (*County of Merced*, *supra*, PERB Decision No. 2740-M, p. 20.) An employer's unexcused failure to provide an exclusive representative with adequate notice and an opportunity to bargain is a per se violation of the duty to bargain in good faith if the decision itself falls within the scope of representation, or if the decision has reasonably foreseeable effects on terms or conditions of employment. (*The Accelerated Schools* (2023) PERB Decision No. 2855, p. 13, citing *Regents of the University of California* (2021) PERB Decision No. 2783-H, p. 18; *Trustees of the California State University* (2012) PERB Decision No. 2287-H, p. 20.) "[A] public meeting and its associated agenda or other documents generally do not provide sufficient notice to a union unless the public entity sends such a document

to a union official, in a manner reasonably calculated to draw attention to a specific item and with adequate time for good faith negotiations to ensue. (*Oakland Unified School District*, *supra*, PERB Decision No. 2875, p. 21, citing *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at p. 45; *Victor Valley Union High School District* (1986) PERB Decision No. 565, pp. 5-6 & fn. 6.)

RTPA did not know of the proposed amendments until the District Board's agenda was posted sometime prior to or on September 4, 2023. Even though RPTA requested to bargain once they reviewed the District Board meeting agenda, the District refused to bargain over its decision to amend AR 5020 and 5145.3 before taking it to the District Board for approval. The District did provide dates to negotiate the effects of its decision on September 8, 2024. The District's willingness to bargain over the impact of its decision to amend AR 5020 and 5145.3 does not satisfy its obligation to provide notice and the opportunity to bargain over the decision itself. (*The Accelerated Schools*, *supra*, PERB Decision No. 2855, p 14, fn. 8 ["Although an employer engaged in effects negotiations need not bargain over the policy reasons for its decision, it cannot refuse to bargain over alternatives, as those alternatives fundamentally impact the employment effects at issue"].) Additionally, "[a]n employer must meet and confer over alternatives to the decision as part of effects bargaining." (*Oxnard*, *supra*, PERB Decision No. 2803, p. 51.) This is because "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." (*Id*. at p. 52.)

The District argues that RPTA first requested to only bargain the effects of its decision to amend AR 5020 and 5145.3; however, RPTA changed its position after PERB issued the complaint and reviewed with legal counsel and on October 12, sent a demand to bargain both the decision and the effects of the decision. Because the District had notice from October 12, both the decision and the effects of the decision are at issue here. “Even if the District disagreed or was unclear as to whether some proposed subjects for bargaining were within the scope of representation, it still had a duty to meet with [RTPA] to clarify the matter.” (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 8.) This also does not overcome the fact that the District failed to provide notice prior to the implementation of the decision, which occurred on September 6, 2023, the date the amendments were approved. Thus, the change occurred without prior notice and opportunity to bargain.

D. Scope of Representation

EERA defines the scope of representation as extending to “matters relating to wages, hours of employment, and other terms and conditions of employment.” (Cal. Gov’t Code § 3543.2(a)(1).) In *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), the Board outlined the general test for assessing whether an unenumerated topic falls within EERA’s scope of representation: (1) it is logically and reasonably related to wages, hours, or other statutorily enumerated subjects of bargaining; (2) it is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective bargaining is an appropriate means for resolving such conflict; and (3) its designation as a negotiable subject would not significantly abridge the employer’s freedom to exercise those

managerial prerogatives (including matters of fundamental policy) that are essential to achieving its mission. (*The Accelerated Schools*, *supra*, PERB Decision No. 2855, p. 14, fn. 9.) However, PERB need not evaluate whether the *Anaheim* test is satisfied here because for "recurring topics," PERB "follows subject-specific standards that implement the overall scope of representation test" set out in *Anaheim*, thereby "obviating the need to 'reinvent the wheel.'" (*The Accelerated Schools*, *supra*, PERB Decision No. 2855, p. 15.)

1. Employee Discipline

Employee discipline, including both the criteria for discipline and the procedure to be followed, are expressly enumerated as matters with the scope of representation under EERA. (EERA, § 3543.2, subd. (b); *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg*); *San Bernardino City Unified School District* (1998) PERB Decision No. 1270; *San Bernardino City School District* (1982) PERB Decision No. 255.) In *Healdsburg*, the Board held that:

> "Proposals relating to categorical forms of discrimination (e.g., race, national origin, political affiliation) . . . have a direct relationship to a whole range of enumerated subjects of bargaining. Discriminatory practices may affect wages, transfer, reassignment and disciplinary policies, and other areas of bargaining enumerated in section 3543.2 of the Act."

(*Id*. at p. 11.)

First, Trustee Levens-Hupp testified that the policies could not be effectively implemented unless RTPA unit members report a student's transgender or gender-nonconforming status to either an administrator or parents. Dr. Limoges testified that it

was the District Board that determined how the policy should be implemented. The requirement to report in three days also could subject teachers to discipline. AR 5020 and 5145.3 could potentially risk placing a teacher or counselor in the position of being required to comply with two conflicting statutory mandates: adhere to the 5020 and 5145.3 and violate student privacy or unilaterally cease to honor the provision and be subject to discipline. Along with those reasons, there is the potential to jeopardize their teaching credential with the CTC could lead the member to be without a job. And when an employer creates a new type of evidence that may be used to support discipline or a new ground for discipline, those effects are negotiable. (See, e.g., *Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 14-16 [use of surveillance camera video for disciplinary purposes was a negotiable effect of non-negotiable decision to install cameras]; *Trustees of the California State University* (2003) PERB Decision No. 1507-H, pp. 3-4 & adopting proposed decision at pp. 12-13 [disciplinary effects of computer use policy are within the scope of representation].) The amendments to AR 5020 and 5145.3 require the teachers and counselors to disclose this information in a very short time period and thus open them up to potential discipline. The disclosure also potentially subjects them to scrutiny by the CTC. Because teachers and counselors could face discipline for not following the new requirements, the District's changes fall within the scope.

2. Change in Job Duties

"A charging party can establish that new job duties materially deviated from the status quo by showing that new duties or assignments are not 'reasonably comprehended' within employees' prior duties or assignments." (*County of Santa*

Clara (2023) PERB Decision No. 2876-M, p. 22 [judicial appeal pending].) "Reasonably comprehended" is an objective standard that refers to what a reasonable employee would comprehend based on all relevant circumstances, including but not limited to past practice, training, and job descriptions. (*Ibid*.)

The job descriptions require employees to comply with antidiscrimination laws. Thus, the question is whether a reasonable District employee, "based on all relevant circumstances, including, but not limited to, past practice, training, and job descriptions" would comprehend being required to disclose a students' transgender or gender-nonconforming status to their parents. (*County of Santa Clara*, *supra*, PERB Decision No. 2876-M, p. 6.) First, the Guidance Counselor job description does not mention board policies or administrative regulations; thus, nothing in that job description would incorporate AR 5020 and 5145.3 into Guidance Counselors job duties. The Teacher job duties does mention "[d]evelop goals and prepare and implement specific objectives for class according to Board Policies and Administrative Regulations" and "[a]dhere to the California Education Code, Title V, and carry out Board Policies and Administrative Procedures." However, before amendment to AR 5245.3, it previously forbade teachers from disclosing a student's transgender or gender-nonconforming status without the student's prior written consent and if the student refused to give permission, the teacher was required to keep the student's information confidential. Now AR 5020 requires a teacher to disclose the transgender or gender-nonconforming status to the parent within three school days and can only be delayed 48 hours to fulfill mandated reporter requirements.

The District argues that the job description for teachers, which states that they are expected to "[c]ommunicate with students and parents on the educational and social progress of the student," already requires teachers to disclose social information to parents. The District also argues that it is similar to other job duties that teachers already perform. It cites the job descriptions' requirement that employees "[c]ommunicate with students and parents on the educational and social progress of the student." At the hearing, Superintendent Stock compared the policy to a teacher reporting a student's negative behavior or poor academic performance against the student's will. However, PERB has held that "catchall language" like this in a job description does not obviate the need to examine the specific duty in question. (*County of Santa Clara*, supra, PERB Decision No. 2876-M, p. 22, citing *Rio Hondo Community College District* (1982) PERB Decision No. 279, pp. 17-18.)

It is clear that before September 6, 2023, the District's policies prohibited employees from making such a disclosure. It is undisputed that, before the District Board adopted the amendments to AR 5020 and 5145.3, certificated employees were not required to notify anyone if a student was questioning their gender identity. It is also clear that the policy requires certificated employees to divulge private personal information that they were previously forbidden from disclosing to parents (without written consent) under the District's anti-discrimination policy. Before the new policy was adopted, they were permitted to disclose a student's private personal information without the student's consent only when not doing so would put the student's safety in jeopardy, as in cases of child abuse. The amendment provides that disclosure may be delayed by 48 hours if a unit member, in conjunction with an administrator,

"determines based on credible evidence that [] notification may result in substantial jeopardy to the child's safety." During this extra 48-hour period, employees are expected to "fulfill mandated reporter requirements" by reporting to Child Protective Services the child abuse they believe they are about to set in motion. But, as Trustee Leavens-Hupp admitted at the hearing, they must still notify the parents. At the hearing, Dr. Limoges suggested that the new policy does not change the terms and conditions of unit members' employment because it can be implemented without requiring anything of them. If this was not already contradicted by the text of the policy itself, Trustee Leavens-Hupp made clear at the hearing that the policy does directly impose new job duties on teachers, counselors, and administrators, and that it cannot be meaningfully implemented without their involvement. Dr. Limoges himself acknowledged that the District Board determined how the policy should be implemented. Thus, disclosing information that was once private to the student without their consent could not be compared to disclosing educational and social progress because past practice showed that teachers and counselors were prohibited from performing the exact duty they are now required to perform. (*State of California (California Correctional Health Care Services)* (2022) PERB Decision No. 2823-S, p. 18, citing *County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 6 [catchall language in a job description does not outweigh contrary past practice].)

The District cites to *Beverly Hills Unified School District* (2008) PERB Decision No. 1969 (*Beverly Hills*) to demonstrate that "communicating certain information to parents falls outside the scope of bargaining." The "communication" at issue in *Beverly Hills*, however, was teachers' provision "to parents, upon request, [of] a copy of their

child's examination(s) for review outside of the classroom." (*Beverly Hills*, *supra*, PERB Decision No. 1969, p. 2.) This differed from the previous policy, whereby "examinations could only be reviewed in the classroom." (*Id*.) Reference to this case does not support the District's position as the new policy in *Beverly Hills* did not require teachers to communicate anything new to parents—it merely specified a new location for the disclosure of exams. It also did not impose new work duties on teachers because they were already required to produce a copy of exams. Thus, *Beverly Hills* is inapposite.

The District next argues that the amendments to AR 5020 and 5145.3 did not require teachers to notify parents at all as they could report to an administrator who would report to the parents. This argument is nonsensical as the teachers are still required to report the students' private information to someone who would eventually report that to their parents. Nothing in the existing job descriptions for teachers or counselors suggests that they may be required to divulge confidential student information.

Therefore, AR 5020 and 5145.3 now require teachers and counselors to disclose private information that materially changes their job duties. Thus, the change to teachers and counselors' job duties is within the scope of representation.

3. Policy Violates External Law

When external law mandates specified procedures in an area within the scope of representation, such procedures remain negotiable to the extent of the employer's discretion, that is, to the extent that the external law does not "set an inflexible standard or insure immutable provisions." (*San Mateo City School Dist. v. Public*

Employment Relations Bd. (1983) 33 Cal.3d 850, 864-865 (*San Mateo*).) For negotiations over matters also covered by external law, the parties may negotiate about incorporating those matters into a collectively bargained agreement. (*Berkeley Unified School District* (2012) PERB Decision No. 2268, p. 9 (*Berkeley*).) The parties may not negotiate terms which replace, set aside, or nullify inflexible provisions of the external law. (*San Mateo*, *supra*, 33 Cal.3d 850, p. 864.)[2]

Proposals that involve matters prohibited by external law or public policy may not be negotiated or included in a collective bargaining agreement, even if the parties were to agree to do so. (*City of San Jose* (2013) PERB Decision No. 2341-M.) Illegal subjects involve matters prohibited by external law or public policy and are nonnegotiable; they cannot be included in an MOU and may not serve as the lawful basis for a declaration of impasse or be imposed by the employer on reaching impasse. (*Id*. at pp. 43–44.) Where a proposal would deviate from an inflexible standard set by external law, it may be characterized as a prohibited, "illegal" or "non-negotiable" subject of bargaining. (*Ibid*.; citing *San Mateo*, *supra*, 33 Cal.3d 850, 864-865.)

In *Berkeley*, *supra*, PERB Decision No. 2268, the Board considered if the employer insisted to impasse on a non-mandatory subject of bargaining in its proposal to recoup money from employees. Under the California Labor Code, an employer

[2] PERB has authority to interpret the provisions of external law when necessary to decide disputes concerning the collective bargaining statutes under its jurisdiction. (*El Dorado County Superior Court* (2018) PERB Decision No. 2589-C, pp. 4-5, citing *County of San Luis Obispo* (2015) PERB Decision No. 2427-M, pp. 30-34, citations omitted.)

cannot reduce wages currently due and owing to an employee to recoup monies allegedly due and owing by him/her to the employer, unless the employee authorized such an action in writing. (*Id*., at p. 9.) PERB concluded that the employer's proposed recoupment of wages allegedly overpaid to individual employees exceeded the scope of negotiable exceptions to the State policy of protecting employee wages from prejudgment attachment; thus, the employer's bargaining proposal varied from mandatory external law, altered the statutory scheme, and was non-negotiable. (*Id*., at p. 11.)

In *Healdsburg*, *supra*, PERB Decision No. 375, the Board provided that "should a proposal seek to violate or in effect violate state law, the proposal would be unlawful and therefore out of scope." (*Id*. at p. 13.) The National Labor Relations Board (NLRB) has held that a party violates its duty to bargain in good faith by insisting on an unlawful proposal. (See, e.g., *Seaway Food Town* (1978) 235 NLRB 1554, 1558; *Thill, Inc.* (1990) 298 NLRB 669, 672, enfd. in relevant part 980 F.2d 1137 (7th Cir. 1992).) Non-mandatory subjects are similar to what the NLRB refers to as illegal subjects and result in a violation and may not be incorporated into an agreement. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326, p. 15, fn. 15.)

Because illegal or non-negotiable subjects cannot be included in a collective bargaining agreement, prohibited subjects may not serve as the lawful basis for a declaration of impasse, nor be imposed by the employer upon reaching a deadlock in negotiations, even assuming good faith bargaining and exhaustion of any applicable impasse resolution procedures. (See *City of San Jose*, *supra*, PERB Decision No. 2341-M p. 44, citing *Berkeley*, *supra*, PERB Decision No. 2268.)

In *Berkeley*, *supra*, PERB Decision No. 2268, the Board provided:

> "[W]hen external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or insure immutable provisions.' Thus, where the external law is silent or otherwise fails clearly to 'set an inflexible standard or insure immutable provisions,' the parties may negotiate. Contrarily, where external law sets an immutable standard, the parties may negotiate only over including such a provision without a change in substance in their negotiated agreement."

(*Id*., at p. 9, citations omitted.)

California expressly prohibits discrimination by public education agencies on the basis of gender, gender identity, gender expression and sexual orientation. (Ed. Code, §§ 200 and 220.) The state policy against discrimination against transgender or gender-nonconforming students is codified in Education Code section 220 and establishes an inflexible standard and immutable provisions. Also, on February 1, 2024, the CDE concluded that the AR 5020 and 5145.3 unlawfully discriminate against the District's transgender and gender-nonconforming students, and it ordered the District not to implement the policy. Rather than comply with this order, the Board decided at its February 7, 2024 meeting to seek reconsideration. On March 27, 2024, the Department of Education issued a decision denying the District's request for reconsideration.

The District argues that because courts have not found policies similar to AR 5020 and 5145.3 to violate the constitution, they are not illegal. The District cites four other cases that it argues have reached differing conclusions on the legality of these

policies. Three of these cases, however, do not concern similar policies: *In Regino v. Staley* (No. 2:23-cv-00032-JAM-DMC, 2023 WL 4464845 (E.D. Cal. 2023)), the district court dismissed the complaint, which asserted that the Chico Unified School District's policy prohibiting the disclosure of a student's transgender identity to their parents without their consent violated parents' constitutional rights. In *Konen v. Spreckels Union School District* (No. 5:22-cv-05195-EJD, 2023 WL 4595143 (N.D. Cal. 2023)), the district court upheld the parties' settlement agreement. Finally, in *Mirabelli v. Olson* (No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992 (S.D. Cal. 2023), the court granted a preliminary injunction in favor of teachers who claimed that the school district's policy, which prohibited disclosure to parents, violated their constitutional rights. However, in *Mae M. v. Komrosky* (No. CVSW2306224 (Riverside Superior Ct. 2023)), the court denied a motion for a preliminary injunction by the plaintiffs, which included students who asserted that they were being unconstitutionally discriminated against by the Temecula Valley Unified School District's policy.

Given the *Komrosky* decision, the District is correct that the lawfulness of these policies under state law is still unsettled. But "[b]ecause allegations that a proposal contains an illegal subject require interpreting statutory, decisional, regulatory, or other authority outside PERB's jurisdiction and special expertise in labor relations, the Board is necessarily cautious about rejecting such claims, particularly when the area of external law is itself unsettled." (*City of San Jose*, *supra*, at 45 n.16 (emphasis added); see also *Lake Elsinore*, *supra*, PERB Decision No. 2548, p. 15.) "When an unfair practice allegation turns on a matter of external law, the appropriate question is not which of two competing interpretations is the more plausible, but whether the

language in dispute is reasonably susceptible of the charging party's interpretation and whether that interpretation supports a viable, i.e., non-frivolous, legal theory of an unfair practice or other violation of a PERB-administered statute." (*Lake Elsinore*, *supra*, PERB Decision No. 2548, p. 15.)

Here, where the CDE has already reviewed the District's policy and declared that it unlawfully discriminated against transgender and gender-nonconforming students, the dispute is reasonably susceptible to RTPA's interpretation and supports the legal theory that the amendments to AR 5020 and 5145.3 are illegal subjects of bargaining. As a non-mandatory bargaining subject, either parties may meet and negotiate in good faith regarding such subjects, but they may also decline to do so. (*Berkeley*, *supra*, PERB Decision 2268, p. 13.) However, "[a] party may not condition its negotiation of, or agreement to, mandatory subjects on agreement by the other party to negotiate on or reach agreement on a non-mandatory subject." (*Ibid*.) Similarly, the District admits it cannot implement the amendments to AR 5020 and 5145.3, without bargaining the effects of those amendments. The District's imposition of the amendments to AR 5020 and 5145.3 on RTPA members and proposing to bargain the effects of that imposition, is analogous to an illegal or prohibited subject of bargaining and because "illegal subjects involve matters prohibited by external law or public policy," they "may not be negotiated or included in a collective bargaining agreement, even if the parties were to agree to do so." (*City of San Jose*, *supra*, PERB Decision No. 2341-M, at 44.) Because the amendments to AR 5020 and 5145.3 were non-mandatory subjects of bargaining, the District and RTPA were not required to negotiate it.

For all the foregoing reasons, the District Board's September 6 decision to approve the amendments to AR 5020 and 5145.3 was non-negotiable and forcing RTPA to agree to the effects of a non-negotiable decision was unlawful. RTPA has met its burden of proof and persuasion that the District violated EERA by approving the AR 5020 and 5145.3 amendments.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5, subdivision (c), states:

> "The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

The District failed to provide notice and an opportunity to bargain over the amendments to AR 5020 and 5145.3 in violation of EERA section 3543.5, subdivision (c). This conduct also interfered with the rights of bargaining unit employees to be represented by the Association and with the Association's right to represent its bargaining unit employees in violation of EERA section 3543.5, subdivisions (a) and (b). PERB's customary remedy for an outright refusal to meet and negotiate is an order to bargain in good faith upon request over negotiable matters or their effects, as appropriate to the circumstances. (*Cerritos Community College District* (2022) PERB Decision No. 2819, pp. 41-43 [refusal to engage in decisional bargaining]; *Regents of the University of California*, *supra*, PERB Decision No. 2783-H, pp. 31-35 [refusal to engage in effects bargaining].) For an unlawful unilateral change, PERB's remedy

commonly includes a cease-and-desist order; restoration of the status quo; a similar bargaining order; make-whole relief, including back pay, benefits, and interest; and a notice posting order. (*Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 14; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, pp. 23-24.)

Here, the District will be ordered to cease and desist from engaging in the unlawful conduct found in this proposed decision and restore the status quo by rescinding the amendments to AR 5020 and 5145.3. The District will not be ordered to bargain because the amendments to AR 5020 and 5145.3 were found to be non-negotiable.

Additionally, it is appropriate to order the District to post a notice to employees at all work locations where notices to employees in the Association's bargaining unit are customarily posted. In addition to physical postings, the District is ordered to post notice of this decision and remedial order by e-mail, intranet, websites, or other electronic means by which it communicates with employees. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M.) The posting requirement effectuates the purposes of EERA by informing employees that the matter has been resolved, their employer is required to cease and desist from the described unlawful conduct, and the employer will comply with the ordered remedy. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 29; *City of Selma* (2014) PERB Decision No. 2380-M, adopting proposed dec. at p. 14; *Regents of the University of California* (1998) PERB Decision No. 1263-H, adopting proposed dec. at p. 72.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that Rocklin Unified School District (District) violated the Educational Employment Relations Act, Government Code section 3540 et seq. by unilaterally amending Administrative Regulation 5020 and 5145.3.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with Rocklin Teachers Professional Association (RTPA) regarding matters within the scope of representation.

2. Unilaterally changing policies within the scope of representation without providing RTPA notice and an opportunity for bargaining

3. Interfering with the rights of bargaining unit employees to be represented by RTPA; and

4. Denying RTPA its right to represent bargaining unit employees.

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

1. Rescind amendments to Administrative Regulation 5020 and 5145.3.

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to bargaining unit employees are posted,

copies of the Notice attached hereto as an Appendix. In addition to the physical posting, the Notice shall also be posted by electronic means used by the District to communicate with bargaining unit employees. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[3]

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

RIGHT OF APPEAL

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

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not

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

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

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

A. Electronic Filing Requirements

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

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see

below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Reg. 32135, subd. (b).)

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

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

C. Service and Proof of Service

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

D. Extension of Time

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-3136-E, *Rocklin Teachers Professional Association v. Rocklin Unified School District*, in which all parties had the right to participate, it has been found that Rocklin Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with Rocklin Teachers Professional Association (RTPA) regarding matters within the scope of representation.
2. Unilaterally changing policies within the scope of representation without providing RTPA notice and an opportunity for bargaining
3. Interfering with the rights of bargaining unit employees to be represented by RTPA; and
4. Denying RTPA its right to represent bargaining unit employees.

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

1. Rescind amendments to Administrative Regulation 5020 and 5145.3.

Dated: _____ ROCKLIN UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

PROOF OF SERVICE

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

On June 24, 2024, I served the Cover Letter and Proposed Decision regarding Case No. SA-CE-3136-E on the parties listed below by

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

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

Sinead McDonough, Attorney
Lozano Smith
One Capitol Mall, Suite 640
Sacramento, CA 95814
Email: smcdonough@lozanosmith.com

Michelle Cannon, Attorney
Lozano Smith
1 Capitol Mall, Suite 640
Sacramento, CA 95814
Email: Mcannon@lozanosmith.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 24, 2024, at Sacramento, California.

Maryna Maltseva
(Type or print name)

Maltseva M.
(Signature)