PERB
California Public Employment Relations Board

Division of Administrative Law
1031 18th Street
Sacramento, CA, 95811-4124
Telephone: (916) 324-0143

January 10, 2024

Re: *Oakland Unified School District v. Oakland Education Association*
Unfair Practice Case No. SF-CO-864-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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT, Charging Party, v. OAKLAND EDUCATION ASSOCIATION, CTA/NEA, Respondent.	UNFAIR PRACTICE CASE NO. SF-CO-864-E PROPOSED DECISION (January 10, 2024)

Appearances: Fagen, Friedman & Fulfrost, LLP, by Roy A. Combs and Mary J. Breffle, Attorneys, for the Oakland Unified School District; California Teachers Association, by Mandy Hu, Staff Attorney, for the Oakland Education Association, CTA/NEA.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

This case involves a public school employer allegation that an exclusive representative violated the Educational Employment Relations Act (EERA)[1] by engaging in an unlawful one-day strike regarding the public school employer's decision to close certain school sites prior to completing its obligation to meet and negotiate over the reasonably foreseeable negotiable effects of this decision and therefore failed to bargain in good faith and failed and refused to participate in statutory impasse procedures in good faith.

[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.

The exclusive representative denies any violation of EERA and affirmatively alleges that the public school employer was barred by the doctrine of unclean hands when it failed and refused to act in good faith in responding to the exclusive representative's earlier demand to bargain.

PROCEDURAL HISTORY

On April 27, 2022, the Oakland Unified School District (OUSD or District) filed an unfair practice charge (charge) against the Oakland Education Association, CTA/NEA (OEA or Association) with the Public Employment Relations Board (PERB). On the same day, the District filed a request for injunctive relief and request for the expedited processing of the charge pursuant to Government Code section 3541.3, subdivision (j), and PERB Regulations 32147 and 32450, respectively.

On April 28, 2022, the PERB Office of the General Counsel (OGC) denied the District's request for injunctive relief, but granted the request for expedited processing at all division levels if a complaint were issued by the PERB OGC.

On May 3, 2022, the PERB OGC issued a complaint which provided:

> "1. Charging Party is a public school employer within the meaning of Government Code section 3540.1(k).
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> "2. Respondent is an exclusive representative within the meaning of Government Code section 3540.1(e) of an appropriate unit of employees.
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> "3. In or around early February 2022, Charging Party decided to close certain school sites.
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> "4. On or about February 8, 2022, Respondent asked Charging Party to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.

"5. On or about February 28, 2022 and ongoing, Charging Party expressed its willingness to Respondent to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.

"6. On or about April 6, 2022, Charging Party asked Respondent for its availability to meet to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.

"7. Respondent has failed to provide Charging Party with its availability to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites, and no such bargaining has occurred.

"8. As of April 29, 2022, Charging Party had not implemented its decision to close certain school sites.

"9. In addition, as of April 29, 2022, Respondent and Charging Party had not completed the statutorily required impasse procedures, set forth at Government Code sections 3548 through 3548.3, regarding any bargaining dispute over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.

"10. On April 29, 2022, Respondent's unit members, acting pursuant to Respondent's prior strike notice, engaged in a one-day strike at Charging Party's facilities related to Charging Party's decision to close certain school sites.

"11. By the acts and conduct described in, but not limited to, paragraph 10, Respondent failed and refused to bargain in good faith in violation of Government Code section 3543.6(c).

"12. By the acts and conduct described in, but not limited to, paragraph 10, Respondent failed and refused to

participate in impasse procedures in good faith in violation of Government Code section 3543.6(d).[2]"

On May 16, 2022, the Association filed its answer to the complaint. The Association denied any violation of EERA. Additionally, the answer affirmatively asserts that the District was barred by the doctrine of unclean hands when it failed and refused to act in good faith in responding to the Association's earlier demand to bargain.[3]

On June 28, 2022, the Board approved a Stipulation to Sequence Hearings of Expedited Matters and Admit Evidence regarding PERB Case Nos. SF-CE-3481-E and SF-CO-864-E. The stipulation, in summary, directed that PERB Case No. SF-CE-3481-E proceed first, and that the case in PERB Case No. SF-CO-864-E

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[2] EERA section 3543.6, subdivisions (c) and (d), provide:

"It shall be unlawful for an employee organization to:

"(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

"(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548)."

[3] This affirmative defense became the subject of another unfair practice case between the parties—PERB Case No. SF-CE-3481-E. PERB Case No. SF-CE-3481-E involved the Association's allegations that the District violated EERA when it unilaterally decided to close and consolidate certain schools or truncate grades, including that it failed to follow procedures set forth by a prior governing board resolution, and failed to meet and negotiate in good faith over that decision and/or its effects. The charge in that case was filed on February 15, 2022, the complaint was issued on March 4, 2022, and the case was determined by the Board to be expedited at all division levels on March 24, 2022.

proceed subsequent to a proposed decision being issued in PERB Case No. SF-CE-3481-E. The evidentiary record in PERB Case No. SF-CE-3481-E was to be admitted as part of the evidentiary record in PERB Case No. SF-CO-864-E.

After the proposed decision was issued in PERB Case No. SF-CE-3481-E, the parties agreed to an extension of time to file exceptions and to begin the hearing in PERB Case No. SF-CO-864-E.

On March 22, 2023, the Administrative Law Judge (ALJ) scheduled the instant case for formal hearing on May 12 and 19, 2023. The formal hearing was continued by agreement to the week of September 5, as the District stated at an April 18, 2023 prehearing videoconference that it wanted to file a motion to amend the complaint.[4]

On May 1, 2023, the District filed a motion to amend the complaint, which included an allegation that the Association engaged in unlawful strikes on March 24, 2023, and had authorized unlawful strike activity on April 28 2023, which it planned to begin on May 1, 2023, or in the alternative, a motion to consolidate the instant case with PERB Case No. SF-CE-877-E—a charge recently filed by the District regarding a March 24, 2023 one-day wildcat strike and that the Association planned to begin a strike on May 1, 2023, while it was negotiating a successor collective bargaining agreement (CBA).[5] On May 17, 2023, the Association filed its opposition to the motions.

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[4] Even an expedited hearing may have its time frame to conduct the hearing extended due to a charging party's desire to have its complaint amended. (*County of San Joaquin* (2021) PERB Decision No. 2761-M, pp. 78-83.)

[5] The complaint in PERB Case No. SF-CO-877-E was issued by the PERB OGC on May 2, 2023. This complaint, along with the complaint issued in PERB Case No. SF-CE-3535-E, was consolidated with PERB Case No. SF-CO-877-E for hearing.

On May 20, 2023, the ALJ issued his ruling denying both the motion to amend the complaint and motion to consolidate the cases. In summary, the allegations proposed to be amended were not "closely related" to the matters within the instant complaint, and as such, would not be included as part of the amended complaint. (*Regents of the University of California* (2018) PERB Decision No. 2601-H, p. 13; *Cloverdale Unified School District* (1991) PERB Decision No. 911, pp. 23-24*; Inglewood Unified School District* (1990) PERB Decision No. 792, pp. 6-7*; Riverside Unified School District* (1985) PERB Decision No. 553, pp. 4-8.) The ALJ also denied the motion to consolidate the complaints for hearing as PERB Case No. SF-CO-864-E was part of a unique stipulation for sequencing with SF-CE-3481-E for which a proposed decision had already been issued. In addition, the strikes which were the subject of SF-CO-877-E occurred almost a year later and were also the subject of successor CBA negotiations, whereas the instant case did not concern successor CBA negotiations.

On August 7, 2023, the Association filed motions in limine that the District be precluded from presenting evidence in support of a remedy that the Association's alleged unlawful strike deprived students and parents of students within the District of educational services[6] and presenting evidence regarding the alleged wildcat strike on

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The consolidated cases were resolved by the parties and jointly withdrawn with prejudice on December 18, 2023. The consolidated cases were closed by PERB on December 28, 2023.

[6] The District contended that it was not seeking compensatory damages as a result of the educational deprivation, but that the certificated employees provide educational services (instructional time) for the students who attended the District.

March 24, 2023, and the alleged pre-impasse strike from May 4 through 12, 2023. The District filed its opposition to the motions on August 28, 2023. On August 31, 2023, at the end of a prehearing videoconference, and after hearing further argument from the parties, the ALJ granted both motions in limine. The ALJ found that the lost educational time that was alleged to have been deprived to students and parents of students pursuant to educational requirements found in California Constitution Article XI and the Education Code fell outside the scope of remedies authorized by EERA for PERB to award. (Gov. Code, §§ 3540, 3541.3 subds. (i) and (n), 3541.5 (c), PERB Reg. 32325,[7] and *Boling v. Public Employment Relations Board* (2019) 33 Cal.App.5th 376, 388.) Additionally, the ALJ found that including the subsequent strike dates which occurred 11 and 13 months later were irrelevant and did not constitute an intermittent strike, especially as the Association gave four days' notice to the District of the 2023 strikes. (*San Ramon Valley Unified School District* (1984)

The District cited in support of its argument California Constitution, Article XI, Section 5 and Education Code section 32212.

[7] Government Code sections 3541.3, subdivisions (i) and (n), and 3541.5 (c), and PERB Regulation 32325 all include the phrase "as will effectuate the policies of the applicable" chapter/statute. As these statutory and regulatory provisions refer to an overall labor relations remedial purpose, harm to students and parents fall outside the scope of EERA and fall within the scope of remedies for other statutes. Such causes of actions are usually bought on behalf of students and parents. (*Vergara v. State of California* (2016) 246 Cal.App.4th 619.) A remedy issued by PERB shall not stand where it is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of its statutes or encroaches upon statutes and policies unrelated to its statutes and, therefore, fall outside of PERB's competence to administer. (*Boling v. Public Employment Relations Board*, *supra*, 33 Cal.App.5th 376, 388.)

PERB Order No. IR-46 (*San Ramon*); *Fremont Unified School District* (1990) PERB Order No. IR-54.)

The formal hearing was held on September 5 and 6, 2023.

On October 25, 2023, the ALJ took official notice of the Board's decision in *Oakland Unified School District* (2023) PERB Decision No. 2875, which was the Board's decision of PERB Case No. SF-CE-3481-E.

On November 17, 2023, both parties submitted post-hearing briefs.

FINDINGS OF FACT

The Parties and Jurisdiction

At all relevant times, the District has been a public school employer within the meaning of EERA section 3540.1, subdivision (k). The Association has been 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 District within the meaning of EERA section 3540.1, subdivision (e).

Successor CBA Negotiations between 2017 and 2019

The parties entered into a CBA for the term of 2014 through 2017, which expired on June 30, 2017. Between 2017 and 2018, the parties bargained for a successor CBA to the 2014-2017 CBA.

On approximately June 4, 2018, impasse was reached as to these successor CBA negotiations. Before impasse was declared, the Association did not make any proposals during negotiations related to school closures or consolidations. At some point during the negotiations, the District communicated to the Association that school closures were a tradeoff to save money for teacher wages.

In January 2019, the District Board approved Board Resolution 1819-0143 which, among other actions, approved the closure of Roots International Academy.

Factfinding hearings occurred between the parties on January 31 and February 1, 2019. A factfinding report was issued on or around February 15, 2019.

From February 21, 2019 until March 1, 2019, the Association's bargaining unit members participated in a seven-day strike after the parties exhausted impasse procedures on successor CBA negotiations.

During the strike, the parties engaged in a series of meetings where discussions occurred that involved multiple stakeholders in the broader community, including local, regional, and statewide elected officials or their representatives. Some of these meetings occurred at the State building in Oakland. Formal bargaining also occurred during the strike between the respective bargaining teams. Some of the bargaining occurred at the State building and some occurred at other locations, outside of these community meetings.

On February 26, 2019, the parties discussed the issue of school closures. The Association presented a draft proposal regarding placing a moratorium on school closures to the District, which the District did not accept or sign. State Superintendent Tony Thurmond (Thurmond) recommended an alternative—such as a Board Resolution regarding school closures. Then District Board President, Aimee Eng (Eng), attended one or more meetings at the State building, as one of the District Board members attempting to resolve the strike. Eng was not a member of the District's bargaining team, and she was not given authority to bargain on behalf of the

District during these meetings. Eng did not attend any bargaining meetings between the parties.

On February 27, 2019, the chair of the District's bargaining team, Director of Labor and Negotiations Jenine Lindsey (Lindsey), told Association bargaining team member Muni Citrin (Citrin) and the Association bargaining team that the District would not negotiate school closures. The Association's co-Executive Director John Green (Green) testified that he knew that the District did not want a provision in the CBA related to school closures as the District objected and viewed this specific subject of bargaining as a managerial prerogative and not a mandatory subject of bargaining. Citrin testified that the framework developed in a small meeting with Eng and others regarding the procedures for school closures was rejected by the District. Eng was present when this was conveyed. Since the District would not bargain the closure of schools with the Association, Eng made a commitment to bring a resolution to the District Board which set forth procedures for the District to follow before deciding to close a school. Eng and Citrin, along with other Association members, drafted a resolution which Eng would then take to the District Board to consider setting forth an evaluative process for determining school closures.

On February 28, 2019, California Teachers Association (CTA)[8] staff Doug Appel (Appel) sent a copy of a draft memorandum of understanding regarding school closures to Lindsey via e-mail. Lindsey responded by stating, "President Eng can address both your collaboration on this letter and on her proposed [board] resolution

[8] The Association is a local union affiliate of CTA.

regarding school closures separately with the Board." Lindsey requested Appel confirm that the memorandum would not be part of the CBA. Appel confirmed this via e-mail. Eng also informed Citrin that she was only one District Board member so there were limitations on what she could do with the draft board resolution. Eng did not represent any other District Board members when she attended the meetings or engaged in discussions with Citrin.

Tentative Agreement to 2018 to 2021 CBA

On March 1, 2019, the parties reached a tentative agreement, and on March 3, 2019, Association members ratified the tentative agreement which brought an end to the strike. The tentative agreement became the CBA operative for the period between July 1, 2018 and June 30, 2021. The CBA contained Article 12.9, entitled "Transfer/Consolidation Due to School Closure/Replacement," which provided:

> "12.9.1 Unit members according to their seniority will have the option of being assigned to schools to which students from the closed school have been placed if positions are created due to the attendance of students from the closed school.
>
> "12.9.2 In the event all unit members cannot follow the students from the school due to changes in enrollment, the process set forth in this Article shall be followed.
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> "12.9.3 Should the unit member not exercise this option, they will follow the process set forth in this Article.
>
> "12.9.4 If closure is based on inability to use the facility, when the facility is rebuilt, all unit members who were in the original school shall have first opportunity to be assigned to the new facility. If more unit members desire to return than there are positions available, the assignment factors shall be considered.

“12.9.4.1 After the unit members in the original school have had an opportunity to be assigned to the new facility, if vacancies still remain, then procedures for filling a vacancy under this Article shall be followed.

“12.9.5 Unit members assigned to a school prior to grade reconfiguration (grade level changes) shall have the option of remaining at the school after reconfiguration. An exception would be allowed if the unit members do not have the credential required for the new grade level configuration.

“12.9.5.1 In the event that all the unit members cannot remain after the reconfiguration due to enrollment decreases, the consolidation factors will be used to determine who is to be consolidated.

“12.9.5.2 Unit members who wish to follow their students to another school, due to enrollment shifts required by reconfiguration, shall be granted the opportunity to do so, in accordance with the process set forth in this Article.

“12.9.5.3 Unit members who do not want to continue in their assignments, due to reconfiguration, shall have the first opportunity to accept current vacancies for which they are qualified according to the process set forth in this Article.

“12.9.6 Should the unit member not exercise the option to be considered or not be selected for a position in the New School, he/she may select a position from the Position List referenced in Section 12.1, unless such selection conflicts with the assignment factors (contained in Section 12.4). The Position List will be presented to the unit member before the end of the current school year. The unit member shall select in order of preference, up to his or her first five (5) choices from the Position List. If more than one unit member selects the same position, the unit member with the most seniority shall have preference.

> "12.9.7 A unit member not selected for a position in the New School under this section may appeal the decision pursuant to the appeal procedures enumerated in Section 12.7.4 above."

The tentative agreement, which eventually became the 2018-2021 CBA, did not contain any provisions regarding school closures or change the language of Article 12.9. That CBA was set to expire on October 31, 2021.

The 2018-2021 CBA also contained Article 20, entitled "Concerted Activities," which provided the following in section 20.1.1:

> "The Association agrees that it will not authorize, engage in or support any sanction, strike, work stoppage, or other concerted refusal to perform assigned duties by any members of the unit for any reason during the term of this Agreement."

District Board Resolution 1819-0178

On March 20, 2019, the District's Board approved Resolution 1819-0178 – "Improving Community Engagement for Proposed School Changes" that included limitations to the mergers, closures, or consolidations of the District's schools:

> "BE IT FURTHER RESOLVED, that no closure, merger, or consolidation would occur without inclusion of a planning period (no less than a school year or 9 months) between the vote to approve the action and its implementation, unless a recommendation has been brought forward by a team representing multiple stakeholders from the impacted school communities to accelerate the implementation; and
>
> "BE IT FURTHER RESOLVED, that prior to the Board's final decision, staff shall present to the Board a preliminary financial analysis of foreseeable impacts of the proposed changes on the district's budget, including student and staff projected attrition or growth, as well as projected costs associated with services, staffing and any facility

> improvement costs deemed necessary to implement the proposed changes; and
>
> "BE IT FURTHER RESOLVED, to ensure the successful transition of students who are displaced by school closures, students will have access to priority enrollment, individual student and family "case management" will be provided to support the transition to welcoming schools, and student progress will be monitored."

(Emphasis added.)

After the District Board adopted Resolution 1819-0178, several schools were closed, and the District complied with the nine-month requirement set forth in Resolution 1819-0178.

District Board Resolution 2122-0026

On December 9, 2020, the District Board approved Resolution 2021-0128, "Advancing District's Citywide Plan Work" to initiate the process of selecting a cohort of schools to expand, redesign, merge, and/or close. The District Board directed the Superintendent by Fall 2022 to:

> "expand, redesign, merge, and/or close schools as voted on by the Board in accordance with this Resolution, consistent with all applicable Board Policies and Resolutions (including but not limited to Resolution No. 1819-0218 - Blueprint for Quality Schools - Action Plan and Selection Considerations) without the need for additional Board action."

On November 17, 2021, the parties reached a tentative agreement which, among other conditions, extended the term of the 2018-2021 CBA to October 31, 2022. The Association ratified the extension of the CBA in or around November 2021 and the District approved the agreement on April 17, 2022.

At its meeting on December 15, 2021, the District Board President[9] and a District Board member introduced a draft of Resolution 2122-0026, which proposed to "direct[] the Superintendent to present the [District] Board at the soonest possible opportunity (e.g., a Special Board meeting) a list of school consolidations sufficient to achieve at least an estimated $8 million in ongoing savings."

At its meeting on January 12, 2022, the District Board adopted a final version of Resolution 2122-0026. At a Board meeting on January 31, 2022, the Superintendent presented Resolution 2122-0030 to the District Board, which included a list of many suggested schools for closure, merger, or grade truncation. Superintendent Kyla Johnson-Trammell (Johnson-Trammell) proposed that six schools be closed at the end of the current school year (i.e., June 2022), and an additional two schools be closed at the end of the following school year (June 2023).

Demands to Bargain by the Association and Subsequent District Responses

On February 3, 2022, the Association e-mailed the District its first demand to bargain the decision to "waive" Resolution 1819-0178 and requested that the District inform it if it intended to honor its obligation to bargain over this issue.

On February 8, 2022, the District responded to the Association's demand to bargain as follows:

> "[The District] disagrees with [the Association]'s position that decision to close schools is subject to negotiations with [the Association]. Moreover, the impact of school closures has been contemplated in the negotiation of successor contract agreements and therefore the impact of school

[9] Eng was no longer the District Board President at this time.

> closures on [Association] members is addressed in our collective bargaining agreement."

About an hour after the District's response, the Association made a second demand to bargain through e-mail, which stated:

> "The Oakland Education Association is clarifying and amending our February 3 letter. We demand to bargain: . . . (2) the decision to close or consolidate 16 schools, and (3) the impacts and effects of the decision to close or consolidate schools. . . .
>
> "[¶ . . . ¶]
>
> "Please advise me if the District intends to honor its legal obligation to bargain with us."

Approximately a half-hour later, the District Board held a meeting and voted to implement an amended list of the school closures proposed in the Superintendent's January 31, 2022 list. The amended list included: (1) the closure of two schools (Community Day School and Parker Elementary) in June 2022; (2) the truncation of grades six through eight at La Escuelita in June 2022; (3) the closure of five schools in June 2023; (4) the truncation of grades six through eight at Hillcrest in June 2023; and (5) a consolidation of two schools in June 2022.

On February 11, 2022, Superintendent Johnson-Trammell wrote an e-mail to "Oakland Unified Families" that "mapped out a timeline of next steps." Johnson-Trammell noted that the District's goal was to place students by March 10—"the same notification date as all other families who are applying through the enrollment process."

On February 11, 2022, La Escuelita Principal Faris Jabbar held a meeting with La Escuelita middle school teachers, to discuss how teachers "could help students

and parents navigate the whole enrollment process." Parents of students in the truncated grades at La Escuelita were given an "Opportunity Ticket" to allow their children to be transferred to schools of their choice. The teachers then "took on helping parents do [the enrollment process]." Specifically, a District teacher at La Escuelita Jennifer Brouhard (Brouhard) helped students with the enrollment process. On February 18, 2022, the District's human resources department e-mailed Brouhard about the recent closure of La Escuelita middle grades to offer help with finding another job.

The Association's Filing of a Charge with PERB in Case No. SF-CE-3481-E

On February 15, 2022, the Association filed a charge against the District which alleged, in summary, that the District unilaterally repudiated an agreement that the District and Association bargained in 2019 regarding the limits on and procedures for the District's closure of schools; and failed to bargain in good faith with the Association, including by categorically refusing the Association's demand to bargain the negotiable effects and impacts of its decision to close schools, as well as the decision itself. On the same day, the Association requested that the processing of the charge be expedited pursuant to PERB Regulation 32147, which was granted by the PERB OGC on February 18, 2022.[10]

[10] On March 4, 2022, the PERB OGC issued a complaint against the District alleging that the District violated EERA sections 3543.5, subdivisions (a), (b), and (c), by: (1) unilaterally, without providing the exclusive representative notice and an opportunity to meet and negotiate, implementing a decision to close, consolidate, and truncate grades in its schools without following the procedures set forth under Resolution 1819-0178; and (2) failing or refusing to bargain the effects of the decision to close, consolidate, and truncate grades in its schools. On March 22, 2022, the

On February 15, 2022, the Association sent out an e-mail to its membership which provided:

> "We have charged [the District] with three counts of illegal activity surrounding school closures and consolidations. . . . The three counts are:
>
> "Unilaterally rescinding the negotiated 2019 agreement to provide schools with one year of stakeholder engagement before closure or consolidation.[11]
> Refusing to negotiate over the decision to close or consolidate schools.
> Refusing to negotiate over the effects of closing or consolidating schools.
>
> "[¶ . . . ¶]"

More Responses to the Association's Demand to Bargain after the Associations' Filing of the Charge

On February 28, 2022, the District responded to the Association's February 8, 2022 clarification of its demand to bargain. The District considered the Association's clarification as substantially the same as the February 3 demand. The District added, however:

> "[We] want to make clear that to the extent [the Association] is now demanding to bargain any alleged impacts or effects of the decision to close or consolidate schools, we ask that

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Association requested that PERB seek injunctive relief regarding this complaint pursuant to Government Code section 3541.3, subdivision (j).

[11] This "negotiated 2019 agreement" is a reference to the District Board passing Board Resolution 1819-0178 on March 20, 2019, which the Association contends resolved successor CBA bargaining. In *Oakland Unified School District*, *supra*, PERB Decision No. 2875, p. 14, PERB found that the District changed a policy rather than entered into a bilateral agreement with the Association.

> [the Association] identify in writing the impacts or effects [the Association] believes exist. We do not believe there are any but will review what [the Association] believes are any impacts or effects."

On March 22, 2022, the District sent the Association another communication regarding the Association's demand to bargain, which stated:

> "I have not received any response [. . .] regarding our request that [the Association] identify what it believes are the impacts or effects of the [District] Board's decision to close and consolidate schools. Again[,] we do not see any but are asking [the Association] to identify in writing the impacts or effects [the Association] believes exist."

On March 24, 2022, the Association responded to the District's March 22 communication. The Association emphasized that EERA obligates the District to bargain the negotiable effects prior to its decision to close the schools and that the District's February 28 e-mail was untimely as it occurred after the implementation of its decision and came only after the Association filed its charge and injunctive relief request with PERB. The Association, however, identified the following effects of the District's decision to close, consolidate, merge or truncate grades: hours of work, leaves, assignment, transfer, evaluations, class size, and safety and security conditions.

March 25, 2022 Association Informational Announcement to the Bargaining Unit and Further Response from the District

On Friday, March 25, 2022, the Association issued an update to the bargaining unit. The update announced that marches would take place at three different locations that day regarding the closing of schools within the District. The update also stated:

"School Closure Legal Update

> "On Tuesday, [March 22, 2022] [the Association] took the extreme step of requesting injunctive relief to stop [the District] from implementing school closures until our full case can be heard in front of an Administrative Law Judge. We are demanding that [the District] honor our 2019 strike agreement and fulfill its legal obligation to bargain both the decision and impacts/effects of school closures.
>
> "**The school board can resolve our legal challenge at any time by rescinding its racist decision to close our schools.**"

(Bolding included in quotation.)

On March 30, 2022, PERB denied the request for injunctive relief, but directed that the case be expedited at all divisions within PERB.

On April 6, 2022, the District communicated with the Association again about the Association's demand to bargain, requesting more specific impacts or effects and once again indicating the District believed that all effects were already covered by the CBA. However, regardless of this position, the District proposed to meet the following dates for effects bargaining: April 8, 12, 13 and 14, 2022.

Strike Authorization Vote and Statements regarding the Strike

On April 16, 2022, Association President Brown sent an e-mail/newsletter out to the bargaining unit members which provided in part:

> "Oakland educators, families and community are united against [the District's] racist, illegal decision to close schools. The school board is setting a very dangerous precedent of violating agreements with us whenever they choose. I can't accept this. So[,] with the authorization of our elected Executive Board, **I am asking all members to**

vote in favor of a one day strike against Unfair Labor Practices. [reference to explanation of an unfair practice is omitted.]

"I strongly believe we need to strike to defend our schools and our right to fair negotiations with [the District]. If a supermajority of [Association] members agree, my intent is to hold our strike on Friday, April 29, which is the start of the May Day weekend.

"Electronic voting will begin on or about Thursday, April 21.

"Going on strike is a serious decision. Every site needs to hold meetings this week, allowing all members the opportunity to share questions and listen to each other's perspectives. I don't expect everyone to immediately agree with my perspective. An FAQ of common strike questions is here and will be updated throughout the week.[12]

"Oakland educators have utilized every tool to stop school closures, short of going on strike. We have marched and rallied. We have spoken at school board meetings and held teach-ins. We have filed legal complaints with PERB and supported the ACLU's[13] complaint to the Attorney General.

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[12] The first question of the FAQ posed the following:

"**1. WHY A STRIKE?**

"We have tried many tactics already: marches, rallies, teach-ins, legal complaints, public comments, petitions, and hunger strikes. The high level of [member] participation shows that Oakland educators are united against school closures and Unfair Labor Practices. We know that Oakland schools can't run without us. Our ULP strike will send a powerful message to Senior Leadership of OUSD and the School Board majority."

[13] American Civil Liberties Union.

> I have directly pleaded with every school board member to come to their senses. I know many others have, as well.[14]
>
> **"So that's why I am voting YES on a strike**. . . ."

The question posted to the bargaining unit membership for the strike authorization vote was "Do you authorize the President to call a 1 day ULP strike, if he deems necessary?" The vote was held between April 21 through 23, 2022. The results of the inquiry were to approve the authorization for the Association President to call a strike with a 75% voter approval.[15]

On April 23, 2022, Green announced the results of the Association membership strike authorization vote—that the members had agreed to strike to "defend our schools and our right to fair negotiations with [the District]."

On April 23, 2022, District Chief Governance Officer Josh Daniels (Daniels) e-mailed a letter to Association President Brown stating that the District had become aware that the Association was in the process of taking a membership vote to authorize a one-day strike on April 29, 2022, in protest over the consolidation of the District's schools. Daniels demanded that the Association cease and desist from moving forward with the potential strike as it would be unlawful, an unfair labor practice in violation of EERA, and a violation of the CBA. Daniels also stated that the

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[14] Green testified to the actions taken by the Association prior to its decision to seek authorization to strike. His testimony including the Association participating in meetings with the Superintendent, protests, march(es), a car caravan passing by the East Oakland schools that were proposed for closure, contacting District Board members, and speaking during the public comment portion at District Board meetings.

[15] According to the Association, 1391 voted for the strike and 351 voted against.

strike would have an adverse effect on students and the District's finances. Daniels asked that the Association contact him before April 25, 2022, at noon, to indicate it was not proceeding with a strike or else the District would take necessary action, including seeking injunctive relief before PERB.

On April 24, 2022, the Association sent out an update to the bargaining unit informing them:

> "One Day ULP Strike Set
> "For Friday, April 29
>
> "● [Association] members have authorized a one-day Unfair Labor Practice (ULP) Strike against [the District] for unilaterally rescinding the negotiated 2019 agreement to provide schools with one year of stakeholder engagement before closure or consolidation. Picket sign assembly tentatively scheduled for 4 pm Wednesday April 27 at the [Association] center. Check frequently for Constant Contact e-mail updates."

The update also encouraged members to e-mail California Attorney General Rob Bonta to support a complaint filed by the American Civil Liberties Union to conduct an investigation of the District's school closure plan as disproportionately impacting minority students.

On April 25, 2022, the Association e-mailed its response to Daniels stating that the Association membership had voted to authorize a strike and it gave notice that it intended to strike for one day on April 29, 2022, which was motivated by the District's unfair practices. The letter further provided:

> "As the Association described in its Unfair Practice Charge (No. SF-CE-3481-E, filed February 15, 2022), as well as in a Request to Expedite filed the same day and a Request for Injunctive Relief filed on March 22, the District has

> committed unfair labor practices in connection with its decision on February 8, 2022 to close, consolidate, or truncate grades in numerous District schools at the end of this school year. These unfair labor practices include the District's repudiation of an agreement on school closures that facilitated the settlement of the 2019 strike, which obligated the District to engage in a planning period of at least nine months before implementing a decision to close, merge, or consolidate schools; as well as the District's failure to bargain the impacts and effects of its decision to close schools prior to implementing that decision."
>
> ". . . It is [undisputed] that a pre-impasse strike can be lawful if the strike was provoked by the employer's unfair practices. *See Sweetwater Union High School District* (2010) PERB [Decision] No. IR-58 at [p.] 9. Here, the Association has made amply clear in consistent messaging to its membership that the upcoming strike is motivated by the District's unfair labor practices.
>
> "The Association's membership has voted to authorize a strike. Through this letter, the Association provides notice to the District of its intent to strike for one day on Friday, April 29, 2022."

(Emphasis added.)

On April 26, 2022, Green sent an e-mail to other CTA staff and Association President Brown regarding the upcoming April 29, 2022 strike. The e-mail provided in pertinent part:

> "You've probably heard by now that [the Association] is on strike at all [District] schools this Friday. This is an Unfair Labor Practice strike over [the District's] jettisoning of our written 2019 agreement to engage with families and educators before permanently closing schools AND for refusing to bargain with us in good faith over this decision and its impacts.

> "Earlier today the [District] Superintendent put out a message to all families urging them to keep their students home on Friday (!!!)
>
> "[¶ . . . ¶]
>
> "If your members are interested in supporting [the Association] and the fight to keep neighborhood schools open, a simple thing is to sign this letter urging the Attorney General[16] to investigate OUSD's school closing for racial bias."

On April 26, 2022, the Association's Facebook site advertised the April 29, 2022 strike and requested members join the Association in participating in the strike. These posts included:

> "Permanently closing neighborhood schools HARMS our students and families. And violating our labor rights sets a terrible precedent for further abusive actions by [the District]. So[,] on Friday[,] we're going on strike against Unfair Labor Practices!"

and,

> "Oakland Educators on a one day ULP strike this Friday against unethical and illegal permanent school closures."

On April 27, 2022, the Association's Facebook site again advertised the April 29, 2022 strike. One of its posts provided:

> "It's time for [the District] to listen to families, and to listen to educators. There's been hunger strikes, there's been marches, the ACLU has filed a complaint, and we have packed the school board meetings. IT IS TIME for [the District] to honor our agreement, stop these school

[16] The e-mail had a link to the letter to sign.

> closures, and meaningfully engage with [] our school communities."

On April 27, 2022, the Association published a news release announcing the results of the strike vote. The news release announced that an unfair practice strike would be conducted on April 29, 2022. The news release explained:

> "The Oakland Unified School District [(the District)] has unilaterally set aside its 2019 agreement with [the Association] to engage with families when considering closing schools. [The District] has continued to ignore this part of the agreement, despite outcry from families to stop school closures and ACLU of Northern California filing a complaint[17] with the [California] Attorney General's office on behalf of the Justice for Students Coalition. Setting aside negotiated agreements with [the Association] is a very dangerous precedent and a flagrant [unfair labor practice]. [The District] also flatly refused to bargain the decision or the effects of its decision after [the Association] demanded to bargain."

On April 28, 2022, Association President Brown wrote an article which was posted in an online blog. The contents of the article were very similar to the April 27, 2022 news release. The article was also posted on the Association's Facebook site.

The April 29, 2022 Strike

On April 29, 2022, the Association conducted a strike at the District with approximately 95 percent of the Association's membership participating. The picket signs stated, "On Strike Against Unfair Labor Practices." On that day, Association President Brown stated that the strike was provoked by the District's attack on schools

[17] The new release had a link to the complaint.

which will disproportionately impact “black and brown” students and that the District refused to bargain with the Association in good faith.

On April 29, 2022, CTA published an article about the strike. The article set forth a historical description of the reasons for the strike, specifically that the strike came after the District did not follow the 2019 agreement with the Association to engage with families when considering closing schools, that a complaint was filed by the ACLU of Northern California on behalf of the Justice for Students Coalition, and that the District failed to bargain the school closures.

Post-Strike Discussions

On May 12, 2022, Lindsey sent an e-mail to Association President Brown stating that she was available to meet on May 19, 2022. On May 13, 2022, Brown appointed Association representative Corrin Haskell to chair the Association’s team for impact bargaining of the school closures. On May 19, 2022, Lindsey recommended that the District and Association select some bargaining dates and offered to meet the next week.

On June 13, 2022, Lindsey sent an e-mail to Brown offering to meet with the Association on June 14, 15, 16 and 17, 2022, as well as the next week. On June 15, 2022, Green submitted the Association’s initial bargaining proposal by e-mail. On June 16, 2022, Lindsey responded that the District was reviewing the proposal, but still wanted to meet to “talk through” the impacts. On August 8, 2022, Lindsey submitted a response/counterproposal to the Association.

On November 30, 2022, Green responded with a counterproposal to Lindsey and stated that he believed that they were “close” to an agreement. On March 20,

2023, Green asked Lindsey for a response to its November 30, 2022 proposal and Lindsey responded that they would review the proposal and get back to him by Friday.

On April 15, 2023, Green again asked for a response. The District and the Association have not yet come to an agreement over the impact of the decision to close the schools at the end of 2022 school year and continue to bargain over this.

Litigation of PERB Case No. SF-CE-3481-E

The hearing in PERB Case No. SF-CE-3481-E was conducted on May 20, August 9 and 10, and September 7, 2022, and the proposed decision was issued on January 30, 2023. The proposed decision found that the District did not violate EERA regarding its failure to follow its own resolution, but found that the District failed to meet and negotiate in good faith over the foreseeable effects of the decision to close the schools.

The Board itself issued its decision on October 16, 2023 in *Oakland Unified School District*, *supra*, PERB Decision No. 2875, which, in summary, held that an employer must bargain over the amount of notice employees receive, either in effects and implementation bargaining over a particular school closure decision or as a mandatory subject of bargaining if the issue arose as a proposed new or changed policy of general application and that the District failed to satisfy its' bargaining obligation in this case as the subsequent change required decision bargaining, absent a valid business necessity defense. (*Id*. at p. 3 and 15.) The Board did not hold that Resolution 1819-0178 was a negotiated bilateral agreement which was violated, but that Board Resolution 1819-0178 was an established policy which was unilaterally changed without the District satisfying its EERA bargaining obligations. (*Id*. at

pp. 14-15.) The District took no appeal of that decision within the 30-day appeal period and the Board's decision is now final. (Government Code § 3542, subd. (c).)

ISSUES

1) Whether or not public school employees for kindergarten through 12th grade students can strike under EERA?

2) Whether the April 29, 2022 strike conducted by the Association violated EERA section 3543.6, subdivisions (c) and (d)?

CONCLUSIONS OF LAW

Legality of Public School Employee Strikes under EERA

The District initially alleges that the California Constitution and California statutes, at least as interpreted by the California Supreme Court, do not authorize an unfair practice strike for a kindergarten through 12th grade public school employee. Specifically, the District alleges that EERA's own statutory language in EERA section 3549, which refers to Labor Code section 923, expressly prohibits public school employees from engaging in the right to strike before the exhaustion of statutory impasse procedures.

However, as succinctly stated in *City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, 1287-1288:

> "'As the expert administrative agency established by the Legislature to administer collective bargaining for covered governmental employees, PERB has exclusive initial jurisdiction over conduct that arguably violates [the Act].' (Citations omitted.) 'PERB is specifically empowered to 'determine in disputed cases whether a particular item is within or without the scope of representation' and to investigate unfair practice charges and 'take such action and make such determinations in respect of such charges

> ... as the board deems necessary to effectuate the policies of [the Act].' ' (Citations omitted.) PERB's construction of a statute within its legislatively designated field of expertise will be regarded with deference and will be followed unless it is clearly erroneous. (Citations omitted.) And PERB decisions are persuasive authority on legal matters that are within its expertise. (Citations omitted.)"

(Emphasis added.)

In *Modesto City Schools* (1980) PERB Order No. IR-11, pp. 2-3, the Board held that EERA section 3549 did not prohibit strikes, but simply excluded the applicability of Labor Code section 923's protection of concerted activities.[18] Later, in *Modesto City Schools* (1983) PERB Decision No. 291, pp. 50-61, the Board more extensively reviewed the applicability of EERA section 3549–and Labor Code section 923–and its applicability to a public school employee's right to strike and found:

> "Even though EERA does not prohibit strikes, the Board cannot hold that a work stoppage is protected unless there is language in EERA which actually authorizes such a decision. We find that there is.
>
> "Neither the NLRA [nor] section 923 of the Labor Code contain plain and explicit language permitting strikes, yet the right of employees covered by these statutes to strike is protected. . . .
>
> "EERA contains no reference to concerted activities. It does, however, in section 3543, guarantee public school employees the right, free from employer interference, 'to form, join, and participate in the activities of employee organizations of their own choosing. . . .' [Footnote omitted.]
>
> "The only difference we find between the right to engage in

[18] Citing to *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 13.

> concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. Membership drives, meetings, bargaining, leafletting and informational picketing are activities which are, without question, authorized by section 3543. Similarly, work stoppages must also qualify as collective actions traditionally related to collective bargaining. Thus, except as limited by other provisions of EERA, section 3543 authorizes work stoppages.
>
> "However, while EERA does not prohibit strikes per se, it does contain restrictions such as the impasse procedures not found in the NLRA or section 923 of the Labor Code."

(*Id*. at pp. 61-62.)

Decades later in *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418, pp. 24-27 (*Fresno County IHSS*), PERB conducted an extensive review of the California Supreme Court cases regarding a public employee's right to strike, including *San Diego Teachers Assn.*, *supra*, 24 Cal.3d 1; *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946; *County Sanitation Dist. No. 2 of Los Angeles County v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*); and *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, including EERA section 3549. (*Fresno County IHSS*, *supra*, PERB Decision No. 2418, p. 25, fn. 11.) After reviewing all of these cases and the labor relations statute(s) under PERB's jurisdiction, the Board in *Fresno County IHSS,* relying heavily on *Modesto Public Schools*, concluded:

> "In light of these decisions, the law is clear: Unless the Legislature has expressly stated otherwise, as it has with peace officers and firefighters, PERB may determine whether, and under what circumstances, public employees and employee organizations have a *statutorily-protected* right to strike. [Citations omitted.]"

(*Fresno County IHSS*, *supra*, PERB Decision No. 2418, pp. 26-27, italics included in the original.)

In the *Fresno County IHSS* decision, the Board also upheld the validity of unfair practice strikes, if one of the purposes of the strike was to protest an employer's unfair practice. (*Id*. at p. 27.)

While the District may contest the legal right to strike for public school employees, this matter has been resolved by PERB for many years now. The District's contention that public school employees do not have the right to strike is therefore rejected.

Limitations to the Right to Strike and the Unfair Practice Strike

The limitations on California public sector employees' right to strike are few and carefully defined. As the California Supreme Court explained, "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." (*County Sanitation*, *supra*, 38 Cal.3d 564, 586.) In *San Ramon*, a strike provoked by an employer's unfair labor practices would be protected at any time during the bargaining process as long as the striking employee organization has not failed to participate in good faith in the statutory impasse procedure. (*San Ramon*, *supra*, PERB Order No. IR-46, p. 10.) In *City and County of San Francisco* (2017) PERB Decision No. 2536-M, "an economic strike occurring after exhaustion of

statutory or other applicable impasse-resolution procedures" is "statutorily protected." (Id. at p. 54.) A strike occurring before the completion of statutory impasse procedures creates a rebuttable presumption that the strike violated the union's duty to bargain and participate in the impasse procedures in good faith.[19] (*Fresno County IHSS*, *supra*, PERB Decision No. 2418-M, p. 28; *Sweetwater Union High School District*, *supra*, PERB Order No. IR-58, pp. 9, 18; *Santa Maria Joint Union High School District* (1989) PERB Order No. IR-53, p. 5; *Sacramento City Unified School District* (1987) PERB Order No. IR-49, p. 3.)

Specifically, PERB has held that such strikes by the union prior to the exhaustion of impasse resolution procedures may constitute an "illegal pressure tactic," and thus an unfair practice for failure to negotiate in good faith. (*San Diego Teachers Assn.*, *supra*, 24 Cal.3d 1, 8-9; *Regents of the University of California* (2019) PERB Order No. IR-62-H, pp. 6-10; *Fresno Unified School District* (1982) PERB Decision No. 208, p. 11.) This rebuttable presumption may be overcome by the union's showing that the strike was an "unfair practice strike." (*Rio Hondo Community College District* (1983) PERB Decision No. 292, pp. 22-23.)

To establish that a strike is a lawful unfair practice strike, the Association must prove that the District committed an unfair practice, and the strike was provoked by the District's unfair practice and was undertaken as a last resort. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, p. 32; *Santa Maria Joint*

[19] In one sense, the completion of statutory impasse procedures is inapplicable to this instant case as it was the District who imposed its decision to close certain schools prior to completing its statutory bargaining obligations with the Association.

Union High School District, *supra*, PERB Order No. IR-53, p. 5; *Rio Hondo Community College District*, *supra*, PERB Decision No. 292, p. 21.) PERB has noted that the mere fact that an unfair practice was committed prior to a strike does not necessarily render the strike a lawful unfair practice strike. Rather, the burden rests with the Association to prove, in the nature of an affirmative defense, that the District's unfair labor practice in fact provoked the strike. (*Rio Hondo Community College District*, *supra*, PERB Decision No. 292, p. 23.)

Provocation is a question of fact, and to make this determination, PERB considers the record as a whole as well as such factors as: (1) the statements made when the strike vote was taken; (2) the content of picket signs and handbills; (3) the closeness in time between the unfair practice and the strike; (4) whether unfair practice charges were filed to protest the employer's alleged misconduct; (5) the nature and seriousness of the alleged unfair practices; and (6) any other relevant evidence. (*Rio Hondo Community College District*, *supra*, PERB Decision No. 292, pp. 22-23.) In other words, a causal connection must be shown to exist between the employer's unfair practice and the strike. (*Sacramento City Unified School District*, *supra*, PERB Order No. IR-49, p. 7.)

A. <u>The District Committed an Unfair Practice</u>

The Board in *Oakland Unified School District*, *supra*, PERB Decision No. 2875 expressly found the District failed to fulfill its bargaining obligations regarding its change of policy in Resolution 1819-0178 and the District's selection of schools on February 8, 2022, that it designated for closure, merger, or grade truncation by the end of the 2021-2022 school year or in June 2022—as it had already implemented this

decision to close those schools shortly after the decision was made. That matter is now final and cannot therefore be relitigated.

The California Supreme Court held in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, regarding issue preclusion:

> "*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] . . . In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party. [Citation.] . . . In summary, issue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or in privity with that party. [Citations.]"

(*Id*. at p. 824.)

The four elements set forth to establish collateral estoppel have been easily established in this matter. The Board's decision is now final, the issues as to whether an unfair practice had been committed in PERB Case No. SF-CE-3481-E and SA-CO-864-E were identical, were actually litigated in an evidentiary hearing in PERB Case No. SF-CE-3481-E, and the parties in both cases were the same or in privity. As such, the District is bound by the issues already determined in PERB Case No. SF-CE-3481-E, and therefore, it is determined that the District committed an unfair practice regarding those issues set forth in PERB Case No. SF-CE-3481-E.

B. <u>The Strike was Provoked by the District's Unfair Practice and was undertaken as a Last Resort</u>

In reviewing the evidentiary record as a whole, it is clear that the Association established that a causal connection existed between the employer's unfair practice and the strike. That causal connection was established by the provocation factors

listed in *Rio Hondo Community College District*, *supra*, PERB Decision No. 292, pp. 22-23.

Specifically, the Association's pre-strike statements and strike authorization statements contended that the District violated its negotiated 2019 agreement regarding school closures and that it did not bargain the effects of the school closures. While the Association may have mischaracterized the bilateral nature of Resolution 1819-0178, the Association was correct that the District changed that policy without satisfying its bargaining obligations with the Association. This message that the District failed to satisfy its bargaining obligations regarding school closures and the process of school closures was central to the Association's communications to the District and its membership as its justification for the strike.

The events surrounding the unfair practice also took place close in time to the unfair practice strike. The District Board actions took place primarily at its February 8 District Board meetings and the strike took place on April 29, 2022, after other actions were taken by the Association to attempt to change the District's trajectory as to the method in which it proceeded regarding school closures.[20] One of those actions taken by the Association was filing an unfair practice charge with PERB on February 15, 2022, regarding the same allegations at issue during the unfair practice strike. The Association also requested that the matter be expedited and PERB granted that request. Later, on March 22, 2022, the Association requested that PERB provide the

[20] While closeness in time is one of the provocation factors, it is important that the time between the unfair practice and the strike, not be too closely restricted to exclude the Association's attempt to cause the exclusive representative and the employer to arrive at a resolution of the issue(s), short of a strike.

Association with injunctive relief as to these bargaining violations.

The subject matter of the strike was also serious. School closures are a great concern to certificated employees as they provide the possibility of greatly disrupting the personal lives and working conditions of those certificated employees working at those schools which will be closed. (*Oakland Unified School District*, *supra*, PERB Decision No. 2875, pp. 14-15.)

Lastly, prior to resorting to a strike, the Association took lesser forms of protected advocacy such as organizing marches, protests, speaking with District Board members and at District Board meetings, and filing an unfair practice including requesting PERB to proceed with injunctive relief. The Association has satisfied the requirement that the unfair practice strike be taken as a last resort.

As the Association has demonstrated that it engaged in a lawful unfair practice strike, the District's allegations that the Association violated its bargaining obligations surrounding the impacts of the June 2022 school closures is dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SF-CO-864-E, *Oakland Unified School District v. Oakland Education Association, CTA/NEA,* are hereby DISMISSED.

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 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.)

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Los Angeles, 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, Los Angeles Regional Office, 425 W. Broadway, Suite 400, Glendale, CA, 91204-1269.

On January 10, 2024, I served the Proposed Decision and Cover Letter regarding Case No. SF-CO-864-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 Los Angeles, California.
____Personal delivery.
_X_Electronic service (e-mail).

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California Teachers Association
1705 Murchison Drive
Burlingame, CA 94010
Email: mhu@cta.org

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 10, 2024, at Glendale, California.

J. Carter
(Type or print name)


(Signature)