STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA VIRTUAL ACADEMIES, Employer, and CALIFORNIA TEACHERS ASSOCIATION, Petitioner.	REPRESENTATION CASE NO. LA-RR-1227-E PROPOSED DECISION (October 30, 2015)

Appearances: Jackson Lewis by Davis S. Allen and Nicole Elemen, Attorneys, for California Virtual Academies; Laurie Burgess, Staff Attorney, for California Teachers Association.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

The issue presented in this case is whether a self-described "network" of 11 charter schools operating primarily online is a single employer or joint employer in order for a unified, statewide bargaining unit of all teachers employed by the 11 charter schools to be found appropriate. The petitioning union seeking exclusive recognition contends that the operations of these charter schools are so entwined that they should be considered a single employer. The charter schools counter that each of them are legally separate entities; thus, a single bargaining unit belonging to multiple, separate employers would be untenable and inappropriate.

PROCEDURAL HISTORY

On or about May 9, 2014, the California Teachers Association (CTA) filed with California Virtual Academies a request for recognition (petition) under the Educational Employment Relations Act (EERA or Act)[1] section 3544 for a bargaining unit consisting of "all full and part-time certificated employees and all teachers hired pursuant to Education Code

[1] EERA is codified at Government Code section 3540 et seq.

Section 47605(j) employed by California Virtual Academies ('CAVA')," and excluding "all mangers, supervisors, classified employees, confidential employees and casual substitutes within the meaning of the Act." In accord with the regulations of the Public Employment Relations Board (PERB or Board), a copy of the petition was also filed with PERB.[2] On or about May 10, 2014, CTA filed with PERB its original proof of support for the petition. The organization named in the support documents was "California Teachers Association."

After PERB's Office of the General Counsel (PERB OGC) sent correspondence to the parties requesting certain information from the employer, attorney David S. Allen on behalf of 11 named charter schools filed with PERB a single response in opposition to the petition. The charter schools were identified as: California Virtual Academy at Jamestown; California Virtual Academy at Kings; California Virtual Academy at Los Angeles; California Virtual Academy at Maricopa; California Virtual Academy High School at Maricopa; California Virtual Academy at San Diego; California Virtual Academy at San Joaquin; California Virtual Academy at San Mateo; California Virtual Academy at Sonoma; California Virtual Academy at Sutter; and California Virtual Academy at Fresno (hereafter, referred to collectively as "the Schools," "CAVA," or "CAVA Schools"). The opposition response contended, among other things, that the petition was deficient because it sought an inappropriate bargaining unit of employees who were not employed by a single or common public school employer.

On June 18, 2014, Allen filed with PERB on behalf of the Schools separate, alphabetized lists of employees per School including the total number of employees employed at each School. Also throughout June and July 2014, a dispute between the parties developed over the identity of the Petitioner, prompted by the filing of an amended petition in the case

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

and notice of appearance by CTA staff attorney Laurie Burgess on behalf of an organization named "California Virtual Educators United, CTA/NEA" (CVEU). No proof of support accompanied the amended petition. The Schools contended that the named employee organization on any cards or petitions bearing employees' signatures in support of the union must precisely match the name of the petitioning organization in order for any exclusive recognition to be valid. CVEU countered that it is a common practice for a CTA-affiliated local, like itself, to select the formal name for the chapter during the time that the local entity is creating by-laws, a constitution, and filing its recognition request, and furthermore that PERB Regulation 33100 permits recognition petitions to be amended to correct technical errors before notices of hearing or an election are issued.

On July 18, 2014, PERB OGC issued an administrative determination finding that CTA had provided evidence of majority support in the claimed unit and requesting that the employer submit a decision under PERB Regulation 33190.[3] The administrative determination did not acknowledge the amended petition filed by CVEU or otherwise refer to CVEU.

The Schools timely filed a denial of recognition under the dual grounds that CTA, not CVEU, had provided proof of support, and "California Virtual Academies" is not a legal entity; therefore, it is not a single employer or joint employer with the 11 independent charter Schools at issue and thus the statewide unit sought of employees of separate employers is inappropriate. The Schools requested that PERB conduct an investigation over the petition under EERA section 3544.5, subdivision (a). On September 17, 2014, CVEU filed its own

[3] At this time, PERB's own records regarding the employer named on the petition were incorrect due to a clerical error. PERB's correspondence wrongly captioned the employer as "California Virtual Education Partners."

request for Board investigation. The Schools opposed CVEU's request for lack of standing due to inadequate showing of support.

On November 6, 2014, the parties appeared at the PERB Los Angeles Regional Office for an informal settlement conference but the disputes were not resolved. The case was then transferred to PERB's Division of Administrative Law for one formal hearing. CVEU requested that the hearing be expedited but that request was denied by the PERB Chief Administrative Law Judge (ALJ). A hearing was then set for March 2 through March 4, 2015.

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

On February 13, 2015, a pre-hearing conference was held to hear argument and rule on the Schools' motion. Burgess appeared on behalf of both CVEU and CTA, and Allen appeared for the Schools. A written, tentative ruling was issued finding that: (1) CTA and CVEU were not the same organization for recognition purposes; (2) PERB had only made an adequate support determination for the original petition filed by CTA; thus, the amended petition filed by CVEU without support was deficient; and (3) the current case record did not demonstrate that the Schools had posted Notice of EERA Representation Petition as required by the statute and PERB regulations; accordingly, a hearing to resolve unit appropriateness could not take place unless and until all threshold requirements had been satisfied. The proposed order in the tentative ruling granted leave to Petitioners to perfect their filings or take other action consistent with the tentative ruling. The employer's motion to dismiss/stay was therefore denied as premature.

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

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

FINDINGS OF FACT

The Founding and Organization of the Schools

1. Origins

The first CAVA-named Schools came into existence sometime in 2002, providing instruction to home-schooled students in grades Kindergarten (K) through 12 via the Internet. Four or five Schools opened between 2002 and 2003. Other Schools were added and subtracted over time until the current number of 11 was reached.[4] The record does not make explicit when that occurred, nor does it provide context for the circumstances that led multiple online charter schools to be branded with the CAVA name. According to Katrina Abston, the current "Head of Schools" for all 11 Schools, the impetus for forming an online charter school originates with a group of parents and teachers who, for various reasons, desire a public school

[4] According to a charter renewal petition dated January 23, 2013, for CAVA at Los Angeles, there were 12 Schools at that time.

offering that is different than what is currently available within their home school district. The reasons include parents and guardians requesting a more tailored educational experience for their special needs or academically advanced students, needing a more convenient public school option for students living in remote areas, or wanting to shield students from bullying situations and therefore to educate them at home.

In the case of the CAVA charters, the "founding groups," or persons who originally presented individual charter school applications to authorizing school districts, and then to the state, all were familiar with and supportive of the curriculum offered by K12, a Virginia-based education and charter management company that has relationships with charter schools and school districts across the country.[5] Abston, for example, learned of K12 when, in around 2002, she attended a conference catering to small school districts and saw K12's presentation introducing the concept of online education. People involved with founding the various Schools learned of K12 in a similar manner and/or by word of mouth. No founding group members testified, but one of them, from CAVA at Fresno, is Abston's mother.[6] Abston began her affiliation with CAVA when she was initially employed in 2003 by CAVA at Jamestown as a Special Education teacher. Since July 2004, Abston has been employed by K12.[7] As discussed in greater detail below, each of the Schools has a contractual relationship with K12.

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

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

[7] Abston is also the Head of Schools for at least one other K12-affiliated school, "Insight," that is distinct from the CAVA Schools at issue here.

In fact, the California Virtual Academies, *i.e.*, "CAVA" name itself is owned and trademarked by K12.

2. The Charter Documents, By-Laws, and Boards of Directors

a. Charters

After realizing a need or desire to form an online charter school and being aware of the curriculum and services offered by K12, the next step in the process of establishing a CAVA School was that the founding group approached a local school district representative, usually the superintendent, to discuss whether the school district was willing to approve and authorize a charter school application. When mutual interest existed for an online charter school to operate within the school district, then a presentation to the school district's governing board was prepared. Such presentation included a charter petition that was discussed and voted upon during a public meeting of the governing board. The Charter Schools Act[8] establishes criteria that a school district considers when evaluating whether to authorize or deny a charter petition.[9] Here, after a charter petition was approved by the authorizing school district's governing board, then the final step in the process was submission of the locally-approved petition to the California Department of Education (DOE) for approval of the charter, issuance

[8] The Charter Schools Act of 1992 (Charter Schools Act) is codified at Education Code section 47600 et seq. In 1999, the Legislature enacted amendments to the Charter Schools Act through AB 631 (Migden). (Stats. 1999, Ch. 828.) AB 631 applied EERA to charter schools and required the charter school to declare whether it or the chartering entity shall be the public school employer for purposes of EERA. (See *Chula Vista Elementary School District* (2004) PERB Decision No. 1647, p. 3, fn. 2 (*Chula Vista*).) The Charter Schools Act expressly requires PERB to take its provisions into account when deciding cases involving charter schools. (*Id.* at p. 19; Ed. Code, § 47611.5, subd. (d).)

[9] The criteria include, among others, whether the charter school has declared itself to be the public school employer for EERA purposes, the description of the governance structure of the charter school, and qualifications of employees to be employed by the charter school. (See Ed. Code, § 47605, subd. (b)(5)(A-P).)

of a charter school number, and issuance of a County District School (CDS) code. The CDS code is a unique numerical identifier for each public school in the state to track fiscal and performance issues. After the state approves a charter application and supplies a CDS code, a charter school may lawfully operate in the county within which it was chartered and in all contiguous counties. So, for example, CAVA at Los Angeles may operate within Los Angeles, Orange, San Bernardino, Kern, and Ventura counties.[10] Each of the Schools at issue has its own CDS code and charter school number.

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

All of the Charter Renewal documents are nearly, if not completely, identical in substance. The same is also true for all of the Charter Proposal documents. The Charter Proposals are more detailed and therefore roughly double the number of pages than the Charter Renewals. All of these documents express common academic goals and requirements for students. Both categories of documents contain a heading entitled, "Governance Structure,"

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

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

with virtually indistinguishable statements under that heading in each document. The following is an excerpt of the statement appearing in all of the Charter Proposals,[12] which describes in detail how a CAVA School will operate:

> Upon approval of this charter, the [name of School] will constitute itself as a California Public Benefit Corporation pursuant to California law. The school will be governed pursuant to the By-laws adopted by the Incorporators and subsequently amended pursuant to the amendment process specified in the By-laws. Please see attached By-laws produced by legal council [*sic*] for the petitioner.[13] The By-laws clearly indicate the roles and responsibilities of the California Virtual Academy governing board and clearly spells out the autonomous nature of the board. The applicants for the Charter School chose the structure of nonprofit public benefit corporation to ensure a seriousness of purpose and adequate protection for its members, and the District. A Head of Schools will act in the same capacity as a Superintendent in implementing the actions of the Board of Directors.
>
> [¶…¶]
>
> The School's Founding Group appointed a five (5) member Board of Directors ("Board of Directors"). The founding group was made up of individuals, parents and teachers, who are familiar with the California Virtual Academies using K12 Inc. services. Subject to the limitations of this charter and of the corporate By-laws, the governance of the school will be under the authority of the Board of Directors and its duly appointed representatives, In accordance with Education [Code section] 47604(b), the District shall be entitled to a single representative on the Board of Directors. After the initial Board appointment, Board elections, terms, term limits, resignation, removal and vacancies will all be handled in accordance with the corporate By-laws.
>
> [¶…¶]

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

[13] The documents referred to in this quoted text as "attached" were all separately received in evidence for each School.

> The Board of Directors will meet regularly to oversee the management, operation, activities, and affairs of the charter school. The Board of Directors will define, compose, and revise (as needed) the policies of CAVA and ensure compliance with its charter agreement and applicable laws and regulations.
>
> All Board meetings will be held in compliance with the Brown Act. The Board, at its discretion, may vote to expand its membership and create subcommittees. Specific responsibilities of the Board are defined in the By-laws.
>
> The decision making authority vested with the governing board is contained in the By-laws and the Services Agreement that are established to make a matter of public record the operational relationship of the [name of School] Governing Board, K12 Inc. and any other entity that will do business on behalf of the virtual academy. See attached By-laws and sample Services Agreement.

(Emphasis added.)

The Charter Renewal and Charter Proposal documents also contain a heading entitled "Human Resources," with the substantive content under that heading in both categories of documents setting forth identical educational and licensing requirements for teachers to work at the Schools. A separate subheading entitled "Employee Representation" appears only in the Charter Proposals. This section states: "The Charter School shall be deemed the exclusive public employer of the employees of the Charter School for the purposes of the Educational Employment Relations Act."[14] (Emphasis added.) Although it seems that the above-quoted statement is not repeated in the Charter Renewals, it is undisputed that each of the 11 Schools has declared itself to be the public employer of its employees for EERA purposes.

[14] As discussed previously, Charter Schools Act section 47605, subdivision (b)(5)(O), allows an authorizing school district to consider a declaration of whether or not the charter school shall be deemed the exclusive public school employer under EERA when determining whether to approve or reject a charter application. If a charter school does not declare itself to be the public school employer, then the authorizing school district is considered to be the public school employer for EERA purposes. (Ed. Code, § 47611.5, subd. (b).)

b. By-laws and the Boards of Directors

As the charter documents expressed, each of the Schools has been incorporated as what is known as a 501(c)(3)[15] public benefit corporation under state and federal law and currently operates as what Abston described as an "independent" and "direct funded" charter school.[16] Each School has its own Board of Directors.[17] One spot on each School's Board of Directors is reserved for a representative from the authorizing school district.[18] The Board of Directors for each School has adopted By-laws as referred to in the charter documents. These By-laws establish how the decision-making bodies for the Schools will conduct their business. They provide, among other things, that members of a School's Board carry staggered terms and are seated and removed according to majority vote by the sitting Board of Directors. In practice, when vacancies on the Boards have arisen, an informal recruitment process headed by Abston and/or members of her management staff has yielded potential candidates for director positions. Abston testified that when a director vacancy opens up, she and other staff communicate over whether they know a parent, teacher, or community member who may be interested in and suited to serving on a School's Board and send out email inquiries in that

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

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

[17] Some directors serve on more than one School's Board. For example, the same individuals serve on both boards for CAVA at Maricopa and CAVA High School at Maricopa.

[18] See Charter Schools Act, section 47604, subdivision (b).

regard. Some of the individuals currently serving on the Boards either ultimately report to Abston through their employment relationships with other K12-affilated schools outside of the CAVA system with which Abston is also affiliated, or because they are also currently employed by a different CAVA School. For example, one of the School's Board members of CAVA at San Joaquin is employed by CAVA at Sonoma. Some other individuals serving on various Schools' Boards are family members of management employees who report to Abston either through CAVA Schools or other K12 schools.

Most of the By-laws referred to above appear identical to each other, except for the name of the School and roster of members of the Boards of Directors.[19] They contain a common statement of general and specific powers of the Board of Directors that provides, among other things, that the Board of Directors may delegate management of the corporation's activities to any person, committee, or company, but all corporate powers remain under the ultimate direction of the Board of Directors. The process for seating and removing members of the Board of Directors by vote of the sitting Board of Directors is also set forth.

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

- Meeting regularly to oversee the management, operation, activities and affairs of the [name of School];

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

- Define, compose, and revise (as needed) the [name of School's] policies and ensure compliance with its Charter and applicable laws and regulations;
- Financial development and management
- Fiduciary duties (duty of care and loyalty) owed to the [name of School];
- Program oversight;
- Coordination and long-term planning;
- Overseeing and evaluating the work of the Head of Schools;
- Setting a framework for the budget process and authorizing the annual budget;
- Approving large resource expenditures, significant program changes, expansion into new program areas, and building and facility issues;
- School calendar;
- Appointing or dismissing administrators;
- Adopting the annual budget;
- Purchasing or selling of land;
- Locating new buildings or changing the location of the school's administrative offices;
- Creating or increasing indebtedness;
- Adopting online and offline education programs;
- Designating depositories for school funds;
- Entering into contracts where the amount exceeds $5000;
- Approving salaries or compensation of administrators, teachers, or other employees of the [name of School];
- Entering into contracts with and making appropriations to local school districts, professional service providers, or education service centers; and
- Hold meetings in compliance with the Brown Act.

Most of the By-laws list the same address in Simi Valley as the location of their corporate offices. Abston described the office in Simi Valley as a records retention facility, with only a handful of classified employees physically working out of that location. All other employees of the Schools and employees of K12 who provide services for the Schools are

remote employees who work out of their homes. The Simi Valley office stores student and employee records for all CAVA Schools.[20]

What was received in evidence purporting to be the By-laws of CAVA at Jamestown is different in form and substance than all of the others previously discussed. (See Employer's Exh. D6, tab 5.) This document does not contain any statement regarding the general or specific powers of the Board of Directors. It also appears, but is not entirely clear, that the document received at tab 5 of Employer's Exhibit D6 is not actually CAVA at Jamestown's By-laws. For example, the first page of the document begins with a heading entitled "Articles of Incorporation," and includes an item numbered "Section 7," which states that the CAVA at Jamestown Board was presented with and adopted By-laws that were purportedly attached to that original document as an "Exhibit 'B'." No By-laws, however, are found anywhere in or attached to the documents included in Employer's Exhibit D6.[21] Despite the fact that the CAVA at Jamestown By-laws appear to be missing from the record, there is no evidence that the Board of Directors of CAVA at Jamestown functions any differently than the other Schools' Boards of Directors.

[20] According to their respective By-laws, the corporate offices of CAVA at Sonoma, CAVA at Jamestown, and CAVA at San Diego are not located in Simi Valley, and instead these three corporate offices are each at different locations in the state. Despite the fact that those three Schools have corporate offices separate from the Simi Valley location, there is no evidence in the record that student and employee records from those Schools are not also retained in the Simi Valley office.

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

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

As alluded to previously, all 11 Schools have a contractual relationship with K12 through individual Educational Products and Services Agreements (EPSAs).[22] In addition to supplying uniform technology platforms and curriculum to all of the Schools, the EPSAs also dictate that K12 will furnish to the Schools "administrative services, teacher recruiting, training and management" that include an administrative team consisting of the Head of Schools (currently Abston), a financial officer (currently Mark Galang), Human Resources staff (including the current Human Resources Director, Casey Johnen), and clerical support staff. This same K12 administrative team services all 11 Schools.

The EPSAs provide that K12 will "take the lead to help recruit, set the terms of employment, hire, supervise, discipline and terminate Teachers and Student Support Staff and such activities will be performed in consultation with the [School's] Board [of Directors]…." The EPSAs make the Schools, not K12, responsible for paying teachers' salaries, and the Schools' Boards of Directors retain final decision-making authority over all personnel matters. It is also noted in the agreements that the Schools are responsible for adopting and approving their own budgets. No K12 employee may sit as a voting member on a School's Board of Directors. Under the terms of the EPSAs, K12 also provides advertising and marketing services for all of the Schools, provides and licenses the CAVA logo (a bear), supplies all employees' business cards (with the Simi Valley mailing address), and provides employees an email address that share a common domain. K12 hosts one website for all of the Schools, which, in most respects, presents the Schools to the public as a single entity. There is one

[22] 11 EPSAs, one for each School, were received in evidence. They are not identical to each other in form, but are substantially similar enough in content to discuss as though they are one document. The quoted provisions here are taken from the EPSA belonging to CAVA at San Diego.

Parent-Student Handbook distributed to all families enrolled in any of the Schools that also presents the Schools as a single entity. Each School pays K12 directly for these services according to the terms of its EPSA.

All 11 Schools also have a contractual relationship through individual Client Services Agreements (CSAs) with Insperity,[23] a private, Texas-based company that supplies payroll and other Human Resources support services to its clients. According to Abston, there is no relationship between Insperity and K12. Unlike in the case of the association between the Schools and K12, which is memorialized in the charter documents, the circumstance that led all 11 Schools to contract with the same, private human resources services company was not explained in the record. According to the CSAs and Abston's testimony, Insperity handles all employees' payroll and benefits administration, including reporting information to the State Teacher Retirement System (CalSTRS) and Public Employees Retirement System (CalPERS). The CSAs also describe that Insperity and the Schools are considered "co-employers" of employees of the Schools. As further discussed below, Insperity also is available to and does consult with CAVA management when employees need to be disciplined and/or terminated from employment.

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

a. Budgets

The Schools are funded for their general education programs in the manner customary for most, if not all, public schools in California—*i.e.*, primarily through average daily attendance (ADA) funds provided by the state, local property tax revenues, and federal title

[23] Insperity was formerly known as "Administaff." Thus, some of the CSAs received in evidence are between that named entity and various Schools.

monies for specific programs.[24] Each School has a distinct amount of funding available dependent upon, in large part, its own student enrollment levels and local fiscal conditions. Therefore, each School's Board develops and approves its own budget. All of the Schools' proposed budgets are typically prepared and presented to each Board of Directors in a common format by K12 financial officer Galang after local Site Councils for each School, consisting of parents and teachers, have been afforded an opportunity to provide input over budget allocations. Each School's Board of Directors then votes upon and ultimately approves its own budget. Each School also purchases and inventories its own equipment, such as the computers that are issued to employees.

b. Decision-Making of the Boards

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

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

According to Abston, the records regarding each School's Board meetings are maintained at the CAVA Simi Valley office.[25] Meeting agendas are posted online on the CAVA website and physically at the authorizing school district. Abston attends and presents information to the Boards at each meeting. The meeting minutes from five quarterly meetings of the Boards held between September 2013 and September 2014 were received in evidence.[26] During these meetings, each School's Board took action to approve employee hiring and firing recommendations as applicable to them during these particular periods of time. The agenda items for the Boards' approval with respect to an employee leaving employment did not distinguish between firing and resignation. In regard to hiring, all of the Schools use the same employment contracts that set forth identical employment terms for teaching positions at the same grade levels. These contracts all state that employees will report to the Head of Schools (Abston), and establish that employment is at-will. The employment contracts further state that an employee's at-will status cannot be altered without written confirmation by the Head of Schools that the parties desire to amend the contract, and notes: "The [Head of Schools] does not have authority to alter or amend this Agreement without the approval of the Board." At the time of the hearing, the Schools collectively employed approximately 700 teachers.

[25] Again, Abston made no distinction for records storage between the eight schools that list the Simi Valley office as their corporate headquarters and the three others with distinct locations for their corporate offices.

[26] These consisted of the meetings of the Boards of Directors of all 11 Schools from September 2013, December 2013, March 2014, June 2014, and September 2014. CTA also introduced testimony by one its employees who examined minutes of the Schools' Board meetings and prepared a chart purporting to summarize the Boards' actions. The chart was received in evidence. During the employee's testimony, he first asserted it was completely accurate but later admitted to noticing an error on the chart. Neither his testimony regarding the Boards' actions, nor the summary chart have been relied upon for any factual finding in this proposed decision.

Proposed policy changes, be they regarding employees or students, were often, but not always, presented at the same time to each School's Board. As one example, the meetings from March 2014 show that the Boards of CAVA at Los Angeles and CAVA at Fresno considered and approved an "Action Plan to Implement Common Core Standards." This same proposal was tabled at CAVA at Jamestown, but was not presented at that time to any of the other Boards.[27] After reviewing the minutes from all 55 meetings during this time period, it appears that whether or not action items were presented to the Boards at the same time, eventually all of the same, or at least similar, items were presented to each School's Board.[28]

There was marked correspondence in the approval rate of common proposed items by the individual Boards. For example, over the course of these 55 meetings, only one item that was presented to all of the Boards was rejected by one School's Board. The rejected proposed policy was over Kindergarten Early Admittance. It was rejected by CAVA at San Joaquin and accepted by all of the other Schools that considered it.[29] Abston could only recall three instances of rejection of proposed items by any of the Boards, with the Kindergarten Early Admittance policy being one of those three. The other two rejected items were a proposal for a field trip applicable to only one School and an individual student's course work variance that

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

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

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

was only considered by the School's Board that rejected it. As relevant here, all of the Boards approved the same certificated salary schedule.

c. Billing for Allocated Services

Teachers are employed by one CAVA School, according to their employment contracts, but can and do perform simultaneous services at their appropriate grade levels for any of the CAVA Schools. Abston explained that the sharing of teachers by the Schools is done to contain costs, and that a smaller School, like CAVA at Jamestown, is more likely to need assistance from teachers outside of its own employ. In fact, it appears the norm for a CAVA teacher to have students from multiple Schools, rather than to have assigned students only from the CAVA School at which he or she is under an employment contract. None of the teachers who testified taught students enrolled only at the CAVA School by which they were officially employed. Rather, they all taught students enrolled at various Schools throughout the state. Abston testified that it is the "goal" to hire locally at all levels, especially for Elementary level teachers who are required to hold more in-person meetings with students and parents than are teachers in the upper grades.[30] The practice of sharing employees among the Schools becomes most common at the High School level where it is quite difficult in some subjects, such as Physics, for instance, to recruit and hire qualified teachers. Thus, for Physics, there is only one teacher that serves all CAVA students in the state. This is true for some other single-subject content areas and in Special Education as well. However, even at the Middle School and Elementary levels, it appears more common for a teacher to provide services to more than one CAVA School than it is to be assigned wholly to teach students enrolled at the School that holds the teacher's contract. (See, *e.g.*, Petitioner's Exh. 27 [showing teacher allocations in

[30] In-person meeting requirements and other in-person teaching duties will be discussed in greater detail in later sections of the proposed decision.

grades K-8 during September 2014, where more than half of the teachers were assigned to teach students in multiple Schools].)

Each School is billed proportionally for teacher services based on the percentage of students that a teacher is assigned from that particular School. For example, in the case of teacher Nancy Neal that was discussed during Abston's testimony, if two percent of her students are enrolled at CAVA at Jamestown, then CAVA at Jamestown is billed and pays for two percent of Neal's salary. This is so even if CAVA at Jamestown does not hold her employment contract. Other Schools are similarly billed proportionally for their students being taught by Neal, so that funds from multiple Schools contribute to her salary. This proportional billing for teacher services is the standard practice across the CAVA system.

Once per month, Abston reviews allocation reports or charts that purportedly show each teacher's percentage of students from each School. Department directors are responsible for preparing them. Allocation charts from September 2014 were received in evidence showing student distributions per teacher for K-8, High School, Special Education, and Intervention.[31] The Boards are not furnished with copies of the allocation charts. Abston testified that a teacher's highest allocation of students is supposed to determine the School that issues the employment contract, and that "teachers will be issued a new School depending on where the students fall versus ending employment with a teacher and hiring someone over there. We can reassign them to a new School." (Hearing Transcript, Vol. I, p. 165.) Thus, if student enrollment changes at the School where a teacher is officially employed to a level that no longer justifies the teacher's employment at that School, his or her employment contract can

[31] The allocation charts introduced in the record were furnished to employees by Human Resources Director Johnen. The employees who received them were working in a committee formed in preparation for the Schools' accreditation review process. That process is discussed in greater detail in the next section of this proposed decision.

apparently be re-issued by another CAVA School. This is evidently deemed preferable to having to lay off or fire an employee and rehire them elsewhere in the CAVA system.

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

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

because the School received services from all of those management employees or at least received common benefits.

5. Accreditation and Reporting to State and Local Entities

a. Accreditation

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

b. Reporting

Once per year, each School must individually submit data to the DOE through a report called the School Accountability Report Card (SARC). Thus, 11 SARCs are submitted each year for the CAVA Schools. The SARC is filed under a School's unique CDS code and tracks, among other things, the School's academic progress, student enrollment and demographics, standardized testing results, and financial and employee data. Abston is referred to on each SARC as the "superintendent" of the School, even though that is not her official title. This nomenclature is consistent with the Schools' charter documents that note that the Head of Schools performs duties consistent with that of a public school superintendent. For Special Education, each School has multiple reporting requirements that are submitted to the state by the Schools through the SELPAs to which they belong.

6. Management Structure

a. Chain of Command

All 11 Schools have a common, statewide management structure that is organized by content divisions and grades as follows: General Education (High School Department, Middle School Department, and Elementary Department), and Special Education (K-8 and High School).[32] Abston, who, as a reminder, is a K12 employee, is the person to whom every employee across all divisions of every CAVA School ultimately reports. Abston is the only K12 employee who is included in the management chain of command for the Schools.

For the General Education program, April Warren is the "Academic Administrator" for all 11 Schools.[33] Warren reports directly to Abston. Warren did not testify, but Abston described her as being responsible for the analyzing the "evaluation of scores for each School…and disaggregation…of scores[,]" but clarified she was not responsible for overseeing curriculum. (Hearing Transcript, Vol. I, p. 42.) The scores that Warren evaluates were not further described in the record nor were her other duties described in great detail.[34] Warren is an employee of CAVA at San Diego.

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

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

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

Directly reporting to Warren are the two Directors of High School, Cathy Andrew and Mina Arnold; the Director of Middle School, Deanna Haynie; and the Director of Elementary School, Amy Maxwell. These directors are each employed by particular Schools, but provide services to all of them as applicable to the grade-level offerings at each School. Directors are generally responsible for overseeing the academic program covering all staff and students. Within each department, several Regional Program Coordinators (RPCs) report to the appropriate directors of their departments. As discussed in more detail below, RPCs have wide discretion to make hiring and firing decisions. RPCs also determine teachers' assignments to regional teams that fix lines of supervision. RPCs assign students to teachers for homerooms and content areas. RPCs are required to attend several Board of Directors' meetings per year. RPCs, like all teachers and other management employees (except Abston), are employed by a particular School. Regional Lead Teachers (RLTs), again, also employed by particular Schools, report to RPCs. Teachers report directly to RLTs.

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

Intervention teachers report to Intervention Lead Teachers. All of the Special Education management and supervisory employees, again except Abston, are employed by particular Schools.

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

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

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

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

The Community Day program provides an option for CAVA students to meet in-person, once per week, with other CAVA students and a teacher, and to have the remainder of their instruction provided online. Leah Fellows is the Director of Community Day. Three RLTs report directly to Fellows. Bailey, employed by CAVA High School at Maricopa, was formerly an RPC and is currently a Community Day teacher.[35] Bailey's content area specialization is science. She testified that there are approximately 15 sites throughout the state hosting Community Day students, and that all sites accommodate at least K-8 students. Bailey's Community Day site is located in Redlands and includes High School. Students are grouped into classrooms by grade level as follows: K-1; 2-3; 4-5; 6-8; and 9-12. Her students are split between those from CAVA High School at Maricopa (two-thirds) and CAVA at San Diego (one-third). Students come to the Redlands location on Tuesdays and Thursdays.

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

> Q Okay. So at least based on P-5, and I really don't mean to confuse things. I really am trying to understand, because I'm fairly new to this as well. But looking at P-5, if I understand how CAVA functions, Jennifer Shilen is -- has a contract out of

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

> Sutter. According to P-5, Sutter is Campus Two, correct, a Campus Two assignment?
>
> A Correct.
>
> Q Okay. So according to the High School structure, Jennifer Shilen should be supervised by [one of the Campus Two RLTs,] either Francine Bailey, Loretta Gilbert, or Nick Stecken, correct?
>
> A If it was based on the students, correct. This is not a Board-adopted document or anything. So again, there's complete autonomy within what is going on here for them to do what best suits the students.
>
> Q Them who?
>
> A The teachers, the administrators, the RLTs, the RPCs. I'm not going to tell them, like, I'm sorry, you have a contract from here, you must be here. It's going to be the best suited for what's needed for those students.
>
> Q Okay. So what you're telling me, and I think we're getting somewhere, what you're telling me is that P-5 may not actually be correct with respect to matching up teacher assignment to a campus.
>
> A I think that's what I just said, yes.

Because each teacher, supervisor, and manager (except Abston) is employed by a particular CAVA School, it is often the case that the RLT and RPC to whom a teacher reports is employed by a different School than the teacher. Especially in smaller Schools, according to Abston, it would be "fiscally irresponsible" for them to hire all of the positions that are needed to offer the instructional program, "so they share services just like small school districts outside of our schools share services all the time." (Hearing Transcript, Vol. IV, p. 208.) Teachers in small schools will also have assigned homeroom students outside of their geographic area and contract School because otherwise they may be considered part-time. For example, there is only one Middle School teacher employed by CAVA at Jamestown because

there are only 15 Middle School students enrolled at that School. Fifteen homeroom students is under the minimum threshold required for full-time employment. Thus, the Middle School teacher there takes homeroom students from CAVA at San Joaquin and CAVA at Jamestown to maintain her full time status.

Terms and Conditions of Employment for Teachers

The shared employment conditions of all CAVA teachers statewide as discussed below are essentially undisputed.

1. Hiring

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

Abston explained the reason why some EdJoin job postings list a specific CAVA School and some do not as follows. If it is a larger school (like CAVA at Los Angeles or CAVA at San Diego, for example) that can afford a full-time staff person or if there is a specialty program within a School, then the posting would specify it was for that School. Otherwise, the teacher applicant goes into a "candidate pool to service one of the CAVA schools or one of the other K12 managed schools." (Hearing Transcript, Vol. IV, p. 202.) A teacher candidate's placement in an eligibility pool is largely based upon the county in which the candidate resides. Middle School Director Haynie testified that once a candidate had been selected, "we ask[ed] that they be placed in a particular school depending on where they live and the need of the students in that area." (Hearing Transcript, Vol. III, pp. 114-115.)

Bailey testified to her experience regarding hiring decisions when she served as an RPC. The RPCs and department directors determine, based on student enrollment, when a teacher needs to be hired. Sometimes RLTs consult in this process as well. The School's Board did not have to pre-approve an RPC's recommendation to create a job posting. From EdJoin applications, Insperity created a spreadsheet of eligible candidates categorized by subject matter. If Bailey needed to hire a math teacher, she could view all of the candidates who were qualified to teach math, and then selected those candidates from the list that she wanted to interview. Bailey would typically ask an RLT to sit in on interviews of the candidates. After Bailey made a decision to hire one of the interviewed candidates, she would notify Insperity and Human Resources (Human Resources Director Johnen) to process and complete the new employee's paperwork. Johnen extends written job offers on behalf of an RPC, but Johnen herself does not participate in the hiring decision-making process. A School's Board approves the RPC's hiring decision after an employee has been hired and

already has started working. As discussed previously, all 11 Schools utilize the same employment contract for teachers, with the only differences being found in the rate of pay based on experience level and in the duty statements by grade level and content area. Returning teachers must sign a new contract every year. Johnen handles that process.

2. Pay and Benefits

There is one certificated salary scale that has been adopted by the Boards of all 11 Schools. The levels of teachers' health and welfare benefits were not specifically described in the record, but the identical employee contracts used by all Schools describe the benefits offered to teachers by the Schools in the same terms.

3. Work Year and Hours

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

4. Equipment and Technology/Employment Handbooks and Forms

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

Resources, and some student records. All employment-related forms, such as the form for requesting time off, are the same across the Schools.

All teachers are issued a common employee handbook, compiled by Insperity, which instructs employees regarding policies and procedures. All employment policies and procedures are the same in all Schools. Receipt of the handbook must be acknowledged in writing by employees. The handbook notes that only the Head of Schools or an Insperity officer has the authority to change an employee's at-will status or enter into employment agreements for specified time periods.

5. Duties

a. Staff Meetings/Professional Development

A series of mandatory, online staff meetings are customarily held every Monday for all teachers. Typically, one of these meetings per month is an all-staff meeting by department. The all-staff meeting can be run by Directors, RPCs, and/or RLTs, working in conjunction with each other. There are more frequent regional meetings with an RLT and teachers assigned to the RLT.[36] Approximately once per month, Curriculum Specialists conduct a content meeting for teachers. During periods of standardized state testing, teachers meet within their regional teams to prepare.

Teachers are also periodically required to attend, in-person, Professional Development meetings/trainings. In 2013, for the first time, all CAVA teachers gathered together in one location for a Professional Development meeting. In 2014, all teachers participated in separate regional Professional Development meetings at the beginning of the school year. When the

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

Schools are preparing for mandatory state testing periods, teachers are required to attend virtual and in-person meetings by departments and regions.

b. Homeroom Attendance Records

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

c. Instruction

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

d. In-person Meetings with Students and Parents

Teachers are required to meet, from time-to-time, with their students and/or with parents.[37] All teachers are also required to be physically present with students during periods of state standardized testing. For this reason, CAVA administrators try to assign teachers to students that are located within close geographic proximity to each other. The frequency with

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

which teachers are required to hold in-person meetings varies widely based on grade-level, and also by the specific needs of students. For example, there was testimony that teachers at the Elementary level are required to meet in-person with students four times per year, but there have been more frequent in-person meetings, even weekly, where a particular student required it. Middle School teachers are required to meet in-person with students three times per year. High School teacher Cara Bryant testified that she only meets in-person with students during state testing periods. Abston testified that High School teachers are expected to hold outings with their families, but not all do. High School teachers are asked to attend any one of five graduation ceremonies held across the state. In-person meeting requirements are suspended and a "remote" teacher is assigned if there are no qualified teaching candidates that can be hired within a close distance to students in a particular area.

e. Submitting Grades and Access to Students' Records

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

6. Performance Evaluations

Elementary Director Maxwell, Middle School Director Haynie, and Bailey, because of her experience as a former-RPC in the High School Department, all testified regarding the process of evaluating teachers' performance. First, a teacher completes a self-evaluation, including recording a video segment of live instruction and providing a lesson plan for that instruction session, self-rating his or her overall performance (including the video segment), and summarizing student data. The teacher's RLT then rates the teacher's self-evaluation video segment. An RPC, or in some cases, a Curriculum Specialist, completes the final evaluation rating after receiving the teacher's self-evaluation and the scores from the RLT. RPCs decide whether to assign Curriculum Specialists' evaluation duties. According to Haynie, an RPC's evaluation of a teacher is final and those ratings are not disturbed by Department Directors. Maxwell confirmed the formal evaluation process described above, but added that teachers are also informally evaluated throughout the year including observations and feedback by RLTs, RPCs, Curriculum Specialists, or Directors. All of the forms and protocols used in evaluations are the same for the Elementary, Middle School, and High School departments.[38]

7. Discipline/Firing

Bailey testified that when she was an RPC, teacher misconduct usually first came to her attention through an RLT. She and the RLT then conducted an investigation as warranted by the situation. Progressive discipline was always issued unless the conduct was something particularly egregious. She would consult with Insperity if she was unsure of what level of discipline was appropriate. Insperity would then advise her, but she made the final call in that

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

regard. As an example of this, Bailey believed in one instance that a teacher should receive a written warning, where Insperity was recommending only a verbal warning. Insperity deferred to her judgment and Bailey issued written discipline to the teacher. Haynie also testified regarding the discipline process, and confirmed that RPCs are the initial decision-makers regarding employee discipline matters and that they may consult with her and Insperity over the process as needed. Haynie said that RLTs do not make discipline decisions. There is also no evidence in the record that Abston was ever a decision-maker in a teacher termination or disciplinary case, although she did testify to participating in phone calls delivering news to employees that their employment was terminated.

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

Because of the degree of shared services between all of the Schools, including the common management teams by department, Abston admitted during discussion of a hypothetical scenario that the School's Board holding a teacher's employment contract can take action to approve an employment termination decision that does not directly involve any of the School's own students or management employees. The hypothetical supposed that teacher Shilen, who is an employee of CAVA at Sutter, was accused of misconduct involving one of her students from CAVA at Kings. The hypothetical further presumed that Shilen's RLT (who is employed by CAVA at Sonoma) discovered the misconduct and reported it to Shilen's RPC (who is employed by CAVA at San Diego). Abston confirmed that under this scenario, if it was determined that employment termination was warranted, only the CAVA at Sutter Board would take action to ultimately approve the termination decision. The CAVA at Kings Board would have no role or input, despite that the alleged misconduct involved one of its students. (See Hearing Transcript, Vol. II, pp. 33-41.) Incidentally, while the alleged misconduct was entirely fictional, the employment status of Shilen and they to whom she reports is the same in reality as it was posed in the hypothetical.

POSITIONS OF THE PARTIES[39]

[39] Both parties' briefs focused argument entirely on whether the Schools should be considered a single employer, and neither addressed the related, but separate question of whether the composition of the Schools satisfy the joint employer doctrine. This is so, despite the fact that the specific issue of joint employer status was raised by CTA in its opening statement and refuted by the Schools theirs. In the pre-hearing motion conference, I framed the substantive issue to be decided on the issue of unit appropriateness as: whether the Schools could be considered "one or several employers," and the Schools' decision and denial of recognition denied that the "charter schools operate as a single employer or joint employer." Thus, both parties had ample notice and opportunity to address the issue of joint employer status but apparently chose not to do so. For this reason, my analysis is not constrained by the parameters of the parties' legal arguments in that regard. In contrast, neither party argued at hearing or in its post-hearing brief that K12 and/or Insperity should be considered the employer of the employees at issue, and therefore I do not reach those issues.

CTA

CTA asserts that the 11 Schools here should be considered a single employer and offers two central arguments in support of the appropriateness of the statewide unit consisting of all certificated employees of the Schools over which it seeks PERB's approval. First, CTA argues that although each individual School has purportedly declared itself to be the "exclusive" public school employer for purposes of collective bargaining under EERA, these declarations are materially inconsistent with the chartering documents of each School, which CTA contends cede authority from the individual Boards to the CAVA administration team headed by Abston. CTA notes that Charter Schools Act section 47611.5, subdivision (f), mandates that a charter school's declaration of whether it is the EERA-employer "shall not be materially inconsistent with its charter." CTA argues that the Boards here have no real, independent authority, which renders them incapable of being considered separate and exclusive employers. CTA quotes the charter documents under the "Governance Structure" headings, which explain that:

> The decision making authority vested with the governing board is contained in the By-laws and the Services Agreement that are established to make a matter of public record the operational relationship of the [name of School] Governing Board, K12 Inc. and any other entity that will do business on behalf of the virtual academy.

CTA asserts that because the above-referenced By-laws in turn permit a School's Board to delegate management of its corporate activities to other entities, that this provides a "*prospective* 'blank cheque'" for Abston's administrative team to control all operations of the Schools, which is illustrated by the uniform manner that the Boards adopt policies advanced by Abston's team applicable to all CAVA Schools. (CTA's closing brief, p. 38; emphasis in

original.) Thus, the declarations of employer status in the Schools' charter documents are materially inconsistent with the way the Schools are actually run.

Second, CTA posits that the test in *Plumas Unified School District and Plumas County Superintendent of Schools* (1999) PERB Decision No. 1332 (*Plumas*), establishing that nominally separate entities act as a single employer where there is: (1) functional integration of operations between them; (2) centralized control over labor relations; (3) common management; and (4) common ownership or financial control, is met in this case for the following reasons. Functional integration is built into the CAVA model through the required contractual relationship with K12 that supplies a uniform structure across the CAVA system, through the wholesale sharing of teachers across all of the Schools, and through the same grant of decision-making authority to a team of CAVA administrators in all of the Schools' chartering documents. Centralized control over labor relations is demonstrated by the adoption of the same terms and conditions of employment for all teachers at the same departmental levels in every CAVA School. The fact that the same regional departmental management structure is shared in all of the Schools, with Abston at the top, amply demonstrates that there is common management. Finally, common ownership or financial control is shown because the CAVA business model requires the Schools to share employees, yet there is no evidence in the Boards' meeting agendas or minutes that individual Boards are even aware of the degree of the shared services across the Schools. CTA also alleges that the Schools' funds are co-mingled because "while ADA is drawn from different schools, all determinations of the use of funds are made by [the] CAVA [administration team], the funds are in fact are shared to cover the costs of teachers, staff and training." (CTA's closing brief, p. 49.) Thus, the CAVA administration team is the true source of control of the financial assets rather than the Boards.

The Schools

The Schools readily acknowledge the high degree of common employment terms and shared services in the Schools stating that: " these factors form the essence of the CAVA model: dependable quality education, competent instruction, a diverse and comprehensive curriculum throughout the State, and taxpayer cost savings based upon the ability to maximize each dollar spent." (Schools' closing brief, p. 3.) They contend, however, that the Schools' common employment terms are insufficient grounds to find that they should be considered a single employer, since they are each legally separate entities with independent governing boards that have complete autonomy over their distinct operating budgets and affairs. Citing *Plumas, supra*, PERB Decision No. 1332, *Paso Robles Union School District, et al.* (1979) PERB Decision No. 85 (*Paso Robles*), and *Turlock School Districts* (1977) EERB[40] Order No. Ad-18 (*Turlock*), the Schools contend that, as PERB found in each of those cases, because here they each have their own funding sources and budgets, independent governing authority, and despite that they have chosen to share some personnel between them, the lack of common financial control trumps satisfaction of the other three factors of the four-part test discussed previously, which ultimately defeats a finding of single employer status. Citing the reluctance expressed within *Turlock* and *Paso Robles* to look to NLRB case law for guidance in this area, the Schools argue that federal precedent should not be followed here.

The Schools further argue that the definition of a public school employer under EERA does not contemplate a network of separate schools:[41]

[40] Before 1978, PERB was known as the Educational Employment Relations Board. (See EERA, § 3540; *Madera Unified School District* (2007) PERB Decision No. 1907.)

[41] The Schools make a separate argument that because "CAVA" is not a legal entity, but rather a nickname for the network of Schools, and because CTA named "California Virtual Academies ('CAVA')" as the employer, the petition should be dismissed on this ground. This

> Under EERA section 3540.1(k) the meaning of "public school employer" includes a duly recognized charter school which has declared itself as such, as each CAVA charter has done by way of its charter petition and bylaws. Therefore the EERA means precisely what it says and compels a finding by PERB in this matter that the CAVA charter schools must each stand as separate public school employers, each with its own separate bargaining unit of certificated teachers.
>
> The law is clear as written, and if a network of lawfully recognized California charter schools is to be treated as a single employer for purposes of union representation, this must be done by **Legislative amendment** of the EERA, not through PERB adjudication. Until then, PERB must follow the clear intent of the EERA and dismiss the Petition in this matter.
>
> Consequently, if Petitioner wishes to lawfully pursue its representational interest, it must follow the law and submit a representation to [a] individual charter school where the Petitioner has majority support among the teachers employed by the charter[.]

(Schools' closing brief, pp. 2-3; emphasis in original.) The Schools express doubt that CTA's proof of support is shown per School, however, and argues that if the statewide unit is established it is likely that many employees will be unionized against their will.[42]

The Schools finally speculate that if the petitioned-for unit is established by PERB, then 11 autonomous entities will be forced to engage in a sort of coordinated bargaining with CTA. The argument here is that a long and tedious bargaining process would be required in order to reach agreement with so many separate players, which would therefore impede labor-management cooperation and frustrate EERA's purpose.

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is not persuasive. CTA named the "Academies" in the petition, which reasonably can be read to encompass the network of the 11 Schools here.

[42] A review of the proof of support submitted by CTA in this matter reveals that support was gathered by CTA on a statewide basis. Furthermore, the Schools argument in this regard need not be considered or addressed because the unit sought here is a single one, not 11 separate units, and it was for that unit alone that PERB OGC made its adequate support determination.

ISSUE

Whether the CAVA Schools should be considered a single employer or joint employer under relevant law so that a single, "statewide" bargaining unit of all teachers employed by the 11 Schools is appropriate?

CONCLUSIONS OF LAW

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

> There seems to be little doubt that the Legislature meant to minimize the dispersion of school district faculty into unnecessary negotiating units. It is apparent that unit configurations based on geographical, or campus considerations, or split along lines of academic disciplines and teaching specializations are proscribed by subsection (b)(1). But that is not to say that the Legislature rejected the possibility that critical, negotiation-related differences between groups of teachers might compel unit separation. We believe that to reduce those possibilities the Legislature directed this Board to combine all classroom teachers into a single unit except where an issue of appropriateness is raised and the requirements of subsection (a), which are then invoked, leave the Board with no other option.
>
> Reading subsection 3545 (b) together with its companion subsection (a) gives rise to the presumption that all teachers are to be placed in a single unit save where the criteria of the latter section cannot be met. In this way, the legislative preference, as

> the Board perceives it, for the largest possible viable unit of teachers can be satisfied. Thus, we would place the burden of proving the inappropriateness of a comprehensive teachers' unit on those opposing it.

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

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

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

> A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code.

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

Apparently seizing on the singular language highlighted above in EERA's definition of a charter school employer, the Schools argue that the statutory definition does not permit, as currently written, a network of charter schools to be treated as a common employer for union recognition purposes. This argument is unpersuasive for several reasons. In *Alameda County Board of Education and County Superintendent of Schools of Alameda County* (1983) PERB Decision No. 323, the Board found that the definition of employer in section 3540.1, subdivision (k):

> like section 2(2) of the National Labor Relations Act (NLRA)[43] is a jurisdictional definition identifying the types of agencies subject to PERB jurisdiction. To determine whether an agency so listed is an employer in a given instance, it is appropriate to consider whether the alleged employer has such "sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." See *National Transportation Service, Inc.* (1979) 240 NLRB 565[.]

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

[43] The NLRA is codified at 29 U.S.C. section 151 et seq. Although PERB is not bound by the decisions of the National Labor Relations Board (NLRB) or the federal courts interpreting federal law, cognizance of these authorities may be taken where appropriate as an aid in interpreting identical or analogous provisions of the statutes administered by PERB. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 35; *Office & Professional Employees International Union, Local 29, AFL-CIO & CLC* (*Fowles*) (2012) PERB Decision No. 2236-M, p. 14, fn. 10.)

in large part the analysis required here in determining whether the Schools are independent from each other or whether they act in concert as a single employer or joint employers.

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

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

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

Finally, courts and PERB itself have recognized that PERB has the power and duty to determine whether multiple employers meet the statutory definition of an employer under section 3540.1(k) over the same group of employees. In *United Public Employees, Local 790, SEIU, AFL-CIO v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119 (*United Public Employees*), the court found that PERB's internally inconsistent determinations of whether a community college district and the City and County of San Francisco were joint employers was clearly erroneous and directed PERB to revert to its own earlier finding of joint employer status of those entities. (*Id.* at pp. 1125, 1131-1132.) Thus, the joint employer and single employer doctrines would be wholly unwarranted if it were not possible to determine that, consistent with recognized tenets of statutory interpretation, more than one public employer can meet the definition of "employer" of the same group of employees under EERA. (See *Id.* at pp. 1127-1128 for statutory construction analysis; see also *Plumas*, *supra*, PERB Decision No. 1332, p. 2, fn. 2 [although finding that the employers at issue were separate, also making clear that "EERA section 3540.1(k) does not preclude the possibility of two entities acting as a single employer or joint employer within the meaning of EERA"].) Accordingly, EERA's employer definition does not bar recognition of the CAVA network of Schools as either a single employer or joint employer if sufficient proof exists for either conclusion.

The Doctrines of Single Employer v. Joint Employer

A. Background

The distinct doctrines of single employer and joint employer are sometimes confused as being interchangeable but they require distinct analyses. (*Plumas*, *supra*, PERB Decision No. 1332, proposed decision, p. 17.) The confusion between the concepts is understandable, because the fact patterns giving rise to these analyses always involve multiple entities who are

together potentially responsible for collective bargaining as an "employer" with the same group of employees. For this reason, the same fact pattern is often analyzed under both theories to determine if either test would result in the employers sharing bargaining responsibilities in a given situation.[44] In a seminal decision, the federal Third Circuit court observed:

> [A]s the Supreme Court itself has recognized, the two concepts approach the issue of "who is the employer," from two different viewpoints. As such, different standards are required for each—that enunciated in *Radio Union v. Broadcast Service of Mobile, Inc., supra,*[45] to apply in the "single employer" context and that set out in *Boire v. Greyhound Corp., supra*,[46] to apply in the "joint employer" context.

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

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

> A "single employer" relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer."
>
> [¶…¶]
>
> In answering questions of this type, the Board considers the four factors approved by the *Radio Union* court. (380 U.S. at 256, 85 S.Ct. at 877): (1) functional integration of operations; (2) centralized control of labor relations; (3) common management;

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[44] See, *e.g.*, *Turlock, supra*, EERB Order No. Ad-18; *Plumas, supra* PERB Decision No. 1332. These analyses also arise in both the contexts of representation matters, as in *Turlock* and *Plumas*, and in unfair practice cases. (See, *e.g. San Jose/Evergreen Community College District* (2007) PERB Decision No. 1928.)

[45] *Radio Union v. Broadcast Service of Mobile, Inc.* (1965) 380 U.S. 255 (*Radio Union*).

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

> and (4) common ownership. Thus, the "single employer" standard is relevant to the determination that "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise." [Citation omitted.]

(*Browning-Ferris-Pennsylvania, supra,* 691 F.2d at p. 1122.) In contrast, the *Browning-Ferris-Pennsylvania* court found regarding determining a joint employer relationship that:

> [T]he "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather, a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"—independent legal entities that have merely "historically chosen to handle jointly ... important aspects of their employer-employee relationship." *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966).
>
> [¶…¶]
>
> The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. *Walter B. Cooke*, 262 NLRB No. 74 (1982) (slip op. at 31). Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment. *C.R. Adams Trucking, Inc.*, 262 NLRB No. 67 (June 30, 1982) (slip op. at 5); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969); *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966).

(*Browning-Ferris-Pennsylvania, supra,* 691 F.2d at pp. 1122-1123; italics in original; underscore added.)

Very recently, the NLRB restated the standard for finding joint employer status, holding that its own precedent in the years since *Browning-Ferris-Pennsylvania* was decided had imposed additional restrictions, without explanation and contrary to the common law of agency, on the joint employer standard quoted above to mandate that the control exercised by

the putative employer had to be direct and immediate and not in a limited and routine manner. The Board stated:

> We return to the traditional test used by the Board (and endorsed by the Third Circuit in *Browning-Ferris*): The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and the courts have done in the past.
>
> [¶…¶]
>
> Also consistent with the Board's traditional approach, we reaffirm that the common-law concept of control informs the Board's joint-employer standard. But we will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner.

(*Browning-Ferris Industries of California, Inc. et al.*, (2015) 362 NLRB No. 186, slip op. at 19 (*Browning-Ferris-California*); internal footnotes and citations omitted.) The NLRB then explicitly overruled all of its previous precedent that could be read to conflict with the restated standard. (*Ibid*.) It also explained under the restated standard, a putative employer's indirect control, such as that exercised through an intermediary, may establish joint employer status. (*Id.* at p. 2, citing *Restatement (Second) of Agency,* § 220, comment d ["[T]he control or right to control needed to establish the relation of master and servant may be very attenuated"].)

B. PERB's Treatment of the Doctrines

1. Instances Where PERB Has Rejected Single Employer and Joint Employer Status

The issue of single employer or joint employer status was first considered by the Board in *Turlock, supra*, EERB Order No. Ad-18. *Turlock* involved the following essential facts. Two school districts—Turlock Joint Union High School District and Turlock Joint Union School District—had operated for many years under a "common administration district" model. The districts shared several high-level administrators, including a superintendent, but separately paid their salaries. The terms and conditions of employment, including salary and benefits, were largely the same, but were independently adopted by each governing board. There was a policy to facilitate the inter-district hiring of certificated employees, but only a handful of certificated and classified employees (16 out of 525) performed simultaneous duties in both districts. Some facilities, equipment, and modes of student transportation were shared between them. Before EERA was enacted, the districts had acted jointly in matters of labor relations. The districts had different physical boundaries, separately elected and independent governing boards, and separate budgets and tax bases funding those budgets. The Board considered those facts under both federal doctrines of single employer and joint employer, and held that neither finding was warranted because of the "plain meaning" of employer in section 3540.1(k). The Board stated:

> [I]t is obvious that both the Turlock Joint Union High School District and the Turlock Joint Union School District must be viewed as separate employers under the plain meaning of the Act. Where the language of a statute is clear, there is no room for interpretation; it must be followed and effect must be given its plain meaning. The Turlock School Districts are clearly separate legal entities with separate governing boards. The fact that they have chosen to share some administrators and a small number of

> certificated and classified personnel can hardly lead one to conclude that they are one employer. In fact, since the certificated and classified employees customarily receive separate checks from each school district, that is evidence of the separate status of each governing board. Any other arrangements made mutually and cooperatively by the two boards seem more a matter of convenience than the result of any compelling legal authority to do so.

(*Id.* at p. 14; internal footnote and citation omitted.)

But even setting aside its statutory interpretation analysis and considering the material facts, the Board in *Turlock* concluded that the districts there were not so interrelated as to be considered either a single employer or joint employer under federal precedents. (*Turlock, supra*, EERB Order No. Ad-18, p. 17.) The Board explained that it would be justified in imposing higher standards than the NLRB for setting aside the districts' separate legal status since public sector employment involves "political entities that the Legislature has seen fit to clothe with certain indices of sovereignty" (*Id.* at p. 20), and emphasized that the separate funding sources through separate tax bases of the two districts especially militated against the Board finding in favor of single employer status. (*Id.* at pp. 25-26.) The Board also noted that although the superintendent and top level administrators were common in both districts, they possessed no ultimate authority regarding personnel matters but always acted under the control of the independent governing boards. (*Id.* at p. 19.) The Board further explained:

> In the final analysis the existence of certain common administrative facilities and equipment, a common salary schedule, a common transportation system, and the employ of 16 common personnel,[47] simply does not compare to the overwhelming number of employees who are not employed by both districts, who are not involved in any interchange or

[47] The Board also cited to several NLRB decisions from the 1950s to support that NLRB cases emphasize the importance of the "interchange of employees between employers" to find common control over the employees because that fact is indicative of an interrelationship of operations. (*Turlock, supra*, EERB Order No. Ad-18, p. 22, fn. 23.)

> interaction, who are not engaged in joint committees, who perform services in totally separate environments, and who are under separate fringe benefit programs. As stated quite perceptively in the decision below, "The bargaining relationship must be between employees and the employer who has control over them."

(*Id.* at p. 24.)

The Board's next consideration of this issue came in *Paso Robles*, *supra*, PERB Decision No. 85.[48] This was actually two cases consolidated on appeal regarding whether two school districts operating in Paso Robles, and two school districts operating in San Rafael, should each be considered a single employer of its respective employees. The districts in Paso Robles shared 41 employees and had separate and independent governing boards that had, at times, consisted of the same members. The Paso Robles districts operated from separate budgets with separate tax bases. There was a common administration, including one superintendent. The San Rafael districts had a single governing board because of a provision in the San Rafael city charter, but they operated from separate budgets that were not comingled. A handful of common employees were shared between them. The Board found that although NLRB case law would favor finding single employer status in both instances, those authorities did not provide "appropriate guidance" in this area. (*Id.* at p. 8.) The Board explained:

> Meaningful negotiation can only occur where the employer has the authority and ability to reach agreement with the duly selected representative of its employees about those matters within the scope of representation. In the instant cases, each district is confined to the framework of its own tax base, budget and revenue limits. The budgets of each district are kept separate and there is no comingling of funds. In each case, where the districts share staff, facilities or equipment, there is strict apportionment

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

> of the expense between them. Each governing board is a separate policy-making body responsible to different constituencies.
>
> [¶…¶]
>
> In the final analysis it is this separate economic status of each district coupled with the exclusive policy-making authority of each district which determines its ability to negotiate about those matters within the scope of negotiations.

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

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

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

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

(*Id.*, proposed decision, pp. 23-24; emphasis added.)

The hearing officer in *Plumas* also rejected the union's urging of the joint employer doctrine to find the integrated unit appropriate, concluding that the county superintendent's exercise of "some control" over approximately one half of the school district's employees was insufficient for joint employer status. The hearing officer cited *Jewish Hospital of Cincinnati* (1976) 223 NLRB 614, where the NLRB rejected a hospital employer's argument that the employees of an auxiliary gift shop should be included in the same unit as hospital employees. In that case, the gift shop employees were on the hospital payroll, were recruited and screened by hospital human resources staff, were subjected to the same security screening as hospital employees, were on the same insurance plans, and used some of the same facilities as hospital employees, such as the cafeteria and parking lots. (*Id.* at p. 615.) The NLRB held that the hospital and gift shop were not joint employers of the gift shop employees because the gift shop "independently and autonomously determines wages and terms and conditions of employment for its employees." (*Id.* at p. 618.) Likewise, the hearing officer in *Plumas* concluded that because the school district and county superintendent each "independently and autonomously" controlled its own labor and employee relations policies, they could not be considered joint employers over the same unit. (*Plumas*, *supra*, at proposed decision, p. 25.)

In *San Jose/Evergreen, supra*, PERB Decision No. 1928, a Board majority reversed an ALJ's finding that a community college district (district) and a joint powers agency (JPA), the South Bay Regional Public Safety Training Consortium (consortium), were joint employers of instructors teaching for the consortium.[49] In finding the two entities to be joint employers, the ALJ had relied heavily on the joint powers agreement between the district and the consortium, which stated that employees provided to the consortium should not be considered employees of the consortium, but rather of the district. The Board rejected the ALJ's conclusion for several reasons. The Board cited with approval the standard set forth in *Browning-Ferris-Pennsylvania*, which was also adopted by the court in *United Public Employees*, for determining joint employer status between public entities stating, "[i]t is well established that an employee may have more than one employer controlling the terms and conditions of his or her employment." (*San Jose/Evergreen, supra*, PERB Decision No. 1928, p. 12.)

But unlike the ALJ, the Board did not find the operative documents between the parties to be probative of joint employer status:

> In this case, notwithstanding the JPA Agreement, the Consortium has been hiring instructors since 1997. Further, notwithstanding the Staffing Agreement, the instructors are not paid in accordance with the District's salary schedule, nor do they derive any other rights and privileges for the District's CBA.
>
> Clearly, the actions of the parties since 1997 has been inconsistent with the express language of the Operational Documents. In our opinion, these actions better reflect the true nature of the employment relationship between the parties. Here, the District and the Consortium have consistently and repeatedly disregarded the employment provisions in the Operational Documents. Thus, the mere fact that the Operational Documents describe instructors as employees of the District does not, in light of this conduct, manufacture a joint employer situation. As stated above, <u>the key issue in joint employer cases is the level of control</u>

[49] A single employer analysis was not explored in that case.

> over the shared employees. Because we conclude the District exercised little control over the Charging Parties, this contract language, which has been largely ignored and routinely breached, is insufficient to create a joint employer situation between the District and the Consortium.

(*San Jose/Evergreen*, *supra*, PERB Decision No. 1928, p.15; emphasis added.) The Board also was not persuaded by the ALJ's finding that the consortium was utterly dependent upon the district for its existence and therefore the interrelationship between the parties was determinative of joint employer status. The Board stated that a joint employer situation does not exist merely because of an "intimate connection" between the employers and again emphasized that "when assessing whether a joint employer situation exists, the central focus is the level of control each entity exerts over the shared employees." (*Id.* at p. 16; emphasis added.) Later, in at least three other separate sections of the majority decision, the Board repeatedly underscored the importance of examining the level of control over shared employees between the putative joint employers. (*Id.* at pp. 17-18.)

2. Instances Where PERB or Courts Have Found a Single Employer or Joint Employer Relationship

PERB and the courts have found single employer and/or joint employer relationships to exist between multiple public employer entities. As previously discussed, in *United Public Employees*, *supra*, 213 Cal.App.3d 1119, 1132, the court ordered PERB to vacate its decision that was inconsistent with PERB's own earlier decision finding that a community college district (district) and the City and County of San Francisco were joint employers of certain classified employees of the district. The court found that since the district had responsibility to hire and fire, albeit through the City/County civil service framework, to process employee grievances, and direct duties, again while guided by the City/County civil service framework,

that the employer entities had " successfully harmonized and divided their responsibilities over the employees." (*Id.* at p. 1131.) The court stated: "Our conclusion that the City [and County] and the District are joint employers will not affect the status quo. The Union will continue to bargain with the District over those matters in which the District exerts authority and control, and with the City [and County] over the areas within [their] purview." (*Id.* at pp. 1131-1132.)

A joint employer relationship was also found to exist between a community college district (district) and the local Sheriff's department in *Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura*). In that case, the district had been offering courses through its criminal justice department that were certified by the Commission on Peace Officer Standards and Training (POST), while the local Sheriff's department had also been running its own officer basic training academy that was also POST certified. The two entities ultimately reached an agreement to allow academy cadets to receive academic credit as district students. The agreement reached also resolved a dispute that had arisen between the two employer entities over whether academy instructors should be paid by and/or considered employees of the district. The Sheriff's department did not want their law-enforcement employees to be considered district employees while teaching at the academy; however, a government code section (Section 58058) regarding the district's ability to receive state funds for student attendance, made the district wary of ceding employment authority over completely to the Sheriff's department. At some point, the union representing instructors at the district became aware of the situation and was inquiring about status of the potential agreement during its collective negotiations with the district, but the district ultimately entered into an agreement with the Sheriff's department before concluding its negotiations on the subject with the union,

leading to the filing of an unfair practice charge. The agreement provided in relevant part that academy instructors would not be considered academic or district employees; rather they would be Sheriff's department employees, except for a limited accounting purpose in the calculation of district attendance records, and the district would retain "primary right to control and direct instructional activities of the instructors." (*Id.* at p. 10.)

In order to decide the underlying unfair practice issue of whether the district had unilaterally transferred bargaining unit work to academy instructors, the Board had to determine who was considered to be the employer of academy instructors, and whether academy instructors were "employees" under EERA or independent contractors, looking to the NLRB's interpretation of common law in the latter regard.[50] First, the Board rejected relying on the parties' agreement to determine employee or employer status. The Board opined:

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

(*Ventura*, *supra*, PERB Decision No. 1547, p. 21.) Citing the test in *United Public Employees*, the Board also found that the district's control over the instructors extended not just to the result of their work but also to the manner and means of its performance, stating:

> [T]he District maintains more than general supervisory control over the academic instructors, Indeed the District maintains the power to dictate the performance of the academy instructors by directing their teaching, ensuring their compliance with applicable standards, evaluating their performance, and by its power to remove them from the classroom.

[50] The Board ultimately concluded that the instructors in question were employees and not independent contractors. (*Ventura*, *supra*, PERB Decision No. 1547, p. 23.)

> Thus, although the academy instructors are Sheriff's employees in many respects, the Board finds that they are also "employees" of the District within the meaning of EERA during the times they are teaching at the academy. This finding is based on the fact that both Section 58058 and the Agreement require the District to maintain the primary right of control over the academy instructors while they are teaching. Such a finding is consistent with Board precedent which has recognized the concept of "joint employers."

(*Id.* at p. 25; footnote omitted.)

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

Finally, in *County of Ventura* (2009) PERB Decision No. 2067-M, the Board found joint employer status between the county and some clinics operating within county boundaries that served low-income populations.[51] In that case, the Board found that both employer entities were the joint employer over clinic physicians because the county retained control over hiring practices, review of individual employment agreements, salaries and specialty pay, time base reduction, discipline, restrictions regarding patient care, and dress code. (*Id.* at p. 7.) In

[51] The Board did not analyze the employment relationship under the single employer doctrine in that case.

addition to citing *Browning-Ferris-Pennsylvania* as the basic test for the joint employer analysis, the Board also cited *Service Employees International Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769 for the premise that "the question is whether the employer retains the right to 'control both what shall be done and how it shall be done,' such that it retains 'the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.'" (*County of Ventura, supra*, at pp. 4-5.) The Board also took the opportunity to clarify the holding of *San Jose/Evergreen* regarding the employer's assertion that PERB mandated "actual control" to find joint employer status:

> While the Board in *San Jose/Evergreen Community College District* (2007) PERB Decision No. 1928 does discuss the notion of "actual control," the Board does not establish an "actual control" test of any kind. Rather, the term is used in discussion when distinguishing the significance of the conduct between the parties from mere recitals in operational documents. The question of whether or not a company exerts sufficient control over the terms and conditions of employment such that it is deemed a joint-employer is primarily factual, based on the entire record.

(*Id.* at p. 6; emphasis added.) Thus, the Board here makes clear that the determination of whether sufficient control over employment conditions exists to conclude that multiple employers may be considered joint employers over shared employees is made on a case-by-case basis and the Board does not require a particular showing of actual control.

C. Analysis of Employer Status in This Case

At the outset, it is noted that no precedential Board decision appears to have addressed the question of whether multiple charter schools operating in a purported network, where each have declared themselves to be the exclusive EERA employer of their own employees, can be considered either a single employer or a joint employer over all employees employed by the

network schools.[52] Thus, while the precedent above is certainly instructive regarding how to determine employer status in this case, those authorities are not in precise factual alignment with the situation here. It is unique.

Although the Schools argue that NLRB precedent should not be applied to this matter, because of the discussions in *Turlock* and *Paso Robles* expressing doubt about its applicability in the public sector employment context due to potential infringement on political sovereignty, these discussions do not bar consideration of NLRB decisional law. Even though the *Turlock* Board opined that it "would" be justified in applying a more stringent standard than the NLRB for finding separate employers to be acting as one employer in the public sector, neither it nor any Board decision after that, not even *Paso Robles*, actually adopted more stringent standards than those in the federal cases for determining single employer or joint employer status. Instead, every other Board decision discussed above from *Plumas* to *County of Ventura* continued to look to federal authorities for guidance and to cite with approval the tests discussed in *Browning-Ferris-Pennsylvania*. Thus, it is appropriate to also do so here.

A. Single Employer

Considering first whether the Schools can be considered a single employer of all certificated employees in the Schools, the Schools' argument is more persuasive, on whole, than CTA's. This is so, despite that at least two factors of the four-part test, namely: centralized control over labor relations and common management are likely established.[53] The

[52] CTA cited extensively to a non-precedential decision of a hearing officer, *Education for Change* (2006) PERB Decision No. HO-R-165-E, in its brief. While the facts in that case were somewhat similar to those here, that case was only binding on those parties because the decision was not appealed to the Board.

[53] Not every factor need be present to establish single employer status. (*The Regents of the University of California* (1999) PERB Order No. Ad-293-H, adopted proposed decision, p. 15.)

Schools argue that there is no "centralized control" over labor relations because "day-to-day management over teachers is minimal given their substantial autonomy, and where needed supervision is dispersed, not centralized, through a group of RPCs employed by different CAVA charters throughout the state." (Schools' closing brief, p. 24.) First, teachers are professionals. There is no evidence to suggest certificated professionals, whether working in remote learning situations or in traditional "brick and mortar" schools, typically require anything more than "minimal" supervision. Moreover, the School's argument here ignores that centralized control over labor relations is demonstrated by the fact that all of the Schools have adopted the exact same terms and conditions of employment, the pinnacle of "labor relations," for all teachers at every School. All terms and conditions of employment: from hiring to hours of work, the salary schedule and benefits, job duties (including in-person meeting requirements by department), lines of supervision (by department), evaluation of performance, and discipline up to and including termination, are uniform across the CAVA network. If there were not *some* kind of centralized control, one would expect to see some variance in employment terms between the Schools. But there is none.

Finally, although "dispersed" regionally, the management structure here is rigidly hierarchical and statewide, with Abston at the top and several levels of management beneath her organized by department. This is certainly indicative of "centralized control," namely that each School has determined that "control" over employment conditions will be "centralized" under the Head of Schools. Similarly, the Schools argue that there is no "common management" because each School is ultimately managed by an independent governing board. This again ignores the fact that Abston is the "common management" across all Schools, and further that RPCs and RLTs manage and supervise employees at multiple Schools, regardless

of where they themselves are employed, and this happens statewide. Thus, the management of the Schools is shared in common between them.

Where the Schools' arguments are persuasive, however, are regarding the factors of the four-part test that have been deemed by PERB to hold the most weight. Regarding functional integration of operations, although all of the "programs," *i.e.*, academic offerings of the Schools, are shared in common (which is notably distinguished from the situation in *Plumas*, where at least half of the programs were not shared), the Schools correctly point out that in *Plumas*, the fact that each employer entity in that case operated under an independent governing board defeated satisfaction of that factor of the test. More importantly, that fact trumped satisfaction of the other factors:

> the separate and exclusive policy-making authority of the District's Governing Board and the County Superintendent, combined with the separately maintained budgets of the two, defeat a finding of the other three factors (centralized control of labor relations, common management and common financial control).

(*Id.* at p. 24; emphasis added.) The Schools' Boards here have such separate policy-making authority. Although CTA argues that the Schools' Boards are not truly "independent" there is insufficient evidence to support that conclusion.

First, although it is true that some School's Board members and/or their familial relations ultimately report to Abston through one means or another, that fact alone does not show that these members are influenced by that relationship in the exercise of their decision-making authority. Nor does the fact that Abston, or members of her staff, may have spread the word among each other or to friends, colleagues, acquaintances, or parents when vacancies arise on the various Boards imply that the Schools' Board member selection process is somehow tainted with impropriety. Furthermore, examination of the relevant operating

documents, *i.e.*, the Charter Proposals and/or Charter Renewals, By-laws, EPSAs, and employment contracts show, contrary to CTA's assertions, that final decision-making authority over all personnel and policy matters always rests with the Schools' Boards. For example, most of the By-laws, with limited variances discussed previously, contain a specific recitation of the Boards' powers, including, *e.g.*, "Adopting the annual budget," and "Approving salaries or compensation of administrators, teachers, or other employees of the [School]." While the By-laws allow for the Boards to delegate management of the corporations' activities to other entities, it does so under a caveat: "provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board." (Emphasis added.) CTA reads that phrase as a license to let third parties, namely Abston, have free reign and blanket authority to make all of the Schools' decisions with some kind of grant of pre-approval from the Boards. I read it to mean that even where management powers have been delegated, the Boards still retain their ultimate power to direct corporate activities.

Examination of the EPSAs and employment contracts also show that the Boards always retain ultimate control over both personnel matters and finances in the Schools. For instance, although the EPSAs provide that K12 (currently through Abston) will "take the lead" to help recruit, set terms of employment, supervise, discipline, and hire and fire employees, such activities are always done "in consultation with" the Boards, and the Boards specifically retain final decision-making authority over all personnel matters. Notably, the By-laws also make the Boards specifically responsible for evaluating the work of Abston as Head of Schools, so her authority is not unfettered as CTA suggests. Likewise, all employment contracts between

the Schools and their employees note that although Abston can recommend a change in at-will employment status, this cannot be effected without approval of the School's Board.

As noted in *San Jose/Evergreen, supra*, PERB Decision No. 1928, however, the way the operating documents are drafted does not take precedence over the parties' actual practices. Here, though, the actual practices back up the operating documents. Although CTA argues that "CAVA administrators prepare and present all agenda items, which are identical for all schools[]" and "[a] cursory review of the CAVA board local actions reveal that the act in lock-step manner in accepting all "recommendations' that are prepared by Abston and/or CAVA's administration team[]" (CTA's closing brief, p. 12), these assertions overstate the record. After examining the documents memorializing 55 meetings of the Boards, there were clear variations in the proposals that were presented to each Board, especially over financial items like common core funding. While it is true that Abston's administration team prepares the agenda proposals to be presented to the Boards, and there is marked correspondence in the approval rate of commonly proposed items, there was still both variation in the items presented and independent action taken by each School's Board to approve or reject proposals.

Moreover, each School's Board separately considered and voted upon all personnel matters, *i.e.*, hiring and firing actions, that were particular to each School during the time period at issue for that meeting. There is no evidence that after-the-fact approval or rejection of personnel matters by a governing board is unique to CAVA or that it implies lack of independent action. Rather, it is typical for school district governing boards to be presented with staff recommendations over personnel matters after initial action by subordinate managers has already been initiated against an employee. (See, *e.g.*, Ed. Code, § 44934, subd. (b) [after the filing of written charges against an employee with a governing board of a school district,

the governing board of the school district may then vote upon whether to suspend or dismiss employee for cause].) In short, the record supports a finding that the Boards act with independent authority.[54]

Importantly, in this case, the budgets for each School are separate and include separate funding sources—meaning, separate tax bases—particular to the local conditions in the counties where the charters are held, and also dependent upon ADA funding and federal title money based on student enrollment and attendance at each School. This fact has repeatedly persuaded PERB to decline finding multiple public school employers in such circumstances to be considered a single employer over their shared employees. As stated in *Plumas*:

> As in *Paso Robles*, the two governing authorities (Governing Board and County Superintendent) have separate and exclusive policy-making authority and the funding sources and budgets of the two entities are separate, distinct and not comingled. These factors, under *Turlock* and *Paso Robles*, require finding that the District and the County Superintendent do not constitute a single employer.

(*Plumas*, *supra*, PERB Decision No. 1332 at proposed decision, pp. 23-24; emphasis added.) There is simply no evidence that the Schools' funds are comingled, despite CTA's assertions about the lack of evidence in the record that the Boards are aware of the extent of shared services and that the CAVA administration team determines all use of ADA funding. The

[54] And unlike in *El Camino*, *supra*, PERB Decision No. 2033-M, there is no evidence that any of the Boards have the authority to appoint a majority of members, or any member, to another School's Board. Thus, it cannot be shown that one School has taken over the operations of another or the whole as was the case in *El Camino*. Furthermore, the fact that the Boards of CAVA at Maricopa and CAVA High School at Maricopa contain the same members does not show that they do not still act independently from one another. (See *Paso Robles*, *supra*, PERB Decision No. 85, p. 10.)

record is undisputed that Schools are billed proportionally for the services of teachers[55] and that they separately approve distinct financial budgets. The fact that all Schools use the same financial officer, Galang, to prepare and present the individual budgets does not change that they are each separately funded and separately approved by each School's Board. For all of these reasons, it cannot be determined under current PERB precedent that the Schools have common ownership or financial control or that the Schools lack independent and autonomous governing authority. (*Turlock, supra,* EERB Order No. Ad-18; *Paso Robles, supra,* PERB Decision No. 85; *Plumas, supra,* PERB Decision No. 1332.) Accordingly, the Schools cannot be considered the single employer of all teachers employed by the Schools.

B. Joint Employer

Considering next whether the schools can be considered a joint employer, selections of the notable passage from *Browning-Ferris-Pennsylvania* quoted above bear repeating:

> [T]he "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather, a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"—independent legal entities that have merely "historically chosen to handle jointly ... important aspects of their employer-employee relationship."
>
> [¶…¶]
>
> Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment.

[55] This is so, notwithstanding the unexplained variances that were discussed in the allocation charts for Intervention and Special Education. The evidence was unrefuted that Schools are billed proportionally for teachers' services.

(*Id.* at pp. 1122-1123, internal citations omitted; underscore emphasis added.) It is important to note that because the joint employer doctrine explicitly recognizes the separateness of the employer entities in question, the concerns raised in *Turlock* about the infringement on political sovereignty are somewhat diminished. Remember, "[i]t is well established that an employee may have more than one employer controlling the terms and conditions of his or her employment." (*San Jose/Evergreen, supra,* PERB Decision No. 1928, p. 12.) There is nothing in the law that prevents a separate legal entity, even a political sovereign, as here, to choose to handle jointly with another separate legal entity the terms and conditions of employment over employees that they both have chosen to share between them. Historically, from their inception, the CAVA Schools made these precise choices—both to share a majority of their employees and to handle jointly the employer-employee relationship.

First, it is noted that the chief factual distinction between this situation and the situations in *Turlock* and *Plumas*, both of which entertained a joint employer analysis, is the degree to which the sharing of employees occurs between the putative employers. In *Turlock*, the number of employees shared between the employer entities was miniscule—16 out of 525. The Board considered the small amount of shared employees to be an important factor in deciding against single employer or joint employer status in that case.[56] In *Plumas*, there were more employees shared, as the school district exercised "some control" over approximately one-half of the county superintendent's certificated workforce; but the Board found that "some control" was insufficient for joint employer status given each employer's independent

[56] Also, in bolstering its argument against finding single employer or joint employer status appropriate in *Turlock*, the Board noted the absence in that case of an important factor relied on by the NLRB, namely that a large number of employees shared between putative employers supports finding that multiple employers are acting in concert and should be jointly responsible for bargaining with those shared employees. (See, *Turlock*, *supra*, EERB Order No. Ad-18, p. 22, fn. 23.)

authority over its own labor relations policies. In contrast here, the sharing of employees across all of the Schools is systemic and pervasive, and part and parcel of the model in which the Schools have chosen to operate. Abston admitted that especially for the smaller Schools, they must share employees with the other Schools or they would be acting in a "fiscally irresponsible" manner. But regardless of the reason for it, the record demonstrates that all of the 11 Schools can and will share any employees, as necessary, between them. PERB has not had occasion to consider joint employer status in light of facts such as these. The large percentage of shared employees here is a highly persuasive factor in determining joint employer status.

Second, as repeatedly highlighted in *San Jose/Evergreen, supra*, PERB Decision No. 1928, the central focus in a joint employer analysis is the level of control exerted by the employers over the same group of employees. Again, when analyzing "control" the question is "whether the employer retains the right to 'control both what shall be done and how is shall be done,' such that it retains 'the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.'" (*County of Ventura, supra*, PERB Decision No. 2067-M at pp. 4-5.) Here, instead of control over <u>certain</u> terms and conditions of employment having been divvied up and parsed out between the putative employers, which has often been the case in other joint employer situations examined herein,[57] the control in question is over <u>all</u> terms and conditions of employment for <u>all</u> CAVA employees. This control is equally retained by all of the Schools. Likewise, all 11 Schools have equally shared or co-determined those matters governing all essential terms and conditions of employment. All of these Schools, by virtue of their operating documents and in

[57] For example, as in *United Public Employees, supra*, 213 Cal.App.3d 1119.

the way they actually run their affairs, retain both the ultimate right to control and direct the activities of the shared employees and the manner and method in which work is performed by the shared employees. Also, notably distinguished from *Plumas*, the control over terms and conditions of employment here is not "some control." It is total control, which is shared equally among all 11 Schools. Control in this case should not solely be evaluated in the context of that which is wielded by the employee's contract-holding School. Where an employee may be terminated or disciplined for conduct which occurs during the performance of duties for another entity, as illustrated in the hypothetical involving teacher Shilen, for example, the other employer entity's latent power over the employee must also be considered. Under that scenario, an employee of Cava at Sutter who engaged in misconduct at Cava at Kings may still be terminated by the former School and nominal "employer" rather than the latter School for whom the teacher performed services and engaged in terminable misconduct. The only way for such a scenario to make sense, and which Abston admitted could happen under the circumstances posed, is if control over the employee is equally dispersed among the network Schools.

K12's role, through Abston, in the way that control over the employment conditions of all certificated employees is shared by and between the Schools cannot be ignored. In *Browning-Ferris-California*, the NLRB reaffirmed the tests adopted in *Browning-Ferris-Pennsylvania* and noted that indirect control, as through an agent or intermediary, can show joint employer status. Since the Board in *County of Ventura* explained that PERB's joint employer analysis has never included and does not include an "actual control" test, the NLRB's discussion of indirect control in *Browning-Ferris-California* does not contradict, but

rather is harmonized with, PERB precedent.[58] If PERB does not mandate a showing of "actual control," then it stands to reason that PERB may consider lesser or indirect forms of control in its joint employer analysis. Such consideration of indirect control is warranted under these facts.

Each of the Schools has entered into a contractual agreement with K12 and those agreements supply to each School common agents—currently Abston and some other administrators.[59] It is through their relationships with K12/Abston, and her administrative team, that all of the Schools are able to consider, and have ultimately adopted, the same proposals that govern essential terms and conditions of employment of all certificated employees. Without such a common thread, it is very unlikely that there would be a "network" of Schools to consider as a potential employer for recognition purposes, or in any other way. Abston also gave illuminating testimony on the fluidity of "employment" of teachers by particular Schools. To provide context, what was trying to be determined during the testimony

[58] Remember that NLRB precedent is not controlling on PERB. PERB may adopt it, or depart from it, as it deems appropriate. (*Capistrano Unified School District*, *supra*, PERB Decision No. 2440, pp. 28-29.)

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

below was teacher Shilen's lines of supervision based on her contract-holding School (CAVA at Sutter) and Campus placement.

BY MS. BURGESS:

Q Is it your testimony that, when Jennifer Shilen is teaching at CAVA LA, that either Francine Bailey, Loretta Gilbert, or Nick Stecken is her supervisor?

A Is she assigned to Campus Two?

Q Well, you tell me. Her contract says she teaches at Sutter, and your document says that Sutter is Campus Two.

A Correct.

Q So I don't understand your question.

A I'm asking you what—Unless I know what campus she's assigned to and who her RLT is, again, I cannot answer your question.

Q Are we going round and round?

A No.

Q She teaches at –

A It's a very simple question.

ADMINISTRATIVE LAW JUDGE RACHO: Hold on. Hold on.

MS. BURGESS: Okay.

ADMINISTRATIVE LAW JUDGE RACHO: Is the campus assignment based on the employment contract?

THE WITNESS: It should be based on the majority of their students, which should correlate to their employment contract, correct.

ADMINISTRATIVE LAW JUDGE RACHO: Should but not always?

> THE WITNESS: So for example, that's when you were asking the question if she was at Sutter last year and at Sutter this year, because teachers will be issued a new School depending on where the students fall versus ending employment with a teacher and hiring someone over there. We can reassign them to a new School.

(Hearing Transcript, Vol. I, pp. 164-165; emphasis added.)

The "we" to which Abston likely referred is herself, perhaps in consultation with a department director or RPC, to determine from looking at student enrollment levels at other CAVA Schools, which School should be the new "employer" of a teacher when the contract-holding School's enrollment can no longer justify the teacher's employment. The Schools as employers are really interchangeable in this context. It is the contractual relationship with K12, providing common management, that allows the Schools to share employees, from rank and file to high-level managers, and to essentially operate as a connected unit. Having a common agent allows for the Schools to exercise sufficient control over all CAVA employees' terms and conditions of employment so that they may be found to be joint employers.

As stated above, PERB made clear in *Plumas* that the employer definition in section 3540.1(k) allows for multiple public entities, as here, to be considered either a single employer or joint employer of the same group of employees. It is no different in the context of charter schools. Although Charter Schools Act section 47611.5, subdivision (b), requires a charter school to declare whether it will be the "exclusive" public school employer under EERA, the exclusivity refers to the caveat in the same section that in the absence of such declaration, the authorizing school district will be considered the EERA employer. That situation is not at issue. Since it has been concluded that the Schools are considered a joint employer of all of the employees in the sought-after unit, under *Peralta*, the burden is on the party opposed to a

comprehensive unit to demonstrate that all employees of the public school employer should not be included in the same unit.

Community of Interest

In finding a community of interest to exist among employees, PERB typically considers as persuasive evidence whether there are common conditions, such as method of compensation, wages, hours, employment benefits, supervision, qualifications, training and skills, contact, and interchange with other employees. (*Office of the Santa Clara County Superintendent of Schools* (1978) PERB Decision No. 59.) Here, all of those factors are demonstrated and the Schools concede the existence of these common employment conditions.

The Schools advance only one argument against community of interest in this case, namely, that the statewide unit sought would result in a cumbersome bargaining process because of the coordinated effort required between the 11 Schools in order to reach a comprehensive agreement on terms and conditions of employment with CTA. This is essentially an argument that a comprehensive unit of all teachers would impair the efficient operations of the Schools. The impact of the petitioned-for unit configuration on the operations of the employer is a factor considered by PERB when determining unit appropriateness. (*San Diego Community College District* (2001) PERB Decision No. 1445, p. 13 (*San Diego*) [rejecting employer's argument for lack of proof that having continuing education counselors in existing counselor's unit would impair efficient operations].) In balancing the impact on the efficient operations of an employer with the employees' right to effective representation in appropriate units, the Board has never found the efficiency factor to outweigh representation rights. (See *Los Angeles Unified School District* (1998) PERB Decision No. 1267; *Sweetwater Union High School District* (1976) EERB Decision No. 4.)

The Schools offer no facts in support of this argument, and I see none in the record that could support it, in light of the way that the Schools currently operate with Abston's administrative team presenting the same or similar proposals for consideration to the Boards regarding all terms and conditions of employment coupled with the apportioned billing process for shared services. The Schools have chosen to unify every employment condition across all of the Schools, so it is curious why they desire separateness in collective bargaining. In fact, the 11 separate units suggested by the Schools as more appropriate are what would have likely resulted in a cumbersome and confusing bargaining process, especially as applied to employees on a day-to-day basis. Under that scenario, a single employee could have been simultaneously subjected to the terms of up to 11 separate collective bargaining agreements. That would be a less than desirable situation. As it stands, other than the injection of a collective bargaining agent with whom they must collectively deal, there are no facts to suggest that the Schools will be forced to consider or approve proposals any differently than the way they do now. As the Schools presented no facts to show that their operations would be impaired under the sought-after unit configuration, and there are no other arguments to consider against finding sufficient community of interest between the certificated employees in the Schools, the petitioned-for unit is appropriate. (*San Diego*, *supra*, PERB Decision No. 1445; *Peralta*, *supra*, PERB Decision No. 77.)

Conclusion

Because the 11 CAVA Schools share a majority of their employees and exert sufficient control over the terms and conditions of employment of all certificated employees, both directly and indirectly, the Schools are a joint employer of the employees in the petitioned-for unit. Furthermore, the Schools did not meet their burden of proof in showing that the

comprehensive, "statewide" unit sought was inappropriate under the *Peralta* presumption. Therefore, the unit sought in the petition is appropriate.

PROPOSED ORDER

Since the Schools have not granted recognition, it is HEREBY CERTIFIED, as of October 30, 2015, that the California Teachers Association is the exclusive representative of all employees in the unit set forth below:

Certificated Unit

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

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

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)