AAA Case No. 01-20-0000-2531

IN THE MATTER OF THE GRIEVANCE ARBITRATION BEFORE ARBITRATOR CAROL VENDRILLO

SACRAMENTO CITY TEACHERS ASSOCIATION, CTA/NEA,

Grievant,

vs.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,

Employer/Respondent.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT'S POST HEARING BRIEF

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INTRODUCTION

This legal dispute, while simple, is a rather vexing one. It centers on District-administered student assessments, which is one of the most important tools for our educators to identify the learning needs of a student, monitor the student's academic progress, and ensure that the student is appropriately supported. It is through District-wide assessments that the District is able to implement multiple strategies to support the unique needs of each of our students. These assessments are critical to furthering the District's goals of ensuring equity and access of education for all its students, as Superintendent Jorge Aguilar testified at hearing:

> I wanted to make sure that we notified [SCTA] of the importance and of our desire to bring assessments back into the District, as I was really trying my best as Superintendent, again, to create this aligned instructional system across the District given that I was very concerned about the disproportionality in student achievement levels by students across the District, but in particular … historically…disadvantaged students particularly our English learner students, with disability, our black and brown students as well. So I thought that it was crucial that we have the ability to regularly monitor the academic performance across the entire District, so that we could have a better understanding of the areas that we need to focus on to make sure that students were able to access curriculum, teaching and learning, so that they could meet their true potential.[1]

But the Superintendent inherited a November 30, 2016 agreement (also known as the "Testing MOU") between the Sacramento City Unified School District ("District") and the Sacramento City Teachers Association ("SCTA"). Even though the Testing MOU was never subject to public scrutiny and never ratified by the District's Governing Board ("Board"), the District tried to work with SCTA in compliance with the Testing MOU's "good faith and timely effort" mandate for the parties to agree on these assessments. SCTA did not. SCTA moved to initiate this arbitration with a purported sense of urgency, which the District had hoped it would bring to the parties' efforts to agree on student assessments.

The evidence is ample that SCTA repeatedly rebuffed the District's requests to meet and come to mutual agreement until the last minute. When SCTA agreed to meet, it only consented to a strictly limited amount of assessments after most of the school year had passed, and for what was left of the school year only. This meant that the District lost the chance to assess and properly serve students from the start of the school year—a lost year for students whom the

[1] See transcript of hearing on October 8, 2020, Reporter's Transcript, Volume 7 at 1580:7—1581:4.

District could have helped. This pattern began in the 2016-17 school year, and continued in the 2017-18 school year, and persisted in the 2018-19 school year.

Straining to get agreement with and cooperation from SCTA, the District even cited specific directives to the District from the United States Department of Education's Office of Civil Rights ("OCR") about the need to administer assessments to avoid discriminatory impact on African American, Latino, and English learner students. In response to this information, SCTA agreed to meet only one time in the 2018-19 school year to discuss assessments, with no agreement or even feedback on any of the District's proposed assessments. Superintendent Aguilar, citing the harm to the District's most underserved and needy students and in light of SCTA's obstinate conduct, notified SCTA that the District would implement specified assessments beginning in spring 2019 and again in the 2019-20 school year, stating in his September 3, 2019 letter:

> Sac City Unified has far too long accepted the status quo of unacceptably low student outcomes that disproportionately impact our students of color, our economically disadvantaged students, our students with disabilities. The District is now moving forward with the assessment schedules because such assessments are required by law, and necessary for the District to effectively serve its students, a duty which the District believes is of utmost importance.[2]

Following a non-substantive response from SCTA, Superintendent Aguilar responded on September 12, 2019, summarizing the dispute as follows:

> The District has determined again to implement critical District-wide assessments to ensure that all of our students are provided with educational programs that meet their individual needs…[t]he District cannot continue to put assessments on hold until this matter is resolved because our students should not have to wait.[3]

On September 16, 2019, SCTA filed the instant grievance.

The grievance turned this needless controversy about the District's students into a simple, but protracted, legal proceeding about a memorandum of understanding. That simple legal issue is whether the Testing MOU was ever made part of the parties' collective bargaining agreement ("CBA"), which provides for this arbitration to resolve disputes under the CBA. If so, then the arbitrator's jurisdiction is proper and an award may be issued. If not, then SCTA's grievance must be denied for lack of jurisdiction.

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[2] See Union's Exhibit ["UX"] BBBBB.
[3] See UX GGGGG.

During hearing, SCTA offered little evidence to show that the Testing MOU was ratified as part of the CBA. Their witnesses even offered confounding and conflicting testimony about what was in the CBA that the District's Board approved on December 7, 2017. Despite spending over a year negotiating the CBA and even authorizing a strike because of it, SCTA President David Fisher testified that he could not find a copy of the CBA before the Board that night, while SCTA Executive Director John Borsos testified that he did not view a copy either (yet he compiled a version of the CBA for his members to ratify a few days later), both of which contravened SCTA Vice-President Nikki Milevsky's testimony that she had a copy of the CBA that night and reviewed it in sufficient detail to object to the inclusion of one document. Despite calling it a "major issue" for SCTA, she did not insist to anyone that night that the Testing MOU was missing from the CBA.

In contrast, the District presented five witnesses, all of whom had some role in preparation of the CBA, testifying consistently that the Testing MOU was never part of the CBA and that it was not part of the CBA when the Board ratified it on December 7, 2017. Superintendent Aguilar, the District's lead negotiator at that time—Scott Holbrook, then Assistant Superintendent of Labor Relations Ted Appel, Chief Human Resources Officer Cancy McArn, and then Director of Employee Relations Cindy Nguyen all confirmed that the Testing MOU was not part of the CBA. Mr. Appel who negotiated the Testing MOU with Mr. Borsos confirmed that the negotiations took place outside of the bargaining for the successor CBA. Indeed, in the weeks after the District emphatically rejected at the bargaining table Mr. Borsos's insistence that the Testing MOU was part of the CBA, he never brought it up with Mr. Appel in their verbal or written exchanges or proposed any revisions to the Testing MOU that indicated that the Testing MOU was part of the CBA. SCTA continued its silence in the period leading up to the Board's ratification when Superintendent Aguilar invited any other matters to be included in the CBA for ratification. If SCTA considered this a "major issue," it never stated as such to the Superintendent or any other representative of the District during that crucial time.

SCTA simply cannot overcome its threshold for jurisdiction under the weight of this evidence. The District's arguments on this point, and in the alternative, are detailed below. The grievance must be denied in full.

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STATEMENT OF ISSUES

1. Whether the District's Governing Board approved and ratified the assessments memorandum of understanding (Testing MOU) as part of the parties' collective bargaining agreement, thus making SCTA's grievance subject to this arbitration under the CBA's grievance procedure.

2. If arbitrable, whether the Testing MOU itself is valid and enforceable.

3. If arbitrable, and the Testing MOU is valid and enforceable, whether SCTA's grievance was even timely under the CBA.

4. If arbitrable, the Testing MOU is valid and enforceable, and timely grieved, whether SCTA can prevail on the merits despite its breach of the "good faith and timely effort" mandate.

5. If arbitrable, valid and enforceable, timely grieved, and that SCTA can prevail on the merits, whether the arbitrator may reconcile the two dispute resolution procedures in the CBA and Testing MOU, and decide between the District's proposal for assessments, presented to SCTA on August 5, 2019, and SCTA's non-existent proposal for District-wide assessments, as interpreted by SCTA's own witnesses at hearing.

SUMMARY OF ARGUMENT

1. SCTA had the burden of proof in this proceeding, yet the weight of the evidence unequivocally demonstrates that the Testing MOU was not ratified by the District's Board as part of the CBA. Therefore, SCTA's grievance cannot be resolved on the merits pursuant to the CBA's Article 4 grievance machinery. The CBA itself, the testimony of the District's five witnesses, and the odd and inconsistent testimony of SCTA's leadership point to no other conclusion of fact. On this ground alone, the grievance must be denied. SCTA otherwise failed to meet its burden of establishing that the Testing MOU was automatically incorporated into the CBA as a matter of past practice, especially in light of Article 3.1 of the CBA—adopted over a year after the execution of the Testing MOU—which expressly "terminates and supersedes all past practices, agreements, procedures, traditions, and rules or regulations concerning the matters herein." SCTA cannot now request that the Arbitrator alter or amend the CBA to add the Testing MOU. The Arbitrator must deny this grievance on the ground that it is not arbitrable.

2. Even if the Testing MOU is grievable, which the District denies, the Testing MOU is in any event unenforceable for several reasons: (1) the District's Board never ratified

the Testing MOU as part of the CBA or as a standalone agreement and, thus, the Testing MOU is invalid per se under Education Code section 17604; (2) the Testing MOU, as applied, has caused harm to students and has created disparities among African American, Latino, and English learner students, in violation of the State Constitution's equal protection clause; and (3) the Testing MOU illegally divested the District's publicly elected school board of policymaking authority over testing, expressly granted by the Legislature.

3. Even if the Testing MOU is grievable under the CBA, and the Testing MOU is lawful and enforceable, both of which again the District denies, SCTA did not show by the preponderance of the evidence the grounds to prevail on the merits. First, SCTA did not establish a timely filing of the grievance after the District first provided written notice on April 24, 2019, that it would administer assessments. SCTA filed one grievance related to assessments—on September 16, 2019, well after the 30-day deadline provided in Article 4 of the CBA. Second, SCTA did not establish which administered assessments purportedly violated the terms of the Testing MOU. Third, SCTA had to establish that it, too, complied with the Testing MOU, yet SCTA failed to demonstrate how it sought agreement on District-wide assessments in a "good faith and timely" manner as required under the agreement. Indeed, the evidence showed that SCTA met just once with the District, despite the District's repeated requests, throughout the 2018-19 school year.

4. If the Arbitrator finds that the jurisdiction of this dispute is proper, the Testing MOU itself is valid and enforceable, the grievance is timely, and SCTA can prevail on the merits, the arbitrator may reconcile the two dispute resolution procedures in the CBA and Testing MOU, and decide between the District's proposal for assessments, presented to SCTA on August 5, 2019, and SCTA's non-existent proposal for District-wide assessments, as interpreted by SCTA's own witnesses at hearing.

STATEMENT OF FACTS

A. FROM THE BEGINNING, THE DISTRICT REJECTED ANY NOTION THAT THE TESTING MOU WAS EVER PART OF THE SUCCESSOR AGREEMENT NEGOTIATIONS.

The evidence showed that Scott Holbrook, the District's lead negotiator for successor collective bargaining negotiations, expressly stated to SCTA's negotiation team that the subject of District-wide assessments (or benchmarks) was not part of the parties' successor CBA

negotiations, which commenced in October 2016. (Reporter's Transcript Volume 1 ["RT1"][4] at 228:7-10; UX W at SCUSD846-848.) At the time, the District's bargaining team was comprised of seven individuals—Scott Holbrook (Lead Negotiator and Attorney); Ted Appel (then Assistant Superintendent of Labor Relations); Cancy McArn (Chief Human Resources Officer); Cindy Nguyen (then Director of Employee Relations); Dr. Iris Taylor (then Chief Academic Officer); Tu Moua; and Mary Hardin Young. (RT6 at 1139:15-16.) In contrast, SCTA's bargaining team was comprised of three primary negotiators—President David Fisher, First Vice President Niki Milevsky, and Executive Director John Borsos—although the full SCTA bargaining team included up to 60 individuals present during any given negotiations session. (RT2 at 383:2-4; RT6 at 1151:12-13.)

In the fall of 2016, "the District was intending to implement District wide benchmark exam[s] or test[s]" and there was "discussion about teachers not implementing or teachers not grading and/or not cooperating with the District's desire to implement the benchmarks." (RT1 at 246:19—247:5.) SCTA objected to the administration of these assessments, describing them at hearing "cumbersome," not "very useful," "onerous," "destructive," and "unnecessary." (RT2 at 288:1-11, 290:10-12; RT3 at 676:10-21, 680:12-20.) Mr. Appel testified that "[p]rincipals were sort of in the middle, and so…John [Borsos]…and I, began engaging in conversations to see if we can get some agreement for SCTA to agree to cooperate or work with the District on the implementation of a benchmark exam." (RT2 at 247:6-10.)

Mr. Appel, also the District's co-lead negotiator for the successor contract negotiations at the time, testified that he and Mr. Borsos sought to resolve the testing dispute in November 2016, as a "separate issue" from the successor negotiations. (RT3 at 676:10—677:6.) This is because the District had scheduled student assessments for that fall of 2016, "so there was a lot of pressure to get this done." (RT3 at 680:12-20.) As such, Mr. Appel testified that the testing dispute was being handled outside of the successor negotiations because "the successor contract wasn't going to be completed until who knows when. So, this was being done outside of

[4] Citations to the arbitration hearing Reporter's Transcript refer to the relevant volume through numeration at the end of each RT citation, e.g., for volume 1, "RT1." The respective volumes are numbered as follows: July 30, 2020 (RT1); July 31, 2020 (RT2); August 10, 2020 (RT3); September, 2020 (RT4); October 6, 2020 (RT5), October 7, 2020 (RT6), and October 8, 2020 (RT7).

negotiations because there was an important timeline to get an agreement done." (RT3 at 680:12-20.)

As Mr. Appel and Mr. Borsos worked toward a structure for a resolution, under time constraints and pressure from SCTA, Dr. Taylor voiced her concern to Mr. Appel that the proposal from SCTA was "giving away the farm" and "essentially handcuffs our ability to assess students." (UX P.) The District communicated to SCTA its concerns about finalizing an agreement on assessments as proposed, but rather than work toward more agreeable terms, SCTA threatened to file an unfair labor practice charge with the Public Employment Relations Board. (RT2 at 306:8-13.)

Critical here, SCTA also attempted unsuccessfully to bring the subject of testing up during the successor negotiations bargaining session on November 14, 2016, but Mr. Holbrook repeated, in what can only be described as black and white terms, that the issue of testing was not part of the successor negotiations. (UX W at SCUSD846-848.) Notably, at the outset of the November 14, 2016, bargaining session Mr. Borsos, Mr. Appel, and Mr. Holbrook engaged in the following exchange:

> John [Borsos] – On Nov 10, 6pm, you sent us this proposal. We want to know where we are on Benchmarks. On November 10th, you sent us a proposal at 4:18, again at 6:18. So...where are we?
>
> Scott [Holbrook] – I want to point out before you review this, that we are here to negotiate the successor contract and the **benchmark proposal is separate from that**.
>
> John – **We consider this to be part of the contract.**
>
> Scott – **We don't.**
>
> Ted [Appel] – I'm looking for email. As I recall I [sic] sent the first proposal earlier in the day and you made counter that looks more like this…we were responding to that. I didn't write this second proposal. This is what you wrote me.
>
> John – I don't think so. You wrote at 6:57 p[.]m.
>
> Ted – I didn't write this originally.
>
> John – [L]atest and greatest.
>
> Ted – I agree. We're missing some back and forth between that. THat [sic] was your counter to our proposal. What was in response[?] What was date on Thursday?
>
> John – [T]he 10th.

John – I wrote you something back at 4:40 p[.]m. Yeah, we'll take the 4:40 p[.]m[.] proposal if you want that.

Ted – And this was the response to that. We're not agreeable at this point – this is not agreed upon.

John – Where are we then? Are you prepare to agree to your proposal at 6:57 p[.]m[.]?

Ted – We're not ready to agree to a proposal at this point.

John – Your proposal at 6:57 [p.m.], you're not making it?

Ted – At this point, no. I did propose we insert language on the 6th line that says "develop a mutual consent to a recommendation for…[.]" I proposed in the 5th paragraph.

John – So you're not going to develop a recommendation? That's bad faith bargaining.

Scott – Is the November 10th, last one printed, the last proposal? Is that the most recent proposal? Ok, we'll caucus to review your counter

John – If you have a different proposal, make it. Sounds to me you're bargaining in bad faith. In the meantime, you've sent this (show paper), you're putting it out in all the schools.

(UX W at SCUSD846-847, emphasis added.)

Following this exchange, the parties caucused and the District reviewed the proposals that SCTA shared with the District's negotiations team. (UX W at SCUSD847.) Upon returning from caucus, Mr. Borsos and Mr. Holbrook engaged in the following exchange:

Scott – We had a chance to look at your proposals. **These proposals you reference were passed outside of the negotiations table**. The district is open to meeting with you later this week…we need additional time outside of the successor contract.

John – **We consider this to be part of the negotiations and we want a response.**

Scott – **We do not have a response further than that. We want to meet to discuss positions.**

John – You don't know what you last response is? We're asking can you tell us what were the district's last positions?

Scott – No

Ted – Not at this point

John – (Continues to badger) I just want to be clear. You don't know your last positions?

Scott – I just want to be clear and say for the last time. We've given you a response.

John – We're gonna file an unfair labor.

Scott – That's what you said last time. Do what you have to do.

John – But then you bargained

Scott – **Outside of this process, you and Ted had conversations**.

John – All we're asking for is your last position and you're not prepared to give it. "ok district doesn't know its last position." (John write it down on his notepad) That's helpful. Alright.

(UX W at SCUSD847-848, emphasis added.)

Mr. Appel testified that the Testing MOU was negotiated between he and Mr. Borsos outside of successor negotiations because it was a "standalone" agreement and he "did not have any understanding" that the Testing MOU was going to be part of the CBA. (RT6 at 1079:10—1099:5.) While SCTA may have brought up the testing dispute at the bargaining table on November 14, 2016, Mr. Holbrook noted that "it was not uncommon for SCTA to bring up other items that were unrelated to successor contract negotiations," because "[i]t was sort of Mr. Borsos's opportunity to play at his audience of unit members." (UX W; RT6 at 1135:14-19.) The Testing MOU was just one in a "host of issues" the District and SCTA were dealing with at the same time as successor negotiations. (RT6 at 1149:23-25.) Mr. Holbrook testified that the District and SCTA "had all kinds of issues they were working with SCTA separate and aside from our contract negotiations." (RT6 at 1150:13-21.) For example, the Hippo M.D. MOU—which was listed on one of SCTA's written summary of successor negotiations—was another matter, along with the testing issue, that was negotiated between the parties outside of the successor CBA negotiations and never made part of the parties' CBA. (RT6 at 1147:12-25.) As Mr. Holbrook pointed out, the parties had a lot of work ahead of them and they could not afford to "get bogged down with these separate issues that were unrelated to the contract." (RT6 at 1135:19-24.)

At no point following November 14, 2016 did Mr. Holbrook rescind or recant his statement to SCTA that the Testing MOU was not part of the CBA, and when asked whether SCTA ever stated subsequent to that meeting that the Testing MOU was part of the CBA, Mr.

Holbrook confirmed "[a]bsolutely not." (RT6 at 1143:1-9.) Nor did Mr. Holbrook ever state to Mr. Borsos that the Testing MOU was part of the CBA. (RT5 at 1078:2-3.) As Mr. Borsos himself testified, he knew that "Mr. Holbrook did not want to discuss testing at the bargaining table – period." (RT5 at 1074:24-25.) Mr. Borsos also admitted that "[t]he Testing MOU was negotiated outside of the successor negotiations." (RT5 at 1070:15-16.)

B. MR. BORSOS'S SILENCE IN RESPONSE TO THE DISTRICT'S REJECTION OF THE TESTING MOU AS PART OF THE SUCCESSOR AGREEMENT NEGOTIATIONS.

In receipt and admitted acknowledgement of the clear statements of Mr. Holbrook at the bargaining table on November 14, 2016, rejecting any notion that the testing dispute was part of the successor negotiations, Mr. Borsos continued thereafter to negotiate a resolution with Mr. Appel outside of successor negotiations. (UX DD, EE; RT3 at 676:10—680:20.) Over the course of the next 15 days, they exchanged drafts of the MOU. (UX DD, EE; RT5 at 1070:15-25.) Not once, verbally or in writing, did Mr. Borsos reassert SCTA's demand that the Testing MOU be part of the CBA or successor negotiations. (RT3 at 682:6-11; RT6 at 1094:12-16.) Nor did Mr. Borsos propose any language in the Testing MOU that expressly incorporated the MOU into the CBA, much less reference the CBA. (RT3 at 682:6-11, 696:6-12; RT6 at 1094:12-16.) Mr. Borsos is not a timid advocate—yet, after Mr. Holbrook expressed clearly that the District did not consider the testing dispute to be related to the successor negotiations, there is no evidence that Mr. Borsos or any member of SCTA's bargaining team ever again tried to renegotiate with the District at the bargaining table the inclusion of the Testing MOU in the parties' CBA. (RT3 at 672:1-5; 682:6-11.)

The parties signed the Testing MOU on November 30, 2016 before the bargaining session that day. (Joint Exhibit ["JX"] JX 1; RT2 at 306:8-13.) After execution, the parties each distributed separate communications regarding the parties' resolution of the testing dispute. (UX MM, QQ.) Mr. Appel prepared a message summarizing the parties' agreement for the development and administration of District-wide assessments, which he shared with Mr. Borsos before then Superintendent Jose Banda sent the message to District staff. (UX KK; RT3 at 689:19—690:23.) The message made no mention of the Testing MOU being tentatively agreed upon (or "TA'd") as part of the successor negotiations or that it would be part of the parties' successor CBA, yet Mr. Borsos stated that with the exception of the last sentence, the message "looks fine." (UX LL, MM; RT3 at 689:19—690:23.)

SCTA also celebrated the Testing MOU in communications with its members. (UX OO, QQ.) These communications did not mention that the Testing MOU was reached during successor negotiations or intended to be part of the successor CBA. (UX OO, QQ.) Ms. Milevsky also spoke at the Board meeting a week after the Testing MOU was signed, on December 8, 2016. (UX RR.) Ms. Milevsky did not state to the Board that the Testing MOU was adopted as part of successor negotiations nor did she state that the Testing MOU was part of the CBA. (UX RR; RT3 at 532:2—534:6.)

Despite Mr. Holbrook's clearly stated position on November 14, 2016, SCTA distributed its November 30, 2016 written summary to their membership's bargaining team, with the marking of "TA, need to sign off," next to the "testing" line. (UX HH.) However, the District had not rescinded its clearly stated position on November 14, 2016 that the testing dispute was not part of successor negotiations. (RT6 at 1143:1-9.) In fact, the parties had not discussed the Testing MOU during successor negotiations again after November 14, 2016 all the way through Board ratification of the agreement over a year later, even as SCTA continued to distribute its self-described summary over the course of successor negotiations, marking "TA" next to the "testing" line. (UX RRR, YYY; RT6 at 1143:25—1144:8.)

Mr. Holbrook rejected any characterization of the testing dispute being TA'd as stated in SCTA's own document: "[I]t's their internal document. They put together whatever they want to put together. It has no bearing on us or our negotiations….I don't know why they call it a TA. It wasn't something that we TA'd at the table." (RT6 at 1148:5-25.) Throughout successor negotiations, when the parties TA'd an article, "the parties would initial each article to memorialize that the parties had tentatively agreed to the revisions to that individual article." (RT6 at 1149:8—1150:10.) The Testing MOU was never TA'd because it was not part of the successor CBA negotiations. (RT6 at 1148:5-25.) In fact, the parties never discussed the Testing MOU at the bargaining table after it was executed. (RT6 at 1143:25—1144:16.)

C. THE TESTING MOU CALLED FOR THE PARTIES' "GOOD FAITH AND TIMELY EFFORT," AND A DISPUTE RESOLUTION PROCEDURE LEADING TO A "FINAL AND BINDING" DECISION BY A "NEUTRAL FACT-FINDER."

The Testing MOU, executed on November 30, 2016, provided that the parties make a "good faith and timely effort" to agree to "District initiated" or "District-wide" assessments, and process disputes regarding a "specific test or assessment" by way of an expedited fact-finding dispute resolution process:

> The parties further agree that where a district initiated / district-wide specific test, assessment or process for monitoring student progress is not specifically and unambiguously directed by state or federal or programmatic (e.g. International Baccalaureate) mandate, the parties will jointly develop and mutually agree to the development of a process for monitoring student progress, which will meet state and/or federal guidelines, if applicable. **The parties will make a good faith and timely effort to mutually develop and mutually agree to the specific test or assessment described in the preceding sentence**. If the parties are unable to reach agreement, the parties agree to the expedited fact-finding dispute resolution process below:
>
> a. An expedited three (3) person fact-finding panel will be convened consisting of one representative selected by the Association, one representative selected by the District, and the neutral, who shall be selected by both parties.
>
> b. The fact-finding panel will engage in an informal mediation process to resolve the issue. There will not be formal presentations or briefs, unless mutually agreed upon. The mediation process shall last no longer than forty-eight (48) hours, unless there is agreement to extend the time period. If, at the expiration of the mediation process, no agreement is reach, the Association and the District will each submit its final position. **The neutral fact-finder will decide between the two positions, which shall be final and binding.**

(JX 1 at ¶ 3, emphasis added.) Mr. Appel interpreted the "good faith and timely effort" language as follows: "it would make no sense to keep negotiating about a fall assessment into the spring. So timely meant that it would be done it a way that would enable the district to administer in a timely way." (RT6 at 1118:19—1119:1.)

The Testing MOU did not reference Article 4 of the CBA, or any provision of the CBA whatsoever, or any existing grievance procedure between the parties. (JX I.)

D. SCTA'S TELLING SILENCE ON A "MAJOR ISSUE" FOR ITS MEMBERS WHEN THE DISTRICT'S BOARD RATIFIED THE CBA.

While SCTA Vice-President Ms. Milevsky testified that the MOU being part of the CBA was a "major issue" for SCTA, Ms. Milevsky, SCTA President Mr. Fisher, and SCTA Executive Director Mr. Borsos made no mention of the Testing MOU in a series of emails with the District over a course of weeks between November 9, 2017, and November 30, 2017, intended to confirm provisions that would be part of the CBA for the parties' ratification. (District Exhibit ["DX"] 8, 9; RT2 at 288:5-11.) These "loose ends" emails accounted for significant issues between the parties for purposes of finalizing the CBA that the District's Board would ratify on December 7, 2017. (DX 8, 9; RT6 at 946:18—947:4; 1014:13—1018:9.) Nor did anyone from

SCTA insist verbally to the District that the MOU was to be part of the CBA. (RT6 at 1014:13—1018:9; RT7 at 1557:13—1566:7.)

At its December 7, 2017 meeting, the District's Board considered and ratified the District's tentative agreement with SCTA. (DX 11.) Superintendent Aguilar, Mr. Holbrook, Mr. Appel, Ms. McArn, and Ms. Nguyen were each present at the Board meeting, and each confirmed that the Testing MOU was not considered nor ratified by the Board. (RT4 at 849:22—850:23; RT6 at 1095:6-8; RT7 at 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21.) Mr. Appel, Ms. McArn, and Ms. Nguyen each assisted in the preparation of the Executive Summary about the CBA that was presented to the Board that night. (RT4 at 849:22—850:23; RT6 at 1093:13-20; RT7 at 1424:9—1425:11.) Each of these witnesses and Mr. Holbrook testified that the Executive Summary and Board presentation made no reference to the Testing MOU as being part of the CBA. (RT4 at 849:22—850:23; RT6 at 1094:20-23; RT7 at 1421:8—1422:19, 1424:9—1425:11.) The Testing MOU was not discussed at all that night. (RT6 at 1095:3-16; RT7 at 1424:9—1455:15.)

Ms. Nguyen assisted with preparing the copy of the CBA that was made available to the public that night. (RT7 at 1422:10-19.) As a member of the District's negotiations team, Ms. Nguyen "held on to all of the tentative agreements as the process went through negotiations to compile everything that was tentatively agreed to and in preparation of putting all of that together, that's what ended up in the Board packet made available to the public that night at the Board meeting." (RT7 at 1422:24—1423:10.) After the Board meeting, Ms. Nguyen compiled each of the tentative agreements which were ratified by the Board into a PDF and directed one of her staff members to upload the CBA that the Board approved onto the District's website. (RT7 at 1123:11—1124:8.) While that version of the CBA includes one memorandum of understanding, the Sacramento City Unified School District New Teacher Support Program MOU ("Induction MOU"), as Ms. Nguyen testified, that version of the CBA did not include the Testing MOU. (RT6 at 1426:1—1427:17, see also DX 11 at SCUSD3806-3818.) Ms. Nguyen explained that she is familiar with the Induction MOU:

> [P]rior to becoming a director I was a credential specialist, so I'm familiar with this MOU and the conversations around this because CTC requirements had changed and there was no longer BITSA, and it was called induction, so this MOU, really, is to support our teachers in clearing their credential as they worked for the District.

(RT6 at 1426:13-21.) As Ms. Nguyen testified, the "Induction MOU" was included in the CBA that the Board ratified because "this MOU is to replace the outdated language in the Collective Bargaining Agreement" found in Article 22. (RT6 at 1426:1—1427:17.) "[T]he old contract book spoke to 150 hours to clear their credential through BITSA," and this was outdated "because it was no longer BITSA and the 150 clock hours were no longer required." (RT6 at 1426:1—1427:17.)

SCTA's leadership was also present at the December 7, 2017 Board meeting. (RT7 at 1425:16-25.) There was no evidence that Ms. Milevsky, Mr. Fisher, or Mr. Borsos (or any other member of SCTA's negotiations team) raised any issue with the District staff's presentation of the key terms of the CBA or the District's Executive Summary, which explicitly excluded the Testing MOU. (RT6 at 1157:11-21; RT7 at 1425:16-25.) Ms. Milevsky, Mr. Fisher, and Mr. Borsos each provided different and conflicting accounts of what was presented to the Board and made available to the public that night. (RT3 at 574:12—575:7; RT5 at 1026:22—1028:13, 1083:5—1084:1.)

Ms. Milevsky, who testified that the Testing MOU being part of the CBA was a "major issue," reviewed the packet that was made available to the public, but she did not object to the absence of the Testing MOU as part of the document comprising the CBA. (RT3 at 526:6-16; RT7 at 1425:16-25.) The only evidence presented that indicated any discontent with the version of the CBA before the Board that evening was Ms. Milevsky's request that the "Theodore Judah MOU" be removed from the CBA. (RT3 at 574:12—575:7; RT4 at 738:7—739:2; RT7 1431:10—1432:2.) Ms. Milevsky, Ms. McArn, and Ms. Nguyen each recalled that Ms. Milevsky asked that the Theodore Judah MOU be pulled from the packet presented to the Board, confirming that Ms. Milevsky had reviewed the packet that night. (RT3 at 574:12—575:7; RT4 at 738:7—739:2; RT7 1431:10—1432:2.) No one—including Ms. Milevsky, Mr. Fisher, or Mr. Borsos—testified that Ms. Milevsky or anyone from SCTA demanded that the Testing MOU be included in the CBA ratified that night. (RT6 at 1157:11-21; RT7 at 1425:16-25.)

Mr. Fisher, the SCTA President, testified that he could not recall specifically whether he reviewed the version of CBA that was being considered and ratified by the Board that evening. (RT5 at 1026:22—1028:13.) He testified that he did not recall whether the Board provided copies of the CBA that night, but he did recall some documents being at the back of the table. (RT5 at 1026:22—1028:13.)

Mr. Borsos was asked on cross examination whether he received a copy of the CBA that was ratified by the Board on December 7, 2017, and he testified that he did not at all review the version of the CBA approved by the Board that evening:

> No. It's not how it works. The District puts these documents out in the back of the room. They usually make – you know, a meeting can have anywhere from 20 to 200 people. They usually make five or six copies, and then people grab up copies and there's never enough copies for everybody and then the District doesn't post what the documents that they handed out that evening were, so, no, I never saw a copy of the document at the meeting and I never got a copy of the document that was at the meeting. Me, personally, never saw it.

(RT5 at 1083:5-23.) Mr. Borsos also testified that he never asked the District for a copy of the CBA the District ratified on December 7, 2017. (RT5 at 1083:22—1084:1.) Yet, Mr. Borsos admitted to preparing a version of the CBA that SCTA members voted to approve on or about December 11, 2017, a version inconsistent with the CBA that District's Board ratified on December 7, 2017. (UX A, DX 11.)[5]

One week after the Board ratified the CBA on December 7, 2017, Ms. McArn sent an email to the District principals notifying them of the changes to the CBA. (DX 12.) The email also indicated that Superintendent Aguilar would hold a principal's meeting on December 18, 2017, to discuss the changes in further detail. (RT6 at 1099:13—1102:1.) The Testing MOU was not discussed during the Principal's meeting nor was it included in the summary of the changes to the CBA that was distributed to all District principals. (RT6 at 1101:24—1102:2.)

E. THE CBA EXPRESSLY TERMINATED ALL PAST PRACTICES AND AGREEMENTS AND VESTED THE ARBITRATOR WITH "FINAL AND BINDING" DECISION-MAKING AUTHORITY FOR GRIEVANCES.

The CBA ratified on December 7, 2017, expressly terminated all past practices under Article 3.1: "This Agreement terminates and supersedes all past practices, agreements, procedures, traditions, and rules or regulations concerning the matters herein." (UX 11 at SCUSD3735.)

Further, Article 3.2 of the CBA provides:

> The parties agree that during the negotiations which culminated in this Agreement, each party enjoyed the right and opportunity to make demands and

[5] UX A, SCTA's version of the CBA that included the Testing MOU, was not moved into evidence at hearing. RT4 at 72714-15 indicates that UX A was received into evidence. However, the record does not reflect that SCTA ever moved UX A into evidence or that the Arbitrator made any ruling regarding same.

proposals or counter proposals with respect to any matter not reserved by policy or law from compromise through negotiations, and that the understandings and agreements arrived at after the exercise of that right and opportunity are set forth herein.

(DX 11 at SCUSD3735.) [6]

The following excerpts of Article 4 were likewise ratified by the District's Board on December 7, 2017:

Definitions

4.1.1 A grievance is an allegation by one or more members of the bargaining unit or Association that a member(s) has been adversely affected by a violation, misinterpretation, or misapplication of a specific provision of this Agreement.

(DX 11 at SCUSD3736.)

Level III

4.5.5 The function of the arbitrator shall be:

4.5.5.1 To hold a hearing concerning the grievance, and

4.5.5.2 To render an award in accordance with the timelines agreed to between the parties and the arbitrator after the close of the hearing. **The arbitrator's decisions will be binding on all parties**.

(DX 11 at SCUSD3744, emphasis added.)

F. THE DISTRICT'S INABILITY TO PROVIDE STUDENTS WITH MULTIPLE OPPORTUNITIES TO DEMONSTRATE ACADEMIC ACHIEVEMENT CAUSED HARM TO STUDENTS OF COLOR AND ENGLISH LEARNER STUDENTS.

Student assessments allow the District to properly monitor student progression or lack thereof, to then communicate the need to stakeholders, and ensure effective instruction and support, which Superintendent Aguilar addressed squarely in his testimony at hearing:

[6] Based upon SCTA's questioning of Ms. McArn on direct examination and Ms. Nguyen on cross examination, the District addressed at hearing the missing page at the end of the District's Exhibit 11, which is the signature page of the Sacramento City Unified School District New Teacher Support Program MOU. As District's counsel clarified at hearing on October 7, 2020, this was an inadvertent administrative oversight that occurred during the preparation of the District's Exhibit 11 in anticipation for hearing, but the signature page was disclosed to SCTA during prehearing disclosures at SCUSD3814, and is otherwise consistent with the CBA that had been publicly available on the District's website since December 2017. (RT6 at 1132:5-14.).

> Well, I think it's an obligation that we have toward all students and their families to be able to regularly communicate with them. It's in our Board policies. It's in the standards of the teaching profession. To be able to communicate when there are academic needs, social and emotional needs that students have, our responsibility to intervene·so they don't fall further behind as much as the responsibility to continue to provide challenging content to those students that have demonstrated mastery of subject areas, so that they can continue to be challenged.

(RT7 at 1603:9—1605:21.)

The effect of the District's inability to administer District-wide assessments was identified in a November 16, 2018 letter from OCR, in which it raised concerns regarding the District's Gifted and Talented Education ("GATE") program, namely that the District had only administered one set of assessments that measured academic achievement in the 2016-17 and 2017-18 school years. (DX 15.) OCR showed that the District had reduced the disparity during the 2015-16 school year, "due in large part to an increased number of opportunities for students to demonstrate their ability and achievement, through multiple administration of local assessments." (DX 15.) However, OCR's review of GATE eligibility data for the 2016-17 and 2017-18 school years showed that disparities in GATE eligibility between African American, Latino, and English learner students compared to white students had again increased. (DX 15.) In the 2017-18 school year, for example, only 3.6% of GATE students identified in first grade were African American students, even though African American students represented 14.4% of the District's student population. (DX 15.)

Matt Turkie, the District's Assistant Superintendent of Curriculum and Instruction, testified that if the District cannot provide all students with multiple opportunities to demonstrate academic achievement, it leads to a disparate impact on African American students with respect to access to the GATE program: "[T]he less opportunities which we provide, then the less accurate we are able to get our GATE eligibility, which means the disproportionality is much, much more likely to be higher with the less amount of assessments which we give." (RT6 at 1268:20—1269:2.) Mr. Turkie testified what this disproportionality looks like with respect to the GATE program:

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> [I]f African-American students make up 14 percent of the population, if they were proportionately represented in the GATE program, that should be 14 percent within the GATE program as well….However, for example, in the ’17-’18 school year, there was only three percent, I believe, of the GATE program which was African American rather than 14 percent, which would be proportional. So disproportionality is the gap between what would be proportional versus what is actually reality.

(RT6 at 1269:3-17.)

Mr. Turkie also detailed the role of District-wide assessments in English learner redesignation, and indicated that all of the District-wide assessments, if administered, enable the District to reclassify English learner students. (RT6 at 1270:7—1271:24.) English learner redesignation means that a student who is an English learner has “reached a level of proficiency in academic performance.” (RT6 at 1270:7—1271:6.) Mr. Turkie explained that English learner redesignation is important because it informs the District when English learner students no longer need to be within the English learner program. (RT6 at 1271:7-19.) When the District moved forward with assessments of English learners in May of 2019, without any agreement from SCTA, the District was able to identify 758 first and third grade students for GATE and 514 English learners were reclassified at the end of the 2018-19 academic year, “thereby ensuring that these students are able to compete effectively with English speaking peers in mainstream classes.” (UX BBBBB; RT7 at 1599:18—1601:8.)

Ms. Milevsky testified that under her interpretation of the Testing MOU a parent could opt-in to certain District-wide assessments. (RT2 at 461:9—463:4.) However, relying on parents to opt-in to District-wide assessments only perpetuates the disproportionality based on race, as Mr. Turkie testified:

> What we find are the lines of race and parent advocacy are oftentimes in the same exact place, right. Which basically means in predominantly white rich schools, there is no way that a parent would let or accept a teacher not doing testing for their students to get into GATE, because the lines of advocacy and race are in the same place, and entitlement, if you want to put is that way, whereas other schools are poorer and have got more students of color, more students who don’t speak English as a first language, then there is less parent advocacy and what we found when going through the data is there will be sort of school - - teachers within school who simply did not give the assessment and we had not data at all for large groups of students, which disproportionately would be impacting our poorer students and students of color and our English-learner students.

(RT7 at 1517:10—1518:3; see also 1519:6—1520:1.)

G. THREE YEARS SINCE THE EXECUTION OF THE TESTING MOU, SCTA AGREED TO JUST A FEW ASSESSMENTS BUT ONLY FOR THAT SCHOOL YEAR AND AT THE END OF THAT SCHOOL YEAR.

1. End of Year Assessments Are Not Sound Practice.

Mr. Turkie testified that the administration of end of year assessments is not sound practice because State assessments are administered in May and June. (RT7 at 1510:19—1516:22.) Mr. Turkie stated that "it's pretty awful, actually" because the effect is that "not a 100 percent of kids actually had the opportunity to take these assessments" and "only some students get the opportunities for both GATE designation and EL reclassification." (RT7 at 1513:6—1514-9.) Dr. Taylor also noted that the administration of assessments in the same window as the State assessment "is not a very sound practice." (UX RRRR.)

2. The 2016-17 School-Year Agreement.

The Testing MOU required that parties form the Assessments Committee no later than January 9, 2017. (JX I.) However, the parties did not meet until January 18, 2017. (UX BBBBB.) The Assessments Committee only met three times between January 18 and February 27, 2017, and the parties did not reach an agreement on an assessments schedule during that period. (UX BBBBB.) On March 17, 2017, the District sent SCTA a request for another Assessment Committee meeting, but SCTA refused to respond until after a mediation date was set related to the parties' successor CBA. (UX BBBBB.) Again on March 21, 2017, SCTA refused to schedule an Assessments Committee meeting until after a mediation date was set. (UX BBBBB.) While SCTA finally agreed to meet in April 2017 and July 2017, to discuss assessments, no consensus was reached for the following 2017-2018 academic year. (UX BBBBB.) As for the 2016-17 school year, towards its end, SCTA only agreed to two assessments for the entire year—the KDS ELA/Math Assessment for first-grade students District-wide for GATE identification and English learner redesignation purposes, and the Math I placement test, on April 27, 2017 and May 12, 2017 respectively. (UX EEE, MMM.) SCTA agreed to the assessments at the very end of April 2017, but "the school year [was] almost over," leaving the District with "a very, very short window to basically administer one set of assessments." (UX EEE, MMM; RT7 at 1512:22—1513:4.)

3. The 2017-18 School-Year Agreement.

The District attempted to meet with SCTA in the fall of 2017 to agree on District-wide assessments for the 2017-18 school year, but the parties did not meet. (UX BBBB; BBBBB at

SCTA737; RT6 at 1253:23—1254:2.) Dr. Taylor emailed Mr. Borsos, Mr. Fisher, and Ms. Milevsky on October 6, 2017, offering dates to meet and stating that "it is critical that we meet to discuss and finalize district assessments." (UX BBBB.) On February 1, 2018, the District notified SCTA of its intent to implement assessments for English learner redesignation and the GATE identification purposes at the end of the 2017-18 school year. (UX IIII.) These assessments included the (1) KDS reading and math assessments for grades kindergarten to nine and (2) PSAT for grades ten and eleven. (UX IIII.) Dr. Taylor followed up on February 20, 2018 requesting SCTA to indicate whether or not it would agree to the assessments. (UX IIII.) On February 23, 2018, Mr. Fisher emailed Dr. Taylor stating that "[w]hile we don't think this plan for administration is ideal, we reluctantly agree to go ahead with this plan for this school year only in order to assist in EL redesignation and GATE identification. Next year we will have a district wide adopted English language arts ["ELA"] and math curriculum and we expect to be able to use curriculum based assessment for these purposes." (UX IIII.)

4. The District's Proposed Assessments and Requests to Timely Meet for Good Faith Mutual Agreement in the 2018-19 School Year.

In a letter dated November 13, 2018, Superintendent Aguilar provided SCTA with a clear schedule of assessments that the District intended to administer for the school year. (UX LLLL.) He stated to Mr. Fisher that because of SCTA's lack of engagement the District could not administer District-wide assessments, and therefore, could not objectively evaluate the academic development of its students to ensure compliance with its legal obligations for providing equal access to the District's GATE program and English Learner redesignation. (UX LLLL.) Superintendent Aguilar summarized the history of the parties' meetings on assessments, emphasizing SCTA's failure to make a good faith effort to agree to District-wide assessments. (UX LLLL.) At hearing, Superintendent Aguilar testified about the reason for sending this November 13, 2018, letter to SCTA:

> I wanted to make sure that we notified [SCTA] of the importance and of our desire to bring assessments back into the District, as I was really trying my best as Superintendent, again, to create this aligned instructional system across the District given that I was very concerned about the disproportionality in student achievement levels by students across the District, but in particular are historically…disadvantaged students particularly our English learner students, with disability, our black and brown students as well. So I thought that it was crucial that we have the ability to regularly monitor the academic performance across the entire District, so that we could have a better understanding of the areas

> that we need to focus on to make sure that students were able to access curriculum, teaching and learning, so that they could meet their true potential.

(RT7 at 1580:7—1581:4.)

In a letter dated November 26, 2018, Superintendent Aguilar offered four dates for the parties to reconvene the Assessments Committee: December 3, 2018, December 7, 2018, December 11, 2018, and December 12, 2018. (UX NNNN.) Superintendent Aguilar also attached the November 16, 2018 letter from OCR, and reiterated OCR's concerns regarding the negative impact to students as a direct result of the District's inability to administer multiple assessments to identify students eligible for GATE. (UX NNNN.) Additionally, Superintendent Aguilar requested SCTA respond by November 30, 2018, and pleaded that SCTA provide any additional or different assessments SCTA would like to have considered prior to the meeting so that the parties could make progress towards agreeing to assessments for that school year. (UX NNNN.) While Mr. Fisher sent an email to Superintendent Aguilar on November 30, 2018, stating that the SCTA Representative Council was meeting the following week and that he would get back to the Superintendent with dates, each of the four dates that the District had offered to reconvene the Assessments Committee passed when Mr. Fisher responded to Superintendent Aguilar on December 21, 2018. (UX BBBBB.) Mr. Fisher offered to meet on January 15, 2019 and the District promptly accepted, while requesting that SCTA provide its assessments proposal prior to the meeting. (UX BBBBB.)

The parties met on January 15, 2019, although SCTA did not provide any proposal for assessments. (RT6 at 1509:17-25; RT7 at 1591:17-20.) Moreover, SCTA did not agree to the schedule of assessments which the District proposed on November 16, 2018. (RT6 at 1508:12—1509:11.) The District hoped that recently adopted District-wide curriculum, which had been an important topic for SCTA, would get the parties closer to an agreement on assessments, but SCTA did not state one way or the other—yes or no—whether it would agree to the District's assessment schedule proposal. (RT6 at 1508:2-6, 1508:12—1509:11.) Mr. Turkie testified that the District "only wanted a yes, we agree[,] or no, we don't agree and if there is no, we don't agree then, great," the District could invoke the fact-finding panel to "come to an agreement." (RT6 at 1508:12—1509:11.) However, "there was never a time when SCTA would say we do not agree, instead is would always be [']we have a process to go through, and let's meet again.['] However, those meeting never materialized." (RT6 at 1508:12—1509:11.)

At SCTA's request, Dr. Taylor provided SCTA with a Google folder after the January 15, 2019 meeting, which included the District's proposed math and ELA assessments, and she offered two additional dates for the parties to continue the Assessments Committee meetings. (UX BBBBB at SCTA 770.) SCTA did not agree to the meeting dates, even though there was still no agreement on a schedule of assessments. (RT6 at 1508:12—1509:11.) Following the January 15, 2019 meeting, the District expected the parties to meet again, but no such meeting ever took place. (RT6 at 1508:12—1509:11.)

On April 24, 2019, after receiving no response to the District's request to meet again, Superintendent Aguilar notified SCTA that the District planned to implement certain Math assessments to determine Math placement, GATE identification, and English learner redesignation purposes. (UX BBBBB at SCTA772.) SCTA did not respond, nor did SCTA file a grievance after the District implemented these District-wide assessments towards the end of the school year. (RT5 at 973:25—983:18; RT7 at 1956:25—1957:15.)

As Mr. Turkie testified, the District had wanted to meet with SCTA but it was "SCTA [that] did not want to meet." (RT7 at 1505:16—1507:15.)

5. After a Year, the District Noticed Implementation of Assessments for the 2019-20 School Year Without any Counterproposal from SCTA.

In a letter dated August 5, 2019, Superintendent Aguilar informed Mr. Fisher that consistent with "state and federal mandates, District policies and regulations, and long-standing past practice," the District intended to administer assessments during the 2019-2020 school year. (UX XXXX.) Superintendent Aguilar attached the schedule of assessments, which was previously sent to SCTA on November 16, 2018. (UX XXXX.)

On August 8, 2019, Mr. Fisher emailed Superintendent Aguilar stating that SCTA did not agree with the assessment schedule the District developed. (UX YYYY.) In a letter dated September 3, 2019, Superintendent Aguilar responded to Mr. Fisher stating:

> [A]ssessing our students' performance is a critical element of ensuring educational progress and meeting the individual needs of all our students. The District community cannot afford to wait any longer. This is especially true for our District as our students come from diverse socioeconomic, racial and ethnic backgrounds, and have varying and unique needs. Community leaders and District partners continue to call on the District to improve student learning and educational opportunities for all students, especially students whose families have fewer educational resources. The most clear and direct strategy for supporting

> our students includes the opportunity to assess their academic performance throughout the school year.
>
> ***
>
> Sac City Unified has far too long accepted the status quo of unacceptably low students outcomes that disproportionately impact our students of color, our economically disadvantaged students, our students with disabilities. The District is now moving forward with the assessment schedules because such assessments are required by law, and necessary for the District to effectively serve its students, a duty which the District believes is of utmost importance.

(UX BBBBB at SCTA735-736.)

On September 9, 2019, Mr. Borsos responded to Superintendent Aguilar's September 3, 2019 letter, but did not have a counter-proposal for testing nor proposal for meeting; instead, Mr. Borsos invoked the expedited dispute resolution provision of the Testing MOU. (UX DDDDD.)

On September 12, 2019, Superintendent Aguilar sent a letter to Mr. Borsos stating that the District received SCTA's September 9, 2019 email invoking the expedited dispute resolution provision pursuant to the Testing MOU, but that the District had attempted to work with SCTA for the past three years without any reciprocated commitment in developing District-wide assessments. (UX GGGGG.) He added: "The District has determined again to implement critical District-wide assessments to ensure that *all* of our students are provided with educational programs that meet their individual needs…[t]he District cannot continue to put assessments on hold until this matter is resolved because our students should not have to wait." (UX GGGGG.)

H. SCTA FILES A GRIEVANCE ALLEGING THAT THE DISTRICT VIOLATED THE TESTING MOU.

SCTA filed the present grievance on September 16, 2019, alleging that the District violated the Testing MOU by unilaterally implementing an assessment schedule "that mandated multiple District-wide assessments," but the grievance failed to identify which "mandated multiple District-wide assessments" formed the basis for the grievance. (UX IIII.) The grievance also lacked citation to any provision of the CBA, and only referenced the Testing MOU, acknowledging that the Testing MOU includes its own dispute resolution process. (UX IIII.)

The parties held a Level I meeting on October 7, 2019. (UX NNNNN.) Following the Level I meeting, on October 18, 2019, the District issued a Level I response, denying the grievance on several grounds:

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1. "Alleged violations of the MOU are not grievable;"
2. "Grievances must identify a specific provision of the CBA;"
3. "Grievances may not include attempts to alter or change the CBA ;" and
4. "Grievances not submitted within thirty (30) working days are waived."

(UX LLLLL.)

SCTA appealed to Level II meeting, and the parties held a Level II meeting on November 8, 2019. (UX NNNNN.) During the meeting, SCTA stated that all MOUs between the parties automatically become part of the CBA, but SCTA did not provide any support for its contention other than reference to the counselor's grievance which the parties arbitrated. (UX NNNNN.) Following the Level II meeting, on December 2, 2019, the District issued a Level II response, denying the grievance on the same grounds as cited in the Level I response. (UX NNNNN.) The District further "reserved the right to raise additional defenses during the pendency of this grievance." (UX NNNNN.)

ARGUMENT

I. SCTA FAILED TO ESTABLISH ITS GRIEVANCE IS ARBITRABLE, BECAUSE THE TESTING MOU WAS NEVER PART OF THE CBA.

SCTA filed the instant grievance under Article 4 of the CBA, alleging a violation of the Testing MOU, and it bears the burden of proving its grievance. (See *City of Sandusky*, 98 LA 519, 523 (McDonald, 1992) [moving party has burden of proving its contract interpretation]; See also *Sanderson Plumbing*, 106 LA 535, 541 (Howell, 1966) [arbitrator found union has burden of proving that management violated some or all of the provisions of the contract].) But the weight of the evidence presented at hearing simply undercuts any notion that the Testing MOU is even part of the CBA. Therefore, SCTA's grievance may not be considered on the merits under the CBA's grievance procedures under which this arbitration was conducted.

Article 4.1.1 of the CBA provides that: "A grievance is an allegation by one or more members of the bargaining unit or Association that a member(s) has been adversely affected by *a violation, misinterpretation, or misapplication of a specific provision of this Agreement.*" (DX 11, emphasis added.) Under this plain language of the CBA, the parties limited the grievance procedures and their binding arbitration provision to complaints involving the "interpretation or application" of the agreement. (See BNA, *Elkouri & Elkouri: How Arbitration Works* (8th ed. 2016) ["*Elkouri & Elkouri*"], ch. 5.4.) Indeed, here, SCTA alleged only a

violation of the Testing MOU and did not cite any provision of the parties' CBA. (UX IIIII ["Superintendent Aguilar and the SCUSD Administration violated the 'Monitoring of Student Progress' MOU' when he/they unilaterally implemented an 'Assessment schedule' that mandated multiple District-wide assessments in violation of the MOU and rejected the SCTA offer to resolve the dispute using an expedited resolution process outlined in the MOU"].) The evidentiary threshold for jurisdiction over this dispute, therefore, is that the Testing MOU is part of "this Agreement," i.e., the CBA. Not only did SCTA fail to meet that burden of proof, but the weight of the evidence showed that the Testing MOU was never part of the CBA.

A. The Board Never Ratified the Testing MOU as Part of the CBA.

The weight of the evidence established that the District's Board did not consider or vote to approve the Testing MOU as part of the CBA on December 7, 2017, or ever. (See DX 11; RT4 at 849:22—850:23; RT6 at 1095:6-8; RT7 at 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21.) Education Code section 17604 provides that when school districts are party to any contract, the contract is not valid until and unless it is approved or ratified by a formal vote of the school district's governing board. (Ed. Code, § 17604; see *Santa Monica Unified School Dist. v. Persh* (1970) 5 Cal.App.3d 945, 952; *El Camino Community College Dist. v. Super. Ct.* (1985) 173 Cal.App.3d 606, 612-613 [holding arbitration clause agreements unenforceable against district, even though agreements signed by two district vice-presidents, but where agreements never approved or ratified by district board of trustees]; 87 Ops.Cal.Atty.Gen. 9 (2004) [opining Education Code section 17604 requirement applies as to employment contracts].)

There is only one version of the CBA ratified by the Board on December 7, 2017, and it simply does not contain the Testing MOU. (See DX 11.) SCTA did not even present any evidence to dispute the fact that the Testing MOU was not ratified as part of the CBA that evening. Indeed, SCTA's leadership presented oddly inconsistent testimony regarding the December 7, 2017 meeting. Despite spending over a year in negotiations and going on strike over the negotiations, Mr. Borsos (SCTA's Executive Director) testified that he did not bother checking what the Board was voting on the evening of December 7, 2017, nor did he ever ask the District for a copy of the CBA. (RT5 at 1083:22—1084:1.) Mr. Fisher (the SCTA President) testified that he could not recall whether there was even a copy of the contract up for a vote by the Board that night, although he "remember[s] flipping through some documents that they had

in the back table…." (RT5 at 1026:22—1028:13.) Ms. Milevsky (the Vice-President of SCTA) could not confirm whether the Testing MOU was presented to the District's Board on December 7, 2017, instead, she provided a nonresponsive answer:

> Q: Okay. And do you know if the MOU was presented - - testing MOU was presented to the Sac City School Board?
>
> A: Well, I don't prepare what's presented to the Sac City School Board, but it was presented to our membership.

(RT3 at 566:4-9.) Yet, later in her testimony, Ms. Milevsky stated that she had in fact reviewed the documents that were made available to the public that night. (RT3 at 574:13—575:7.) Mr. Fisher, Ms. Milevsky, and Mr. Borsos were each present during the Board meeting that night, but they did not contest the absence of the Testing MOU as part of the version of the CBA in front of the Board. (RT7 at 1425:16-25.) Irrespective of whether their testimony is consistent and credible, more important is that none of their testimony came close to establishing that the Board ratified the Testing MOU as part of the CBA that evening.

In contrast to SCTA's testimony, Superintendent Aguilar, Mr. Holbrook, Mr. Appel, Ms. McArn, and Ms. Nguyen unanimously rejected any notion that the Testing MOU was ratified that night as part of the CBA. (RT4 at 849:22—850:23; RT6 at 1095:6-8; RT7 at 1137:3-7, 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21.) Superintendent Aguilar, Mr. Holbrook, Ms. McArn, Mr. Appel, and Ms. Nguyen were all present at the December 7, 2017, meeting. (RT4 at 849:22—850:23; RT6 at 1094:20-23; RT7 at 1421:8—1422:19, 1424:9—1425:11, 1552:19—1553:5, 1566:15-21.) They all testified that the Testing MOU was never voted on that night. (RT4 at 849:22—850:23; RT6 at 1095:6-8; RT7 at 1137:3-7, 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21.) Moreover, in the presentations made before the Board, Mr. Holbrook, Mr. Appel, Ms. Nguyen, and Ms. McArn confirmed that there was no mention of the Testing MOU. (RT4 at 849:22—850:23; RT6 at 1094:20-23; RT7 at 1421:8—1422:19, 1424:9—1425:11.) Ms. Nguyen confirmed that she prepared the version of the CBA adopted by the District's Board that night and directed another District employee to upload that version to the District's website—and that version did not include the Testing MOU. (RT7 at 1122:10—1124:8.)

Soon after the District approved the CBA, Mr. Appel prepared a summary of key provisions for school principals, who would presumably help administer District-wide assessments. (DX 12; RT6 at 1099:13—1102:2.) That summary, consistent with the evidence,

did not mention or detail any CBA provision regarding testing or assessments. (DX 12; RT6 at 1099:13—1102:2.) Indeed, about a year prior, when the District announced the signing of the Testing MOU on December 6, 2016, there, too, was no mention that the agreement would be folded into the CBA. (UX PP.)

The clear mandate of Education Code section 17604 is foundational to this threshold jurisdictional issue because there is only one version of the CBA that the Board approved on December 7, 2017, in a public meeting and after the opportunity for public input, and that version did not include the Testing MOU. (See DX 11.)[7] Applied here, SCTA's grievance, which alleges a violation of the Testing MOU only, which is not part of the CBA, may not be considered on the merits under the grievance machinery of the CBA.

B. The District Expressly Rejected Any Notion that the Testing MOU was Part of the Negotiations of the CBA.

Evidence of the District's intent behind the execution of the Testing MOU only substantiates the witness testimony and the four corners of the CBA. Contract interpretation requires a "look to the circumstances surrounding the making of the agreement [citation] including the object, nature and subject matter of the writing [citation] and the preliminary negotiations between the parties [citation] and thus place itself in the same situation in which the parties found themselves at the time of contracting." (*Universal Sales Corp. v. Cal. Press Mfg. Co.* (1942) 20 Cal.2d 751, 761; *Lemm v. Stillwater Land & Cattle Co.* (1933) 217 Cal. 474, 480-81; see also *Elkouri & Elkouri*, ch. 9.3, citing *Contract Interpretation: I. The Interpretive Process: Myths and Reality, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting of NAA* at 124 (Gershenfeld ed., BNA Books 1986) ["the ultimate responsibility of an arbitrator in the interpretive process is to rely on his or her background of experience or expertise in the collective bargaining process, with due regard to the relationship of the given parties and their presentations so as to provide as practical and realistic an interpretation as is possible under the given agreement"].)

The intent of the parties was borne out in the evidence at hearing. As the District's detailed bargaining notes reflect, this very dispute arose during bargaining on November 14,

[7] UX A, the version of the CBA that SCTA purports to be the parties' CBA, which includes the testing MOU at page 81-82, was not moved into evidence at hearing and the Arbitrator did not make a ruling regarding the admission of same into evidence. As such, DX 11 is the only version of the parties' CBA that was moved and admitted into evidence at hearing.

2016, and Mr. Holbrook bluntly stated to Mr. Borsos that the testing dispute was being addressed outside of negotiations. (UX W at SCUSD846-48.) Mr. Holbrook testified that the District never recanted or otherwise modified this unequivocally stated position. (RT6 at 1143:1-9.) Mr. Holbrook testified that the matter was never part of the parties' successor negotiations. (RT6 at 1148:5-25.) On cross examination, Mr. Borsos was asked whether Mr. Holbrook ever said the Testing MOU was part of the CBA, and Mr. Borsos responded with an unequivocal "No." (RT5 at 1078:2-4.) During its cross-examination, SCTA never challenged Mr. Holbrook on these statements. (RT7 at 1162:17—1244:9.) Moreover, while Mr. Borsos informed the District that he believed the testing dispute was part of the successor negotiations, after Mr. Holbrook expressly rejected such notion, Mr. Borsos continued to resolve the testing dispute with Mr. Appel outside of the successor negotiations. (RT3 at 676:10—677:6; RT6 at 1079:10—1099:5.) Mr. Borsos never again stated to the District's bargaining team (as a group or to any individual member) the proposition that the Testing MOU was part of the CBA, and Mr. Holbrook (or any other member of the District's negotiation team) never rescinded his statement that the Testing MOU was part of the CBA. (RT3 at 676:10—677:6; RT6 at 1079:10—1099:5.)

Mr. Appel, who led the negotiation and drafting of the Testing MOU, with Mr. Borsos as his counterpart, also testified that they negotiated the Testing MOU outside of successor negotiations, and the parties never discussed that it would be part of the successor CBA. (RT3 at 676:10—677:6; RT6 at 1079:10—1099:5.) In accord, as Mr. Appel testified, the Testing MOU was a "standalone" agreement to be effective immediately after it was executed. (RT6 at 1079:10—1099:5.) More specifically, the parties needed to discuss the testing dispute separate and apart from the successor negotiations due to the District's intent to immediately implement District-wide assessments that 2016-17 school year. (RT3 at 680:12-20.) The successor negotiations had just begun in earnest when the parties signed the Testing MOU. (RT3 at 680:12-20.) During its cross-examination, SCTA never challenged Mr. Appel on these statements. (RT6 at 1119:12—1128:6.)

From the outset of negotiations over the successor agreement, Mr. Holbrook and Mr. Appel squarely rejected the notion that the negotiation of the Testing MOU was part of the successor negotiations. (UX W at SCUSD846-848.) SCTA cannot now substitute arbitration for bargaining, and superimpose the Testing MOU on the CBA, contrary to any mutual intent of the parties. (*U.S. Postal Serv. v. Postal Workers* (4th Cir. 2000) 204 F.3d 523, 530 [party may not

obtain through arbitration what it could not acquire through negotiation]; *Elkouri & Elkouri*, ch. 9.3.A.Ii.A, citing *Columbia Hosp. for Women Med. Ctr*., 113 LA 980, 987 (Hockenberry, 1999) [if party attempts, but fails, in contract negotiations, to include specific provision in agreement, it should not be read in post-facto]; see also *Kroger Co.*, 86 LA 357, 364 (Milentz, 1986) [recognizing union was "attempting to obtain through arbitration what it could not through negotiations and a strike," arbitrator denied the grievance]; *Marriott Facilities Mgmt.*, 101 LA 211, 217 (Allen, Jr., 1993) [company could not obtain provision via arbitration when union had expressly rejected similar provision during negotiations].)

C. SCTA's Conduct is Consistent with the District's Rejection of the Testing MOU as Part of the CBA and Contradict Its Current View of the Facts.

1. The Appel and Borsos Negotiation Contradicts SCTA's Current Position that the Testing MOU was Part of the CBA.

In the 15 days after Mr. Holbrook soundly rejected SCTA's attempt to negotiate the testing dispute as part of the successor negotiations, Mr. Borsos never raised the matter in his negotiation of the Testing MOU with Mr. Appel—not once, in writing or verbally. (RT3 at 682:6-11; RT6 at 1094:12-16.) Neither in the proposed revisions to the Testing MOU did Mr. Borsos add language clearly stating that the Testing MOU will be part of the CBA, nor did Mr. Borsos propose language referencing the parties' CBA at all. (RT3 at 682:6-11; RT6 at 1094:12-16.) Mr. Borsos had no qualms pressing the matter at the bargaining table across from Mr. Holbrook (in front of the broader and uniquely larger SCTA "bargaining team"), but stayed silent in his negotiation of the substance of the dispute across from Mr. Appel through execution of the Testing MOU on November 30, 2016. (UX W at SCUSD846-47; see *Costco Wholesale Corp.*, 114 LA 39, 44 (Hockenberry, 2000) [where each party had its own contradictory understanding of contract proposal but did not inform other of its interpretation, arbitrator had to look to language to determine meaning]; *Broughton Foods Co.*, 101 LA 286, 287 (Jones, Jr., 1993) [noting union's silence on contested issue during negotiations].) During that 15-day window leading up to the signing of the Testing MOU, Mr. Borsos made SCTA's intentions clear on this "major issue" through his communications with Mr. Appel and proposed revisions to the Testing MOU—it had nothing to do with the CBA.

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2. The Plain Language of the Testing MOU and CBA Contradicts SCTA's Current Position that the Testing MOU was Part of the CBA.

If the parties intended for the Testing MOU to be part of the CBA, the plain language of either document would manifest that intent. Instead, there are two distinct "final and binding" dispute resolution clauses in each. (JX 1, DX 11 at SCUSD 3744.) If the Testing MOU was intended to be part of the CBA, it cannot vest both its neutral fact finder with "final and binding" authority and this arbitrator with the same authority under Article 4 of the CBA. (See and compare JX 1 with DX 11.) Moreover, there is no mention or demonstrable contemplation of the CBA whatsoever manifested anywhere in the language of the Testing MOU.

Likewise, with the exception of Article 3.1, which terminates all past practices and agreements, there is no demonstrable contemplation of the Testing MOU anywhere in the language of the CBA. (See and compare JX 1 with DX 11; RT5 at 1057:12—1058:24.) The language of the CBA simply does not fathom the existence of the Testing MOU. Indeed, the CBA expressly rejects it. (DX 11 at SCUSD3735.) Ratified a year later, on December 7, 2017, Article 3.1 unambiguously provides that: "This Agreement terminates and supersedes all *past practices, agreements*, procedures, traditions, and rules or regulations concerning the matters herein." (See DX 11 at SCUSD3735, emphasis added.) Again, the Testing MOU was not part of the CBA ratified by the District's Board on December 7, 2017. (DX 11.)

3. SCTA's Past Representations Cannot Sustain Its Current Position that the Testing MOU was part of the CBA.

SCTA will point to evidence of bargaining documents, which SCTA itself created, describing the testing dispute as a line-item with an adjacent marking of "TA" to argue that SCTA treated the Testing MOU as a tentative agreement under the successor agreement negotiations. (UX RRR, YYY.) But Mr. Holbrook rightly cast aside that contention in his testimony. (RT6 at 1148:5-25.) Moreover, he described SCTA as acting sometimes to play to its membership. (RT6 at 1148:5-25.)

Furthermore, as proven above, by exposition of the November 14, 2016 bargaining notes and Mr. Borsos's subsequent silence in his negotiation with Mr. Appel, just because SCTA introduced the topic at bargaining did not make it part of the successor negotiations. Similarly, neither can SCTA point to any of the District's documents during fact finding in 2017 as tantamount to ratification of the Testing MOU as part of the CBA. The District's response to SCTA's post-hearing brief item 37 in that fact finding simply states: "The District and SCTA

did negotiate a testing committee MOU as stated; however, to date, SCTA has been slow to cooperate in the implementation of the MOU and has been unwilling to consider any amendment that would allow for the additional assessments to benefit students." (UX ZZZ, ZZZa.) Nothing about this statement suggests the District understood and agreed that the Testing MOU was somehow now part of the CBA. (UX ZZZa.) In fact, on the cover page to the District's September 13, 2017 proposal, the District delineated all the items that had been TA'd and those which were still outstanding—and there is no mention of the Testing MOU. (UX WWWW.) The District's summary is consistent with the District witnesses' testimony that the Testing MOU was negotiated outside of successor negotiations and was not part of the CBA. (RT3 at 676:10—677:6, 680:12-20; RT4 at 849:22—850:23; RT6 at 1079:10—1099:5, 1095:6-8; RT7 at 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21.)

SCTA might point to the fact that the District had included a proposal to amend the Testing MOU, but the parties did not discuss the Testing MOU during that bargaining session, as Mr. Holbrook testified emphatically: "[W]e never even talked about the assessment[s] MOU. We focused entirely on Article 11, safety conditions, and then we knocked out Article 13. So we didn't even discuss the assessment[s] MOU. They continued that dialogue outside the table." (RT6 at 1152:18—1155:12.)

Indeed, looking to other communications or lack thereof, SCTA highlighted the Testing MOU in communications sent to members ("Messengers") describing a victory in reaching agreement on the Testing MOU. (UX CCCC, EEEE, GGGG.) But, note that SCTA never expressly touted that the Testing MOU was part of the successor agreement. (See UX CCCC, EEEE, GGGG.) Moreover, Mr. Borsos testified that he never reviewed the version of the CBA that the District's Board ratified on December 7, 2017, so any purported summary of same from SCTA in its Messengers was not even based on a common understanding of the terms and scope of the CBA. (RT5 at 1083:5—1084:1.) SCTA produced no evidence of non-privileged communications between SCTA leadership or among its large bargaining team that showed any belief by SCTA that the Testing MOU was part of the CBA. (RT3 at 531:11-22.)

Ultimately, SCTA's unilateral representations do not make them true and part of the CBA, as Mr. Holbrook summarized: "[I]t's their internal document. They put together whatever they want to put together. It has no bearing on us or our negotiations….I don't know why they call it a TA. It wasn't something that we TA'd at the table." (RT6 at 1148:5-25.) SCTA offered

no evidence that it ever directly communicated to the District that is understood the Testing MOU to be part of the parties' CBA, which Mr. Borsos confirmed: "You mean in addition to the seven or more status of negotiations updates, the post hearing brief, the contract summary to our members, the ratification summary to our members? No, I don't believe there are any others beyond that, but there may be, but I'm not aware of them." (RT5 at 1076:1-10.) SCTA cannot impose by fiat a mutual consent between the parties.

4. SCTA's Silence Leading up to the Ratification of the CBA Is Consistent with the Evidence that the Testing MOU was not Part of the CBA.

SCTA did in fact have the opportunity to ensure that the Testing MOU was made part of the CBA as the District prepared to put the CBA before the Board on December 7, 2017. (RT7 at 1425:16-25.) Yet, and even though Ms. Milevsky characterized it as a "major issue," SCTA never told the Superintendent or anyone at the District that the Testing MOU should be included in the version of the CBA for adoption the night of December 7, 2017. (RT7 at 1425:16-25.) In nearly a month-long window, when presented with the very purpose of tying up "loose ends" for ratification of the CBA, no one from SCTA replied or communicated in writing asking the District to include the Testing MOU as part of the CBA. (RT7 at 1557:13—1566:7.) Indeed, like Mr. Holbrook before him, the Superintendent would have rejected such a notion. (DX 8, 9; RT2 at 288:5-11.) Mr. Borsos, Ms. Milevsky, and Mr. Fisher—not one of them—ever verbally raised the matter. (RT6 at 1014:13—1018-9; RT7 at 1557:13—1566:7.)

Again, as highlighted above, the testimony of SCTA's witnesses at hearing regarding what the Board voted on was unusual and inconsistent. Again, these are not just random members of the public; SCTA was a party to the CBA, negotiated over the course of a year. One would expect SCTA's president, Mr. Fisher, to have reviewed the CBA, but at hearing, he testified that he could not recall specifically whether he reviewed the version of CBA that was being considered and ratified by the Board that evening or whether one was even made available to the public. (RT5 at 1026:22—1028:13.) Ms. Milevsky did recall reviewing the CBA that was made available to the public and asked the District to remove the Theodore Judah MOU from it. (RT3 at 574:12—575:7; RT4 at 738:7—739:2; RT7 at 1431:10—1432:2.) In contrast to Ms. Milevsky's testimony, Mr. Borsos testified that he did not review the version of the CBA approved by the Board that evening. (RT5 at 1083:5—1084:1.) Having not reviewed what was presented to the Board, and without consulting with the District, and seemingly not Ms.

Milevsky, Mr. Borsos prepared a version of the CBA that SCTA members voted to approve later on or about December 11, 2017. (UX A.) In addition to falling short of its burden of proof, their testimony is jarring to say the least, especially after SCTA had previously decided to strike over the contents of this document. (RT2 at 293:9-17; RT5 at 928:18-22.)

5. SCTA's Conduct Upon Alleged Breach of the Testing MOU Until Filing of Grievance Is Consistent with the Evidence that the Testing MOU was not Part of the CBA.

When the District notified SCTA on April 24, 2019, that it intended to administer assessments that spring, SCTA did not file a grievance, as it would if there was an alleged violation of the CBA. (RT6 at 973:25—983:18.) Later in fall 2019, when the District again notified SCTA of its intent to administer assessments that school year, SCTA did not file a grievance initially, but, instead, invoked the dispute resolution process of the Testing MOU. (UX DDDDD.) Nowhere in SCTA's said communications did it invoke Article 4 of the CBA, which is evidence of its belief that the Testing MOU was not part of the CBA. (UX DDDDD.) The first time SCTA made the claim that the Testing MOU was subject to the Article 4 grievance procedures was by way of the instant grievance, filed on September 16, 2019. (UX IIIII.)

D. SCTA's Fruitless and Hypocritical "Gotcha" of Prior Testimony.

Absent any evidence to support its jurisdictional claim, SCTA reached for evidence offered in prior proceedings of the District stating that an 83-page document compiled by Mr. Borsos was the CBA that the Board ratified on December 7, 2017. SCTA sought to use prior testimony of District witnesses including Superintendent Aguilar, Mr. Holbrook, Ms. McArn, Mr. Appel, and Ms. Nguyen, wherein each testified that SCTA's version of the MOU was the MOU ratified by the District's Board. But as confirmed by each of these same witnesses in this proceeding: (1) the Testing MOU was not at issue in the prior proceeding; (2) no one would have testified as such if they reviewed the document and found the Testing MOU; and (3) the Testing MOU was never adopted by the Board. (RT7 at 1427:18—1430:10, 1606:14—1608:19.) SCTA also tried to make use of a stipulation between the parties in a prior proceeding. (UX SSSSS.) But, the Superintendent testified that he would not have authorized any stipulation if it included the Testing MOU as part of the CBA. (RT7 at 1608:14-18.)

While the District could also point to Mr. Fisher's testimony in another proceeding, in which he admitted that the District's version of the CBA (without the Testing MOU) was the operative CBA, such evidence—like that presented against the District—is not probative or

ultimately relevant. (See RT6 at 1109:9—1111:8 and DX 54; see also *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 457.) It is "a general rule that a pleading containing an admission is admissible against the pleader in a proceeding subsequent to the one in which the pleading is filed," but "it is always competent for the party against whom the pleading is offered to show that the statements were inadvertently made or were not authorized by him or made under mistake of fact." (*Id.*) Notably, "the person against whom such evidentiary admissions are offered may explain the admission and thereby, in effect, controvert it or at least avoid being held to the fact apparently admitted," and thus "reliance by a moving party on evidentiary admissions generally precludes summary judgment." (*Id.* at 457-58.) Again, the District's witnesses offered credible evidence, explaining away and clarifying their testimony in a prior proceeding—that is, the Testing MOU was not part of the parties' CBA and the version of the CBA which SCTA has relied on is not the CBA which the Board ratified on December 7, 2017.

In any event, as noted above, SCTA's version of the CBA, which is bates-stamped and includes the Testing MOU at pages 81-82, was never moved into evidence.

II. SCTA'S CONTENTION THAT THE GRIEVANCE IS ARBITRABLE BECAUSE THE MOU OTHERWISE WAS PART OF THE CBA LACKS MERIT.

A. The Arbitrator Cannot Add the Testing MOU to the CBA.

Notwithstanding the arguments set forth above, the Arbitrator simply lacks authority to alter or amend the terms of the CBA to unilaterally incorporate the Testing MOU into the CBA. (*Jordan v. Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 444; see also *Elkouri & Elkouri*, ch. 3.3.B; *Goodyear Aerospace Corp.*, 86 LA 584, 586 (Fullmer, 1985) ["It is of course, the arbitrators [sic] job to interpret the labor agreement, not write it"]; *Lorillard, Inc.*, 87 LA 507, 512 (Chalfie, 1986) [arbitrator's "function is not to rewrite that Agreement and certainly it is not to suggest, imply nor to inform the Parties of what changes should be effected, renegotiated or changed…The Arbitrator's Award . . . must derive its essence from the Agreement, and . . . tell the Parties what they can or cannot do inside of that Agreement"].) The powers of arbitrators derive from, and are further limited by, the agreement to arbitrate, and an arbitrator is bound to give force and effect to those terms. (*Delta Lines, Inc. v. Internat. Brotherhood of Teamsters, Local 468* (1977) 66 Cal.App.3d 960, 966 [noting arbitrator derives power *solely* from arbitration agreement and cannot exceed those derived powers]; *Oxbow Calcining, LLC*, 137 LA 813, 817 (Nicholas, 2017) [arbitrator declining to hear 401(k)-contribution-plan-related grievance on

substantive arbitrability grounds, because plan provided that all disputes be resolved under plan terms and by Plan Administrator, reasoning that dispute "is not a matter that is ripe for an Arbitrator's judgment," and therefore consideration of grievance "would be exceeding his authority as granted him"].)

In accord, the CBA here contains clear language defining the scope of the Arbitrator's authority. First, the decision at arbitration shall be limited to hearing a grievance, as defined by Article 4.1.1 of the CBA—i.e., the alleged "violation, misinterpretation or misapplication *of a specific term of this Agreement*." (DX 11 at SCUSD3736, emphasis added.) Second, Article 4.5.8 of the CBA further provides that an arbitrator "shall not render any award which conflicts with, or alters this Agreement." (DX 11 at SCUSD3744.) The limited scope of the Arbitrator's authority as provided in the CBA itself, and reinforced by *Jordan* and *Delta Lines*, etc., *supra*, is fatal to SCTA's grievance.

As established by the weight of the evidence, the District's Board never ratified the Testing MOU as part of the CBA. (RT4 at 849:22—850:23; RT6 at 1095:6-8; RT7 at 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21.) SCTA's contention *in its grievance* that the District has "violated the Monitoring of Student Progress MOU," therefore, seeks an award that calls upon the Arbitrator to superimpose the Testing MOU onto the CBA, despite the absence of any evidence that the Board knew that the Testing MOU was part of the CBA when it ratified the CBA. (UX IIIII.) The law mandates rejection of SCTA's request where there is no evidence in the agreement that the other party voted for a provision in the CBA. (*Dept. of Personnel Admin. v. Cal. Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1202-03 ["*CCPOA*"]; *Cal. Statewide Law Enforcement Assn. v. Dept. of Personnel Admin.* (2011) 192 Cal.App.4th 1, 16.)

In *CCPOA*, the employer State of California and the California Correctional Peace Officers Association disagreed as to whether the CBA eliminated a 10,000 hour cap on earned sick-leave credits. (*Id.* at 1197-98.) The union alleged the cap had been removed per the parties' agreement, although the same was not expressly reduced to writing. (*Id.*) The arbitrator ordered the omitted terms should be effectively written in to the contract. (*Id.* at 1203.) During the arbitration proceedings, the union introduced evidence of prior bargaining proposals showing discussion and alleged likely agreement regarding elimination of the cap. (*Id.* at 1197-98.) The arbitrator ruled that the weight of the evidence showed the parties mutually agreed, off the record

but at the bargaining table, to remove the 10,000–hour cap, thus finding through parol evidence that the parties' agreement was imperfectly reduced to writing. (*Id.* at 1199.) The State filed a petition in the superior court to vacate the arbitration award, in relevant part, because the arbitrator's decision violated public policy in that it enforced a version of the collective bargaining agreement that was never submitted to the governing body for approval, as required by law. (*Id.*)

In *CCPOA*, the Court of Appeal affirmed the trial court's vacating of the award, reasoning that "by reforming the written MOU in a manner that changed the provisions approved by the [governing body], the arbitrator violated the Dills Act and the important public policy of legislative oversight of employee contracts." (*Id.* at 1203.) *CCPOA* upheld the trial court's authority to vacate the award as exceeding the arbitrator's powers and against public policy because, without legislative approval, the modified collective bargaining agreement violated applicable Government Code provisions and "the important public policy of legislative oversight of employee contracts." (*Id.*)

Likewise in *California Statewide Law Enforcement Association*, the Court of Appeal disagreed with the arbitrator, who looked to extrinsic evidence to impose an agreement into a CBA, where there was no express agreement by the employer, i.e., the State Legislature, with the appellate court concluding that "[s]uch approval is necessary under [statute]" and "[c]onsequently, to the extent that the arbitrator's award mandates that the agreement be enforced without unequivocal legislative approval, it violates public policy." (*See Cal. Statewide Law Enforcement Assn.*, 192 Cal.App.4th at 16.) Again relevant here, the Court of Appeal, in vacating the arbitration award, further explained:

> Simply stated, it is not sufficient that the Legislature was aware DPA could agree . . . to make the safety member retirement credit retroactive. The Legislature had to (1) be informed explicitly that DPA and CSLEA did enter into such an agreement, (2) be provided with a fiscal analysis of the cost of retroactive application of the agreement, and (3) with said knowledge, vote to approve or disapprove the agreement and expenditure.

(*Id.* at 19.)

CCPOA and *California Statewide Law Enforcement Association* are controlling. Here, too, in light of the inflexible mandate of Education Code section 17604—that a school board must ratify agreements—SCTA cannot win an award under the CBA's grievance machinery for a dispute over an agreement that the District's Board never approved. (Ed. Code, § 17604; see

also *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504, 520 ["If the matter proceeds to arbitration and results in an award that conflicts with the Education Code, the award must be vacated"], citing *Bd. of Ed. v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 287-88.)

SCTA did not prove that the District's Board ratified the Testing MOU as part of the CBA. Conversely, the evidence overwhelmingly proves that the Board never considered or approved the Testing MOU, nor did the parties intend for the Testing MOU to be incorporated into the CBA—an undisputable fact which Superintendent Aguilar, Mr. Holbrook, Mr. Appel, Ms. McArn, and Ms. Nguyen each confirmed. (RT4 at 849:22—850:23; RT6 at 1095:6-8; RT7 at 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21; see generally Part I, *infra*.)

For the reasons stated above, it is wholly improper, contrary to law and contract, and a violation of public policy to agree with SCTA's invitation to add to terms to the CBA in a manner inconsistent with that which the Board expressly approved. Therefore, the Arbitrator must deny the grievance in full on this ground alone.

B. SCTA Cannot Alter the CBA under the Guise of Past Practice.

Left with insurmountable evidence that the Testing MOU was not ratified as part of the CBA, SCTA contends that all memoranda of understanding between the parties are automatically incorporated in the CBA as a matter of past practice and grievable under the Article 4 grievance procedures. Even if true, which the District denies, there is no evidence that SCTA communicated this understanding to the District. (See RT1 at 266:10-14.) Moreover, the CBA expressly terminated any past practice and agreements. (DX 11 at SCUSD3735.) Lastly, SCTA only offered evidence of sporadic instances of SCTA grieving an alleged violation of an MOU, evidence that is severely deficient to establish any such past practice of incorporating all MOUs into the CBA.

1. The Testing MOU was Not Incorporated into the CBA as Past Practice.

It is a longstanding tenet of contract interpretation that one party's undisclosed understandings and impressions are not dispositive to determine the meaning of contract language. *Kahn's & Co.*, 83 LA 1225, 1229-30 (Murphy, 1984), is on point here. There, a company never communicated to the union the meaning it claimed in arbitration to have attached to a term during negotiations, and the arbitrator determined that, even if the company did in fact

hold that understanding during negotiations, because the understanding was never communicated to the union, it was merely an unexpressed understanding of the company, ultimately immaterial to contractual meaning. (*Id.*) Accordingly, Arbitrator John Murphy found: "The intent manifested by the parties to each other during negotiations by their communications and their responsive proposals— rather than undisclosed understandings and impressions—is considered by the arbitrators in determining contract language." (*Id.*)

The same is true here. Even if SCTA did hold such an understanding during negotiations that the Testing MOU was automatically incorporated into the CBA, it offered no evidence that it communicated this to the District's negotiations team. On direct examination during SCTA's case-in-chief, Mr. Appel testified that SCTA never communicated its understanding in the course of his negotiation of the Testing MOU:

> Q: Okay. In November of 2016, did the parties discuss the incorporation of the MOU into the Collective Bargaining Agreement?
>
> A: I don't recall ever doing that.

(RT1 at 266:10-14.) So while SCTA contends that the Testing MOU was automatically incorporated into the CBA, SCTA's uncommunicated understanding cannot be relied upon in interpreting the contract language, and its associated theory on point must fail. (See *Kahn's & Co.*, 83 LA at 1229-30; see also *Jefferson Smurfit Corp*., 102 LA 164, 166 (Duff., 1994) ["union ought not to be permitted to obtain here under the guise of interpretation an objective it did not even try to obtain through negotiations"].)

Moreover, the plain language of the CBA is dispositive. Specifically, Article 3.1 quite clearly provides: "This Agreement terminates and supersedes all past practices, agreements, procedures, traditions, and rules or regulations concerning the matters herein." (DX 11 at SCUSD3735.) The "plain meaning rule" is well established in the context of labor contract interpretation—"if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." (*Elkouri & Elkouri*, ch. 9.2.A; see also *National Linen Serv*., 95 LA 829, 834 (Abrams, 1990) [provisions in written agreement were binding even though union contended that written contract included terms on which parties had not agreed].) The parties expressly negotiated a term in the CBA which terminated any and "all past practices" and "agreements," a

term that the District approved on December 7, 2017, and SCTA membership adopted on December 11, 2017. (UX A at 37; DX 11 at SCUSD3735.)

This means—even assuming *arguendo* that the parties incorporated memorandums of understanding automatically into their collective bargaining agreements as a matter of past practice—they negotiated and expressly rejected that past practice by way of Article 3.1. (UX A at 37; DX 11 at SCUSD3735.) Moreover, the Testing MOU was signed on November 30, 2016, and Article 3.1 also explicitly "terminates and supersedes all past…agreements…concerning the matters herein." (UX A at 37; DX 11 at SCUSD3735.) Thus, insofar as MOUs were previously incorporated into the parties' CBA as a matter of past practice, Article 3.1 eliminated such a notion. (See *St. Louis Post Dispatch*, 116 LA 760, 775-77 (Dichter, 2001) [where language in agreement supersedes "all prior agreements…including any letter of interpretation, verbal understandings and/or past practices," any past practice existing before contract signed may not be considered].)

In addition, SCTA did not prove that the Testing MOU survived or otherwise merged with the CBA. Article 3.2 provides that:

> The parties agree that during the negotiations which culminated in this Agreement, each party enjoyed the right and opportunity to make demands and proposals or counter proposals with respect to any matter not reserved by policy or law from compromise through negotiations, and that the understandings and agreements arrived at after the exercise of that right and opportunity are set forth herein.

(UX A at 37; DX 11 at SCUSD3735.) SCTA presented its version of the CBA at hearing, but never moved that document into evidence and the Arbitrator did not make a ruling regarding the same's admission into evidence. At hearing, in the course of presenting this past practice argument, SCTA never addressed Article 3.1 and Article 3.2, both of which reject any notion that the Testing MOU was made a part of the CBA as a matter of a past practice.

2. SCTA Never Proved a Past Practice for Incorporating the Testing MOU into the CBA.

Even if SCTA somehow overcomes the express language of Article 3.1 terminating past practices and agreements, SCTA has failed to meet its burden of proving the existence of a past practice. (*Elkouri & Elkouri*, ch. 12.2, citing *Erie County*, 129 LA 79, 85 (D'Eletto, 2011) [party asserting the past practice has burden of demonstrating its existence].) To be enforceable, a past practice must be: "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily

ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." (*Elkouri & Elkouri*, ch. 12.2, citing *Burroughs Corp. of Am.*, 120 LA 1247, 1252 (McDonald, 2004); *Carlton Cnty*., 132 LA 73, 79 (Imes, 2013) [union could not successfully claim past practice in work assignments where purported practice had not been followed several times since 2002]; *City of Alliance*, 121 LA 1352, 1355 (Frankiewicz, 2005) [noting that "regimen bears all the genes of a binding past practice: clear, consistent, long-standing, and frequent"].) "When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required." (*Elkouri & Elkouri*, ch. 12.1, citing *GTE Hawaiian Tel. Co.*, 98 LA 832, 834-35 (Najita, 1991); see also *Mich. Dept. of State Police*, 97 LA 721, 722 (Kanner, 1991).)

SCTA presented evidence of five grievances[8] it previously filed alleging violations of an MOU (or side letter)—two of which related to the same MOU—to support its belief that all MOUs are automatically incorporated into the CBA, and thus subject to the grievance machinery of Article 4 of the CBA. (See UX WWWWW, DDDDDD, EEEEEE, FFFFFF, and GGGGGG; RT4 at 765:23—767:4; RT7 at 1433:17—1439:1.) Unfortunately for SCTA, sporadic occurrences of an activity do not rise to the level of a past practice. (See *Elkouri & Elkouri*, ch. 12.2, citing *Kohler Printing*, 125 LA 137, 146 (McReynolds, 2008) ["The two instances when post-accident drug testing was waived and the single incident where another employee was sent to rehabilitation are far too isolated and remote to constitute an enforceable 'past practice' as that term is commonly used"].) Evidence that SCTA has grieved alleged violations of four different MOUs does not establish unequivocally the existence of a past practice. (See *Nashville Symphony Orchestra*, 132 LA 174, 190 (Ruben, 2013) ["(f)our instances over a number of years falls short of qualifying as a past practice"]; *International Paper Co.*, 132 LA 556, 561-62 (Nicholas, 2013) [arbitrator found that three instances of giving last-chance agreements to employees who completed employee assistance program after being found inebriated at work did not establish past practice between union and employer].)

[8] The District objected to the admission of UX DDDDDD, EEEEEE, FFFFFF and GGGGGG on the grounds that SCTA failed to produce the evidence, which it was required to do under Article 4.5.7: "Neither the District nor the grievant shall be permitted to assert any grounds or evidence before the arbitrator which was not previously disclosed to the other party." (RT7 at 1438:8-12, 1439:2-7, 1440:19-21, 1443:22-25.) Nonetheless, even if the Arbitrator considers this evidence, the evidence is still insufficient to establish a past practice as a matter of law.

Of the five grievances, one was filed in 2014 and the other was filed in 2015, well before the Board ratified the parties' CBA on December 7, 2017, including Article 3.1, which expressly terminated any past practice. (UX DDDDDD, GGGGGG.) Thus, SCTA is left with three grievances offered and admitted into evidence for purposes of proving a past practice. Mr. Fisher testified that he has been the signatory of at least 25 MOU's between the District and SCTA, yet SCTA offered no credible evidence to support its contention that each of those MOUs were somehow automatically incorporated into the CBA beyond the introduction of three grievances alleging violations of MOU. (See RT4 at 840:22—841:4.) This evidence—three available grievances—is sporadic and far from unequivocal, clearly enunciated and acted upon, or readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties. (*Elkouri & Elkouri,* ch. 12.2.)

Moreover, all five grievances offered as proof of a past practice showed that these grievances alleged an actual violation of the CBA with citations to specific articles of the CBA or otherwise pertained to a subject matter covered by the CBA. (RT7 at 1452:23—1456:6.) Ms. Nguyen testified that the grievance at Union Exhibit DDDDDD implicated a provision of the CBA because it relates to class size, and "[t]here is an article in the contract language that speaks to class size maximum and caseload, and Article, I believe [it's] Article 17." (RT7 at 1452:23—1453:18.) Ms. Nguyen testified that the grievance at Union Exhibit EEEEEE also implicated Article 17 of the CBA regarding class size and caseloads for counselors. (RT7 at 1453:20—1454:11.) Ms. Nguyen testified that the grievance at Union Exhibit FFFFFF implicated Articles 6 and 12 of the CBA. (RT7 at 1455:7-12.) Ms. Nguyen testified that the grievance at Union Exhibit GGGGGG implicated the article in the CBA regarding substitutes, which she believed was Article 6. (RT7 at 1455:14—1456:6.) Finally, the grievance at Union Exhibit WWWWW specifically mentions article 12.3 of the CBA. (UX WWWWW.)

As Ms. Nguyen confirmed, each of those grievances alleged, to a degree distinct from this case, a violation of some provision of the parties' CBA. (RT7 at 1452:23—1456:6.) A grievance would be proper as an alleged violation of the CBA. The current grievance, however, only alleges a violation of the Testing MOU—which, as the record evidence demonstrates, is not part of the CBA. (UX IIIII ["Superintendent Aguilar and the SCUSD Administration violated the 'Monitoring of Student Progress' MOU' when he/they unilaterally implemented an 'Assessment schedule' that mandated multiple District-wide assessments in violation of the

MOU and rejected the SCTA offer to resolve the dispute using an expedited resolution process outlined in the MOU"].)

Finally, the Testing MOU, unlike the other MOUs in evidence, expressly identified a dispute resolution procedure that is *not* the grievance machinery of the CBA. (JX 1 at ¶ 3.) Mr. Borsos confirmed in testimony that the Testing MOU "is the only" MOU between the parties that has a "final and binding" dispute resolution process such as the "baseball arbitration" procedure specified in the Testing MOU. (RT5 at 1069:11-13.) Consequently, even if SCTA met its evidentiary burden of proving a past practice, the express language of the Testing MOU created an exception to that practice. In sum, SCTA offered little proof for its position that all MOUs are automatically incorporated into the CBA.

III. THE MOU IS NOT LEGALLY VALID OR ENFORCEABLE ANYWAY.

SCTA did not meet its burden to prove that the Testing MOU is a legally enforceable agreement.

A. The Board Never Ratified the Testing MOU.

As discussed above, absent compliance with Education Code section 17604, *any* purported contract with the District is void and unenforceable. (See, e.g., *Persh*, 5 Cal.App.3d at 952 [finding no enforceable contract against school district requiring it to purchase property for particular price where district's board had not ratified or approved last offer of contract for purchase of same]; *El Camino*, 173 Cal.App.3d at 612-13 [finding unenforceable arbitration clause agreements in contract signed by two vice-presidents of community college district, but never approved or ratified by district's governing board].)

In *Persh*, the Court of Appeal held there was no enforceable contract against a school district requiring it to purchase property for a particular price where the school district's board had not ratified or approved the last offer of a contract for the purchase of the same. (See *Persh*, 5 Cal.App.3d at 952.) To be effective, contracts purportedly executed on behalf of a school district must be formally approved or ratified by the district's governing board as specified in section 17604. (See *id.* at 953.) While Education Code section 35035 provides that the superintendent may "[e]nter into contracts for and on behalf of the district," that section also expressly stipulates that such power must be exercised pursuant to Section 17604. (Ed. Code, § 35035, subd. (h).) Section 17604 states plainly that: "However, no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the

district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted." (Ed. Code, § 17604; *Patterson v. Bd. of Trustees* (1958) 157 Cal.App.2d 811, 818 ["A board of school trustees is an administrative agency created by statute and invested only with the powers expressly conferred by the Legislature and cannot exceed the powers granted to [it]"].)

As stated in *City of Pasadena v. Estrin* (1931) 212 Cal. 231, 235, the municipality context, but directly applicable here where the District is bound by statute to certain modes of entering into binding contracts:

> It is too well settled to require an extended citation of authority that when, by charter or statute, the mode and manner in which contracts of a municipal corporation may be entered into is provided for and, as here, any other method is expressly or impliedly prohibited, no contract will be binding on the municipality unless made in the manner specified and no implied liability can arise from the benefits received thereunder; nor can the same be the subject of ratification or an estoppel in pais. [Citation.] The mode specified constitutes the measure of the power and persons dealing with a municipal corporation are chargeable with knowledge of the limitation of the authority of its officers and agents. [Citation.]

Here, as in both *Persh* and *El Camino, supra*, SCTA presented no evidence that the Board ratified the Testing MOU at all; indeed, the District proved the opposite. (DX 11; RT4 at 849:22—850:23; RT6 at 1095:6-8; RT7 at 1421:8—1422:19, 1424:9—1425:11, 1456:8-13, 1566:15-21.) Therefore, the Testing MOU—even as a stand-alone agreement—is not legally enforceable under Education Code section 17604. (See, e.g., *Persh*, 5 Cal.App.3d at 952-53; see also *Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460, 1473 ["A contract entered into by a local government without legal authority is 'wholly void,' ultra vires, and unenforceable"].)

B. The Testing MOU, as Applied, Violates the State's Constitutional Protections against Discrimination in Education.

The Testing MOU is also unenforceable because, as applied, it has caused a disparate impact on African American, Latino, and English learner students. (See, e.g., *Richey v. AutoNation, Inc*. (2015) 60 Cal.4th 909, 916 ["(a)rbitrators may exceed their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy"].) The Testing MOU violates the Equal Protection clause of the California Constitution. (Cal. Const., art I, § 7.) "[E]vidence of a disparate impact is sufficient to support an equal protection claim based on unequal treatment affecting the

fundamental right to an appropriate education." (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 900.) The District's inability to assess students has a demonstrated disparate and discriminatory impact on African American, Latino, and English learner students.

1. Demonstrated Disparate Impact on African American, Latino, and English Learner Students Support an Equal Protection Claim.

The District is not just chasing a legal theory here. In 2014, OCR conducted an investigation into a complaint alleging that the District discriminated against students at a school site on the basis of race or national origin by implementing policies and procedures that denied Latino students equal access to GATE classrooms. (DX 13.) Following its investigation, OCR entered into an agreement with the District in 2014 designed to address discriminatory effects on students and ensure equal access for all students to the District's GATE program. (DX 13; RT6 at 1263:23—1264:6.) In its November 16, 2018 letter to the District, OCR stated:

> The data show[ed] that a substantial disparity in GATE eligibility between Aftican American, Latino, and English [learner] students and white students during the 2013-14 and 2014-15 school years. The District significantly reduced this disparity during the 2015-16 school year due in large part to an increased number of opportunities for students to demonstrate their ability and achievement, through multiple administration of local assessments.

(DX 15.)

But in the 2016-17 and 2017-18 school years, i.e., since the Testing MOU took effect, the disparities in GATE eligibility between African American students compared to white students had again increased. (DX 15.) OCR found that only 3.6% of GATE students identified in first grade were African American students, even though African American students represented 14.4% of the District's student population. (DX 15; see *Collins*, 41 Cal.App.5th at 898 [plaintiffs may properly allege equal protection claim under State Constitution when school district's "disciplinary policies have created a segregated school system whereby minority students are placed in allegedly lower quality school settings in substantially higher proportions than their population or disciplinary requirements warrant"].) The inability for the District to assess students creates this disparity, as Mr. Turkie also confirmed during his testimony: "[T]he less opportunities which we provide, then the less accurate we are able to get our GATE eligibility, which means the disproportionality is much, much more likely to be higher with the less amount of assessments which we give." (RT6 at 1268:20—1269:3-17.)

Mr. Turkie also testified how the Testing MOU, as applied, provides less opportunities for students to demonstrate academic achievement, which results in disparities between English learner students, Latino, and African American students and their counterparts. (RT6 at 1268:20—1270:6.) Moreover, with respect to English learner redesignation specifically, the less opportunities these students have to demonstrate their academic achievement has a direct and detrimental impact on the District's ability to redesignate English learners.[9] (RT6 at 1268:20—1270:6.) Mr. Turkie further testified that these English learners are impacted by limited District-wide assessments, because these students overwhelming have less parent advocacy than these students' white counterparts. (RT7 at 1517:10—1518:3.) "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*Cooley v. Superior Court* (2003) 29 Cal.4th 228, 253, internal quotations omitted.)

Superintendent Aguilar presented these very concerns to SCTA in a November 13, 2018 letter: "The lack of assessments also impacts the ability of the District to reclassify English learners and identify students for Gifted and Talented Education services." (UX LLLL.) Superintendent Aguilar also informed SCTA of its meeting with OCR: "At a recent meeting with the Office of Civil Rights, OCR noted the negative impact caused by the inability to use multiple assessments measures for GATE identification, particularly to students from traditionally under-served and under-represented student groups." (UX LLLL.) SCTA responded by agreeing to meet just once that school year to discuss the District's proposed assessments schedule. (RT6 at 1254:12—1255:7; UX BBBBB.)

2. As Applied, the Testing MOU Precluded Assessments of African American, Latino, and English Learner Students.

When the parties signed the Testing MOU, the intent was not to provide SCTA with the power to obstruct the District's ability to administer any assessments; rather the purpose of the "timely and good faith" agreement provision was, as Mr. Appel testified, to resolve any disagreements promptly so the assessments could be administered as scheduled. (RT6 at 1118:19—1119:1.) Thus, the language of the Testing MOU is facially neutral, but SCTA's

[9] English learner redesignation is mandated by the Education Code. The English Language Proficiency (ELP) Assessment requirements are specified in Education Code sections 313, 60810, and 60812.

conduct precluded the District from administering assessments designed to remedy disparate impacts on African American, Latino, and English learner students, a consequence that rendered the Testing MOU unlawful.

As explained by the California Supreme Court:

> [A] school board in this state is not constitutionally free to adopt any facially neutral policy it chooses, oblivious to such policy's actual differential impact on the minority children in its schools. As recent California decisions concerning the constitutional obligations of state officials have held, public officials in some circumstances bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory results.

(*Crawford v. Bd. of Ed.* (1976) 17 Cal.3d 280, 296-97 [addressing constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin]; see also *Collins*, 41 Cal.App.5th at 899 [reasoning that *Crawford* extends to claim that "de facto racial segregation due to racially discriminatory disciplinary practices are receiving an education that is fundamentally below the standards provided elsewhere throughout the state where the legal proscriptions on such discriminatory practices are being enforced"].)

Indeed, presented with such obstruction by SCTA, which is outlined further below, the District undertook *Crawford's* "affirmative obligation" to "avoid discriminatory results" and acted to administer the additional assessments at the end of the 2018-2019 school year. (UX BBBBB at SCTA772; RT7 at 1592:12—1596:9.) When the District unilaterally administered these assessments, the data demonstrated how the absence of such assessments impacted students: the District was able to identify 758 first and third grade students for GATE and 514 English learners were reclassified at the end of the 2018-19 academic year. (UX BBBBB; RT7 at 1599:18—1601:8.) With respect to this data, Superintendent Aguilar testified:

> As much as this is a celebratory data point, the fact is that our obligation is also to intervene on behalf of students that weren't demonstrating throughout the course of an academic year that they were on pace [and] finished their academic year demonstrating grade level proficiency.

(RT7 at 1598:15—1601:3.)

Therefore, the District intended to administer assessments beginning in the fall of 2019 to prevent further discriminatory impact, as Superintendent Aguilar testified: "I just felt that it was at that point…it was our obligation to implement the schedule of assessment that we had been

trying to work with SCTA." (RT7 at 1602:2-14.) That decision to prevent any further discriminatory impact prompted the instant grievance by SCTA.

Ms. Milevsky's interpretation of the Testing MOU—that parents could purportedly opt-in to assessments that SCTA refused to approve—only confirms the discriminatory impact on these students. (RT2 at 461:9—463:4; RT7 at 1517:10—1518:3.) Ms. Milevsky testified that under her interpretation of the Testing MOU, a parent could opt-in to certain District-wide assessments. (RT2 at 461:9—463:4.) However, relying on parents to opt-in to District-wide assessments only perpetuates the disproportionality based on race, as Mr. Turkie testified:

> What we find are the lines of race and parent advocacy are oftentimes in the same exact place, right. Which basically means in predominantly white rich schools, there is no way that a parents would let or accept a teacher not doing testing for their students to get into GATE, because the lines of advocacy and race are in the same place, and entitlement, if you want to put is that way, whereas other schools are poorer and have got more students of color, more students who don't speak English as a first language, then there is less parent advocacy and what we found when going through the data is there will be sort of school - - teachers within school who simply did not give the assessment and we had not data at all for large groups of students, which disproportionately would be impacting our poorer students and students of color and our English-learner students.

(RT7 at 1517:10—1518:3; see also RT7 at 1519:6—1520:1.)

SCTA Vice-President Ms. Milevsky testified that EL redesignation is required by law and "it wasn't really a concern to me about that being overtesting." (RT2 at 424:9-16.) Yet, SCTA would only agree to these assessments for one school year only and at the end of the school year, which is not sound practice. (RT7 at 1510:19—1516:22.) The California Standards of the Teaching Profession, Standard 5-Assessing Students for Learning, speak to the need for assessments:

> Teachers apply knowledge of the purposes, characteristics, and uses of different types of assessments. They collect and analyze assessment data from a variety of sources and use those data to inform instruction. They review data, both individually and with colleagues, to monitor student learning. Teachers use assessment data to establish learning goals and to plan, differentiate, and modify instruction. They involve all students in self-assessment, goal setting, and monitoring progress. Teachers use available technologies to assist in assessment, analysis, and communication of student learning. They use assessment information to share timely and comprehensive feedback with students and their family.

(DX 52.)

The District informed SCTA of the concern over the impact on students in its November 13, 2018 letter, and again on November 26, 2018, and the District provided additional information about OCR's concerns to SCTA on February 27, 2019 at SCTA's request. (UX LLLL, NNNN, TTTT, VVVV.) Taken together with SCTA's refusal to propose any counter or revised assessments schedule, in light of the District's repeated pleas, this evidence of SCTA's conduct subjects the Testing MOU to greater scrutiny under the state's anti-discrimination statutes. (See RT7 at 1517:10—1518:3; UX BBBBB; see Ed. Code, §§ 200 and 201, subd. (a) ["All pupils have the right to participate fully in the educational process, free from discrimination and harassment"]; *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 605 [providing for money damages under Education Code section 220 by showing agency's "own deliberate indifference to known" conduct in harassment case]; see also Gov. Code, § 11135, subd. (a) [prohibiting denial of "full and equal access to the benefits of…any program" funded by state].)

The Testing MOU is unenforceable because it otherwise permits the disparate treatment of African American, Latino, and English learner students in violation of the State Constitution. (RT6 at 1268:20—1270:6.)

C. The Testing MOU Divests Powers the Legislature Expressly Vested with the Board.

The Testing MOU is otherwise unenforceable because it requires that the District "mutually develop and mutually agree" to District-wide assessments with SCTA, divesting in perpetuity the policymaking authority from the District's publicly elected board on a matter that the Education Code expressly vests with it. (JX 1 at ¶ 3.) This is a policy matter that the District expressly addressed in its Board policies, which recognize "the importance of evaluating student achievement and monitoring" and require the District to "regularly" and "frequently monitor the well-being of our students." (See RT7 at 1567:7-23, 1570:6—1572:4; DX 49, 50, 52; see also *Pasadena Unified Sch. Dist. v. Commn. on Professional Competence* (1977) 20 Cal.3d 309, 314 [noting action by district, in violation of its own policies, cannot be upheld]; *Richey*, 60 Cal.4th at 917 ["judicial review may be warranted when a party claims that an arbitrator has enforced an entire contract or transaction that is illegal"].) The Testing MOU contravened these Board policies and the Education Code. Board Policy 5123, Promotion/Acceleration/Retention, for example, states that "[e]ach school has the responsibility to provide frequent reviews of student

performance," and that "[s]tudent achievement is determined on the basis of objective data using multiple assessment." (DX 50 at SCUSD3830-31.) "It is a familiar principle of law that no legislative board, by normal legislative enactment, may divest itself or future boards of the power to enact legislation within its competence." (*City & County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 929 [invalidating portion of school board resolution that purported to place terms of resolution beyond reach of future board action unless certificated employee council agreed to such future action]; see also *Thompson v. Bd. of Trustees* (1904) 144 Cal. 281, 283.)

The Education Code expressly provides that publicly elected school boards "must have the ability to choose instructional materials…" and that "instructional materials" include "tests." (Ed. Code, §§ 60000, subd. (c), 60010, subd. (h); see also *id*., § 60041 ["When adopting instructional materials for use in the schools, governing boards shall require such materials as they deem necessary and proper"].) "'Test' means a device used to measure the knowledge or achievement of pupils." (*Id.*, § 60010, subd. (n).) In contrast to the obligations and powers vested with the District's Board, the Education Code calls for "involvement" of both teachers, parents, and members of the community: "Each district board shall provide for substantial teacher *involvement* in the selection of instructional materials and shall promote the *involvement* of parents and other members of the community in the selection of instructional materials." (*Id.*, § 60002, emphasis added.)

"It is a well-accepted principle within arbitral jurisprudence that 'an arbitrator should refuse to enforce a particular contract provision if enforcement would require action forbidden by law.'" (*Labor Arbitration Decision, 149108-AAA*, [Number redacted], 2012 BNA LA Supp. 149108 (2012).) The reasons for this approach have been persuasively articulated by Professor Archibald Cox:

> The parties to collective bargaining cannot avoid negotiating and carrying out their agreement within the existing legal framework. It is either futile or grossly unjust to make an award directing them to take action which the law forbids - futile because if the employer challenges the award the union cannot enforce it, unjust because if the employer complies, he subjects himself to punishment by civil authority.

(Cox, "Place of Law in Labor Arbitration" the Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948-54 (Washington, DC: BNA, 1957), pp. 77-78.)

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Consistent with this proposition, in *Round Valley*, the California Supreme Court specifically considered an arbitration award that was contrary to statute, finding that upon petition, a court "shall" vacate the award if the court determines that an arbitrator exceeded his or her powers, and the award cannot be corrected without affecting the merits of the decision. (*Id.* at 275.) *Round Valley* ruled that a collective bargaining agreement which is inconsistent with the law may not be enforced or upheld via a grievance. (*Id.* at 279-81; see also *United Teachers of Los Angeles*, 54 Cal.4th at 520 ["If the matter proceeds to arbitration and results in an award that conflicts with the Education Code, the award must be vacated"].)

Applying these principles here, the Testing MOU is legally defective because it subverts the statutory scheme described above, putting SCTA in the position of the District's Board and eliminating any need to involve parents and other stakeholders—all without ever being considered or ratified by the District's Board at a public meeting. When "the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization." (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24.) The Testing MOU unlawfully eliminated parents entirely from the Legislature's statutory design while elevating SCTA's powers from "involvement", as provided in Education Code section 60002, to "mutual agreement," which has been applied as a veto since its execution on November 30, 2016.

IV. EVEN IF ARBITRABLE AND LEGALLY ENFORCEABLE, SCTA's GRIEVANCE IS UNTIMELY.

Notwithstanding the arguments above, and dispositive on its own, SCTA's grievance is untimely and should be dismissed on that ground alone. Article 4 governs procedures and timelines for filing grievances, providing:

> No grievance shall be recognized unless it shall have been presented at the appropriate level within thirty (30) working days after the grievant knew or reasonably should have known of the act or condition and its aggrieving nature that forms the basis of the grievance, and if not so presented, the grievance will be considered as waived.

(DX 11, CBA, art. 4.2.4.)

On April 24, 2019, after receiving no response to the District's request to meet, Superintendent Aguilar notified SCTA that the District planned to implement certain math assessments to determine math placement, GATE identification, and English learner

redesignation purposes. (UX BBBBB at SCTA772.) SCTA did not respond, nor did SCTA file a grievance after the District implemented these District-wide assessments. (RT5 at 973:25—983:18.) Then, on May 14, 2019, Mr. Fisher "texted Dr. Taylor because we were starting to [hear] that there were these assessments, as I recall." (RT5 at 929:3-8.) So, while Mr. Fisher testified that he "became aware that there were some assessments being implemented," he confirmed that SCTA never filed a grievance after the District implemented assessments that school year. (RT5 at 973:25—983:18.)

Under the clear terms of the CBA, SCTA should have filed a grievance within 30 working days after it "knew or reasonably should have known" of the alleged violation forming the basis for the grievance. Here, 30 working days from the Superintendent's April 24, 2019 letter is June 5, 2019. (See DX 11, Art. 4.2.4.) While Mr. Fisher was confused and "mixed up the times" when he had agreed to the implementation of assessments, he eventually confirmed that he had agreed to these assessments in the 2017-18 school year, but there was no such agreement for the 2018-19. (RT5 at 973:25—983:18; UX IIII.) Instead, SCTA filed its instant grievance on September 16, 2019, alleging that the District and Superintendent Aguilar violated the MOU by unilaterally implementing an assessment schedule "that mandated multiple District-wide assessments." (UX IIIII.) As stated in Part I, *supra*, the alleged violation of the Testing MOU is not grievable, but even if it were, SCTA's grievance is untimely and should be denied to the extent SCTA alleges violations beyond the 30 day window.

In the vast majority of cases, arbitrators strictly enforce contractual limitations on the time periods within which grievances must be filed, responded to, and carried through the steps of the grievance procedure where the parties have consistently enforced such requirements, and untimely grievances will be refused a hearing. (*Elkouri & Elkouri*, ch. 5.7.A.I, citing *Cosmic Distribution*, 92 LA 205, 208-09 (Prayzich, 1989); *Louie Glass Co.*, 85 LA 5, 10-11 (Hart, 1985); *Dana Corp*., 83 LA 1053, 1056 (King, 1984); *Mobile Video Servs*., 83 LA 1009, 1011-13 (Hockenberry, 1984); *Kansas Gas & Elec. Co.*, 83 LA 916, 918-19 (Thornell, 1984).) In one case, *Ashland, Inc*., the arbitrator denied a challenge to the amount of money a disabled employee received because the union did not comply with the labor contract's 10-day filing requirement. (*Ashland, Inc*., 136 LA 1697, 1701-05 (Goldstein, 2016).) While the former employee claimed he did not receive the letter, the arbitrator relied on a presumption that a properly addressed letter is properly delivered. (*Id*.) And even though the union argued that the

parties were working on a solution during the intervening period, the arbitrator found the contract did not provide for flexibility in the timeliness of grievance filing. (*Id*.)

Here, the District notified SCTA of its intent to implement District-wide assessments at the end of the 2018-19 school year on April 24, 2019, but SCTA did not respond. (UX BBBBB at SCTA772.) SCTA failed to file a grievance when it first knew that the District had implemented assessments without SCTA's express agreement. (See DX 11, Art. 4.2.4.) SCTA's grievance is therefore untimely, which constitutes a further independent basis for the Arbitrator to deny SCTA's grievance.

V. EVEN IF ARBITRABLE, LEGALLY ENFORCEABLE, AND TIMELY, SCTA FAILED TO ESTABLISH, WITH SPECIFICITY, ANY BREACH OF THE TESTING MOU, BUT ITS OWN.

Even at hearing, and consistent with the record over the last three years, SCTA could not state clearly why it disagreed with the District's proposed assessments. SCTA carried, but did not meet, this burden of proof in support of its grievance. Moreover, the law requires that SCTA prove its own performance with the Testing MOU as an essential element for its claim that the District breached the terms of the MOU. But, here, too, SCTA did not meet its burden of proof. To the contrary, the weight of the evidence shows that SCTA did not timely meet and agree with the District for ongoing District wide-assessments, and certainly the 2019-20 assessments SCTA has put at issue in the instant grievance. Therefore, the grievance must be dismissed on the merits, even if it overcomes the procedural hurdles raised above.

A. SCTA Has Not Met its Burden of Establishing that the District Breached the Testing MOU.

SCTA bears the burden of proving that "one or more members of the bargaining unit or Association that a member(s) has been adversely affected by a violation, misinterpretation, or misapplication of a specific provision of" the parties' CBA. (DX 11 at SCUSD3735; *City of Sandusky*, 98 LA at 523 [moving party has burden of proving its contract interpretation].) After the close of hearing, amounting to seven full days, SCTA did not present *any* credible evidence to satisfy its threshold burden.

Ms. Milevsky testified that her stated criteria for approving assessments was "useful, needed and provides a true educational benefit." (RT3 at 533:13-19; see also UX RR.) But SCTA did not demonstrate how or why the assessments proposed by the District on April 24, 2019, or again on August 5, 2019, failed to meet that stated criteria by SCTA. (UX XXXX,

BBBBB at SCTA772.) The record remains unclear as to which specific assessments SCTA alleges violate the Testing MOU. Nor did SCTA offer any credible evidence suggesting that the District's alleged implementation of these nonspecific assessments adversely affected any member of SCTA. SCTA otherwise indicated at hearing that it would prepare a proposed stipulation as to uncontested assessments, but consistent with the record of attempted agreement between the parties on this subject, SCTA never offered into evidence any such stipulation. (RT2 at 340:7-20.)

Mr. Borsos and Ms. Milevsky did, however, testify that under the Testing MOU, a third party neutral may decide between the District's proposed assessments and SCTA's total absence of a proposal, which is not only manifestly absurd, but both proof of SCTA's failure to demonstrate which assessments it considers a violation of the Testing MOU and its failure to engage in good faith effort with the District on agreeing to assessments. (RT3 at 595:7—596:15; RT5 at 1078:21—1082:21.) Indeed, Ms. Milevsky even stated that neutral fact-finder was supposed to choose between dates that the parties would meet to try to agree on assessments in the first place, but only because SCTA refused to provide the District with any dates, which is not only indicative of bad faith, but contrary to the explicit terms of the Testing MOU. (RT3 at 595:7—596:15.)

Notwithstanding the above, and in complete contrast to the lack of specific evidence offered by SCTA, the record clearly demonstrates that SCTA failed to make a "good faith and timely effort" to agree to District-wide assessments as explicitly required by the Testing MOU. All told, the weight of the evidence makes clear that SCTA violated the MOU for three straight years, leaving the District with no choice but to implement District-wide assessments.

B. SCTA's Failure to Make a Good Faith and Timely Effort to Agree on District-wide Assessments Constitutes a Total Breach.

For SCTA to prevail on a breach of the Testing MOU, it must demonstrate performance or excuse for nonperformance. "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) "Arbitrators continue to look to general principles of contract law to interpret contracts between the parties." (*Elkouri & Elkouri*, ch. 10.7.) "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on

its part or that it was excused from performance." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.) Thus, "[o]ne who himself breaches a contract cannot recover for a subsequent breach by the other party." (*Silver v. Bank of America, N.T. & S.A.* (1941) 47 Cal.App.2d 639, 645.) In other words, a material breach by one party to a contract relieves the other party of a duty to perform its as yet 'unripened' obligations under the breached contract. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602.)

Here, SCTA breached the Testing MOU when it failed to make a "good faith and timely" effort to agree on District-wide assessment. When time is made of the essence of a contract, a failure to perform within the time specified is a material breach of the contract. (*C. O. Bashaw Co. v. A. U. Pinkham Co.* (1926) 77 Cal.App. 591, 594.) Mr. Appel, who was Mr. Borsos's counterpart in drafting the agreement, testified that the intent behind this language was to resolve a dispute in short order for that fall so that the District could "administer the assessment as it was intended." (RT6 at 1118:10-16.) Mr. Appel noted that "it would make no sense to keep negotiating about a fall assessment into the spring. So timely meant that it would be done it a way that would enable the district to administer in a timely way." (RT6 at 1118:19—1119:1.) As the evidence showed, SCTA never agreed to assessments until the end of the school year, which not only violates the "good faith and timely" effort mandate of the provision, but is not a sound practice. (DX 11; RT7 at 1510:19—1516:22, 1513:6—1514-9.) Time had been of the essence, yet after nearly four years since the parties executed the Testing MOU, SCTA has not agreed to nor provided any counter proposal to the District for any assessments schedule. (RT7 at 1510:1-6; see *C. O. Bashaw Co.*, 77 Cal.App. at 594; *Mappa v. Council of City of Los Angeles* (1882) 61 Cal. 309, 312-313.) As such, as put well in *Coughlin v. Blair* (1953) 41 Cal.2d 587, 599-600:

> The circumstances of each case determine whether an injured party may treat a breach of contract as total...there is a limit to the time a promisee must thereafter await performance. The trial court could reasonably conclude that that limit was reached here….Although defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs' belief that performance was either unlikely or would be forthcoming only when it suited defendants' convenience. Plaintiffs were not required to endure that uncertainty or to await that convenience and were therefore justified in treating defendants' nonperformance as a total breach of the contract.

Considering these strictures, SCTA only met with the District five times during the 2016-17 school year. (UX BBBBB.) Following months of effort, SCTA did not agree to a schedule of

District-wide assessments for that school year. (UX BBBBB.) Instead, SCTA agreed to only one set of assessments at the very end of that school year, and then followed a similar course for the 2017-18 school year. (UX BBBBB.) In each of these years, SCTA failed to agree on a set of assessments in a timely manner. (UX BBBBB.) These facts are already sufficient to demonstrate SCTA's nonperformance of the Testing MOU.

Even so, the District sought to meet with SCTA in 2018-19 before the District began administering assessments. (UX LLLL.) By then, the District adopted District-wide curriculum, which SCTA stated it needed to agree on assessments (see RT7 at 1508:12—1509:11), and, of the number of assessments proposed by the District in the fall of 2018, all but a few of them were curriculum-embedded assessments (RT6 at 1260:22—1261:12). In response to the District's November 2018 request to meet, SCTA blew off the request and did not bother responding with dates until a month later. (UX BBBB.) Then the parties only met once, on January 15, 2019. (RT6 at 1509:17-25, 1591:17-20.) As Mr. Turkie testified, SCTA never agreed to a set of assessments, but requested more information, which the District promptly provided on January 22, 2019. (RT6 at 1508:12—1509:25, 1591:17-20.) SCTA never agreed to assessments: "there was never a time when SCTA would say we do not agree, instead is would always be we have a process to go through, and let's meet again. However, those meeting never materialized." (RT6 at 1508:12—1509:11.)

The Testing MOU, however, demanded more—it demanded a "good faith and timely" effort. (JX 1.) The District sought agreement as early as November 2018, and by April 2019 SCTA had not provided any substantive response to the proposed assessments, thus remaining in breach of the Testing MOU. (UX BBBBB at SCTA772, LLLL; RT5 at 973:25—983:18.)

With these events in mind, it was apparent to the District that SCTA failed to perform its obligations under the Testing MOU. The District then notified SCTA that it intended to administer a schedule of assessments in April 2019, and then again in 2019-20 school year. (UX BBBBB at SCTA772; RT5 at 973:25—983:18; 1508:12-1509:11.) Therefore, having not shown its own compliance with the Testing MOU, SCTA has not and cannot establish that the District breached any remaining legal obligation under the Testing MOU. As such, the grievance must be denied in full.

CONCLUSION

SCTA's grievance should be denied in full, based on each of the aforementioned reasons independently:

1. The grievance is not arbitrable;
2. The Testing MOU is invalid and unenforceable;
3. The grievance is untimely; and/or
4. SCTA has not established the right to a remedy because it failed to comply with the Testing MOU.

In the alternative, however, if the Arbitrator finds that the jurisdiction of this dispute is proper, the Testing MOU itself is valid and enforceable, that the grievance is timely, and that SCTA established a violation of the Testing MOU, the arbitrator may reconcile the two dispute resolution procedures in the CBA and Testing MOU, and decide between the District's proposal for assessments, presented to SCTA on August 5, 2019, and SCTA's non-existent proposal for District-wide assessments, as interpreted by SCTA's own witnesses at hearing.

Dated: December 14, 2020

Respectfully submitted,

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