GRIEVANCE ARBITRATION PURSUANT

TO THE PARTIES COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

SACRAMENTO CITY TEACHERS ASSOCIATION, CTA/NEA,
Grievant

and

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,
Employer

Testing MOU; AAA Case No. 01-20-0000-2531

Arbitrator

Carol A. Vendrillo, Esq.

January 11, 2021

Appearances:

For the Association:

John Borsos
Sacramento City Teachers Association
5300 Elvas Avenue
Sacramento, CA 95819

For the District:

Steve Ngo
Courtney de Groof
Lozano Smith
2001 North Main Street, Suite 500
Walnut Creek, CA 94596

INTRODUCTION

The Sacramento City Teachers Association filed a grievance on September 16, 2019, alleging that the Sacramento City Unified School District violated a testing memorandum of understanding signed by the parties on November 30, 2016, when it unilaterally implemented a schedule of District-wide student assessments and rejected the Association's offer to use the expedited dispute resolution process outlined in the testing MOU.

An evidentiary hearing was conducted by the undersigned Arbitrator on July 30, July 31, August 10, September 4, October 6, October 7, and October 8, 2020. The parties introduced documentary evidence; witnesses were called to provide sworn testimony during both direct and cross-examination. Verbatim transcripts of the hearings were prepared by a court reporter. On December 14, 2020, the parties filed closing briefs and the matter was deemed submitted.

ISSUE

The central issue in dispute is as follows:

Did the District violate the testing memorandum of understanding in September 2019 when it unilaterally announced a schedule of student assessments? If so, what is the appropriate remedy?

FACTUAL SUMMARY[1]

In October 2016, the parties began negotiations for a successor collective bargaining agreement. Among the Association's opening bargaining proposals was one that sought to reduce or eliminate what it believed to be unnecessary testing. At a bargaining session on November 14, 2016, the District's chief negotiator, Scott

[1] A more detailed recitation of the facts appears below in the Discussion section of this decision.

Holbrook, resisted efforts by Association Executive Director John Borsos to discuss the testing proposal as part of the successor talks. Mr. Borsos insisted it was a proper subject to be discussed at the bargaining table. By all accounts, the terms of the testing were negotiated by Mr. Borsos and Ted Appel, then Assistant Superintendent of Labor Relations. The two exchanged numerous proposals. On November 30, 2016, agreement on the testing MOU was reached and was signed by then-Superintendent Jose Banda and Association officers David Fisher and Nikki Milevsky.

As the parties continued to bargain over a successor agreement, the Association prepared negotiation status reports. These indicated that the parties had tentatively agreed to the testing MOU.

The parties reached agreement on a successor agreement. It was ratified by the Board of Education on December 7, 2017. The parties dispute what terms were made part of the agreement ratified by the Board. Specifically, they disagree whether the testing MOU was adopted by the Board. The document shared with and ratified by Association members included the testing MOU.

Under the terms of the testing MOU, the parties convened an assessment committee. It began meeting in January 2017. Committee members continued to meet and agreed to the administration of certain student assessments.

In November 2018, Superintendent Jorge Aguilar announced his intention to administer a schedule of assessments for the 2018-2019 school year. Again in August 2019, Superintendent Aguilar announced testing for the 2019-2020 school year. The Association objected to the scheduled assessments. On September 3, 2019,

Superintendent Aguilar said the testing MOU was no longer in effect. The Association filed a grievance on September 16, 2019. This arbitration ensued.

The testing MOU between the District and the Association concerns the monitoring of student progress. The terms of the agreement are as follows:

1. The District and the Association agree that testing should be meaningful and useful.
2. The parties mutually agree those state and/or federal specifically mandated assessments (i.e., [the specific test will be inserted here]), will be administered in accordance with state and federal regulations.
3. 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 that 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 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 reached, 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.

4. Opt out information for parents will be posted on the district web site. Alternative learning opportunities and resources will be provided for those students who opt out. No teacher shall be required both to administer the required test and to provide the alternative learning opportunities for students who opt out of standardized testing.
5. The District and the Association also mutually agree that monitoring student progress in individual classrooms, across grade levels or subject, at site and district levels may be valuable instruments to monitor student progress and may provide information useful to teacher reflection and planning as well as for student feedback.
6. The District agrees to limit the current District-developed Benchmark to the period from November 7th to December 6th only. Any future District-wide assessment and/or other process for monitoring student progress will be jointly developed and mutually agreed according to the provisions of this agreement.

7. Teachers who grade the benchmark that require additional work beyond their regular workday will be compensated for the additional time spent grading the benchmark. Thursday collaborative time will not be used to grade or otherwise administer benchmarks unless agreed to by the teachers at the work site.
8. To design a comprehensive and balanced system for monitoring student progress, the District and the Association will form a committee, consisting of representatives designated by the Association and representatives designated by the District to develop processes for monitoring student progress and to advise sites and teachers regarding additional local assessment strategies. Decision shall be by consensus between the two parties, except for those areas covered by Paragraphs 2 and 3 of this agreement, which shall apply.
9. The Committee will commence no later than the week of January 9th. Once the committee determines the content, structure and nature of the best processes for monitoring student progress, mutually agreed upon dates may be determined for implementation of any state or federal assessment described in Paragraph 3 above that apply for the 2016-2017 school year.

PARTIES POSITIONS

The Association's position. The testing MOU did not expire after the 2016-2017 school year. It remains in full force and effect. The parties have entered into several other MOUs that have been enforced using the contractual grievance procedure.

The testing MOU was formally incorporated into the collective bargaining agreement and is enforceable through the contractual grievance procedure. The grievance was timely filed within 30 days after Superintendent Aguilar abrogated the MOU.

The MOU does not violate state or federal law.

The District had recourse to the MOU's expedited dispute resolution process but instead chose to repudiate the agreement.

The Association satisfied its obligations to operate under the testing MOU in good faith. The assessment committee consistently met before the District abrogated the MOU.

The District's position. The testing MOU did not extend beyond the 2016-2017 school year. The testing MOU was not part of the agreement approved by the Board of Education and is not enforceable through the contractual grievance procedure.

Even if subject to the contract grievance procedure, the grievance was untimely filed.

The arbitrator lacks the authority to add the testing MOU to the parties' contract.

Having failed to satisfy its obligations under the MOU, the Association cannot force the District to comply with its terms.

DISCUSSION

Testing MOU not limited to 2016-2017 school year. For several reasons, the record does not support the District's claim that the testing MOU was operational only for the 2016-2017 school year. There is no language in the text of the MOU indicating it would expire at the conclusion of the 2016-2017 school year. To the contrary, the language of the MOU expressly states that any *future* District-wide assessments and/or

other processes for monitoring student progress will be jointly developed and mutually agreed to according to the provisions of the MOU.

Other MOUs executed by the parties have included expiration dates (See, for example, Union Exhibit VVVVV [long-distance learning MOU]). The parties could have added similar language to the testing MOU if their intention was for it to only cover the 2016-2017 school year. They did not.

Mr. Appel, who was closely involved in negotiating the testing MOU, said there was no expectation it would expire at the end of the 2016-2017 school year (RT 259 [Appel]). Association leaders were never informed that the testing MOU would expire after the 2016-2017 school year (RT 351 [Milevsky]). As noted, the MOU refers to any future assessments and was not limited to assessments administered in the 2016-2017 school year (RT 936; 953 [Fisher]). Mr. Appel never told Mr. Borsos, his counterpart in the testing MOU talks, that the agreement would expire after the 2016-2017 school year (RT 1067 [Borsos]).

It is also telling that on five separate occasions, the District sought to amend the testing MOU by adding an expiration date (Union Exhibits UUU, VVV, and BBBB). Those efforts were rebuffed by the Association (RT 292 [Milevsky]; RT 808, 827 [McArn]; RT 1067 [Borsos]). In fact, in the District's package of proposals for a successor collective bargaining agreement, it sought to "amend" the testing MOU to allow students to take the SAT during the school day in April 2018 (Union Exhibit XXX). The District's repeated efforts to amend the testing MOU adds weight to the Association's claim that neither party viewed it as expiring after the 2016-2017 school year.

The record also references numerous instances after the 2016-2017 school year when the District acted contrary to an understanding that the testing MOU had expired. For example, Matt Turkie, Assistant Superintendent of Curriculum and Instruction, said that in 2019, the District wanted a "yes" or "no" answer from the Association about an assessment it wanted to administer so the District could use the "fast-tracked" dispute resolution process of the MOU (RT 1508-1509 [Turkie]). In January 2019, Dr. Iris Taylor, Chief Academic Officer, offered dates for the assessment committee to meet (Union Exhibit BBBBB). In fact, the assessment committee met on January 15, 2019 (Union Exhibit IIII, p. 770). Two days later, on January 17, 2019, Dr. Taylor and Mr. Turkie made a power point presentation to the Board of Education that included a discussion of the testing MOU (Union Exhibits QQQQ and RRRR).

In no written correspondence sent by Superintendent Aguilar prior to September 3, 2019, did he suggest that the testing MOU had expired (Union Exhibit BBBBB). His communication with Mr. Fisher on November 13, 2018, repeatedly refers to the testing MOU and, at the time he wrote the memo to Mr. Fisher, he believed there to be an "existing" MOU (RT 93-95 [Aguilar]; Union Exhibit LLLL).

Finally, Superintendent Aguilar testified he changed his mind and began to view the testing MOU as expired toward the end of the 2018-2019 school year (RT 94-96; 157-158 [Aguilar]). However, neither the Level I response to the grievance nor the Level II response to the grievance drafted by Cancy McArn, Chief Human Resources Officer, made any assertion that the testing MOU had expired (Union Exhibits LLLLL and NNNNN).

Taken together, the evidence does not support the District's assertion that the testing MOU expired at the end of the 2016-2017 school year.

Board did not approve the testing MOU as part of the collective bargaining agreement. In anticipation of successor negotiations, the Association drafted and widely circulated a brochure that set out a blueprint for revitalizing the Sacramento City Unified School District (Union Exhibit C). One of its goals was to eliminate what it perceived to be unnecessary testing as the primary indicator of student achievement (Union Exhibit C, p. 20). It was apparent that the Association intended to bring this issue to the bargaining table (RT 226-228 [Appel]; RT 783-784 [McArn]; RT 877 [Fisher]).

In August and September 2016, Mr. Turkie notified Mr. Fisher that the District wanted to implement a series of benchmarks. Mr. Fisher told Mr. Turkie the Association was going to bring the testing issue to the bargaining table (Union Exhibit B; RT 877-878 [Fisher]). On October 17, 2016, the Association "sunshined" a proposal calling for the reduction in standardized testing (Union Exhibit E; RT 302-303 [Milevsky]). The topic was discussed at the bargaining table on October 17, 2016 (Union Exhibit F; RT 303 [Milevsky]; RT 601 [Appel]; RT 780 [McArn]; RT 1047-1049 [Borsos]). The issue of benchmarks was discussed at a bargaining session on November 9, 2016 (Union Exhibits G, H, and I).

The record also includes a flurry of emails between Mr. Appel and Mr. Borsos on November 10, 2016. The subject of these emails was referred to as the "assessment proposal" or the "testing proposal." Mr. Borsos and Mr. Appel exchanged drafts that would form the basis for the assessment agreement (Union Exhibits K, L, M, N, O, P,

and R). Mr. Appel testified that during these exchanges with Mr. Borsos, they did not discuss whether the testing MOU would be part of the contract (RT 682 [Appel]).

At the bargaining table on November 14, 2016, Mr. Borsos asked Mr. Holbrook where the parties stood with regard to the drafts he and Mr. Appel had been exchanging. Mr. Holbrook said that the benchmark proposal was separate from the successor agreement talks (Union Exhibit W). In his testimony, Mr. Holbrook said the assessment issue was unrelated to the contract and the District was not open to discussing it at the table (RT 1135-36 [Holbrook]).

Mr. Appel also testified that the testing MOU was separate from the successor negotiations. He said it was a "stand alone" agreement that was not part of the contract (RT 677; 1098 [Appel]). Mr. Appel said the testing MOU came out of a separate process (RT 681 [Appel]). Mr. Appel said that he and Mr. Borsos never had a conversation about whether the testing MOU was part of the contract (RT 1098 [Appel]).

Mr. Borsos, on the other hand, testified that he did not consider Mr. Holbrook's remarks at the November 14, 2016, to be controlling. Mr. Borsos said Mr. Holbrook objected to a number of matters that were raised at the bargaining table that ended up becoming part of the contract going forward (RT 1061-1062, 1073 [Borsos]).

Away from the table and prior to a bargaining session later that day, the parties signed off on the testing MOU on November 30, 2016 (Joint Exhibit 1). It was signed by Ms. Milevsky and Mr. Fisher for the Association and by Mr. Appel and then-Superintendent Banda for the District.

Based on events up to that point, the testing MOU was not part of the ongoing successor negotiations at the bargaining table. In fact, after the November 14, 2016,

bargaining session, the issue of testing was not discussed at the table by the bargaining teams. The terms had been hammered out by Mr. Borsos for the Association and Mr. Appel for the District. The MOU became effective immediately because both sides wanted to utilize the process right away and did not want to wait until agreement was reached on all outstanding issues raised in the successor talks. In that regard, it was intended to become operational independent of the collective bargaining agreement.

On December 8, 2016, soon after the testing MOU was signed, Ms. Milevsky appeared before the Board of Education. She did not identify the MOU as part of the collective bargaining agreement (Union Exhibits RR and SS; RT 292, 532-534 [Milevsky]). Similarly, when then-Superintendent Banda announced the testing MOU had been signed, he did not indicate it was folded into the collective bargaining agreement (Union Exhibit PP). In the Association's newsletter on December 1, 2016, when it informed its members the testing MOU had been signed, it was not included as part of the "bargaining update," but was separately listed under the heading of "The Benchmark Agreement." (Union Exhibits OO.) The Association's newsletter in December 2017 seeking teachers' input on a benchmark survey did not refer to the testing MOU as part of the contract (Union Exhibit GGGG).

These facts further support the conclusion that the testing MOU was thought of by the parties as distinct from their collective bargaining agreement.

In asserting the testing MOU is part of the successor contract, the Association points to the negotiation status reports that repeatedly indicated the testing MOU had been tentatively agreed to (Union Exhibits RRR, WWW, YYY). It is true, as the Association asserts, that the District never challenged this characterization of the testing

MOU (RT 659-660 [Appel]; RT 804 [McArn]; 1074 [Borsos]). However, these status reports were drafted and circulated by the Association. They were not written jointly by the parties. As Mr. Holbrook said, the District was not bound to or acceding to the Association's characterization of the testing MOU by not voicing an objection to the status reports (RT 1148-1149 [Holbrook]).

Other factors undermine the Association's assertion that the testing MOU was tentatively agreed to as part of the successor agreement negotiations. As noted above, contrary to typical negotiation practice, the testing MOU was not put aside to be incorporated into the contract after all outstanding issues got resolved. Indeed, the testing MOU was not tentatively agreed to at the bargaining table (RT 1149 [Holbrook]). It was agreed to separately by Mr. Borsos and Mr. Appel, away from the table, with then-Superintendent Banda signing for the District and Mr. Fisher and Ms. Milevsky signing for the Association. There is no language in the testing MOU the parties signed that identifies it as part of the collective bargaining agreement

The Association also notes that the District's package settlement offer made on September 15, 2017, included a proposal to amend the testing MOU to schedule an SAT in April 2018. Likewise, the District's response to the Association's post fact-finding brief in the successor talks references the parties' testing MOU and commented that the Association had been unwilling to consider an amendment (Union Exhibit ZZZ[a]). These bargaining positions advanced by the District – while further evidence that the testing MOU survived beyond the 2016-2017 school year – do not show that the testing MOU was ever made part of the parties' collective bargaining agreement. What they do show is the District's on-going desire to get out from under the testing MOU.

Furthermore, the evidence surrounding the Board of Education's action on December 7, 2017, is consistent with the parties' actions leading up to Board approval. Witnesses called by the District all testified that the testing MOU was not part of what the Board approved (RT 849-850, 866 [McArn]; RT 1095 [Appel]; 1421-1425, 1456 [Nguyen]). The executive summary of the successor agreement prepared by District staff did not refer to the testing MOU (RT 1425 [Nguyen]). It is true, as the Association urges, that no District staff member voiced concern about the testing MOU being part of the contract (RT 805, 829 [McArn]). However, the testing MOU was not discussed at the Board meeting. Indeed, there is no evidence that Association officials demanded that the testing MOU be included in the collective bargaining agreement presented to the Board for its approval. Nor did they even raise the issue of including the testing MOU in the contract at the night of the Board meeting (RT 1425 [Nguyen]). If, as the Association claims, the issue of student assessments was a major part of its bargaining goal, it is more reasonable to expect that Association leaders would have taken proactive measures to ensure the testing MOU was among the tentative agreements presented to the Board than to expect District spokespeople to come forward to announce it was not.

Testimony about what material was made available at the Board meeting does not support the Association's case. Ms. Milevsky recalled objecting to public distribution of the Theodore Judah agreement (RT 574 [Milevsky]; RT 738-739 [McArn]; RT 1431 [Nguyen]). However, she did not object to the absence of the testing MOU being made available (RT 1425 [Nguyen]). Mr. Fisher could not recall if the District made a copy of the document presented for Board approval available to the Association or the public (RT 1026-1028 [Fisher]). Mr. Borsos testified he did not review the material presented to the

Board and did not ask for a copy of the document voted on (RT 1083-1084 [Borsos]). None of this establishes that the document approved by the Board included the testing MOU. And again, one would expect Association leadership to have examined the tentative agreements gathered by Ms. Nguyen to be presented to the Board to ensure the testing MOU was among them.

After the Board vote, Ms. McArn sent an email to District principals and did not mention the Board's approval of the testing MOU (RT 1099-1102 [Appel]). It was not discussed by Superintendent Aguilar when he met with District principals. Mr. Appel's summary made no mention of the testing MOU (District Exhibit 12; RT 1099-1102 [Appel]). These documents generated after the Board's action continued to treat the testing MOU as outside the purview of the successor agreement.

Finally, the Association notes that in two other arbitrations the District agreed to an exhibit that included the testing MOU as part of the successor agreement (Union Exhibits OOOOO, PPPPP, QQQQQ, RRRRR). Indeed, Association witnesses testified that the first time it heard the assertion that the Board had not approved the testing MOU as part of the contract was in this case (RT 1032-1033 [Fisher]; RT 1082-1083 [Borsos]).

Nonetheless, testimony from District witnesses that is part of the record in this case calls into question what the Board approved on December 7, 2017 (RT 853-866 [McArn]; RT 1122-1123 [Appel]; RT 1431-1434 [Nguyen]; RT 1621-1623 [Aguilar]). Evidence that District representatives may have agreed to in other matters cannot be elevated or bootstrapped to conclusively establish as a factual matter what the Board adopted as part of the parties' collective bargaining agreement.

Testing MOU is legally enforceable. As explained above, the testing MOU was not negotiated as part of the successor contract talks. It was a stand-alone agreement reached away from the bargaining table. Nor was the testing MOU included in the packet of documents voted on by the Board. However, it is an enforceable agreement between the parties.

The District claims the testing MOU is unenforceable because it violates the equal protection clause of the California Constitution and points to the agreement with the Office of Civil Rights that documents disparities in minority students' admissions into the GATE program, some of which occurred after the testing MOU was signed.

Resolution of this argument is beyond the scope of the arbitrator's authority. The dispute raised by this grievance is whether the District unlawfully abrogated the testing MOU in September 2019 when Superintendent Aguilar declared it was no longer in effect. For an arbitrator to invalidate a memorandum of understanding agreed to by the parties based on constitutional infirmities flouts a fundamental tenet of labor arbitration – that an arbitrator's award draw its essence from the contract.

Moreover, there is nothing in the terms of the testing MOU that mandates an assessment regimen that is at odds with notions of equal protection. To the contrary, the MOU allows administration of state and federally mandated assessments in accordance with applicable regulations. The MOU calls for formulation of a committee to aid the parties in developing a process for monitoring student progress that will meet state and federal guidelines. And it establishes an expedited dispute resolution process to adjudicate disagreements on administration of a specific test or assessment. Given this

language, adherence to the terms of the testing MOU does not facially affront constitutional strictures.

The District also claims the testing MOU divests the Board of its policy making authority. This is a specious argument. The testing MOU was signed by then-Superintendent Banda for the District and as Ms. McArn testified, the superintendent is authorized to sign an MOU on behalf of the District (RT 771, 800 [McArn]).

The District argues that the testing MOU is unenforceable because it is contrary to Education Code Section 17604. This argument too is unavailing. That section provides that when the power to enter into a contract is invested to the governing board, that power may be delegated to the district superintendent. Here, the testing MOU was signed by then-Superintendent Banda with the Board's awareness.

Additionally, the record does not establish the testing MOU required Board approval. No hard and fast rule as to when Board approval is necessary emerges from the record in this case. There have been MOUs that have received Board approval (Union Exhibits BBBBBB [School Attendance Calendars] and YYYYY [Program Specialist Grievance]). And the record includes evidence of agreements signed by Superintendent Aguilar for the District that did not get Board approval (Union Exhibit ZZZZZ [Hippo MD]; RT 769-770 [McArn]). Neither Ms. McArn nor Superintendent Aguilar could articulate a policy describing when the Board must approve an MOU (RT 197-201 [Aguilar]; RT 769-771 [McArn]).

Moreover, the Board was well aware of the testing MOU. Ms. Milevsky briefed the Board on the testing MOU (Union Exhibits RR and SS). Then-Superintendent Banda lauded the agreement (Union Exhibit PP). Despite the Board's awareness of the testing

MOU, no one from the District told the Association the testing MOU had to be approved by the Board (RT 801 [McArn]).

In sum, the evidence does not support the District's claim that the testing MOU is not a legally enforceable document because it did not get formal Board approval.

Similarly, the evidence does not support the District's claim that the testing MOU is unenforceable through the contractual grievance procedure. First, the fact that the testing MOU has its own dispute resolution procedure is beside the point. The purpose of the expedited fact-finding process in the MOU is to quickly resolve disagreements between the parties over whether a particular assessment should be administered. The mechanism for resolving that type of dispute does not foreclose reliance on the contractual grievance procedure to resolve other disputes, like the repudiation of an MOU.

Article 4 of the parties' contract governs the grievance procedure. It defines a grievance as an alleged violation, misinterpretation, or misapplication of a specific provision of the agreement. It lists five types of disputes that are not subject to the contractual grievance procedure. A violation of the parties' memoranda of understanding is not among the five excluded disputes. Article 4 directs that a written grievance "should" – not "shall" – include a listing of the specific article of the agreement alleged to have been violated.

Taken together, the language of Article 4 does not clearly or unambiguously preclude the parties from enforcing an MOU using the contractual grievance process. Accordingly, under clear principles of contract construction, it is appropriate to look to established past practice to interpret the terms of the agreement.

There is a past practice of using the collective bargaining agreement to enforce terms of the parties' memoranda of understanding (RT 371-372 [Milevsky]; RT 869-872 [Fisher]; RT 1063-1064 [Borsos]). The District has never denied a grievance filed by the Association based on a claim that it was founded on the terms of an MOU (RT 744-745 [Ms. McArn]; RT 1440-1442 [Nguyen]). The evidence includes examples of grievances filed by the Association based on provisions of MOUs (Union Exhibits GGGGG [Theodore Judah], WWWWW [Karen Harris], ZZZZZ [Hippo MD]). The contractual grievance procedure was used to enforce and/or resolve disputes concerning these MOUs (RT 218-219 [Aguilar]; RT 740-742, 767 [McArn]; RT 1431-1435 [Nguyen]). Ms. Nguyen could not recall one instance when an alleged MOU violation was not processed as a grievance (RT 1440-1447 [Nguyen]). Given this testimony, the record supports a finding that the parties have allowed grievances to be filed and arbitrations pursued based on alleged violations of MOUs.

The District also contends that the testing MOU is unenforceable because it was terminated as a past practice by operation of Article 3.1. While it is true that the testing MOU was signed on November 30, 2016, and the successor agreement was approved by the Board and ratified by Association members in December 2017, the Board and the Association made the agreement retroactive to July 1, 2016. Therefore, the testing MOU was brought under the umbrella of the successor agreement since it was signed after July 1, 2016.

In sum, the District's argument that the alleged repudiation of the testing MOU is not grievable or arbitrable under the collective bargaining agreement is unpersuasive. To find there is no remedy for the repudiation of an executed memorandum of understanding

requires the untenable conclusion that the parties engaged in a deliberate effort to craft the terms of an agreement that neither could enforce.

Grievance was timely filed. On April 24, 2019, Superintendent Aguilar announced plans to implement certain tests (Union Exhibit BBBBB). When those tests were implemented, the Association did not file a grievance because it had agreed to the administration of those assessments in the past (RT 928-929; 973-978 [Fisher]; Union Exhibit WWWW). On August 5, 2019, Superintendent Aguilar said the District was moving ahead with assessments. He did not announce the testing MOU was no longer in effect and the Association did not file a grievance. Only after Superintendent Aguilar announced on September 3, 2019, that the MOU was no longer in effect did the Association file a grievance. That complies with the 30-day time limit set out in Article 4.2.4 of the contract.

Association did not breach the testing MOU. It is clear that Superintendent Aguilar felt constrained by the testing MOU that was signed by his predecessor. And is it fair to say he felt frustrated at what he perceived to be the Association's recalcitrance to agree to testing. However, the evidence does not support a finding that the Association walked away from the testing MOU thereby releasing the District from its obligation to perform under its terms.

The assessment committee that was formed as part of the testing MOU met for the first time in January 2017 and multiple times thereafter through the spring of 2017. In April 2017, the parties agreed to English Language Arts and math assessments that were used for GATE qualification and English Language Learner Reclassification (Union Exhibit EEE). Superintendent Aguilar was unaware of this agreement (RT 76 [Aguilar]).

In May 2017, the parties reached agreement on a Math I placement exam (Union Exhibit MMM). Again, Superintendent Aguilar was not aware of this agreement (RT 76 [Aguilar]).

In November 2017, the parties agreed to conduct a survey to solicit teachers' input on District-wide student assessments concerning GATE, English Language Learner Reclassification, English Language Arts and math tests (Union Exhibit HHHH). In February 2018, the parties agreed to additional student assessments that would be used to inform English Language Learner Redesignation and GATE identification (Union Exhibit IIII). This evidence shows a buy-in by both parties to work on garnering agreements over student assessments.

The record reflects that from August until the middle of November 2018, the District did not seek to discuss student assessments with the Association (RT 1531-1532 [Turkie]). In a letter dated November 13, 2018, Superintendent Aguilar said he was continuing to learn about the testing MOU (Union Exhibits LLLL). Mr. Fisher responded to Superintendent Aguilar's letter on November 14, 2018; he informed the superintendent the Association was ready to resume committee meetings upon request (Union Exhibit MMMM).

In fact, the committee reconvened on January 15, 2019. The parties discussed issues raised by the letter from the Office of Civil Rights related to GATE identification. They also addressed a PSAT test for eighth graders, an SAT for high school students, and the schedule of student assessments the District proposed for the 2018-2019 school year. The Association asked for copies of the assessments and additional data concerning the OCR letter (Union Exhibits TTTT and VVVV).

Following that meeting, Mr. Borsos spoke directly with OCR staff and had conversations with Dr. Taylor and Ms. Kari Hanson-Smith about OCR compliance (RT 1632-1633 [Borsos]). Mr. Turkie testified he was unaware of any request from the District to reconvene the assessment committee between February 27, 2019, and September 3, 2019 (RT 1494-1495 [Turkie]).

On April 24, 2019, Superintendent Aguilar, without seeking to reconvene the committee, notified the Association that the District would be moving forward with math placement tests and GATE identification assessments. On May 14, 2019, Mr. Fisher confirmed with Dr. Taylor that these assessments had been given for the past three years (RT 928-929 [Fisher]). Learning that, the Association voiced no objection to the administration of these tests.

The parties did not communicate between May 2019 and August 2019. In a letter dated August 5, 2019, Superintendent Aguilar announced the District's intention to administer student formative and interim assessments during the 2019-2020 school year; attached to the letter was a list of those assessments (Union Exhibit XXXX). Superintendent Aguilar made no request to reconvene the committee prior to announcing the planned assessments. On August 8, 2019, Mr. Fisher reminded Superintendent Aguilar of the testing MOU and demanded that the District follow the process outlined in that agreement (Union Exhibit YYYY).

On August 27, 2019, the Association learned the District was moving forward with the student assessments outlined in Superintendent Aguilar's letter. On August 28, 2019, the Association made the new Chief Academic Officer Christine Beata aware of the testing MOU (Union Exhibit AAAAA).

On September 3, 2019, Superintendent Aguilar declared the testing MOU was no longer in effect (Union Exhibit BBBBB). In response, the Association on September 9, 2019, invoked the dispute resolution procedure laid out in the testing MOU (Union Exhibit DDDDD). Because a scheduled arbitration had settled, a third-party neutral, Paul Roose, was available and ready to serve as the mediator/arbitrator under the testing MOU on September 17, 2019 (Union Exhibit FFFFF). On September 12, 2019, Superintendent Aguilar rejected the Association's demand to engage Mr. Roose (Union Exhibit GGGGG).

Based on the foregoing, Superintendent Aguilar's statements that the Association "consistently refused to meet with the District" is inaccurate. The parties' representatives on the assessment committee did meet and came to agreement on certain tests. And the Association stood ready and willing to meet with the District team and operate under the terms of the testing MOU.

Based on the record in this case, the testing MOU did not expire after the 2016-2017 school year. The agreement on testing was reached outside the collective bargaining process and was not formally approved by the Board. It is not clear that the testing MOU required Board approval. Nonetheless, the testing MOU is a binding and enforceable agreement. The District cannot unilaterally repudiate an agreement entered into on its behalf by the superintendent. There is no showing that the Association failed to live up to its side of the bargain.

Therefore, going forward, both parties are obligated by the testing MOU to mutually agree on those assessments that are mandated by the State of California or by federal laws, to mutually agree to administer district initiated and/or district-wide tests or

assessments to monitor student progress, and to utilize the expedited dispute resolution procedure outlined in the MOU should agreement prove unattainable despite good faith and timely efforts by both sides.

CONCLUSION

For the reasons expressed above, the grievance filed by the Sacramento City Teachers Association is GRANTED.

Dated: January 11, 2021

/s/ _____
CAROL A. VENDRILLO, ESQ.
Arbitrator