Collective Bargaining Issues

PRESENTERS:

Darren J. Bogié

Timothy L. Salazar

COLLECTIVE BARGAINING ISSUES: TABLE TALK

Presentation by Darren J. Bogié & Timothy L. Salazar
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I. ADMINISTRATOR ROLES IN COLLECTIVE BARGAINING

Administrators have varying, important roles in the collective bargaining process. The term administrator encompasses:

- Superintendents
- Assistant Superintendents
- Chief Business Officials
- Directors
- Principals
- Assistant Principals
- Other Certificated Management
- Classified Management

There are three very important ways administrators promote the District's collective bargaining processes that result in a collective bargaining agreement ("CBA").

A. Negotiating Team

Administrators hold positions on the district's negotiating team which can be a very enlightening and rewarding experience. While on the negotiating team, administrators provide guidance to the rest of the team in their areas of expertise. Administrators also help other team members understand the day-to-day aspects of their particular operation.

Matters/concerns that impede the ultimate goal of delivering the best instruction to students are identified by administrators and emphasized by those on the negotiating team. With the knowledge and expertise of administrators, the team is able to develop language for bargaining proposals that provides the District with the ability and flexibility to provide services to students.

The relationship between administrators and association bargaining team members can affect the negotiation process. First, the presence of administrators has a deterrent effect on association negotiating team members who may otherwise take liberties with the facts. Often, after consulting with the involved administrator, we learn that the association's facts were embellished or inaccurate. Administrators who are receptive to association concerns are able to provide guidance on solutions and understandings.

B. Pre-negotiation Feedback

Administrators not on the bargaining team provide valuable input to the negotiation process. Before negotiations, districts solicit input on CBA concerns and "wish list" resolutions" from administrators during administrator meetings or via email requests. In addition, administrators provide regular feedback on workplace issues/concerns and CBA impediments to the educational environment. It is important that administrators identify language constraints in the CBA and language changes that would serve the District.

Issues that administrators must address come up daily and sometimes answers can be found in the CBA. There are times, however, when the CBA provides little or no guidance on a workplace issue. The administrator will need to make a decision, or forward the concern to a superior for guidance. The administrator's action could constitute a past practice. The association could file a grievance contesting the administrator's decision. Depending on the significance of the issue, the parties could resolve the dispute by entering into a grievance settlement or memorandum of understanding ("MOU").

Administrators also take notice of unit member "grumblings" throughout the year and as negotiations get closer. This information serves as a barometer of those issues the association is truly concerned about and those that will not lead to impasse.

C. Post-negotiation Review and Implementation

With completion of negotiations (and full ratification), the District will revise the CBA and make administrators aware of changes (through meetings or in writing). Read the new CBA. Transfer your notes and highlights to the updated CBA. Ask clarifying questions to make sure you understand the intent of the language changes. If a language change has an unworkable impact on the operation, let administration know immediately. The language concern may need to be remedied by an MOU.

II. MEMORANDUM OF UNDERSTANDING

In the context of labor relations between a public school employer and exclusive representative, a memorandum of understanding ("MOU") is a formal agreement and has the same force and effect as a collective bargaining agreement ("CBA"). MOUs are used for a variety of reasons including:

- To replace CBA language that does not promote the interest of the parties
- Where the CBA language is unclear
- A new matter has arisen that requires negotiation
- The parties wish to modify an existing practice that is not in the CBA
- To accommodate new legislation or judicial decision

An MOU requires signature by an authorized representative of the parties and may require association and/or board ratification. Generally, CTA (the certificated representative) does not require that an MOU be ratified by the association membership. However, CSEA (the classified representative) requires a two-step process to approve an MOU (CSEA Policy 610). First, an MOU must be sent to the Field Director for review and approval; once approved by the Field Director, the association membership must vote on the MOU. Assuming ratification by the association, most MOUs are presented to the board of trustees for approval.

MOUs will have an effective date (i.e., specified date or upon full ratification by the parties), and normally have a termination date (i.e., for the term of the existing CBA or specified sunset date). Many districts and associations rely on MOUs that are decades old.

In the absence of a termination date how long is an MOU valid? Government Code Section 3540.1(h) provides that an "agreement may be for a period not to exceed three years." Therefore, an MOU is limited to a maximum of three years.

The following areas have been the subject of MOUs entered into in the last quarter:

- Effects of Layoffs
- Clarification of Vacation Article
- Establishing Stipends for Special Education Employees
- Certificated Retirement Incentive Offer
- Salary Schedule Advancement/Clarification
- Class Size Changes

The process for negotiation of an MOU is similar to that of formal negotiations for a CBA. The process requires a request and mutual agreement to meet and discuss a particular concern (normally a single issue). If formal negotiations are beginning soon, the parties may agree to defer the issue to the full negotiation process.

During the negotiations for an MOU, the parties exchange viewpoints and suggestions to resolve the concern until an agreement is reached. The written agreement is prepared, signed, and ratified by the association/board of trustees (if necessary). The MOU may also provide that its terms will be incorporated into the CBA during the next round of negotiations.

III. THOUGHTS ON DEALING WITH THE UNWRITTEN PAST PRACTICE

Administration Should Consider the Following With Regard to Changing Conditions of Employment

A. General Legal Requirements

1. Notice

"A public school employer shall give reasonable written notice to the exclusive representative of the public school employer's intent to make any change to matters within the scope of representation of the employees represented by the exclusive representative for purposes of providing the exclusive representative a reasonable amount of time to negotiate with the public school employer regarding the proposed changes." (Gov't Code § 3543.2(a)(2).)

2. Unilateral Change - An Unlawful Unilateral Change May Be Found Where:

(a) the employer took action to change policy;
(b) the change in policy concerns a matter within the scope of representation;
(c) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and
(d) the action had a generalized effect or continuing impact on the terms and conditions of employment.

(*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *County of Santa Clara* (2013) PERB Decision No. 2321-M.)

As more recently noted in *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12:

> The gravamen of any unilateral action is exclusion of employees through their chosen representative from participation in the decision-making process. Whether a unilateral action is the creation, implementation or enforcement of policy, or a change to existing policy as contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice, our statutes require an employer contemplating a change in policy concerning a matter within the scope of representation to provide the exclusive representative notice and an opportunity to bargain.

B. Past Practice

Past practice is a recognized and accepted way of doing things over an extended period of time. Based on the actions of the parties, past practice is mutually binding and enforceable. A policy may be established by written agreement, written employer rules or regulations, or regular and consistent past practice. It is the issue of employees alleging that a proposed change violates an unwritten past practice that creates a minefield of potential issues.

1. Test for When Past Practice is Binding

For an unwritten past practice to be binding and subject to a unilateral change analysis, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. *(County of Placer* (2004) PERB Decision No. 1630-M; *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.)

Imposing a unilateral change in working conditions can be considered a per se violation of Government Code section 3543.5(c) if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) the change was implemented without the employer fulfilling its duty to meet and negotiate with the exclusive representative, including providing adequate notice; (3) the change was not merely an isolated breach, but amounted to a change in policy; and (4) the change in policy concerns a matter within the scope of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143.)

Therefore, whether an alleged past practice is binding or even existed is a highly fact specific inquiry. The actual conduct of all parties, including administration and association members, needs to be examined to see if the alleged "past practice" is binding or even existed in the first place.

For some examples on how this can play out consider the following:

A new principal was able to implement a new practice requiring teachers to submit biweekly lesson plans without any requirement to meet and negotiate with the association beforehand because the collective bargaining agreement ("CBA") was silent on the issue and there were no facts to establish a consistent past practice on lesson plans or evaluations. (*San Francisco Unified School District* (2009) PERB Decision No. 2057.)

Conversely, when evidence showed that a district had been paying bus drivers 10 hours of extra-duty compensation for behind-the-wheel training, administration could not unilaterally halt these extra duty payments even though such extra duty was not

specified in the CBA. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092)

2. Tools for Addressing Claims or Potential Claims of an Unwritten Past Practice

Before implementing a change to working conditions, you should do the following:

(a) Check your labor agreement now. You might be surprised what it allows you to do that you have not been doing.

(b) Use clear and unambiguous language. If the language is ambiguous - if the language could reasonably be read your way, but it could also reasonably be read to support the association's position - then you likely cannot start enforcing the language in your favor mid-contract without providing notice and an opportunity to negotiate effects.

As an example, a clause provides for "premium pay for work over eight hours in a day." This may seem at first glance unambiguous. However, this language is potentially unclear on how it will be implemented. Is an employee entitled to premium pay when his or her regular shift ends at midnight and the "overtime" occurs on the following day? Is a day defined as a calendar day or as the 24-hour period following the start of a shift?

Therefore, be sure your language is air tight or be prepared to potentially negotiate the effects of implementation.

(c) Talk to the association before you start enforcing clear contract language. Tell the union what you intend to do and why. Get feedback from the union before you make your change. This will help with relationship issues (obviously, the association is not likely to be happy you are changing past practice). The discussion may reveal problems with your plan to implement the clear language (e.g., the association may produce a contrary "side letter"). And, the discussion will help satisfy your legal duty, if any, under Government Code section 3543.2(a)(2) to "negotiate" the change with the exclusive representative before you implement it. Note, in this context, negotiate does not necessarily mean get approval; it means discuss, listen, consider, and then go ahead with your plan if you still believe it makes sense.

(d) Double check your rights. When you get to negotiations for a new contract, and before you make your proposals, make sure you do not already have the right to do what it is you will be proposing. If you already have the right to do what you want to do, then you can simply

inform the union during negotiations what you are going to do. Conversely, if you make your proposal, and you are unsuccessful in achieving your new language, then it will only undercut your argument that your existing language allows you to do what you want to do.

(e) For an allegation that a policy not be included in the CBA and is "past practice," administration should analyze the following:

(1) First, the practice itself must be unambiguous and easy to understand. If the member cannot explain the practice to you or if he/she says they do it one way sometimes and another way other times, the actual practice may not be clear enough to constitute an actual past practice.

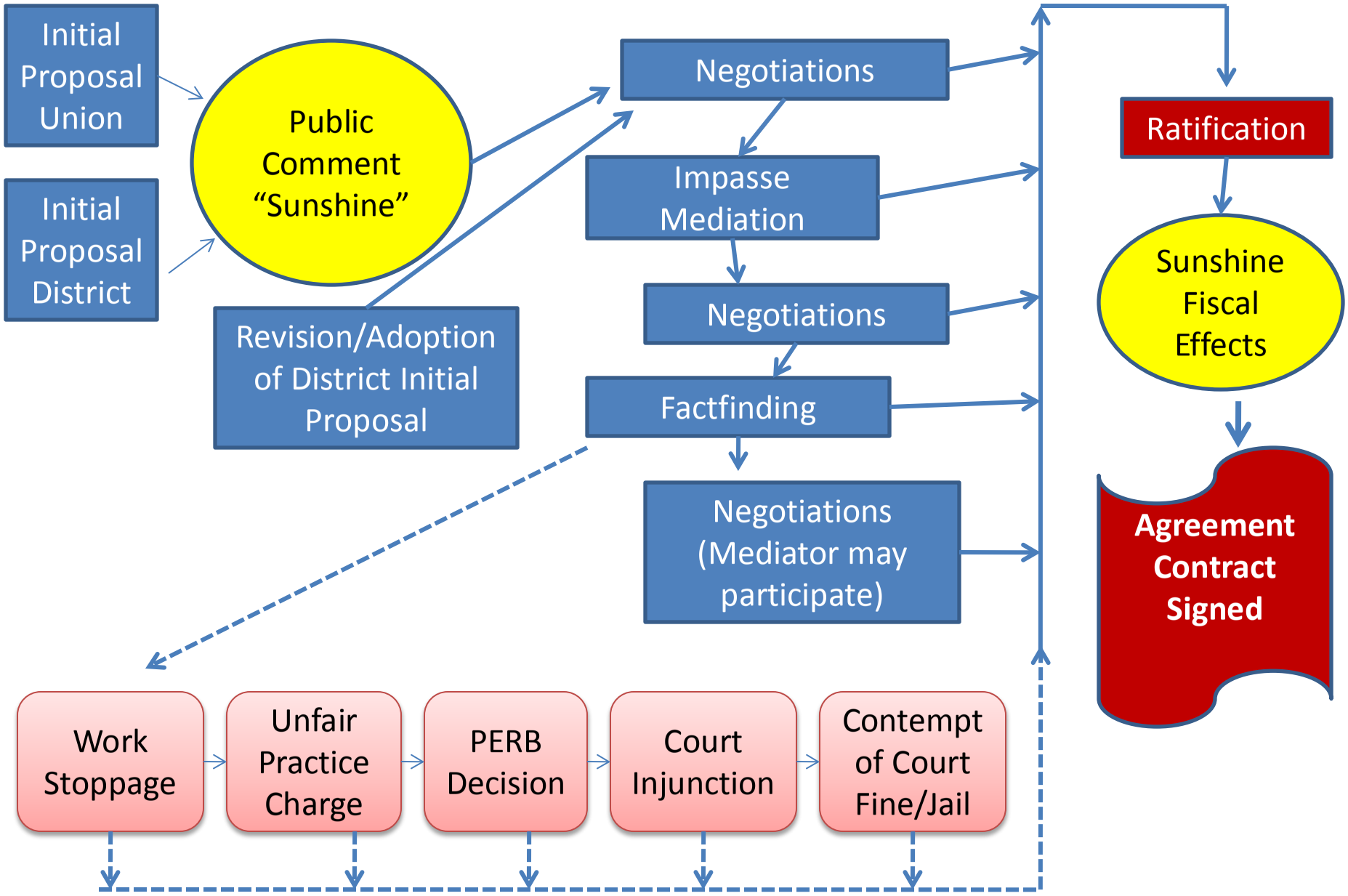
(2) Second, the association will need to be able to show that the practice continued in a single form over a period of time. Previous grievances based on the practice can be evidence of the existence of an unwritten past practice, even if they were handled in the first step. If the practice is new, it probably will not carry, and if it has been handled inconsistently, the association will not have a good argument.

(3) Third, if the underlying reason for the practice is gone, then the employer can eliminate it. For example, if the district builds a break room as part of a new bus barn, then it can justify stopping the past practice of allowing employees to take their breaks off-premises.

(4) Finally, the alleged past practice must not conflict with the law, nor encourage unsafe behavior. Administration has no obligation to let an illegal or unsafe past practice continue no matter how long some employees have been getting away with it.

(f) Remember when in doubt provide the association with advance written notice of any proposed change in working condition and upon request negotiate with the association.

The Collective Bargaining Process



GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*

DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10.7. Meeting and Negotiating in Public Educational Employment [3540 - 3549.3] *(Chapter 10.7 added by Stats. 1975, Ch. 961.)*

ARTICLE 1. General Provisions [3540 - 3540.2] *(Article 1 added by Stats. 1975, Ch. 961.)*

3540. It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

It is the further intention of the Legislature that this chapter shall not restrict, limit, or prohibit the full exercise of the functions of any academic senate or faculty council established by a school district in a community college to represent the faculty in making recommendations to the administration and governing board of the school district with respect to district policies on academic and professional matters, so long as the exercise of the functions does not conflict with lawful collective agreements.

It is the further intention of the Legislature that any legislation enacted by the Legislature governing employer-employee relations of other public employees shall be incorporated into this chapter to the extent possible. The Legislature also finds and declares that it is an advantageous and desirable state policy to expand the jurisdiction of the board created pursuant to this chapter to cover other public employers and their employees, in the event that this legislation is enacted, and if this policy is carried out, the name of the Educational Employment Relations Board shall be changed to the "Public Employment Relations Board."

(Amended by Stats. 1988, Ch. 160, Sec. 51.)

3540.1. As used in this chapter:

(a) "Board" means the Public Employment Relations Board created pursuant to Section 3541.

(b) "Certified organization" or "certified employee organization" means an organization that has been certified by the board as the exclusive representative of the public school employees in an appropriate unit after a proceeding under Article 5 (commencing with Section 3544).

(c) "Confidential employee" means an employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions.

(d) "Employee organization" means an organization that includes employees of a public school employer and that has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person of the organization authorized to act on its behalf.

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of public school employees, as "public school employee" is defined in subdivision (j), in an appropriate unit of a public school employer.

(f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

(g) “Management employee” means an employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Public Employment Relations Board.

(h) “Meeting and negotiating” means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, is not subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

(i) “Organizational security” is within the scope of representation, and means either of the following:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, an arrangement shall not deprive the employee of the right to terminate his or her obligation to the employee organization within a period of 30 days following the expiration of a written agreement.

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

(j) “Public school employee” or “employee” means a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(k) “Public school employer” or “employer” means the governing board of a school district, a school district, a county board of education, a county superintendent of schools, a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code, an auxiliary organization established pursuant to Article 6 (commencing with Section 72670) of Chapter 6 of Part 45 of Division 7 of Title 3 of the Education Code, except an auxiliary organization solely formed as or operating a student body association or student union, or a joint powers agency, except a joint powers agency established solely to provide services pursuant to Section 990.8, if all the following apply to the joint powers agency:

(1) It is created as an agency or entity that is separate from the parties to the joint powers agreement pursuant to Section 6503.5.

(2) It has its own employees separate from employees of the parties to the joint powers agreement.

(3) Any of the following are true:

(A) It provides educational services primarily performed by a school district, county board of education, or county superintendent of schools.

(B) A school district, county board of education, or county superintendent of schools is designated in the joint powers agreement pursuant to Section 6509.

(C) It is comprised solely of educational agencies.

(l) “Recognized organization” or “recognized employee organization” means an employee organization that has been recognized by an employer as the exclusive representative pursuant to Article 5 (commencing with Section 3544).

(m) “Supervisory employee” means an employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend that action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(Amended by Stats. 2012, Ch. 162, Sec. 54. Effective January 1, 2013.)

3540.2. (a) A school district that has a qualified or negative certification pursuant to Section 42131 of the Education Code shall allow the county office of education in which the school district is located at least 10 working days to review and comment on any proposed agreement made between the exclusive representative and the public school employer, or designated representatives of the employer, pursuant to this chapter. The school district shall provide the county superintendent of schools with all information relevant to yield an understanding of the financial impact of that agreement.

(b) The Superintendent shall develop a format for use by the appropriate parties in generating the financial information required pursuant to subdivision (a).

(c) The county superintendent of schools shall notify the school district, the county board of education, the district

superintendent, the governing board of the school district, and each parent and teacher organization of the district within those 10 days if, in his or her opinion, the agreement reviewed pursuant to subdivision (a) would endanger the fiscal well-being of the school district.

(d) A school district shall provide the county superintendent of schools, upon request, with all information relevant to provide an understanding of the financial impact of any final collective bargaining agreement reached pursuant to Section 3543.2.

(e) A county office of education, or a school district for which the county board of education serves as the governing board, that has a qualified or negative certification pursuant to Section 1240 of the Education Code shall allow the Superintendent at least 10 working days to review and comment on any proposed agreement or contract made between the exclusive representative and the public school employer, or designated representatives of the employer, pursuant to this chapter. The county superintendent of schools shall provide the Superintendent with all information relevant to yield an understanding of the financial impact of that agreement or contract. The Superintendent shall notify the county superintendent of schools, and the county board of education within those 10 days if, in his or her opinion, the proposed agreement or contract would endanger the fiscal well-being of the county office.

(Amended by Stats. 2004, Ch. 52, Sec. 16. Effective June 21, 2004.)

MEMORANDUM OF UNDERSTANDING

(TK Instructional Aides)

This Memorandum of Understanding ("MOU") is entered into by and between the **ABC SCHOOL DISTRICT** ("District") and the **ABC TEACHERS' ASSOCIATION, CTA/NEA** (the "Association"). The District and the Association are hereinafter collectively referred to as the "Parties." The Parties have entered into this MOU to reflect the agreements they have reached regarding TK classes.

The Association enters into this MOU on its own behalf as well as on behalf of certificated employees who are members of the bargaining unit represented by the Association in its role as the Exclusive Representative. This MOU is effective for the July 1, 2017, through June 30, 2018, school year only.

TERMS

The Parties hereby agree as follows:

1. The Parties recently concluded reopener negotiations for the 2017-2018 school year.

2. During the course of negotiations, the Parties agreed to continue the 2016-2017 MOU regarding TK Instructional Aides for the 2017-2018 school year.

3. For TK classes with XX or more students, the District will provide a 3.0 hour Instructional Aide per day.

4. TK classes with fewer than XX students will not be provided with an Instructional Aide.

5. The District retains the discretion to remove the Instructional Aide from a TK classroom should the enrollment fall below XX students for two consecutive weeks.

6. Should the District decide to maintain the availability of an Instructional Aide where the TK class enrollment falls below XX students, exercise of that discretion shall not establish a precedent or otherwise constitute a past practice by the District.

7. This MOU does not establish a precedent or create a past practice with regard to the matters set forth in this MOU.

8. The terms of this MOU may not be cited or relied upon for any other purpose in any other administrative or judicial matter or forum.

9. This MOU will automatically sunset on June 30, 2018.

RATIFIED

By affixing their signatures to this MOU, the Parties acknowledge that the matters set forth above are fully settled. This MOU shall be binding upon the Parties' heirs, successors, devisees, administrators, employees, executors, and assigns. The signatories signify they are the authorized representatives of the District and the Association as the proper parties to this MOU, that all actions necessary for the Parties to ratify and accept this MOU as a binding and bilateral agreement have been completed in the manner required by that party or by the law, and that this MOU is hereby entered into without the need for further ratification or acceptance.

FOR THE DISTRICT:	**FOR THE ASSOCIATION:**
_____	_____
District Superintendent	Chair, Bargaining Team
DATED: June __, 2017	DATED: June __, 2017

MEMORANDUM OF UNDERSTANDING
(LAYOFFS)

This Memorandum of Understanding ("MOU") is entered into by the **XYZ SCHOOL DISTRICT** (the "District" or "Employer") and the **CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 123** (the "Association" or "Exclusive Representative"). The parties have entered into this MOU to reflect the agreements that have arisen out of the District's obligation to negotiate the effects of its decision to issue layoff and displacement notices to certain bargaining unit employees. The MOU is dated July 1, 2017, for reference purposes only.

The Association enters into this MOU on its own behalf as well as on behalf of classified employees who are members of the bargaining unit represented by the Association in its role as the Exclusive Representative.

TERMS

The District and the Exclusive Representative agree as follows:

I. Layoffs for lack of funds or lack of work were implemented in conformity with the provisions and requirements of Education Code Sections 45103, 45115, 45117, 45298, and 45308, and required 60-day notices to affected employees were delivered. Attachment A is a copy of the layoff resolution (01-11-11-01) adopted by the District's Board of Trustees on June 15, 2017.

II. Affected employees were given a written Notice of Layoff which, if applicable, indicated that the employee had displacement ("bumping") rights to another position. Employees who do not have bumping rights were given notice that their services would cease as of the date set forth in the notice.

III. Affected employees shall have reemployment rights to the position from which they were laid off as provided by Education Code Sections 45298 and 45308. Affected employees are expected to verify their contact information and update any changes with the District's personnel office. In addition, affected employees shall have a right to reemployment in preference to new applicants for any available position for which they apply and meet the qualifications set by the District.

IV. In negotiations, the parties have agreed further:

A. The District will offer available substitute work on a rotating first-call basis to employees who were laid off and are on the reemployment list, based on hire date. Each affected employee must make a written request for substitute work in any job classification for which the employee is qualified. An employee on the layoff list who has tested and qualified for other positions in the classified service shall be eligible for employment as a substitute in those positions after laid off employees on the applicable rehire list have been offered the work.

B. An employee on the 39-month reemployment list will be given five workdays to respond to an offer to return to work. If the District does not receive a response by the fourth workday, the Exclusive Representative will be notified and will attempt to contact the employee. If there is no response by the close of business on the sixth workday, the offer will be considered rejected.

C. If an employee on the 39-month reemployment list turns down two offers to return to work in a like-for-like position, the turndown shall constitute a resignation from the District and the employee shall be removed from the reemployment list. For purposes of this provision, like-for-like means the same job classification, the same number of hours per week, and the same number of months per school year at the same site.

D. If an employee on the 39-month reemployment list accepts an assignment of fewer hours per week or fewer months per school year, the employee will be eligible for reinstatement to the position and hours from which he or she was laid off for an additional period up to 24 months.

E. Employees may obtain information regarding available positions in the District by calling the district office at 661-XXX-XXXX or inquiring in person at 123 A Street. The District will mail information on classified openings to the employee's address on file. Employees are responsible for updating any changes to their mailing address. An employee on the 39-month reemployment list may request his or her work history in the district office.

F. The District will not transfer regular work performed by classified employees that is unique or limited to job classifications where layoffs have been implemented to employees in another bargaining unit or to non-represented certificated or classified employees. The Association agrees that non-employee volunteers, including student aides, may supplement, but will not supplant, regular work performed by classified employees in job classifications where layoffs have been implemented beyond the level of the prior school year.

G. Laid off employees shall have all sick leave, longevity, and seniority accumulated prior to the effective date of layoff credited back to the employee's records upon reemployment with the District.

H. Prior to hiring new employees, and by seniority, employees who have been laid off will be returned to their full number of hours worked prior to the layoff unless there is a prior agreement with the Exclusive Representative.

I. For laid off employees who were covered by the health insurance benefits identified in the current Collective Bargaining Agreement, the package coverages remain in effect through August 31, 2017.

V. Any alleged violation of this MOU is subject to the grievance procedure in effect at the time this MOU is signed by the District as the Employer and by the Association as the Exclusive Representative of bargaining unit employees.

VI. This MOU does not establish a precedent or create a past practice with regard to the subject matter set forth herein. Further, the terms of this MOU may not be cited or relied upon for any other purpose in any other administrative or judicial matter or forum.

VII. This MOU is effective as of the latest date of signature.

TENTATIVE AGREEMENT

By affixing their signatures to this MOU, the District and Association acknowledge that the matters set forth above are fully settled. This MOU shall be binding upon the parties' heirs, successors, devisees, administrators, employees, executors, and assigns. This MOU will be effective upon ratification by CSEA membership and subsequent approval by the District's Board of Trustees.

XYZ SCHOOL DISTRICT	**CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 123**
_____	_____
Joe Smith, Superintendent	Jane Doe, President
Date: _____	Date: _____

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*

DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 11.5. Public Employee Communication [3555 - 3559] *(Chapter 11.5 added by Stats. 2017, Ch. 21, Sec. 2.)*

3555. The Legislature finds and declares that the ability of an exclusive representative to communicate with the public employees it represents is necessary to ensure the effectiveness of state labor relations statutes, and the exclusive representative cannot properly discharge its legal obligations unless it is able to meaningfully communicate through cost-effective and efficient means with the public employees on whose behalf it acts. In most cases, that communication includes an opportunity to discuss the rights and obligations created by the contract and the role of the representative, and to answer questions. That communication is necessary for harmonious public employment relations and is a matter of statewide concern. Therefore, it is the Legislature's intent that recognized exclusive representatives of California's public employees be provided meaningful access to their represented members as described in this chapter unless expressly prohibited by law.

(Added by Stats. 2017, Ch. 21, Sec. 2. Effective June 27, 2017.)

3555.5. (a) This chapter shall only apply to public employers subject to Chapter 10 (commencing with Section 3500), Chapter 10.3 (commencing with Section 3512), Chapter 10.7 (commencing with Section 3540), or Chapter 12 (commencing with Section 3560) of, or Chapter 7 (commencing with Section 71600) or Chapter 7.5 (commencing with Section 71800) of Title 8 of, this code, or Chapter 7 (commencing with Section 99560) of Part 11 of Division 10 of the Public Utilities Code.

(b) For purposes of this chapter:

(1) "Exclusive representative" means the exclusive representative or recognized employee organization for the bargaining unit.

(2) "Interest arbitration" means a process whereby an employer and an exclusive representative submit a dispute concerning the terms of access to new employee orientations for resolution to a third-party arbitrator who is then authorized to approve either party's proposal in its entirety, to approve a proposal using both the employer's and exclusive representative's final proposals, or to modify the proposals by the parties.

(3) "New employee orientation" means the onboarding process of a newly hired public employee, whether in person, online, or through other means or mediums, in which employees are advised of their employment status, rights, benefits, duties and responsibilities, or any other employment-related matters.

(4) "Newly hired public employee" means any employee, whether permanent, temporary, full time, part time, or seasonal, hired by a public employer, to which this chapter applies and who is still employed as of the date of the new employee orientation.

(c) (1) Except as provided in paragraph (2), the Public Employment Relations Board shall have jurisdiction over violations of this chapter. The powers and duties of the board described in Section 3541.3 shall apply, as appropriate, to this chapter.

(2) The employee relations commissions established by the County of Los Angeles and the City of Los Angeles shall have jurisdiction over violations of this chapter in the County of Los Angeles and the City of Los Angeles, respectively.

(Added by Stats. 2017, Ch. 21, Sec. 2. Effective June 27, 2017.)

3556. Each public employer described in subdivision (a) of Section 3555.5 shall provide the exclusive representative mandatory access to its new employee orientations. The exclusive representative shall receive not less than 10 days' notice in advance of an orientation, except that a shorter notice may be provided in a specific instance where there

is an urgent need critical to the employer's operations that was not reasonably foreseeable. The structure, time, and manner of exclusive representative access shall be determined through mutual agreement between the employer and the exclusive representative, subject to the requirements of Section 3557.

(Added by Stats. 2017, Ch. 21, Sec. 2. Effective June 27, 2017.)

3557. (a) Except as provided in subdivision (g), upon request of the employer or the exclusive representative, the parties shall negotiate regarding the structure, time, and manner of the access of the exclusive representative to a new employee orientation. The failure to reach agreement on the structure, time, and manner of the access shall be subject to compulsory interest arbitration pursuant to this section.

(b) (1) (A) Except as provided in subparagraph (B), when negotiating access to a new employee orientation, if any dispute has not been resolved within 45 days after the first meeting of the parties, or within 60 days after the initial request to negotiate, whichever comes first, either party may make a demand for compulsory interest arbitration, and if a demand is made, the procedure prescribed by this subdivision shall apply. The arbitrator selection process described in paragraph (2) shall commence not later than 14 days prior to the end of the negotiation period provided in this subdivision. A party shall not submit any proposal to compulsory interest arbitration that was not the parties' final proposal during the parties' negotiations. In the case of a school district employer whose administrative offices are closed during the summer, the timeline on this subdivision shall commence on the first day that the district administrative office reopens.

(B) Notwithstanding subparagraph (A), the parties may mutually agree to submit their dispute to compulsory interest arbitration at any time.

(2) The appointment of an arbitrator for compulsory interest arbitration shall be made by the State Mediation and Conciliation Service using its process to obtain a panel of arbitrators, except as provided in paragraph (4). Within seven days of receipt of a request for a panel, the State Mediation and Conciliation Service shall send the parties a list of seven arbitrators selected from its roster. Within seven days following the receipt of the list, the parties shall make their selection. Unless the parties agree on an alternate selection procedure, they shall alternatively strike one name from the list provided by the service until only one name remains. A coin toss shall determine which party shall strike the first name. In lieu of this process, the parties may mutually select any individual to serve as the arbitrator. Any party that fails to participate in the selection of an arbitrator within the prescribed period waives its right to strike names from the list. Interest arbitration shall commence either on the arbitrator's earliest available date or any other date to which the parties agree, and shall be completed within not less than 30 days. The decision of the arbitrator shall be issued within 10 days and shall be final and binding on the parties. The decision shall provide the exclusive representative with reasonable access to new employee orientations. The arbitrator shall consider, weigh, and be guided by the following criteria:

(A) The ability of the exclusive representative to communicate with the public employees it represents.

(B) The legal obligations of the exclusive representative to the public employees.

(C) State, federal, and local laws that are applicable to the employer.

(D) Stipulations of the parties.

(E) The interests and welfare of the public and the financial condition of the public agency.

(F) The structure, time, and manner of access of an exclusive representative to a new employee orientation in comparable public agencies, including the access provisions in other memoranda of understanding or collective bargaining agreements containing those provisions.

(G) The Legislature's findings and declarations under Section 3555.

(H) Any other facts that are normally or traditionally taken into consideration in establishing the structure, time, and manner of access of an exclusive representative to a new employee orientation.

(3) The parties shall equally share all costs of arbitration.

(4) If a city or county objects to the procedure for appointment of an arbitrator pursuant to paragraph (2), that city or county, within five days of a demand for arbitration by the exclusive representative, may request that the Public Employment Relations Board appoint a PERB Administrative Law Judge or other PERB employee to serve as the arbitrator in lieu of an arbitrator appointed by the State Mediation and Conciliation Service. The city or county shall pay for the cost of that arbitrator. The board shall appoint the arbitrator within five days of receiving that request. The same procedures, criteria, and timeline for arbitrations set forth in paragraph (2) shall apply.

(c) During the period between the effective date of this section and the expiration of an existing memorandum of understanding or collective bargaining agreement between the parties, a request to meet and confer pursuant to subdivision (a) shall reopen the existing memorandum of understanding or collective bargaining agreement solely for the limited purpose of negotiating an agreement regarding access of the exclusive representative to new employee orientations. Either party may elect to negotiate a side letter or similar agreement in lieu of reopening the

existing memorandum of understanding or collective bargaining agreement. This section, however, does not abrogate existing agreements between public agencies and recognized employee organizations.

(d) This section does not prohibit agreements between a public employer and an exclusive representative that provide for new employee orientations that vary from the requirements of this chapter. If such an agreement is negotiated, the requirements of this chapter shall not apply to the extent that they are inconsistent with the agreement. In the absence of a mutual agreement regarding new employee orientations, all of the requirements of this chapter shall apply.

(e) A public employer identified in subdivision (a) of Section 3555.5 does not unlawfully support or favor an employee organization or encourage employees to join any organization in preference to another as prohibited by subdivision (d) of Section 3506.5, subdivision (d) of Section 3519, subdivision (d) of Section 3543.5, or subdivision (d) of Section 3571 of this code, or subdivision (d) of Section 99563.7 of the Public Utilities Code, or any other state law, by permitting a recognized employee organization or an exclusive representative the opportunity to present at new employee orientations as required by this section or consistent with a negotiated agreement pursuant to this section.

(f) This section is not intended to modify the scope of bargaining or representation under any applicable employer-employee relations statute.

(g) A provision in a memorandum of understanding reached pursuant to Section 3517.5, and in effect on the effective date of the act adding this section, regarding the access of an exclusive representative to a new employee orientation shall control for the duration of that agreement, and the rights and duties established by this section shall apply only upon expiration of the agreement. The provisions of Section 12301.24 of the Welfare and Institutions Code regarding the access of representatives of a recognized employee organization to an orientation shall control with respect to public employers and exclusive representatives who are governed by the provisions of that section.

(Added by Stats. 2017, Ch. 21, Sec. 2. Effective June 27, 2017.)

3558. Subject to the exceptions provided here, the public employer shall provide the exclusive representative with the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address of any newly hired employee within 30 days of the date of hire or by the first pay period of the month following hire, and the public employer shall also provide the exclusive representative with a list of that information for all employees in the bargaining unit at least every 120 days unless more frequent or more detailed lists are required by an agreement with the exclusive representative. The information identified in this section shall be provided to the exclusive representative regardless of whether the newly hired public employee was previously employed by the public employer. The information under this section shall be provided in a manner consistent with Section 6254.3 and in a manner consistent with Section 6207 for a participant in the address confidentiality program established pursuant to Chapter 3.1 (commencing with Section 6205) of Division 7. The provision of information under this section shall be consistent with the employee privacy requirements described in County of Los Angeles v. Los Angeles County Employee Relations Com. (2013) 56 Cal.4th 905. This section does not preclude a public employer and exclusive representative from agreeing to a different interval within which the public employer provides the exclusive representative with the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses, and home address of any newly hired employee or member of the bargaining unit.

(Added by Stats. 2017, Ch. 21, Sec. 2. Effective June 27, 2017.)

3559. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(Added by Stats. 2017, Ch. 21, Sec. 2. Effective June 27, 2017.)

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

April 17, 2015

Contact Person
Name: Rebecca Walawender
Telephone: 202-245-7399

OSEP 15-08

MEMORANDUM

TO: State Directors of Special Education

FROM: Melody Musgrove, Ed.D. /s/
Director
Office of Special Education Programs

SUBJECT: *Letter to Delisle*: Children with disabilities with high cognition

I am writing to draw your attention to the Office of Special Education Programs' (OSEP) December 20, 2013 letter to Dr. Jim Delisle (*Letter to Delisle*) regarding determining eligibility for special education and related services under the Individuals with Disabilities Education Act (IDEA) for children with disabilities with high cognition; students who Dr. Delisle terms "twice exceptional students" or "2E students." *Letter to Delisle* pointedly addresses children with high cognition who may be eligible for special education and related services as a student with a specific learning disability, but also cites to the broader requirements in 34 CFR §300.304(b)(1) and (2) that state, in part –

> … in determining whether a child has a disability … the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and prohibits the use of any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child."

In spite of the guidance provided in *Letter to Delisle*, we continue to receive letters from those who work with children with disabilities with high cognition, particularly those with emotional disturbance or mental illness, expressing concern that some local educational agencies (LEA) are hesitant to conduct initial evaluations to determine eligibility for special education and related services for children with high cognition.

In transmitting OSEP Memo 15-08, I am requesting that you widely distribute *Letter to Delisle* to the LEAs in your State, and remind each LEA of its obligation to evaluate all children, regardless of cognitive skills, suspected of having one of the 13 disabilities outlined in 34 CFR §300.8

Should you have any questions, please contact Rebecca Walawender at (202) 245-7399. We appreciate your on-going commitment to providing quality services to children and youth with disabilities.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

December 20, 2013

Dr. Jim Delisle
Distinguished Professor of Education (Retired)
P.O. Box 3550
North Myrtle Beach, SC 29582

Dear Dr. Delisle:

This letter is in response to your emails to me dated March 8, 2013 and April 4, 2013 asking for clarification of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations as they apply to children who have high cognition and who may have specific learning disabilities (SLD). In your communications, you refer to these children as "twice exceptional students" or "2E students."

The IDEA does not specifically address "twice exceptional" or "2E" students. It remains the Department's position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations. See *Letter to Anonymous*, dated January 13, 2010 (55 IDELR 172). That is, under 34 CFR §300.8, a child must meet a two-prong test to be considered an eligible child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services.

With regard to your first question, under 34 CFR §300.307, a State must adopt, consistent with 34 CFR §300.309, criteria for determining whether a child has an SLD as defined in 34 CFR §300.8(c)(10). In addition, the criteria adopted by the State: (1) must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD; (2) must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) may permit the use of other alternative research-based procedures for determining whether a child has an SLD. Therefore, a State's criteria under 34 CFR §300.307 may permit, but must not require, the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD.

Regarding your second question, the regulations do not require or prohibit a State's use of "cut scores" when determining if there is a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD; rather, the regulations allow a State flexibility in establishing its criteria for determining whether a child has an SLD, as long as those criteria meet the requirements in 34 CFR §300.307(a). It is important to note that in determining whether a child has a disability -- whether an SLD or any of the other disability categories identified in 34 CFR §300.8 -- the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and prohibits the use of any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR §300.304(b)(1) and (2). Therefore, it would be inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for special education and related services under the SLD category solely because the child scored above a particular cut score established by State policy. Further, under 34 CFR §300.309(a)(1), the group described in §300.306 may determine that a child has an SLD if the child "does not achieve adequately for the child's age or to meet State-approved grade level standards… when provided with learning experiences and instruction appropriate for the child's age or State-approved grade level standards" in one or more of the following areas: oral expression; listening comprehension; written expression; basic reading skill; reading fluency skills; reading comprehension; mathematics calculation; or mathematics problem solving.

In the *Analysis of Comments and Changes* in the 2006 final regulations implementing Part B of the IDEA, the Department, in responding to public comments, recognized that there will be some students who are gifted but also need special education and related services. See 71 Fed. Reg. 46540, 46647 (Aug. 14, 2006) ("Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD."). In responding to a public comment specifically addressing students who are gifted and who have difficulty with reading fluency, the Department stated as follows: "No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified." 71 Fed. Reg. at 46652.

Lastly, you suggest that OSEP adopt specific language to clarify the use of discrepancy models and response-to-intervention models when determining if a child is a child with an SLD. We believe that further clarification is unnecessary at this time.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

I hope this information is helpful. If you have questions, please do not hesitate to contact Jennifer Wolfsheimer at 202-245-6090 or by email at Jennifer.Wolfsheimer@ed.gov.

Sincerely,

/s/ Melody Musgrove

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs