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# COVID-19 ARTICLE



## Negotiations In a Time of Crisis

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The COVID-19 pandemic will go down in history as a shining example of commitment and heroism arising out of tragedy. In addition to front-line health care workers and others risking their own lives to provide for those in need, thousands of certificated and classified school employees are teaching remotely, creating a new virtual system of public education, sanitizing hundreds of classrooms and providing meals to those who depend on the schools for sustenance. These workers deserve our respect and appreciation as they continue to serve others even while caring for their own families and helping to teach their own children through distance learning.

With so many already having lost so much, you might ask why we should care about the state of negotiations at this time. Why be concerned about the legal niceties of good faith bargaining and the scope of negotiations in the middle of a global pandemic? I submit that, as labor and management engage in “crisis negotiations” throughout the state, we must revisit and reaffirm our reliance on existing negotiated contracts as well as longstanding norms of good faith collective bargaining.

We have often heard it said that we must “follow the contract” and “honor the contract.” Indeed, the collective bargaining agreement (CBA) is the Bible of workplace rules, containing covenants and commandments forged through the crucible of the negotiations process. Once in place, the CBA is the foundation and bedrock upon which the labor-management relationship rests even as the parties may agree to change it through ongoing negotiations. It is the source of stability and certainty in the workplace, based on a universal commitment to abide by and apply its terms consistent with the intent underlying its creation.

Then the COVID-19 pandemic came to America’s shores and it is as if the contracts no longer existed in some places. They were tossed aside and, instead of serving as the established foundation for meeting the challenges of school closure, treated by some as almost irrelevant.

Local education agencies (LEAs) across the state immediately received demands to bargain the “change in working conditions” caused by school closures, together with boilerplate memoranda of understanding (MOUs) generated by unions at the state level which mutated into hundreds of variations at the local level. The major subjects addressed by these proposed MOUs were core subjects already addressed in every CBA: compensation, benefits, leaves of absence, hours of work, safety, assignments and transfers, evaluation and more.

My first reaction was, “Why are we being asked to renegotiate over subjects we have already spent years negotiating and reducing to binding legal documents?” Instead, my initial advice to LEAs was to sit down with their labor partners to review the CBA’s relevant areas to ensure common understanding and application of existing language in an extraordinary context. Then, as the parties identify “gaps” in the current CBA that do not address this crisis, by all means bargain them and reduce them to written MOUs.

This profoundly new set of circumstances does not, however, require LEAs to completely renegotiate over subject matters that have already been negotiated. Nearly 40 years ago, the Public Employment Relations Board ruled that such matters need not be renegotiated “merely because events arise which were not in the contemplation of the parties during prior negotiations.” (*Mt. Diablo Unified School District (1983) PERB Dec. No. 373, page 47.*)

The ubiquitous demands to bargain “the impacts of school closure due to COVID-19,” however, violated this rule, containing proposals such as the following (with responses in italics):

- Bargaining unit members will not suffer any loss of pay or benefits relative to their regular schedules for the period of closure or curtailment.
  - *The employer cannot unilaterally reduce pay or benefits according to the CBA, as well as state laws, to say nothing of constitutional prohibitions against the taking of property without due process of law. Also, The Governor’s Executive Order N-26-20, issued early relative to these events on March 13, guaranteed the maintenance of state funding so LEAs could, among other things “Continue to pay its employees.”*
- The parties agree that all current adopted leave policies will remain in full effect for the duration of the COVID-19 pandemic.
  - *Why and how could negotiated leave provisions be changed, especially unilaterally? Why do we need to re-agree to an existing contract article?*
- Unit members shall not have any sick leave, differential pay, or salary deducted during the span of the school closures.
  - *The CBA already contains an extensive Leaves article which dictates when leaves may or must be taken.*
- The LEA shall comply with all applicable laws, rules, regulations and governmental directives, including but not limited to Cal-OSHA and other governmental agency guidelines regarding maintenance of a safe place of employment.
  - *The CBA already contains an extensive Safety article with these guarantees; even if not, LEAs have always been required to follow these laws.*

As mentioned above, there will be “gaps” that need filling. These could include transfer and assignment time lines, evaluation procedures and time lines, and notwithstanding the expansive and generous leave articles in every CBA, additional details to address coordination of pre-existing leaves with Executive Orders and new federal leave laws.

It may also be appropriate to agree upon (not demand as a matter of right) some needed flexibility in the contours of the work day as educators and students grapple together with new ways to teach and learn. Many union proposals, however, seek to *nullify* existing contract provisions rather than supplement them to address new conditions.

Perhaps even more troubling is confirmation of the complete disappearance of the few remaining boundaries around the scope of negotiations. I do not recall that the subject of whether and when students will receive grades is negotiable. Nor have I bargained over a reduction in student instructional time – even via distance learning – especially when the contract already defines the unit members’ instructional day. When did the curriculum itself become negotiable (and don’t LEAs already have an approved curriculum)?

Some proposals seek to bargain the *decision* whether to provide online distance learning, e.g. “Teachers shall not be required to provide distance learning online and may opt instead to do so through paper materials, emails and other means.” This is not the impacts or effects bargaining mandated by the law; rather, this is a demand to bargain over the LEA’s decision on *whether and how* education is to be delivered at all.

I understand and agree fully with the need for partnership, collaboration and standing together right now, but what I have seen in some places are overreaching proposals devoted in large part to what unit members shall *not* be required to do. One may disagree with school board or administration decisions regarding continuity and delivery of education, but these are precisely the kind of policy decisions they are elected and employed to make.

Employers understand and will meet the legal obligation to bargain over the effects of these decisions, tackling issues such as technology, equipment, training, professional development, privacy, use of live video or audio, and the list goes on. These are the “gaps” in the contract which should be filled through impact negotiations. If there was any doubt before, however, the distinction between non-negotiable decisions and negotiable effects can now be confirmed to be nonexistent.

One might argue that no one anticipated a global pandemic when these contracts were negotiated; therefore neither party could possibly have intended those provisions to apply to the present emergency. Applying this theory, however,

renders the entire contract meaningless since the future is unpredictable. The purpose of “the living contract” is to set down jointly created rules that will apply to future, unknown environments, thereby establishing workplace stability and security.

I do not intend to paint all locals and their representatives with one broad brush. Many if not most chapters have been collaborative, cooperative, and student-oriented. These locals and their members have been partners in a herculean and largely successful effort to roll out distance learning after starting from scratch. Classified locals and their unit members have stepped forward to provide food to students, sanitize schools, get the payroll out and partner in distance learning when they can.

A few locals (and apparently the state organizations), however, have crossed the line and held distance learning hostage in pursuit of non-negotiable goals. As a result, some LEAs have swallowed hard, refrained from arguing over “scope” issues and reached less than adequate agreements in order to move on to more pressing concerns.

The contrasting responses to this crisis from some representatives and those they represent could not be more striking. Even before Friday, March 13 – the day most LEAs learned they would be closed on Monday, March 16 – teachers had begun preparing new lessons, developing schedules and devising innovative ways to deliver education remotely. School staffs, site instructional leaders and LEA administrators collaborated powerfully to ensure the engine of education continued to run uninterrupted (perhaps with a few misfires) on Monday morning.

Statewide, we witnessed an impressive if not astonishing display of individual and collective professionalism, dedication and true grit, both from newer educators familiar with current technology, and by experienced professionals who strived mightily to overcome understandable doubts and fears associated with learning and using new ways of teaching on the spot.

Meanwhile, some state and local labor representatives were drafting proposals to restrict how, what and when teachers could teach and whether, when and how teachers should communicate with students, parents and administrators. By the time these fully realized demands made it to the bargaining table, fortunately (especially for students), in many cases the education train had already left the station.

With millions of jobs lost and billions in tax revenue evaporating, LEAs now face a secondary but certain crisis: a recession of epic proportions that might impact schools even more than the last two. This crisis may well require changes in contractual conditions that cost money, such as class size, staffing, hours of work, compensation and benefits.

LEAs will face yet another entirely unforeseen set of circumstances and will look to their labor partners again to answer the call for collective problem-solving and assistance. Based on negotiations over recent school closures, we can be confident that many local unions and their members will step up once more and do what is best for students, staff and the organization as a whole.

One also hopes this experience has taught or reminded us that starting at extreme or one-size-fits-all bargaining positions in order to finally arrive at a sensible center solution is inefficient and often unproductive. All stakeholders are better served by focusing on the unique needs of each educational community especially when it is in all parties’ interest to respond quickly to emergencies. This can best be accomplished without the unnecessary and counterproductive conversations by honoring the contract and the longstanding principles underlying the good faith negotiations process.

For more information regarding the impact of COVID-19 on your district’s operations, please visit our COVID-19 Resources page at <https://www.dwkesq.com/covid-19-resources-page/>.



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