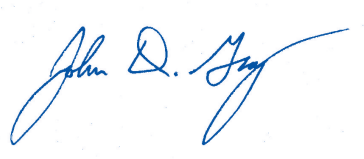


CONCURRENCE AND DISSENT OF DISTRICT PANEL MEMBER

At the outset, I'd like to thank the Chair for his assistance throughout this fact-finding process and the SCTA team for sharing information with the Fact-Finding Panel for consideration. While I dissent with the recommendation for ongoing wage increases for the reasons described below, I remain hopeful that the District and SCTA will work together through successor contract negotiations to reach common ground on compensation, health and welfare benefits, and the other issues that are part of that process. I encourage the parties to engage in the hard discussions on successor contract negotiations that are needed to resolve their differences in a way that does not cause further disruption to the learning and social and emotional supports that the District's students desperately need after three years of interrupted learning.

SCOPE OF FACT FINDING

Throughout this process the District has maintained that only those issues which are directly and specifically involved with aspects of reopening District schools for in-person learning in the 2021-2022 school year during the COVID-19 pandemic are properly included in this proceeding, e.g., health and safety related to reopening schools, short and long term independent study for students, increased pay in the 2021-2022 school year for substitutes, nurses and teachers covering on their preparation period, and temporary assignment of training specialists to fill vacancies. The District has also maintained that changes to ongoing compensation, health and welfare benefits, and other areas of the existing Collective Bargaining Agreement between the District and SCTA are outside of this process and are subject to the ongoing successor contract negotiations between the parties. The District's position on the scope of fact-finding has been well-documented in its communications to the Panel on March 4 and 11, 2022.

I strongly disagree with the Chair's recommendation that ongoing compensation for the 2021-2022 school year be considered as part of the process and explain my reasons when discussing the specific salary recommendation by the Chair below. I am also disappointed that the Chair appears to pick and choose, without any consistency, those items from successor contract negotiations that he believes are at issue in these COVID/Reopening negotiations and those that are outside the scope.

For ease of reading, my position on each of the proposals and issues addressed in the fact-finding hearing is set forth below in the same order discussed in the Chair's report, with the Chair's comment and recommendation in italic font followed by my position.

FINDINGS AND RECOMMENDATIONS[1]

1. Health and Safety

The District has proposed that the parties meet regularly on health and safety issues. The Union has proposed the creation of an SCTA/SCUSD Health and Safety Committee. These proposals are not in conflict. The Chair finds that the establishment of a standing committee, especially on a subject such as this, can act to ensure that issues are addressed on a timely basis. The Chair recommends that a District/Union Health and Safety Committee be established. This recommendation extends beyond 6/30/2021.

I concur in part and dissent in part from the recommendation that a temporary District/Union Health and Safety Committee be established so that the parties can regularly meet and discuss any health and safety issues. I concur insofar as this recommendation, like other recommendations by the Chair, focuses on the current 2021-2022 school year. I dissent from the recommendation proposing that this Committee extend beyond the 2021-2022 school year as the existence of committees ongoing, outside of the current school year, is a subject for successor contract negotiations and is inconsistent with this Chair's statements in his report that he intends to address issues related to the 2021-2022 school year.

The District proposes that for general safety protections, the parties be bound by the guidelines of CDPH and SCPDH. The Union proposes that where the parties have previously agreed to a higher standard, that the higher standard continue to apply. Particularly, state guidelines on distancing, while initially requiring 6 feet, have been adjusted to 3 feet. The Chair recommends that the parties adopt the current CDPH guideline, i.e., 3 feet distancing.[2] Any questions that arise as the result of such updates may be raised for discussion at the Health and Safety Committee, or as otherwise determined by the parties.

I dissent from this recommendation. The current guidance from the California Department of Public Health issued on March 12, 2022, does not recommend physical distancing of three (3) feet in school classrooms. Rather, "CDPH recommends focusing on the other mitigation strategies provided in this guidance instead of implementing minimum physical distancing requirements for routine classroom instruction." (See the March 12, 2022, COVID-19 Public Health Guidance for K-12 Schools in California issued by CDPH, "Safety Measure for K-12 Schools" Section 2 (a).) The District believes that continuing to follow the most current guidance from CDPH is the best way to keep our students and staff safe, and there is no evidence, scientific or otherwise, that any additional measures are necessary or helpful at this stage in the COVID-19 pandemic.

Both parties have proposed compliance with the vaccination-or-testing mandates, but no compliance date has been set. The Chair recommends that April 30, 2022 be set as the final

[1] Recommendations are those of the Chair, and will be shown in *italics*. As noted by the Chair in Footnote 2 of his report, unless otherwise noted, all of the Chair's recommendations are for the term through June 30, 2022.

date for such compliance, with such date being subject to modification by mutual agreement of the parties. This provision should extend beyond 6/30/2022.

I dissent from this recommendation as the recommendation is inconsistent with the current legal requirements for COVID-19 testing in schools. Pursuant to the Order of the State Public Health Officer of August 11, 2021, the vaccinate or test mandate is currently in effect and the District is required to comply with the COVID-19 testing requirements for unvaccinated employees. Because this is a legal requirement, the Chair's recommendation that it extend beyond June 30, 2022 is unnecessary as the requirement will exist, and the District will follow it, as long as it is in place.

The Union has proposed that the District provide Covid Sick Leave retroactively for the period 10/1/21-12/31/21, while SB 95 was inoperative. The Chair finds this to be a reasonable allocation of Covid funds. The Chair recommends that the Union's proposal be adopted.

I dissent from this recommendation. Pursuant to the Collective Bargaining Agreement between the District and SCTA, Article 9.3.11, SCTA unit members who are required to quarantine receive unlimited leave during their quarantine period.

The Union has proposed that an indemnity clause be implemented, requiring the District to compensate the Union $250,000 for each violation of the Health and Safety Agreement. The Chair does not recommend that this proposal be adopted.

I concur in this recommendation. An indemnification clause is not a mandatory subject of bargaining and SCTA cannot insist to impasse over a nonmandatory subject. This provision should not be before this panel as it is outside the scope of this impasse proceeding. I appreciate the Chair's recognizing the highly unusual and improper nature of this proposal.

To the extent that other Health & Safety issues remain, or subsequently arise, the Chair recommends that the parties work through the Health and Safety Committee, or as otherwise agreed by the parties, to resolve such issues.

I concur with this recommendation of the Chair for any issues that arise during the 2021-2022 school year.

2. <u>Continuity of Instruction/Short-Term Independent Study</u>

The District has proposed a plan to require teachers to connect with quarantined students via Zoom while simultaneously providing in-person instruction in the regular classroom. The Chair does not recommend adoption of the District's proposal.

I dissent from this recommendation. The District's proposal would allow students who are required to quarantine due to COVID illness or COVID-related quarantine to remain connected with their teachers and peers by using available virtual technology to participate in the class while at home. This proposal would ensure continuity of instruction for District students while unable to attend school in-person and minimize the learning loss that occurs when students try to work through paper packets at home without teacher and/or peer support. The District classrooms are already equipped with all the necessary technology to allow teachers or students

to be present through virtual means. I also note that the Chair's recommendation on this proposal focuses only on what might be beneficial for the teacher without taking into account what is best for the students of the District. Numerous experts have detailed the impact that the COVID-19 pandemic has had on student learning and specifically the detrimental impact of being isolated from their teachers and peers during distance learning and quarantine periods.

The District has proposed that quarantined teachers provide instruction remotely via Zoom to students in the classroom, while those students are supervised by a substitute, and that such teachers be compensated for additional time needed to prepare for such Zoom instruction. The Chair recommends that the District's proposal be adopted, including a provision that any quarantined teacher may freely choose to volunteer, or decline, such assignment.

I concur, in part, and dissent in part, with the Chair's recommendation for the remainder of the 2021-2022 school year. I concur in this recommendation insofar as it would allow teachers who are required to quarantine due to COVID-exposure or illness, but who feel able to work while out of their classroom, to remain connected to their students and provide continuity of learning for their class. I dissent from the portion of the recommendation that would make this optional for teachers as it will create inconsistency and inequity within the District with some students remaining connected with their teacher during a quarantine period while other students not being given that option.

3. <u>Long-Term Independent Study</u>

The District's proposal regarding long-term independent study includes a chart laying out minimum daily and weekly required times for instruction which are in excess of those required by AB130, described by the District as "more rigorous" or "more robust." While more direct instruction time may be a laudable goal, it is not required by the law. The record shows that currently there are nearly 600 students on the wait list for independent study, and at least 14 teaching vacancies for that program. Getting those students placed with a teacher, and filling the vacancies, should be the priority at this time. The Chair recommends that the parties comply with AB130 and that the chart which exceeds the AB130 requirements (item 3 in the District's 10/26/21 proposal) should be considered a goal of the parties. The parties, of course, may exceed the requirements of AB130 if they mutually agree to do so at some point.

I concur with the Chair's recommendation for the remainder of the 2021-2022 school year. Given that the school year is two-thirds of the way over, and that changing course on the current independent study program would be a hardship on District students and staff, I concur in this recommendation to the extent it encourages the District and SCTA to work together to make the independent study program as robust as possible for the remainder of the current school year. I believe that the District's proposal for a more robust independent study program would have best served the students of the District were the District able to implement it earlier in the current school year.

The District has proposed that teachers with regular classroom assignments can volunteer to work with Independent Study students, due to the staffing shortage. Teachers who volunteer would be assigned up to 10 IS students, and would receive their per diem compensation for up

to 8 hours per week. Volunteers would be selected by seniority, with the numbers based on District need. The Union has concurred with much of that proposal, with the addition that the 8 hours per week would include 5 hours of direct instruction, and 3 hours of prep time. In support of their modified proposal on this issue (see SCTA 1/26/22 proposal on "Safely Reopening Schools . . .," Section XI. C. a. vii on page 12) the Union cited the statement of the SCUSD Superintendent at the 11/18/21 School Board meeting.[3] The Chair recommends that the Union proposal be adopted.

I concur, in part, and dissent in part, with the Chair's recommendation for the remainder of the 2021-2022 school year. I concur in this recommendation to the extent it recommends that teachers who work outside of the independent study program be allowed to volunteer to teach independent study students for the remainder of the 2021-2022 school year and receive extra pay prospectively for such work. I dissent from the recommendation in that it recommends that the District and SCTA determine the number of positions needed, when it is the District that has the managerial prerogative to determine staffing needs.

The District has proposed that teachers who are assigned to Independent Study would have the right to return to their prior or comparable position, while the Union has proposed that staff who accept such assignment would have the right to return to their home school. The Chair recommends that teachers assigned to Independent Study shall have the right to return to their prior assignment, with the understanding that this provision does not confer "super-seniority" for any teacher who would have otherwise been subject to layoff or reassignment from the home school.

I dissent from this recommendation. The District cannot guarantee that the position of a teacher who voluntarily left their position to teach in the independent study program will still be available as some positions may have been eliminated due to declining enrollment or other reasons. Under the Chair's recommendation, the District would potentially have to return a teacher to a position that no longer exists, which would further exacerbate the staffing crisis in the District. The District has a process for addressing surpluses in staffing that is clearly established in Article 8 of the Collective Bargaining Agreement between the parties and has consistently been used every year to ensure placement of teachers whose position has been eliminated at a school of their choice. I am not clear on the Chair's use of the term "super seniority" since seniority for certificated employees is clearly established under the Education Code.

The parties appear to agree on the issue of providing Professional Development prior to the start of the school. The Chair recommends that such provision be adopted.

This proposal is obsolete because the District has already offered professional development opportunities to teachers prior to the start of the current 2021-2022 school year.

To the extent that additional issues remain regarding Long-Term Independent Study, the Chair recommends that the parties work together to finalize those.

I concur with this recommendation of the Chair for any issues that arise during the 2021-2022 school year.

4. <u>Training Specialists</u>

The District has proposed to temporarily assign Training Specialists to fill vacant teaching positions in the District. In support of this proposal, the District cites the current staffing shortage, and the fact that the San Juan Unified School District has adopted such a provision. There is no dispute that San Juan is a "comparable" school district, being of similar size, and its location just to the east of SCUSD. The District included in its presentation at the hearing a copy of the agreement reached between SJUSD and the San Juan Teachers Association. Key points of that agreement include:

- ***Reliance on regular substitutes first, and then non-represented staff second, before using Emergency Backup Practitioners [comparable to the Training Specialists at issue here].***
- ***Staff will not be assigned as EBP more than one full day per week as they have essential work to provide; if lack of supervision requires assignment more than once a week, a key administrator [insert name here] and the union will be notified.***
- ***Participation is optional (voluntary).***
- ***Any staff who agree to act as EBP will be compensated $15 per 15 minute increment, up to a maximum of $345 per day, in addition to their regular pay***.

The Chair recommends that the parties adopt the District's proposal, amended to include the four bullet points from the San Juan agreement, listed above.

I concur, in part, and dissent in part, with the Chair's recommendation for the remainder of the 2021-2022 school year. I concur in this recommendation to the extent that the Chair has recognized that temporarily assigning Training Specialists to the classroom will allow the District to fill vacant positions at its highest needs schools. However, I dissent in that the recommendation is essentially undermined by the Chair's suggested bullet points. Specifically, the recommendation that the temporary reassignment is optional (voluntary) as this recommendation completely undermines the recommendation to allow for reassignment. The District has a large number of vacancies at its highest needs schools because substitutes are not accepting assignments at those schools. To allow the Training Specialists to decline temporary work at a school will continue to exacerbate the shortages in the District and further create inconsistency and inequity within the District. In addition, the recommendation is not clear as to which "nonrepresented staff" needs to be assigned before Training Specialists. Is the District expected to assign every principal and other key District administrator to a position before it can consider temporarily assigning a Training Specialists? The exceptions proposed by the Chair swallow the recommendation and, while they may have worked for San Juan Unified where the relationship between the union and District is different from here, they will not work in this District.

5. Substitutes and Extra Coverage

The District has proposed that daily rates for substitutes be increased by 25%, and that the rate for secondary school teachers who volunteer to substitute on their prep period be increased by 25% over the current rates; that these rates be retroactive to the beginning of the 2021-22 school year, with the provision to expire June 30, 2022. The Chair recommends that the District's proposal be adopted.

I concur in part with the recommendation of the Chair that substitute pay be increased for the 2021-2022 school year; however, I only concur that it should be increased prospectively. Retroactively increasing the pay for substitutes who already worked in the District does not address the staffing shortage as the substitutes that have worked over the past 6 months already committed to working those days at the rate in effective at the time they accepted the assignment. Had the proposal been signed by SCTA in September 2021 when the District and SCTA agreed on the increased rates—the highest in the region—the proposal would have had a significant impact on retaining substitutes to fill vacant positions in the District.

The Union has proposed that the above proposed rates for teachers who volunteer to substitute on their prep period also apply to teachers who agree to substitute on a free period, and to those who voluntarily accept an assignment to teach an extra period or voluntarily accept an out-of-regular assignment; and that any elementary school teacher who is not provided a prep period shall receive an alternative prep period with 5 working days, or shall be paid for the missed prep period at 25% above the teacher's regular rate of pay. This proposal is comparable to other proposals relating to extra work. The Chair recommends that the Union's proposal be accepted.

I concur, in part, and dissent in part, with the Chair's recommendation for the remainder of the 2021-2022 school year. I concur that secondary teachers who, prospectively, substitute on a free period, should receive additional pay for that work. However, I dissent from the Chair's recommendation that any elementary school teacher who is not provided a preparation period will receive an alternative preparation period or receive increased pay. Article 5 of the Collective Bargaining Agreement between the District and SCTA specifically addresses missed preparation time and the Chair's recommendation is inconsistent with that existing contract language. Missed preparation time is an appropriate discussion for successor contract negotiations, not negotiations on COVID-19/Reopening related issues.

The Union has proposed that Special Education teachers who voluntarily accept additional students on their caseload should receive an additional 25% above the contractual rate (see Section 17.6.1(k) of the CBA). This proposal is comparable to other proposals relating to extra work. The Chair recommends that the Union's proposal be adopted.

I dissent from this recommendation. Extra compensation for special education teachers who have extra students on their caseloads is outside the scope of this impasse. The current CBA between the District and SCTA has provisions in Article 17 for when caseload maximums are exceeded. This recommendation to increase the overage pay is outside the scope of this proceeding and is appropriately discussed in successor contract negotiations. This is yet another

example of the Chair making arbitrary and inconsistent recommendations as to what is in and outside the scope of the instant impasse proceeding.

The Union has proposed that no teacher be required to teach a combined class, and that those who volunteer to teach a combined class would be paid $100 per hour for the time worked. This proposal is somewhat comparable to others relating to extra work. The Chair recommends that the Union proposal be adopted, but modified to provide that teachers who voluntarily agree to teach combined classes be compensated for such hours at 25% above their regular salary.

I dissent from this recommendation. There is nothing about combination classes that is related to the scope of the current proceeding and this is again an overreach by the Chair to include recommendations in this proceeding that relate to articles of the CBA that are being negotiated through successor contract negotiations. This recommendation is inconsistent with the way in which comparable school districts in the region and across the state handle combination classes, very few of which have any limitations on districts creating and assigning teachers to combination classes.

The Union has additionally proposed that the regular salary schedule be adjusted so that the starting salary (Column A, Step 1) is equal to the Step 2 rates for substitutes, in order to provide equity within the bargaining unit. The Chair does not recommend that this proposal be adopted.

I concur with this recommendation.

The Union proposed that substitutes be entitled to an additional 14 days of paid sick leave for use if they contract Covid or are required to substitute. This seems an appropriate use of Covid funds and may help with the shortage of substitutes. The Chair recommends that the Union proposal be adopted.

I dissent from this recommendation. Leaves of absence for employees represented by SCTA are part of Article 9 of the Collective Bargaining Agreement and should be negotiated through successor contract negotiations. As explained throughout this concurrence and dissent, I do not understand how the Chair found some issues such as this one to be part of this impasse proceeding, but other issues, such as the one that follows, outside the scope. Further, providing this for the little time that remains in the current school year will do little, if anything, to address the substitute shortage.

The Union proposed that the District create 50 benefitted substitute positions to support schools that struggle to find substitutes. The Chair finds that this proposal is beyond the scope of this fact-finding, and should be dealt with in successor bargaining.

I concur with this recommendation that the proposal is outside of the scope of this fact-finding.

In addition, the Union has proposals in this section regarding Special Ed teachers who accept additional students, pay for teachers volunteering to teach a combined class, and other issues.

The Chair finds that these proposals are beyond the scope of this fact-finding, and should be dealt with in successor bargaining.

I concur with this recommendation that the proposal is outside of the scope of this fact-finding.

6. Extra Pay for Nurses

During mediation on February 2, 2022, the parties reached agreement on an MOU providing extra pay for school nurses working extra hours, retroactive to the first day of the 2021-22 school year. The Union signed that MOU on February 3, but the District declined to sign it at that time, characterizing it as part of a package. Whether or not it was part of a package at that time, the Chair recommends that the proposal be adopted.

I concur in this recommendation for the remainder of the 2021-2022 school year.

7. Staffing Shortage

As discussed above, the parties are in dispute as to whether issues related to the agreed-upon staffing shortage are within the scope of this fact finding. Nevertheless, the Chair finds that this Fact Finding does properly include the issue of short staffing as it affects the ability of the District to deal with the pandemic, and the parties' various proposals related to that issue. And the issues of wages and benefits are clearly relevant to recruitment and retention of staff. ***[FN]***

The District's proposals around Health Benefits and Retiree Health contributions, which have been characterized by the Union as takeaways, are prospective, and thus can continue to be negotiated in successor bargaining. The Chair finds that these proposals are beyond the scope of this fact-finding, and should be dealt with in successor bargaining.

I concur in this recommendation. However, I continue to be confused by how the Chair has selected which items are and are not within the scope of this proceeding. For instance, the Chair has determined that health and welfare benefits are not within the scope of this proceeding while compensation for the 2021-2022 school year is within the scope. It appears the Chair has decided that health and welfare benefits are not within the scope because the District is proposing a cap on its contribution to health and welfare benefits to bring its contribution level more in line with that of school districts across the region and the state. In his footnote 5, the Chair claims it is counter intuitive to expect proposals to shift health care costs would help recruit and retain staff. However, the Chair fails to understand that the District's health and welfare benefits are among the highest in the state, significantly higher than comparable districts, and the root cause of the District's ongoing structural deficit as noted by fact-finders in 2002 and 2017, and by the California State Auditor, the Fiscal Crisis Management Assistance Team (FCMAT), and the Sacramento County Office of Education.

Regarding wages, there have been no increases since when the last scheduled increase occurred during the predecessor contract, presumably during the 2018-19 school year. The District has already made proposals to increase pay to substitutes, to nurses, and to teachers who volunteer for certain assignments, thus recognizing that wages are an important factor in

dealing with staffing shortages. The Chair finds that wages are within the scope of this fact finding.

For the reasons explained above, I dissent from this recommendation/determination.

The Union proposed to extend the existing contract through June 30, 2023, with no takeaways, and both parties having the right to renew their various positions on the issues. The Chair finds that this proposal is beyond the scope of this fact-finding, and should be dealt with in successor bargaining.

I concur with this recommendation that the proposal is outside of the scope of this fact-finding.

The Union proposed to provide cost-of-living increase consistent with those in the Superintendent's employment contract, which provides that the Superintendent will receive the same increases as provided to the SCTU [sic] bargaining unit, and that if there is no agreement on salary for a given year, the Superintendent would receive an increase based on the California CPI.[FN] The Chair recommends that the District provide an across-the-board salary increase retroactive to the beginning the 2021-22 school year, in an amount equal to the cost-of-living increase provided to the Superintendent for this school year. The Chair also finds that the issues of any wage increases for the 2019-20 and the 2020-21 school years, and for 2022-23 or subsequent years, including any effective dates and/or retroactivity, are beyond the scope of this fact finding, and should be dealt with in successor bargaining.

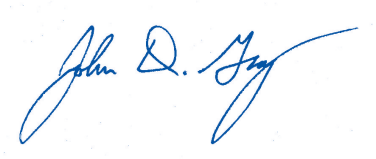
I dissent from this recommendation. First, the District maintains that the issue of ongoing compensation is outside the scope of this impasse proceeding for the reasons described in the District's March --, and --, 2022 letters. Second, the Superintendent has not received any increase in compensation for the 2021-2022 school year. Paragraph 2.a of the Superintendent's Employment Agreement expressly states that "The Superintendent's salary shall remain the same as for the 2020-2021 school year…." While the Chair sites paragraph 2.b.2 of the Agreement in Footnote 6 of his recommendations, that paragraph has not come into play yet because there is no negotiated agreement between the District and SCTA related to compensation. Finally, I am not clear on how the Chair believes the District can implement an ongoing increase to the SCTA salary schedules for 2021-2022 when the two prior school years, 2019-2020 and 2020-2021, remain open for negotiations.

The Union has proposed no layoffs for 2022-23. As the SCUSD Board has recently decided that there will not be layoffs for 2022-23, the Union's proposal is moot.

I agree with the Chair's statement and also note that the decision to layoff positions is not a mandatory subject of bargaining and is therefore outside of the scope of any impasse proceeding.

The Union has proposed the creation of a Recruitment and Retention Committee. The Chair recommends adoption of the Union proposal. This recommendation extends beyond 6/30/2022.

I dissent from this recommendation.

CONCLUSION

As explained above, I dissent with the recommendation of the Panel Chair regarding the recommended ongoing salary increases, not because I believe that hard-working teachers do not deserve additional compensation, but rather because discussions of compensation and benefits are part of the ongoing successor contract negotiations between the District and SCTA. I further strongly dissent from the Chair's bringing into this impasse proceeding issues that directly relate to items in negotiations between the District and SCTA on successor contract. In my twenty-five years serving on fact-finding panels I have never experienced such an overreach by a Panel Chair. Nevertheless, I encourage the District and SCTA to resume their successor contract negotiations immediately with a goal of reaching a student-centered and fiscally responsible agreement on all of the issues before them as soon as possible.