

BEFORE THE
GOVERNING BOARD OF THE
SAN JUAN UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the :

PROPOSED REDUCTION OR
ELIMINATION OF PARTICULAR KINDS
OF SERVICES, AFFECTING 154.02 FULL
TIME EQUIVALENT CERTIFICATED
EMPLOYEES.

OAH No. 2009020163

Respondents.

PROPOSED DECISION

On April 20, 2009, through April 22, 2009, in Carmichael, California, Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Linda C.T. Similick, General Counsel, represented the San Juan Unified School District (District).

Michael N. McCallum, Attorney at Law, assisted by Robin Thompson, Paralegal, represented all 91 respondents, identified in Exhibit A, a copy of which is attached hereto and incorporated herein by reference.

Evidence was received. The matter was submitted and the record was closed on April 22, 2009.

FACTUAL FINDINGS

1. On November 21, 2008, the District sent a letter to certificated employees on the subject of confirming District records. The letter set forth the employee's seniority date and credentials and stated that the employee should review the information for incorrect data and bring errors to the attention of the Human Resources Department. The letter further stated that if the attached form was not returned by December 12, 2008, with any corrections, Human Resources would assume that the information it had on file as set forth in the letter was correct. On February 23, 2009, the District sent emails to each certificated employee. The emails advised that the seniority lists for certificated employees were available for review at

the District office and at the San Juan Teachers Association office. Certificated employees were given the opportunity to review the seniority lists and advise the District of any issues regarding their seniority dates.

2. On or before February 24, 2009, Larry Graser, Director of Human Resources of the District, sent a written recommendation to the Governing Board of the District (Board) for the reduction or discontinuation of particular kinds of services (PKS), in order to reduce expenses for the 2009-10 school year. As a result of the anticipated loss of state and federal funding for the 2009-2010 school year and subsequent school years, as well as an anticipated decline in enrollment, the District expected to experience a budget shortfall. Mr. Graser recommended the elimination of 398.90 full-time equivalent (FTE) certificated positions.

3. On February 24, 2009, the Board adopted Resolution No. 2457, authorizing the reduction or elimination of PKS. The Resolution directed the Assistant Superintendent of Human Resources, or his or her designee, to send notices to a corresponding number of certificated employees necessary to effectuate the reduction of 398.90 FTE that their services would not be required for the 2009-10 school year.

4. Resolution No. 2457 established “competency criteria” for determining whether a teacher affected by the reduction or elimination of services could displace (bump) a junior teacher. The resolution provides:

Teachers are deemed to be “certificated and competent” to teach any class which is:

a. authorized by a valid credential issued by the State of California and held by the teacher; or

b. not associated with a credential issued by the State of California but that the teacher has taught for at least one semester in the current school year or either of the two preceding school years.

5. On February 24, 2009, the Governing Board also adopted Resolution No. 2458, specifying criteria to be used in determining the order of termination of certificated employees with the same first date of paid service to the District seniority (tiebreaker criteria).

6. Resolution 2457 was revised on March 10, 2009, to include six additional FTEs. The Governing Board directed the District to reduce or discontinue 404.90 FTEs, beginning not later than the commencement of the 2009-2010 school year, as follows:

<u>Administrators</u>	FTEs
Coordinator, Curriculum	5.50
Director, Extended Learning	1.00
Director, Schools and Programs	3.00
Program Specialist, School to Career	2.00
Psychologist	0.20
Vice Principal, Alternative School	0.50
Vice Principal, Elementary School	4.50
Vice Principal, Middle School	1.50
Vice Principal, High School	3.07
Principal, Middle School, on Special Assignment	1.00
	Subtotal
	22.27

<u>Certificated Services, Non-Administrative – General Funds</u>	FTEs
Multiple Subject/Self Contained	16.00
Art	0.91
Agriculture	1.00
English	2.60
German	0.60
Instructional Technology Resource Specialists	1.33
Math	1.60
Music	2.61
Physical Education	4.73
School-to-Career	0.32
Science, Biology/Life	1.60
Social Science	2.60
Spanish	0.48
	Subtotal
	36.38

<u>Certificated Services, Non-Administrative – Categorical Funds</u>	FTEs
Multiple Subject/Self Contained (K-3 CSR)	228.00

Counselor	28.69
Language Development Teacher	3.32
Language Specialist	22.64
Music Teacher, Grant Funded	1.70
Nurse	1.00
PAR/BTSA Consulting Teacher	2.45
PE Teacher, Grant Funded	1.50
Reading 1 st Teachers	4.00
Resource Teacher, K-12 (not Special Education)	4.00
Resource Teacher, Elem (not Special Education)	31.00
Resource Teacher, Middle (not Special Education)	4.82
Resource Teacher, High (not Special Education)	5.13
School After School Teacher	2.00
Sierra Nueva Teacher	6.00
Subtotal	346.25
TOTAL	404.90

7. On March 12, 2009, Ruth Peshkoff, Assistant Superintendent of Human Resources, caused to be served on all affected employees, including all respondents, written preliminary notices of the recommendation to the Board that respondents' services would not be required for the ensuing school year due to a reduction or discontinuation of PKS (preliminary notices). The preliminary notices set forth the reasons for the recommendation, as required by Education Code sections 44949 and 44955. The preliminary notices provided respondents with information and deadlines for requesting a hearing and included blank Request for Hearing forms. All of the respondents in this action filed timely Requests for Hearing.¹

8. On March 27, 2009, Larry Graser filed and served an Accusation against 314 certificated employees, in his official capacity. Respondents' counsel filed a Notice of Defense on behalf of all respondents. Thereafter, the matter was set for hearing. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

¹ By order of the Administrative Law Judge at hearing, Barbara Syvertsen was deemed to have timely filed a Request for Hearing.

9. Subsequent to the service of the preliminary notices on the affected employees, the District rescinded multiple preliminary notices, after taking into account, among other things, vacant positions and positively assured attrition, including retirements and resignations. Additionally, the District rescinded multiple preliminary notices because it received information that federal funding, with the exception of SIP (School Improvement Program) funding, for the 2009-2010 school year would be comparable to or greater than the amount received in the current year. The District also changed the number of students per class in K-3, and was able to retain more teachers. In April 2009, the Board revised the PKS reduction to reflect a decrease in the PKS reduction to 154.02 FTEs, due to the restoration of 250.88 FTEs. The changes are reflected in the following table.

	3/10 Version	K-3 at 23	
<u>Administrators</u>	<u>FTEs</u>	<u>Revised</u>	<u>Restore</u>
Coordinator, Curriculum	5.50	5.50	0.00
Director, Extended Learning	1.00	1.00	0.00
Director, Schools and Programs	3.00	3.00	0.00
Program Specialist, School to Career	2.00	2.00	0.00
Psychologist	0.20	.20	0.00
Vice Principal, Alternative School	0.50	.50	0.00
Vice Principal, Elementary School	4.50	3.50	1.00
Vice Principal, Middle School	1.50	1.50	0.00
Vice Principal, High School	3.07	2.50	0.57
Principal, Middle School, on Special Assignment	1.00	1.00	0.00
	Subtotal	22.27	20.70
			1.57

<u>Certificated Services, Non-Administrative – General Funds</u>	<u>FTEs</u>	<u>Revised</u>	<u>Restore</u>
Multiple Subject/Self Contained	16.00	15.00	1.00
Art	0.91	0.35	0.56
Agriculture	1.00	1.00	0.00
English	2.60	1.60	1.00
German	0.60	0.60	0.00
Instructional Technology Resource Specialists	1.33	1.33	0.00
Math	1.60	1.60	0.00
Music	2.61	2.05	0.56
Physical Education	4.73	4.17	0.56
School-to-Career	0.32	0.32	0.00
Science, Biology/Life	1.60	1.60	0.00
Social Science	2.60	2.60	0.00
Spanish	0.48	0.48	0.00
	Subtotal	36.38	32.70
			3.68

<u>Certificated Services, Non-Administrative – Categorical Funds</u>	<u>FTEs</u>	<u>Revised</u>	<u>Restore</u>	
Multiple Subject/Self Contained (K-3 CSR)	228.00	57.73	170.27	
Counselor	28.69	22.69	6.00	
Language Development Teacher	3.32	1.75	1.57	
Language Specialist	22.64	1.30	21.34	
Music Teacher, Grant Funded	1.70	1.70	0.00	
Nurse	1.00	1.00	0.00	
PAR/BTSA a Consulting Teacher	2.45	2.45	0.00	
PE Teacher, Grant Funded	1.50	1.50	0.00	
Reading 1 st Teachers	4.00	4.00	0.00	
Resource Teacher, K-12 (not Special Education)	4.00		4.00	
Resource Teacher, Elem (not Special Education)	31.00		31.00	
Resource Teacher, Middle (not Special Education)	4.82		4.82	
Resource Teacher, High (not Special Education)	5.13		5.13	
SIP funded (originally included in Resource Teacher categories)		2.10	-2.10	
School After School Teacher	2.00	2.00	0.00	
Sierra Nueva Teacher	6.00	2.40	3.60	
	Subtotal	346.25	100.62	245.63
	TOTAL	404.90	154.02	250.88

10. The District created individual lists of persons occupying the positions affected by reductions in PKS. An individual list was created for each affected PKS. The most junior employees providing these services were identified, and where necessary, tie-breaking criteria were applied to those with the same seniority date to determine the order of layoff. The credentials of those subject to layoff were reviewed to determine whether those subject to layoff could bump into a position held by a junior teacher. The competency criteria established by Board Resolution No. 2457 was employed in instances where there was no credential associated with a specific class.

11. All respondents in this action are classified as permanent or probationary certificated employees. There are no administrators among the respondents. Respondents’ arguments with respect to the legality of the layoff proceedings are discussed below.

12. *Multiple Subject /Self-Contained Classes*

The Board authorized the reduction of 57.73 FTE “Multiple Subject /Self Contained (K-3 CSR) and 15.00 FTE “Multiple Subject/Self Contained.” Respondents maintain that the District's authorizations to reduce multiple subject classes above K-3 are authorizations to reduce self-contained classes, not certain classes taught at the seventh and eighth grade levels. Respondents argue that certain

classes taught at the seventh and eighth grade levels in middle schools, such as Gold River, Sierra Oaks and Lichen, are not self-contained classes in that the teachers do not teach in the same class all day. Rather, the teachers split assignments, in that generally two teachers will trade-off or share teaching multiple subjects to two sets of students. Respondents characterize this arrangement as departmentalized classes or core classes, rather than as self-contained classes. Therefore, respondents argue that there is no Board authorization for reduction of teachers who occupy certain seventh and eighth grade teaching positions: **Kristen De Jager, Jinne Horger, Melissa Malone, Jeff Le and Erin Morgan-Voyce**, among others, are affected by this issue.

The District has approximately 2,200 certificated employees. There are 42 elementary schools, nine middle schools, nine comprehensive high schools and a number of schools with other programs, totaling approximately 70 schools. Mr. Graser testified that in certain middle schools, teachers are assigned to teach a seventh and eighth grade core. These middle schools typically have five periods of instruction with two sets of core subjects, for instance English and History is one set of core subjects, paired with a second block of core subjects, for instance Math and Science. There are usually two teachers at each grade level and they split the day between teaching the two groups of students. Mr. Graser explained that the recommendation to reduce multiple subject/self-contained classes encompassed all upper grades, (above the K-3 recommendation) including these seventh and eighth grade assignments.

Traditionally, teachers who provide instruction in seventh and eighth grades hold multiple subject credentials and teach the same group of students. The Education Code has allowed some flexibility in teaching seventh and eighth grade classes, to assist students in transitioning into the departmentalized class structure in high schools. Teachers with multiple subject credentials may instruct in core subject areas if classes are arranged as described above. (The Administrator's Assignment Manual- California Commission on Teacher Credentialing September 2007 edition). Teachers with single subject credentials may teach a single class to multiple students who are pulled out of a seventh or eighth grade class for that purpose. Basically, though, if the school's program has a curriculum arranged so that one teacher provides instruction in several subjects, it is a self-contained classroom and a teacher must have a credential (multiple subject) that authorizes that service. *Id*

Respondents maintain that the "core" instruction provided by the teachers currently assigned to the seventh and eighth grade classes is not "self-contained" instruction, as contemplated by the authorization to reduce multiple subjects/self-contained classes. In essence, respondents claim that the District may not reduce the seventh and eighth grade classes in which core instruction is provided, as opposed to seventh and eighth grade classes in which one teacher provides all instruction to all students. Essentially, respondents argue that the authorization for reduction should have read "multiple subject/core instruction," or some variant thereof, in order to properly authorize reduction of this PKS. Respondents cite no authority for this

contention or for the contention that such great specificity is required to reduce a PKS. The fact is that the District is authorizing the reduction of a particular kind of service, not a particular method of delivery of the service. The District is authorizing reduction in instruction in multiple subjects above K-3. Each of the affected respondents is credentialed and teaches multiple subjects above K-3.² Their credentials authorize them to teach only in compartmentalized/self-contained classes in grades K through eight. Accordingly, the authorization to reduce 15.00 FTE “Multiple Subject/Self Contained” is appropriate and respondents were properly identified as affected by this PKS reduction.

13. *Over- Noticing Multiple Subject /Self-Contained Classes*

Respondents also maintain that the multiple subject/self-contained classes reduction was over-noticed. There were authorizations for 15 FTE layoffs in the multiple subject category above K-3, yet teachers who occupied at least 24 FTEs above K-3 were noticed for layoff. The evidence is persuasive that more than 15 FTE teachers holding multiple subject credentials were noticed for layoff pursuant to the reduction in multiple subject/self-contained classes. But, the evidence is also persuasive that these teachers were properly noticed due to the rights of senior certificated employees to bump them from their positions.

14. *Adjustments of First Dates of Paid Service*

Celeste Freeman, Gina Berry, Melissa Malone, Jeff Le and Babbette Lieberman maintain that their seniority dates should be earlier than the dates the District designated, because they first worked under temporary or substitute contracts, or because they participated in training before they commenced teaching. The arguments of each of these employees were considered and have no merit.

15. *NCLB Compliance*

Amanda Higgins maintains the she can not be bumped out of her position by a person who is not NCLB compliant in science. This argument was considered and has no merit.

² To the extent respondents are arguing that they are teaching departmentalized classes rather than multiple subject compartmentalized classes, they are in error. All of the affected employees hold multiple subject credentials and teach classes above third grade. The fact that the District has arranged certain seventh and eighth grade classes so that the teaching responsibilities are divided between two teachers holding multiple subject credentials does not re-characterize the classes as departmentalized classes. An individual who teaches a particular subject(s) to several groups of students during the day must have an authorization to teach that subject(s) in a departmentalized setting. (The Administrator’s Assignment Manual- California Commission on Teacher Credentialing September 2007 edition). The affected employees do not hold credentials to teach a single subject in a departmentalized setting.

16. *Competency Criteria-Study Skills Class*

Christina Cova is a probationary employee with a seniority date of August 27, 2007. She has a multiple subject credential and teaches in grades seven and eight. She is being laid off .27 FTE as a result of being bumped by senior teachers. She currently teaches one class, .20 FTE, of AVID (Advancement Via Individual Determination) and maintains that she can bump into the study skills class taught by a junior teacher being retained to teach study skills (**Melissa Ewing**, seniority date August 13, 2008, who is being retained .40 FTE to teach study skills). There also may be additional junior teachers assigned to teach study skills in the upcoming school year to whom Ms. Cova is senior.

Melissa Malone is a probationary employee with a seniority date of August 16, 2007. She holds a multiple subject credential and teaches grades seven and eight at Lichen School. She teaches study skills for one period. In this class, she helps students organize their homework and checks to see if it is done, and provides additional skills and support in the area of study skills. The course is entitled “study skills/academic makeup.” Ms. Malone was laid off 1.0 FTE. She maintains that she can bump into the position .40 study skills position held by junior employee Melissa Ewing. There also may be additional junior teachers assigned to teach study skills in the upcoming school year to whom Ms. Malone is senior.

The District maintains that in order for Mrs. Cova to bump a junior teacher out of .27 FTE study skills, she must meet the “competency criteria” established by the Board in Resolution No. 2457 for determining whether a teacher could displace (bump) a junior teacher. The evidence is that there is no specific credential or credentials required to teach study skills. Therefore, the Resolution requires that the senior teacher, in order to be deemed competent to teach study skills, have taught the course for at least one semester in the last three school years.

The District maintains that Ms. Cova has not taught a District course entitled “Study Skills” in the last three years. However, although she has not taught a course specifically entitled Study Skills in the District, both AVID and the District study skills courses are designed to teach students how to be effective learners by teaching study skills and good academic habits. Evidence was presented as to the similarities between AVID and the District Study Skills class. Both programs emphasize note taking practice, test preparation, research, collaborative study groups and problem solving. Both programs include facilitating tutoring in core subjects. There was no evidence introduced that these curriculums varied in any measurable respect.

Under these circumstances, application of the Resolution competency criteria to prevent Ms. Cova from bumping into a study skills course would be arbitrary and capricious. While a governing board has some latitude in determining what factors contribute to competency for provision of a particular service, those factors must be reasonable. There must be a rational relationship between the competency criteria

and a particular service. (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 565.) Competency criteria must be clearly related to skills and qualifications to teach. (*Id.* at pp. 566-567.) Ms. Cova has taught study skills, in the AVID program, in the District within the last three years. Ms. Cova has demonstrated that she is competent to teach Study Skills. The District may not declare her incompetent merely because she has not taught study skills in a class entitled “Study Skills.” To do so would defeat the very clear intent of the Education Code,³ to prevent the termination of senior employees while employees with less seniority are retained to render services which the senior employee is certificated and competent to render.

It is unclear what the District’s position is with respect to Ms. Malone's ability to bump a junior teacher teaching Study Skills. Although the seniority list does not list any specific class(es) under Ms. Malone's 7/8 grade assignment this year, the District produced no evidence to rebut her testimony that she is currently teaching a class entitled “Study Skills.”

Ms. Cova and Ms. Malone are certificated and competent to bump into a Study Skills course taught by a junior teacher. Ms. Ewing is the only junior teacher identified in this matter who is teaching Study Skills, and Ms. Malone is more senior to her and to Ms. Cova. Accordingly, Ms. Malone may bump into .40 study skills taught by Ms. Ewing. In the event there are other junior teachers being retained to teach study skills in the 2009-2010 school year, Ms. Cova and Ms. Malone may bump into Study Skills courses taught by these teachers who are junior to them, Cova at .27 FTE, and Malone at .60 FTE.

17. *Competency Criteria-Continuation Classes*

Aaron Silberman is a probationary employee with a seniority date of August 13, 2008. He holds a Single Subject Credential in English with a CLAD authorization. He currently is assigned to teach Earth Science, Physical Education and Health at the Palos Verde Continuation School. Respondents argue that Mr. Silberman is being retained while teachers more senior, who can teach his continuation school class, are being laid off. Specifically, respondents argue that many teachers with multiple subject credentials and seniority dates in 2007 would be

³ Education Code section 44955, subdivision (b), provides in pertinent part: “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.”

Education Code section 44955, subdivision (c), provides in pertinent part: “The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitled them to render.”

competent to bump into this position at Palos Verde Continuation School. Tanner Lohse is the most senior of these teachers.

The District maintains that there is no teacher senior to Mr. Silberman, including Mr. Lohse, who is competent to take Mr. Silberman's position at the Palos Verde Continuation School. There is no particular credential required to teach continuation school. The District therefore applied the second prong of the competency criteria to junior teachers, and none had taught in the continuation school for one semester in the last three years.⁴ Therefore, it determined that no one senior to Mr. Silberman was competent to teach continuation classes.

Education Code section 44865 provides that a teacher is qualified to teach in continuation school if he or she has “A valid teaching credential issued by the State Board of Education or the Commission for Teacher Preparation and Licensing, based on a bachelor’s degree, student teaching, and special fitness to perform.” Additionally, assignment into a continuation school can only be made if the teacher consents to the assignment. Respondents’ counsel represents that Mr. Lohse and the remaining respondents would consent to an assignment to continuation school.

As set forth above, the District’s competency criteria must be reasonable if it is to override the Legislatures’ clear mandate that senior teachers be reassigned to positions occupied by junior teachers. Competency criteria cannot be used to arbitrarily deny senior teachers statutory seniority rights. However, application of the District competency criteria with respect to assignment to continuation school is not arbitrary. Continuation schools differ significantly from ordinary classroom assignments. For this reason, the Education Code provides that the incumbent teacher have a “special fitness to perform” in the continuation school and teachers must consent to assignments into continuation school. Under these circumstances, the District properly exercised its discretion to establish and apply its competency criteria. In *Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, at p. 565, the court held that a board's definition of competency was reasonable when it considered the skills and qualifications of the teacher threatened with layoff and adopted criteria requiring one years full-time teaching in the subject area within the last 10 years. The competency criteria established by the District herein is less broad than that considered in *Duax*.

Accordingly, respondents have not established that any of their number has taught at least one semester of continuation school in the last three years and is therefore competent to bump Mr. Silberman.

⁴ The District did not argue that Mr. Silberman was or should be skipped from layoff, under Education Code section 44955, subdivision (d)(1), because he possesses special training and experience others do not.

18. *Competency Criteria – Technology Classes*

Joseph Wood has a seniority date of August 12, 2008, and is a probationary teacher. He holds a multiple subject credential with an authorization in science and a single subject credential in biological sciences and computer concepts/applications. He is currently assigned as a resource teacher in curriculum and professional development and teaches technology. He was not noticed for layoff. There is no specific credential required for his position. Accordingly, the District applied the competency criteria to determine that there was no senior certificated employee subject to layoff who had occupied this assignment for at least one semester in the last three years. The analysis above, relating to continuation classes, is applicable herein. The application of the District competency criteria in respect to assignment to technology classes is not arbitrary. These are specialized classes requiring specialized knowledge in technology and the District is acting reasonably in requiring that anyone teaching technology classes have experience in doing so.

Respondents maintain that there is another junior teacher teaching technology classes, **Laura Lyle**, who only holds a multiple subject credential. While Ms. Lyle was laid off in this proceeding, respondents’ point seems to be that if she could teach technology with a multiple subject credential, any of the senior multiple subject credential holders could so teach. The seniority list indicates that Ms. Lyle is teaching kindergarten. There was no evidence to support respondents’ contention that she has taught or is teaching technology. Respondents’ position is not persuasive. Accordingly, no one senior to Joseph Wood is competent to bump into his technology classes.

19. *SIP/ Resource Reductions*

Respondents maintain that the original PKS authorization reduced resource teachers and not SIP funded teachers. The final PKS authorization reduced SIP funded teachers by 2.10 FTE. The following charts were reproduced from the PKS authorizations and illustrate the Board's authorizations in respect to resource teachers and SIP funded teachers.

February 24, 2009 Authorizations

	FTEs
Resource Teacher, K-12 (not Special Education)	4.00
Resource Teacher, Elem (not Special Education)	31.00
Resource Teacher, Middle (not Special Education)	4.82
Resource Teacher, High (not Special Education)	5.13

April 2009 Authorizations

FTEs Revised

Restore

Resource Teacher, K-12 (not Special Education)	4.00		4.00
Resource Teacher, Elem (not Special Education)	31.00		31.00
Resource Teacher, Middle (not Special Education)	4.82		4.82
Resource Teacher, High (not Special Education)	5.13		5.13
SIP funded (originally included in Resource Teacher categories)		2.10	-2.10

The charts clearly indicate that the Board added 2.10 FTE of SIP funded reductions in April 2009, at the same time restoring all of the resource teacher funding. This was done after the Board's initial authorization for reduction and elimination of services and after issuance of preliminary notices to the affected teachers. Mr. Graser explained at hearing that the 2.10 FTE of SIP funded teachers services were originally included in the resource teacher category of the February 24, 2009, authorizations, and that the SIP funded positions were essentially broken out in the April 2009 authorizations. However, the absolute number of FTE reductions in the resource teacher categories remained the same in the February 24, 2009 and April 2009 authorizations (44.95 FTE). The 44.95 FTE resource teacher was fully restored in April 2009, so the SIP funded 2.10 FTE could not have been subsumed under the resource teacher categories the Board authorized on February 24, 2009. If the SIP funded 2.10 FTE's had been part of the original resource teacher reduction, there would have been only 42.85 FTE resource funding to restore.

The District identified 1.60 FTEs that it believed were SIP funded and eliminated them. Since there was no timely Board authorization for reduction of 1.60 FTE in SIP funded programs, and no timely notice to affected employees, the SIP funded positions cannot legally be reduced. Education Code section 44949, subdivision (a), provides that no later than March 15, and before the employee is given notice that his or her services shall not be required for the ensuing school year, the superintendent shall recommended to the governing board that notice be given to the employee that his or her services will not be required for the ensuing school year **and the reasons therefore.** (emphasis added) The notice given to respondents includes a copy of the Board's original resolution to meet the requirement of providing the reasons for the lay off. The original resolution did not specify that SIP funding was reduced. Therefore, the District did not meet its obligation to recommend the SIP funding reduction to the Board no later than March 15. The District also did not meet its obligation to give notice to teachers affected by the SIP funding reduction notice by March 15⁵ as to the reasons for their layoff.

⁵ Education Code section 44951 requires that the written notice be served by March 15.

Accordingly the District must rescind preliminary notices totaling 1.60 FTE. The following teachers were directly affected by the 1.60 FTE SIP funding reduction.

Katherine Wehe teaches fourth grade at Edison School. She is a probationary employee with a seniority date of August 13, 2008. She was laid off .50 FTE under the resource/SIP reduction and .50 FTE under the multiple subject reduction. .50 FTE of her position is restored, but she may be bumped out of that .50 FTE by a more senior teacher.⁶ Ms. Wehe also maintains that she was laid off .50 FTE as a resource teacher, but that she is not a resource teacher. The evidence is that Ms. Wehe is unaware of where the funding for her position comes from and her argument otherwise is not persuasive.

Carol Cacy has a seniority date of October 27, 1980. She was laid off .30 under the resource/SIP reduction. She in turn bumped .30 from **Alexis Preston**, who has a seniority date of November 6, 2009. Ms. Casey is not a respondent in this action, nor is Ms. Preston.

Lisa Ezekiel has a seniority date of August 20, 2004. She was laid off .40 from her position under the resource/SIP reduction. She is not a respondent in this action.

Ruth Paulson has a seniority date of August 18, 2006. She teaches ninth and 12th grade and was laid off .20 FTE under the resource/SIP reduction. She is not a respondent in this action.

Kashmira Lalwani was laid off .20 under the resource/SIP reduction from her resource position teaching grade 9/12. Her seniority date is August 16, 2007. She, however, bumped **Jeffrey Edwards**, seniority date September 22, 2008, who had been employed to teach .20 FTE in Algebra in grade seventh and eighth. Neither Ms.Lalwani nor Mr. Edwards is a respondent in this action.

After restoration of .50 FTE to Ms. Wehe (who may nevertheless be bumped out of that .50 FTE) the District must restore 1.10 FTE of the SIP reduction it effected. The affected individuals, and those they bumped, are not respondents in this action and thus, the District may restore the 1.10 FTE to the most senior certificated and competent respondents.

20. *Counseling Position*

Darcy Hall has a seniority of August 18, 2004. She has a Pupil Personnel Service certificate for school counseling. She is a 1.0 FTE counselor. She was laid

⁶ Respondents and the District have established a list of remaining respondents ranked in order of seniority and to whom lottery tie-breaking criteria have been applied. The respondent with the most seniority may be entitled to bump into the .50 FTE restored to Ms. Wehe.

off .43 FTE because of the reduction in counseling services. She was laid off another .43 FTE after being bumped by a senior employee, Carol Ference, who has a seniority date of August 8, 1997. Ms. Hall argues that she can bump into the .43 FTE in counseling now provided by a junior employee, **Suzanne Kerhoulas**. However, the evidence is persuasive that Ms. Kerhoulas is being retained 1.0 FTE as a principal in the 2009-2010 school year and the .43 FTE she previously held in counseling was considered as attrition before the reductions in counseling services were made. Therefore, there is no .43 FTE available for Ms. Hall to bump into.

21. *Addition of Natalie Lohman*

The District initially maintained that Natalie Lohman was a temporary employee. At hearing, the District stipulated that she is a probationary employee with a seniority date of August 14, 2008, and she was made a respondent in this action. Respondents maintain that now that there is an additional probationary employee affected by layoffs, the most senior probationary employee affected by layoffs should be retained. Essentially, respondent's claim is that before Ms. Lohman was included in the layoffs, the District argued there was cause to lay off x-number of affected probationary employees and noticed accordingly. The number of noticed persons has been increased by one with the addition of Ms. Lohman. Yet the number of positions slated for layoff has not been increased by one. Therefore, respondent's argue the affected employees, with the addition of Ms. Lohman, are over noticed by one. The logic of this argument was not refuted by the District. Accordingly, the most senior affected employee's layoff notice should be rescinded.

22. *Other Arguments*

Except as otherwise set forth in this Proposed Decision, any and all remaining defenses asserted in this matter are determined not to be established by sufficient evidence or law. In particular, the argument that **Sarah Miller** may not have a math authorization for the upcoming school year is rejected. The argument that there are three temporary certificated employees **Probasco, Cook and Obrien/Harrington**, who should have the benefit of a previous administrative Proposed Decision, to which decision they were not parties, is rejected. The argument that there is at least a .5 FTE available in the Vice Principal elementary positions is rejected.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

2. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under Education Code section 44955. As stated in *San Jose Teachers Assn v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, “in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction.” The District must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Board’s decisions were a proper exercise of its discretion.

3. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

4. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838; See also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

5. The services identified in the Governing Board Resolution are particular kinds of services that can be reduced under Education Code section 44955. The Governing Board’s decision to reduce the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

6. The reduction of the particular kinds of services and the resultant reduction in 154.02 FTE certificated positions were made for the welfare of the District and the pupils. The decision was made because of factors affecting the District budget for the ensuing school year, including the state budget crisis with the resultant possible loss of revenue from the state.

7. By reason of the facts set forth in Factual Finding 16, Ms. Malone may bump into .40 FTE Study Skills taught by Ms. Ewing. In the event there are other junior teachers being retained to teach Study Skills in the 2009-2010 school year, Ms. Cova and Ms. Malone may bump into Study Skills courses taught by these teachers who are junior to them, Cova at .27 FTE, and Malone at .60 FTE.

8. By reason of the facts set forth in Factual Finding 19, the District identified 1.60 FTEs that it believed was SIP funded and eliminated them. Since there was no timely Board authorization for reduction of 1.60 FTE in SIP funded programs, they cannot legally be reduced. Accordingly, the District must resend preliminary notices totaling 1.60 FTE. Katherine Wehe may have .50 FTE of her position restored, but she may be bumped out of that .50 FTE by a more senior teacher. The District shall restore the remaining 1.10 FTE of SIP funded programs to the most senior certificated and competent respondents.

9. By reason of the facts set forth in the Factual Finding 21, the District shall restore 1.0 FTE to the most senior certificated and competent respondent.

10. With the exception of those matters set forth in Legal Conclusions 5, 6 and 7, no junior employee is being retained to render services that senior employees are certificated and competent to render.

RECOMMENDATIONS

1. The preliminary layoff notices sent to the most senior respondents occupying 2.60 FTES shall be rescinded.

2. The preliminary layoff notice of .40 FTE sent to Ms. Malone is rescinded.

3. In the event there are junior teachers being retained to teach study skills in the 2009-2010 school year, Ms. Cova and Ms. Malone may bump into Study Skills courses taught by those teachers who are junior to them, Cova at .27 FTE, and Malone at .60 FTE, and their lay off notices shall be rescinded accordingly.

4. Final Notice shall be given to all other respondents that their services will be reduced or eliminated, as set forth in the preliminary layoff notices, in the 2009-2010 school year.

Dated: May 1, 2009

ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A
RESPONDENTS

OAH No. 2009020163

Allen, Kristen	Kiesner, Maxwell
Allenbaugh, Victoria	Koopmans, Kara
Applegate, Lindsay	Kogos, Katherine
Becker, Alison	Kozel, Allison
Berkness, Heather	Kramer, Erica
Berry, Gina	Le, Jeff
Billo, Natalie	Lewis, Lyndsay
Boekestein, Bethany	Lieberman, Babette
Brandt, Angelique	Little, Ellen
Burnsed, Sarah Jane	Lohmann, Natalie
Castaneda, Suzzanne	Lohse, Tanner
Castiaux, Heidi	Lyle, Laura
Caston, Andra	Malone, Melissa
Cataldi-Price, Janice	Markos, Kellee
Cook, Joanne	Mc Cormick, Melissa
Cova, Christina	Mole, Lindsey
Cox, Heather	Moon, Elizabeth
Da Marto, Joseph	Morgan-Voyce, Erin
Davis, Monique	Nisito, Bethany
Day, Amy	Nunes, Sarah
De Jager, Kristen	O'Brien, Amy
Derum, Anthony	Oettle, Jessica
Duarte, Danielle	O'Neal, Megan
Dyadchenko, Angelika	Paixao, Adrienne
Ellis, Bethany	Parsley, Sabrina
Ellison, Amy	Patterson, Brandi
Ewing, Melissa	Price, Kirsten
Fanchar, Brent	Probasco, Daniel
Fleming, Mark	Register, Kristen
Forey, Ali	Richards, Robert
Freeman, Celeste	Robinson, Richard
Garcia, Nicole	Smiley, Jennifer
Goodall, Stephanie	As so this is
Greene, Emily	Smith, Jeannette
Hadzi-Antich, Diana	Smith, Melanie

Hall, Darcy
Hein, Beth
Hesse, Marilyn
Higgins, Amanda
Hoffmore, Katherine
Holmes-Dorner, Belinda
Horger, Jinne
Hurst, Lisa
Johnson, Disa
Jordan, Judith
Kearney, Katie

Sutherland, Molly
Syvertsen, Barbara
Templeton, Inga
Tobey, Karen
Trask, Jarrett
Vargas, Gitzel
Velasco, Martha
Wehe, Kathryn
Winston, Dina
Wong, Karis
Young, Aubree