

BEFORE THE  
GOVERNING BOARD  
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT  
COUNTY OF SACRAMENTO  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL  
EMPLOYED BY THE SACRAMENTO  
CITY UNIFIED SCHOOL DISTRICT,

OAH No. 2009020437

Respondents.

**PROPOSED DECISION**

Administrative Law Judge Catherine B. Frink, Office of Administrative Hearings, State of California heard this matter in Sacramento, California on April 27-May 1, 2009.

David E. Lyon, Attorney at Law, and Celia Ruiz, Attorney at Law, of Ruiz and Sperow, LLP., represented the Sacramento City Unified School District (District).

Margaret Geddes, Attorney at Law, and Christina Medina, Attorney at Law, of Beeson, Tayer and Bodine, APC, represented 270 respondents identified in Exhibit A attached hereto and incorporated herein by reference.<sup>1</sup>

Respondent Angelia Brye-Jones is not represented by counsel. She appeared on April 27, 2009, prior to the commencement of the hearing. She did not attend the remainder of the hearing.

Evidence was received, the hearing was closed, and the record was held open to allow the parties to submit citations to legal authorities in support of their oral closing arguments. The District's Post-Hearing Letter Brief was received on May 4, 2009, and was marked as Exhibit 55. Respondents' Post-Hearing Summary of Disputed Issues and Authority was received on May 4, 2009, and was marked as Exhibit V. The record was closed and the matter submitted on May 4, 2009.

---

<sup>1</sup> Exhibit A lists Shellie Brandow as a respondent represented by Beeson, Tayer and Bodine, APC. At hearing, it was determined that Ms. Brandow was served with a Notice of Release as a temporary certificated employee (see Finding 18). She was not a party to these proceedings.

## **Confidential Exhibits Sealed**

All or part of the following exhibits were ordered sealed, not to be opened except by a duly designated and authorized representative of the Governing Board of the Sacramento City Unified School District (Board), the Administrative Law Judge (ALJ) or another ALJ assigned to preside over further proceedings in the matter, or by a reviewing court of competent jurisdiction: A copy of Exhibit 10, with Confidential Names List of Administrators attached; part of Exhibit 26, listing the names of employees from Confidential Resolution #09-B; Exhibit 28; and Exhibit 50.

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. The District is a large urban school district that provides services to approximately 47,000 students at 90 school sites in and surrounding the City of Sacramento. The District employs approximately 2,200 certificated employees.

2. Carol Mignone Stephen is the District's Associate Superintendent, Human Resource Services. Susan E. Miller is the Interim Superintendent of the District.

3. The District has experienced declining enrollment over the last several years and increasing costs, as well as projected funding cuts from the State, leading to budget cuts of more than \$100 million over the past seven years. In February and March of 2009, the Board was informed of revenue limit reductions of 2.5 percent, and reductions to categorically funded programs of up to 15.4 percent, for a budget shortfall of \$9.76 million for the current school year. As a result of reductions anticipated for the 2009-10 school year, including an additional 4.9 percent reduction in some categorical programs, the projected shortfall for the 2009-10 school is expected to be an additional \$15 million. The Associate Superintendent and her staff met and developed proposals for programs and services to be reduced and/or eliminated to address the anticipated budget deficit.

The District divides its schools into four geographic learning service units (LSUs) and assigns a personnel analyst from the Human Resources (HR) Department to each. Through a process referred to as "one-stop staffing," each school site and/or department was provided with its projected budget and staffing allocation, from which staffing cuts were determined. Each analyst obtained information from the schools and/or departments in her LSU, and a "surplus list" of staffing reductions was created. Additional reductions were recommended, based on changes in the law relating to class size reduction (CSR), as well as the reduction or elimination of programs and services to help close the budget gap.

4. The Associate Superintendent presented her findings and alternative recommendations to the Board at meetings in February and March 2009, along with a proposed resolution specifying criteria to be used to determine the order of termination of certificated employees with equal seniority (tiebreaker criteria). As a result of the District's current financial situation, the Board determined that it must reduce particular kinds of services throughout the organization.

5. On March 5, 2009, the Associate Superintendent recommended to the Board that particular kinds of services being offered by the District be discontinued or reduced. The Associate Superintendent stated the reasons for the recommendation. The Board approved the recommendations and, following the adoption of the Resolution set forth below, directed the Associate Superintendent to implement the recommendations. The Board also charged the Associate Superintendent and her staff to identify an equivalent number of certificated personnel and give those certificated employees notice in writing of the Superintendent's recommendation that their services would not be required for the ensuing school year. The recommendation of certificated personnel to be identified for layoff from employment with the District was not related to their skills or competence as teachers.

6. In response to the Associate Superintendent's recommendation above, the Board adopted Resolution # 2549 on March 9, 2009. The Board resolved that the District needs to reduce or eliminate particular kinds of services as recommended by the Associate Superintendent, and accordingly, it was resolved that it is necessary to terminate the employment of an equivalent number of certificated employees of the District due to the reductions. Resolution #2549 authorized the Associate Superintendent to take action to reduce or discontinue the following particular kinds of services for the 2009-10 school year:

<u>Particular Kind of Service (PKS)</u>	<u>Full-Time Equivalent (FTE)</u>
<b>I. <u>Teachers</u></b>	
Elementary Class Size Reduction Teachers	137.0
High School Ninth Grade Class Size Reduction	7.0
Math	3.0
English	4.0
<b>Sub Total</b>	<b>144.0 FTE</b>
<b>II. <u>School Site Staffing Reductions</u></b>	
Elementary Teachers	37.0
Secondary Art	3.0
Elementary Special Subjects Art	1.4
Secondary Computer Apps	3.0
Secondary English	6.0
Secondary Psychology	1.0

Secondary Industrial Arts	2.0
Middle School LA/History CORE	2.0
Secondary Music	2.0
Elementary Special Subjects Music	5.1
Elementary Special Subjects Reading	0.4
Resource Teacher	8.0
ROTC	2.0
Secondary Math	2.0
Secondary Physical Science	1.0
Secondary Biology Science	4.0
Elementary Special Subjects Science	0.2
Elementary Special Subjects P.E.	7.2
Secondary P.E.	1.0
Secondary ROP	3.0
Secondary Social Science	3.0
Special Education Teacher LD	1.0

**Sub Total** **95.3 FTE**

III. Other Teachers/Additional Options

School Nurse, Health Services	27.0
School Counselors	38.6
Librarians	14.4
School Psychologists	19.6
Music Teachers, Traveling	14.0
School Social Workers	8.875

**Sub Total** **122.475 FTE**

IV. Adult Education Teachers 21.0 **21.0 FTE**

**TOTAL** **382.775 FTE**

The proposed reductions total 382.775 FTE, with an equivalent number of certificated positions.

7. Resolution #2549 specified a “direct and specific need within the District for certificated employee [sic] qualified to serve the needs of K-12 students with respect to the following programs and services and qualifications: English Language Learners (ELL), classes requiring Bilingual Cross-Cultural Language and Development (BCLAD), and No Child Left Behind certification, which are highly specialized programs requiring the possession of additional specialized credentials and/or training or experiences [sic] possessing these credentials and/or certifications in the 2009-10 school year. In addition, there are certain classes and program which require a special education certification or credentials, and related specialized training or experience in the 2009-10 school year.” The

Board noted a special need to retain certificated employees who possess these qualifications, regardless of seniority, citing Education Code section 44955, subdivision (d)(1).

8. At the same meeting, the Board also adopted Resolution #2550. This Resolution set forth criteria for breaking ties when two or more certificated employees with the same first day of paid service were facing potential layoff. The Board listed categories for consideration, and assigned weights to each category, as follows: Category I – English Language Learner (ELL) Certifications/No Child Left Behind (NCLB) Certified; Category II – Professional Preparation, including K-12 teaching and support credential held for services (3 points each), K-12 subject area of teaching competency established by the teacher’s credential major (2 points each), K-12 subject area of teaching competency established by the teacher’s credential minor (1 point each), K-12 supplemental authorization (1 point each), limited supplemental authorization (1/2 point each), doctorate degree (1 point), master’s degree (1/2 point each), and National Board Certification (1 point); and Category III – certificated experience under contract with the District not reflected by the employee’s date of hire (e.g., an employee who may have resigned and was later rehired by the District) (1 point for each year of service). Each category of criteria was to be applied independently, with criteria in Category I constituting a first level tiebreaker, and so on. In case of ties continuing through listed criteria, Category IV – Lottery, was to be used to break such ties.

9. The services set forth in Resolution #2549 are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. There was no evidence that the Board’s decision to reduce or discontinue these particular kinds of services was arbitrary or capricious. The reduction or elimination of the particular kinds of services set forth in Resolution #2549 constituted a proper exercise of the Board’s discretion, within the meaning of Education Code section 44955.

10. On March 11, 2009, the District served via certified mail a written preliminary notice that advised permanent and probationary certificated employees, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year. The preliminary notices were served on 379 certificated permanent and/or probationary employees of the District. Each written notice set forth the reasons for the recommendation and noted that the Board had adopted Resolution #2549, which was attached to the preliminary notice. Of the 379 employees served a preliminary notice, 274 certificated employees timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

11. On March 5, 2009, the Board adopted Confidential Resolution #09-A, in which the Board resolved pursuant to Education Code section 44954 to release or nonreelect 129 certificated employees which it identified as temporary. Of those employees designated as temporary, 62 were hired either directly into categorically funded programs or to fill in for permanent certificated employees serving in categorically funded programs pursuant to Education Code section 44909. These 62 certificated employees each received a Notice of Termination/Layoff for Certificated Temporary Employees, which was served by certified

mail on March 9, 2009 (double notice). The double notice notified the recipients that they had been released as temporary employees by the District; however, if the recipient disputed his or her temporary employment status, he or she was being given notice of layoff pursuant to Education Code sections 44949 and 44955, and could request a hearing to determine if there was cause for not reemploying him or her for the 2009-10 school year. Of the 62 certificated employees who received the double notice, 12 filed timely requests for hearing.

12. On March 5, 2009, the Board adopted Confidential Resolution #09-C for possible release/reassignment of certificated administrative employees. A list of all 187 certificated management/administrative employees was attached to Confidential Resolution #09-C; all of these administrative employees received a Notice of Possible Release/Reassignment, which was served by certified mail on March 10, 2009. At hearing, five certificated administrators were identified as having possible return rights to a classroom teaching position. Of those five, one was notified that her credential(s) and seniority did not qualify her for a classroom teaching position, and she was given a preliminary notice of layoff pursuant to Education Code sections 44949 and 44955. This employee filed a timely request for hearing.

13. The Associate Superintendent made and filed Accusations against each of the 287 certificated employees of the District who timely requested a hearing after receipt of the preliminary notice or double notice. It was not disputed that the Accusations, with required accompanying documents and blank Notices of Defense, as well as Notices of Hearing, were timely served on the responding employees.

14. Of the 287 District employees served with Accusations, 17 failed to timely file a Notice of Defense requesting an evidentiary hearing. Kacey Sevier appeared at the hearing to explain the reasons for her failure to file a Notice of Defense. The District waived its objection to her inclusion as one of the respondents in this matter. Any certificated employee who failed to file a request for hearing and/or a Notice of Defense, other than Ms. Sevier, has waived his or her right to a hearing, and may be laid off by the District.

15. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

16. Prior to or at the hearing, the District rescinded the preliminary notices of layoff to the following seven certificated employees: Christina Allison, Jerome Butler, Claudia Coletta, Patricia Engman, Patricia Kerns, Marguerite Parker, and Valerie Willover. These employees shall be retained for the 2009-10 school year.

### **Probationary Nonreelects**

17. The Board acted pursuant to Confidential Resolution #09-B to not reelect certain first and second year probationary teachers in the District. These nonreelections were an appropriate exercise of the Board's absolute right not to reelect probationary teachers.

## **Temporary Employees Who Did Not Receive the Double Notice**

18. Pursuant to Confidential Board Resolution #09-A, the District sent Notices of Release to 68 temporary certificated employees by certified mail on March 9, 2009. Those employees are not parties to this proceeding.

## **Status of Employees Hired to Fill Positions in Categorically Funded Programs**

19. The District identified 62 employees who were hired either directly into categorically funded programs or to fill in for permanent certificated employees serving in categorically funded programs pursuant to Education Code section 44909.<sup>2</sup> The District classified them as temporary employees, and served them with the double notice of release/nonreelection as temporary employees, with a right to request a hearing to challenge their status as temporary employees.

20. As a preliminary matter, Education Code section 44915 states that, “[g]overning boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.” Notwithstanding section 44915, the Education Code recognizes temporary employees as a fourth classification of certificated employees.

Education Code section 44916 requires a district to give employees classified as temporary a written statement that “shall clearly indicate the temporary nature of the

---

<sup>2</sup> Education Code section 44909 states:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

Whenever any certificated employee in the regular educational program is assigned to a categorically funded project not required by federal or state statute and the district employs an additional credentialed person to replace that certificated employee, the replacement certificated employee shall be subject to the provisions of Section 44918.

This section shall not be construed to apply to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs.

employment and the length of time for which the person is being employed.” If the written statement does not identify the employee as temporary, he or she shall be deemed probationary.

Education Code section 44918, subdivision (a), sets forth the rights of temporary and substitute teachers to gain probationary status under certain circumstances, namely, if an employee “serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.” Education Code section 44918, subdivision (b), provides that any such temporary or substitute teacher “shall be reemployed for the following school year to fill any vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954.”

Education Code section 44919 allows a district to classify employees as temporary who are employed to teach temporary classes or perform services for no more than the first three months of any school term, or persons, other than substitute employees, who are employed to serve in a limited assignment supervising athletic activities of pupils.

Education Code section 44920 allows a district to classify employees as temporary “based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.”

Education Code section 44954, subdivision (b), permits the governing boards of school districts to release temporary employees requiring certification qualifications after serving at least 75 percent of the number of days the regular schools of the district are maintained, “if the employee is notified before the end of the school year of the district's decision not to reelect the employee for the next succeeding year.”

21. The limitations of temporary employee classification were addressed in *California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 146-147 (*Vallejo*):

Section 44915 states: “Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.” Although this statute does not mention temporary employees, other provisions of the Code authorize that classification in certain narrowly defined situations. (*Bakersfield, supra*, 145 Cal.App.4th at pp. 1279-1280; see, e.g., §§ 44917, 44919, 44920.) Section 44915 therefore establishes

probationary status as the default classification for teachers whom the Education Code does not require to be classified otherwise. (*Bakersfield, supra*, 145 Cal.App.4th at p. 1280; *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97, 109 (*Motevalli*.)

“The [Education] Code recognizes two general kinds of temporary employees: those who are employed to serve for less than three or four months, or in some types of limited, emergency, or temporary assignments or classes (see §§ 44919, 44921, 44986); and those who are employed for up to one year to replace a certificated employee who is on leave or has a lengthy illness (see §§ 44920, 44918)... In addition, persons employed in categorically funded programs or in programs operated by a district under contract are treated *like* temporary employees in certain respects (§ 44909), as are persons employed as substitute teachers. (§ 44917.)” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1281, fns. omitted.) In establishing these narrow categories, the Legislature has sought to limit the ability of school districts to classify teachers as temporary employees. (*Id.* at p. 1280; *Haase v. San Diego Community College Dist.* (1980) 113 Cal.App.3d 913 [“The Legislature ... has restricted the flexibility of a school district in the continued use of temporary employees [citations], for otherwise the benefits resulting from employment security for teachers could be subordinated to the administrative needs of a district”].) “Because the substitute and temporary classifications are not guaranteed procedural due process by statute, they are narrowly defined by the Legislature, and should be strictly interpreted.” (*Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821.)

22. The second paragraph of Education Code section 44909 makes clear that employees who are hired to fill in for permanent certificated employees serving in categorically funded programs are treated as temporary employees under Education Code section 44918, and may be released from employment under Education Code section 44954. The status of employees hired directly into categorically funded programs is less clear.

23. In *Bakersfield Elementary Teacher’s Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260 (*Bakersfield*), the court discussed employees in categorically funded programs, stating that, “although such persons are not specifically identified in the Code as temporary employees, they are treated in much the same way in that they may be dismissed without the formalities required for probationary and permanent employees in the event the program expires or is terminated, and their service does not count

toward acquiring permanent status (unless they are reemployed the following year in a probationary position).” (*Id.* at p. 1286.)<sup>3</sup>

The decision in *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App.4th 838, 851, appears to support the conclusion in *Bakersfield*, that the rationale underlying Education Code section 44909 is to “[permit] school districts to hire additional teachers for special programs so long as the designated funds remain available, while retaining the flexibility to readily lay these teachers off if and when the funding is discontinued.”

On the other hand, there are cases in which the courts classify employees hired pursuant to Education Code section 44909 as temporary. For example, in *Vasquez v. Happy Valley Union School District* (2008) 159 Cal.App.4th 969 (*Happy Valley*), the court noted that, “[t]he classification of ‘temporary’ covers a variety of scenarios. A temporary teacher is, among other definitions, a teacher hired by the district for a semester or a complete school year to replace a regular teacher who has been granted leave for that time or is experiencing long-term illness. (§ 44920.) A teacher may also be classified as temporary where the teacher is working on so-called categorically funded projects. (§ 44909.)” (*Id.* at p. 975.)

Likewise, in *Schnee v. Alameda Unified School District* (2004) 125 Cal.App.4th 555, 563-564 (*Schnee*), the court traced the history of Education Code section 44909, stating:

“The intent of former section 13329 [now 44909] was ‘to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.’ ” (*Zalac, supra*, 98 Cal.App.4th at p. 845.) ... Any doubts that one may entertain concerning the interpretation of section 44909 that best conforms with the evident intent of the Legislature – no illuminating legislative history having been brought to our attention – are resolved by reference to those provisions of the Education Code that deal with temporary employees as defined in section 44919.... We can perceive no reason for treating persons whose employment is temporary by virtue of section 44909 differently in this respect than temporary employees under section 44919.”

---

<sup>3</sup> The court in *Bakersfield* went on to state: “Thus, certificated teachers assigned to a categorically funded program may be laid off without the procedural formalities due a permanent and probationary employee *only* if the program has expired. (*Hart Federation of Teachers, supra*, 73 Cal.App.3d at pp. 215-216; *Zalac, supra*, 98 Cal.App.4th at p. 852.)” (*Id.* at p. 1287.)

24. There was no evidence that any specific categorically funded program into which employees had been hired was expiring; however, Ms. Stephen testified that there will be a 20 percent cut in funding for some categorical programs, and that in “Tier III” of categorically funded programs, the District has discretion to allocate funds in a manner that may result in the discontinuation of funding for particular programs.

25. Under all of the facts and circumstances, the District properly classified employees hired directly into categorical programs as temporary. The rationale of *Schnee* is persuasive. Temporary classification is specifically statutorily permitted to allow districts flexibility in staffing short-term vacancies and meeting district needs without having to provide status toward tenure and benefits. Thus, the District may non-reelect those respondents who received the double notice, and they are not entitled to probationary status for purpose of layoff under Education Code sections 44949 and 44955.<sup>4</sup>

### **Method of Effectuating the Reduction in Services and Identifying Affected Employees**

26. The Board’s Resolutions delegated to the Associate Superintendent and her designees the authority to implement the reduction and elimination of the listed particular kinds of services, to identify and determine which District employees would be affected by the reductions and to draft and serve the preliminary notices upon those identified employees. Immediately following the passage of the Resolutions, the Associate Superintendent met with the four personnel analysts during the second week of March 2008, and instructed them to work together to identify employees of the District who would be affected by the reduction or elimination of the particular kinds of services set forth in the Resolution.

27. Except as specifically noted below, the analysts were not given specific instructions about how to implement the layoff. The Associate Superintendent testified that the analysts had considerable experience between them in analyzing the District’s master seniority list and effectuating District reductions in force in previous years. The analysts were provided with copies of the Resolutions for reference, and obtained the master seniority list for the District in three formats, by alphabetical order, by classification, and by inverse seniority order. The analysts were also able to obtain “sublists,” which were lists of certificated employees in a particular PKS, such as elementary special subjects teachers, or

---

<sup>4</sup> In order to insure that districts do not abuse the temporary contract tool to solve staffing problems in derogation of certificated employee rights, the courts have held that districts may not employ more temporary teachers than there are permanent or probationary employees on leave plus the number of categorically funded positions. (*Santa Barbara Federation of Teachers v. Santa Barbara High School District* (1977) 76 Cal.App.3d 223, 227-228; *Paulus v. Board of Trustees* (1976) 64 Cal.App.3d 59, 62-63.) Both these decisions make clear that there need be no one-to-one correspondence between any particular temporary employee in a district, and any particular leave of absence position or categorically funded position, as long as the aggregate total of such positions did not exceed the total number of temporary employees in the District. The parties stipulated that the District had more employees on leaves of absence than it has designated as having been hired pursuant to Education Code section 44920. The District proved it complied with all the requirements of sections 44909 and 44920 and *Santa Barbara* and *Paulus* in dealing with its temporary employees.

school psychologists. In addition, the analysts had access to the District's ESCAPE computerized data system, which contained information about certificated employees such as education, advanced degrees, status as full or part-time employees, and compliance with the "highly qualified" (HQ) teacher requirements of the No Child Left Behind Act of 2001 (NCLB). The analysts also consulted information about NCLB qualifications contained in the District's ACCESS database.

28. The team of analysts identified the positions to be eliminated pursuant to Resolution #2549, and identified the certificated employees to receive preliminary notices of layoff based on seniority.

### **Reassignment of Administrators**

29. After the Board adopted Confidential Resolution #09-C, Ms. Stephen gave the analysts a list of five certificated administrative employees with possible return rights to classroom teaching positions. The analysts calculated the seniority of administrators using the District's ESCAPE computerized data system, and personnel records. They determined that four of the five administrators could be reassigned to classroom teaching positions. The analysts determined that the fifth administrator did not have enough seniority to be reassigned. There was no issue regarding whether any reassignments of administrators were appropriate, or whether any of the administrators being reassigned were certificated and competent to take the reassignments made.

### **Verification of Employment Status and Seniority**

30. Tenure is the relationship between a teacher and the District which gives the teacher greater job security.

Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the District gives a greater legal entitlement to a position. (See *Ferner v. Harris* (1975) 45 Cal.App.3d 363.)

Seniority date is defined as the date upon which an employee first rendered paid service in a probationary position. (Ed. Code § 44845.)

31. Employees were given the opportunity to correct and verify their seniority dates. On December 12, 2008, the Associate Superintendent transmitted to all site and department administrators of the District a list of all certificated employees at each site or department; verification statements for each certificated employee, for distribution to the named employee; and a proof of service, to be signed and returned when all employees had received and returned their Employee Information Verification Statements to the site or department administrator. The deadline for submission of the completed verifications sheets was January 30, 2009.

32. The Employee Information Verification Statement for each employee listed the employee's name; seniority date; classification (first year probationary, second year probationary, or permanent); school assignment; position (e.g. elementary teacher, high school, nurse); and credential (including issue date, expiration date, and "subjects authorized"). The Employee Information Verification Statement stated, in part:

Our records indicate your seniority date as listed above and your credential information as listed below. Please make any corrections to this information as needed. Attach a copy of the credential(s) to this form.

If your seniority date is incorrect, you **MUST** sign, make any corrections and return to the Personnel Office, Box 770, no later than January 30th, 2009.

I certify the below seniority and credential information is true and correct.

The Employee Information Verification Statement contained a line for the employee to sign and date, certifying the truth of the information provided.

33. If employees made corrections to the Employee Information Verification statements, salary technicians would check the information and, if correct, enter the corrected information into the District's ESCAPE data system; these corrections were reflected in the master seniority list.

34. The Employee Information Verification Statement did not contain information about NCLB "highly qualified" certification status, and did not request updated information about NCLB compliance.

35. The District relied on the verifications provided by certificated employees in updating the District's seniority list, which it used to determine the order of layoff.

36. At hearing, the District changed the employment classifications of the following employees to "permanent:" Jerome Butler (9/4/07); Yoko Kato (9/2/08); and Antonia Slagle (9/2/08).

37. At hearing, the District changed the seniority dates of the following employees, as indicated: Debra Sanchez (9/26/05); Elizabeth Ridzick (10/23/07); and Tom Sisterson (3/7/07).

### **Seniority Date Change for Social Workers Webb, Alvarado, and Lambert**

38. Respondents Carol Lambert, Olivia Alvarado, and Rachel Webb are all school social workers with the same date of hire. All of them signed contracts in July of 2003, with

an effective date of August 18, 2003. They were hired into a new grant program, with four days of required training, from August 18-21, 2003. Sometime during the week of August 18, 2003, Ms. Lambert was given a copy of her contract, with the effective date of August 18 overwritten with the date of August 25. She was told that the Human Resources Department had changed the date, and that she would be paid per diem for the training.

39. All three respondents began their salaried employment with the District on August 25, 2003.

40. Ms. Webb, Ms. Alvarado and Ms. Lambert contend that their seniority dates should be changed to August 18, 2003, “the date upon which [they] first rendered paid service in a probationary position.” (Ed. Code § 44845). The contention has merit. The fact that respondents’ contracts initially indicated an effective date of August 18, 2003 supports their contention that they were required to attend training on August 18-21, 2003, and that they began their employment with the District in their contract positions (i.e., in a probationary capacity) on that date. The fact that they were paid at the per diem rate, over and above their salary for the position, does not change their status as probationary employees as of August 18, 2003. Their seniority dates shall be changed to August 18, 2003.

### **Bumping and Skipping<sup>5</sup>**

41. Economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. A senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed. That displacement of a junior teacher is known as “bumping.” In general, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions. The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. Such “skipping” is recognized by statute (Education Code section 44955, subdivision (d)(1)) and appellate law (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831). In order to depart from a seniority-based economic layoff, Education Code section 44955, subdivision (d)(1), requires the District to “demonstrate a specific need for personnel to teach a specific course or course of study... and that the certificated employee [to be skipped] has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.”

42. Resolution #2549 proposed to retain teachers with ELL and BCLAD certifications. The analysts determined that most of the teachers in the District held ELL

---

<sup>5</sup> Although the District listed Jeffrey Holman (9/2/08), a teacher in the Waldorf Program at John Morse School, as an employee to be skipped, the District served him with a notice of layoff, and does not propose to retain him based on special training or experience required for his position.

certifications. They further determined that six employees who would otherwise have been subject to layoff held BCLAD certifications that were required for their classroom teaching assignments: Shannon Zavala (2/5/07); Jade Vang (10/23/06); Teresa Martinez (9/6/05); Rosario Ruiz ((9/6/05); Rafael Perez (9/6/05); and Juan Martinez (2/7/05);. The analysts “skipped” these six teachers in accordance with the provisions of Resolution #2549, and none received a notice of layoff. The analysts did not “skip” any employees who were slated for layoff who held BCLAD certifications if those teachers were not assigned to classrooms in which BCLAD certification was required. As a result, there are respondents with greater seniority than the six certificated employees listed above who hold BCLAD certifications who received layoff notices.

43. The District acted reasonably in implementing Resolution #2549 by “skipping” only those teachers with BCLAD certifications who were actually using the credential in their classroom assignments. (See *Alexander v. Delano Joint Union High School Dist.* (1983) 139 Cal.App.3d 567, 576.)

44. The District’s implementation of “bumping” rights of senior teachers is addressed in reference to specific PKS reductions, as set forth below.

#### **Use of NCLB Certification to Determine Competency for Bumping**

45. Resolution #2549 identified a specific need within the District for certificated employees qualified to serve the needs of K-12 students with respect to NCLB certification. Consequently, when the analysts considered whether a senior employee whose position was affected by the PKS reduction could bump a junior employee, they looked in District records for each affected employee to see if the employee was NCLB-compliant in the area of the proposed bump. In some instances, they were able to determine that the employee would be able to establish NCLB compliance by completing paperwork.<sup>6</sup> These individuals were permitted to bump junior employees, and they were designated on the District’s layoff/bumping matrix as “NCLB w/ppw.”

46. Respondents objected to the District’s requirement that employees be NCLB-compliant (or able to establish compliance by completing paperwork, based on information on file with the District) as a precondition to their being allowed to bump junior employees in positions where the senior employee had the proper credential. Respondents contend that employees were given insufficient notice that they needed to establish NCLB compliance in areas other than the one in which they were currently teaching. This contention is without merit. Certificated employees have an affirmative obligation to provide current and updated information to the District concerning not only their credentials, but other qualifications for employment. Indeed, these matters may have an effect on the pay scale to which teachers are

---

<sup>6</sup> The evidence established that there are three ways an employee can establish that they are “highly qualified” in a subject area under NCLB: by completing required coursework; by taking and passing a subject matter examination; or by earning points under the High Objective Uniform State Standard of Evaluation (HOUSSE), if the employee obtained his or her credential prior to July 1, 2002.

assigned. Likewise, teachers must establish that they are NCLB-compliant for the subjects in which they are teaching or for which they claim to be qualified to teach. It is the District's obligation to assure that teachers are assigned to teach subjects or classes in which they are highly qualified.

47. The analysts properly relied on information in District records in determining NCLB compliance and/or eligibility, and investigated the qualifications of employees prior to determining whether an employee was eligible to bump. The District's actions were reasonable, and did not constitute an abuse of discretion.

48. Respondents identified the following employees who were not permitted to bump because the analysts found they could not show NCLB compliance in alternative subjects: Librarian Denise Nelson (4/26/01) holds a Multiple Subjects (M/S) credential; Elementary Special Subjects Music teacher Merri Sue Brown (11/13/07) holds a M/S credential; High School Music teacher Robin Wilmer (9/15/77) holds a M/S credential; and Librarian Deborah Perry (9/7/99) holds a M/S credential and a supplemental authorization in English, and is NCLB-compliant in M/S but not English.

49. Respondents asked that the District be directed to permit these respondents to establish NCLB compliance in their alternative credentials, and then reassign them to positions in the District that they are certificated and competent to render. Respondent's request is denied, for the reasons set forth above.

### **Partial Bumping Disallowed**

50. Respondent Deborah Perry (9/7/99) occupies 0.6 FTE position as an Elementary Special Subjects librarian. As set forth in Finding 48 above, she holds a supplemental authorization in English. Respondents contend that Ms. Perry should be allowed to establish NCLB-compliance in English, and then be permitted to bump into 0.6 FTE English. Ms. Perry is not eligible to bump into a position teaching English because she is not NCLB-compliant in that subject area. However, even if she were "highly qualified" in English under NCLB, the District is not required to permit Ms. Perry, or any other part-time employee, to bump a full-time teacher out of part of his or her position. It is "within the scope of a school district's discretion ... to define a position as full time if the district concludes that the assignment cannot be as well performed on a part-time basis....So long as the determination is reasonable and made in good faith, neither section 44955 nor any other provision of the Education Code precludes a school district from defining a position, or 'service,' as full time." (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, 343-344.) Respondents' contention is rejected.

### **Home and Hospital "Skip"**

51. Paulette Meeks is the Interim Health Services Director for the District. There are three credentialed teachers who work as teachers on special assignment in the health services department, as home and hospital teachers at U.C. Davis Medical Center, Shriners

Hospital, and Sutter Psychiatric Hospital (Sutter). According to Ms. Meeks, the home and hospital teacher at Sutter must provide educational services to students of various ages, many of whom come from outside of the District for treatment. The home and hospital teacher must be prepared to respond rapidly to changing circumstances, and must be “astute” in dealing with medically fragile and potentially dangerous students.

52. Sharon Rickert (9/2/08) holds a preliminary M/S credential. She is currently employed as the home and hospital teacher at Sutter. Prior to her employment as a teacher, she was an office clerk in the health services department for approximately 10 years. Ms. Rickert was hired into the position of home and hospital teacher based on her response to interview questions, experience, and qualifications/credentials. Ms. Meeks did not participate in the interview process that led to the hiring of Ms. Rickert

53. Ms. Meeks is familiar with Ms. Rickert’s abilities and qualifications. She described Ms. Rickert as “level headed” and “astute,” and as having “sound judgment.” Ms. Meeks commented on Ms. Rickert’s ability to deal with parents and students in a reassuring manner; she has observed Ms. Rickert deal with medication issues, and stated that she “knows the appropriate questions to ask.”

54. Home and hospital teaching was not a service that was reduced as part of the District’s PKS reduction. Ms. Rickert was not served with a notice of layoff. The District “skipped” Ms. Rickert based upon “a specific need for personnel to teach a specific course” (i.e., the home and hospital program), and its belief that Ms. Rickert “has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.” (Ed. Code § 44955, subd. (d)(1).) District personnel did not attempt to ascertain whether any certificated employee with a M/S credential slated to be laid off had the training and experience necessary to serve as a home and hospital teacher.

55. Respondents contend that the District has failed to establish good cause to skip Ms. Rickert, in that the evidence did not show that she had special training or experience to serve in the position of home and hospital teacher. Respondents’ contention was not persuasive.

56. Education Code section 44865 provides, in pertinent part:

A valid teaching credential issued by the State Board or the Commission on Teacher Credentialing, based on a bachelor's degree, student teaching, and special fitness to perform, shall be deemed qualifying for assignment as a teacher in the following assignments, provided that the assignment of a teacher to a position for which qualifications are prescribed by this section shall be made only with the consent of the teacher:

(a) Home teacher.

[¶]...[¶]

(c) Hospital classes.

[¶]...[¶]

57. The District established that, through the hiring interview process, it determined that Ms. Rickert demonstrated “special fitness to perform” the duties of home and hospital teacher, based on her experience and temperament.

58. In *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, the court addressed the issue of special fitness to perform under Education Code section 44865, as it related to bumping and skipping under Education Code section 44955. In that case, the court held that Bledsoe fell within the pool of qualified teachers available under the terms of the statute if he consented to the assignment. Thus, he was deemed “certificated and competent” to render the service under Education Code section 44955, subdivision (b).<sup>7</sup> However, the court further stated, that “[s]uch conclusion does not, however, end our inquiry. [¶] Subdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific ‘needs’ and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements.” (*Id.* at pp. 137-138.) The court permitted testimony from the superintendent of the Biggs Unified School District concerning the specific need for teachers with special qualifications for its community day school. However, the court also held that, “[i]n order to retain a certificated employee under section 44955, subdivision (d)(1), ... a district must not only establish a specific need for personnel to teach a specific course of study, but establish the certificated employee it proposes to retain ‘has special training and experience necessary to teach that course or course of study or to provide those services[.]’ (§ 44955, subd. (d)(1).)” (*Id.* at p. 138.)

59. The District made a minimally sufficient showing that Ms. Rickert demonstrated special fitness to perform the duties of a home and hospital teacher. Respondents provided no evidence that any certificated employee noticed for layoff with a M/S credential, and with greater seniority than Ms. Rickert, possessed the special training and experience necessary to serve as a home and hospital teacher at Sutter.

---

<sup>7</sup> Education Code section 44955, subdivision (b), states, 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.”

## **Reassignment of School Psychologists to Behavior Intervention Specialist Positions**

60. The District employs behavior intervention specialists in its Special Education Department. According to the District's job description for this position, these certificated employees "[provide] support, intervention techniques and in-service assistance to staff in the management of student's [sic] problematic behaviors." The minimum credential requirement for the position is "possession of any credential issued by the Commission on Teacher Credentialing authorizing services in any field of special education or psychology." The minimum education requirement is a bachelor's degree, "but a master's degree is preferred." The minimum experience required is: "...two years of certificated experience with students with disabilities. Trained and experienced in the positive management of 'serious behavior problems' (which are defined as individual's [sic] behaviors which are self-injurious, assaultive, or causing property damage which could lead to suspension or expulsion) and other severe behavior problems that are pervasive and are maladaptive and require a systematic and frequent application of behavioral interventions. Training in the use of emergency behavioral intervention."

61. There are four behavior intervention specialist positions in the District. Diana Otterson (9/5/06), Jason Burke (9/6/05) and Selicia Fletcher (9/27/04) all hold special education credentials, which would entitle them to be "skipped" under paragraph 4 of Resolution #2549. The fourth behavior intervention specialist, Christian Mahaffey, was identified by the District as a temporary employee and received a "double notice;" he did not file a request for hearing. The behavior intervention specialist positions were not identified for reduction in Resolution #2549.

62. School psychologists hold a credential required to qualify them for assignment to the position of behavior intervention specialist. In effectuating the layoff of 19.6 FTE school psychologists, the analysts did not consider whether any of the school psychologists had the credential, education, and experience necessary to be reassigned as a behavior intervention specialist.

63. Rebecca Bryant is the Director of Special Education and Interventions for the District. She supervises the behavior intervention specialists and the school psychologists, and she is familiar with their job duties and the qualifications of individual certificated employees in these positions. Ms. Bryant was involved in hiring the behavior intervention specialists for the District, and she stated that she "was looking for specific training." She stated that behavior interventions specialists "must have some knowledge and experience of classroom teaching," because they are "working side by side with teachers to develop positive behavior support plans." The current behavior intervention specialists all had prior experience teaching emotionally disturbed students.

64. Ms. Bryant acknowledged that at least some of the school psychologists who have received notices of layoff were "qualified to apply for the position" of behavior intervention specialist, in that she had personal knowledge of their training and experience in dealing with students with "serious conduct behaviors." She identified the following

individuals as being qualified for the position, all of whom have more seniority than some or all of the current behavior intervention specialists: Sheila Buckey (9/21/93); Nancie Kenton (9/11/97); Judy Miller (8/20/01); and Holly Jaeger (7/1/05). She was not sure whether Joanne Abbott (8/23/99), Sandra Natale (9/22/99) or Nicole Milevsky (8/20/01) had sufficient experience with severe behavior problems to be qualified for the position.<sup>8</sup> She believes that it would be possible to ascertain whether individuals are qualified to serve as behavior intervention specialists through an interview process.

65. The evidence was clear that several of the school psychologists who received notices of layoff are qualified to serve as behavior intervention specialists. The District shall be required to conduct interviews with school psychologists who are interested in serving in these positions, and shall retain the four most senior school psychologists who are able to establish their experience and training, so long as they have more seniority than the certificated employees currently serving in those positions.

### **Adult Education**

66. Resolution #2549 identified 21.0 FTE reduction in Adult Education Teachers. Adult Education maintains a separate seniority list from the K-12 program.

67. Per the Collective Bargaining Agreement (CBA) between the District and the Sacramento City Teachers Association (SCTA), a teacher cannot have permanent status in both the Adult Education program and the K-12 program.

68. To effectuate the layoff of adult education teachers, the analysts were given a list of names from Ms. Stephen, identifying the teachers in classes that were being reduced or eliminated, based on enrollment and attendance. They confirmed the seniority dates of the individuals, and determined whether any could “bump” a less senior adult education teacher out of his or her position.

69. Mary Shelton is the Associate Superintendent for Learning Support. As part of her duties, she is the head of the Adult Education Division. She was involved in identifying the classes and programs to be reduced in Adult Education. Priorities were identified by the Board in determining which classes to retain, including English as a Second Language (ESL), Parent Participation Preschool, English language tutoring, vocational education/retraining for employment, and classes for adults with disabilities. Other considerations included the demand for various classes, and the high cost of maintaining certain vocational education courses, such as the truck driving program.

---

<sup>8</sup> Ms. Milevsky testified about her experience and training dealing with disabled students and students with behavior problems. She has performed training for teachers and staff in behavior intervention and classroom management; she has done suicide risk screening and crisis intervention, as well as individual and group counseling. She has written positive behavior support plans, which include behavior interventions, and she has worked with emotionally disturbed students

70. The method of identification of adult education teachers for layoff was reasonable and did not constitute an abuse of discretion.

### **Reassignment of K-12 Teachers to Adult Education**

71. Respondents contend that there are certificated employees noticed for layoff from the District's K-12 program that are certificated and competent to teach Adult Education, and that they are entitled to be reassigned to the Adult Education program because they have greater seniority with the District than Adult Education teachers that did not receive layoff notices. Respondents' contention is not persuasive.

72. The District maintains its Adult Education program separate from its K-12 program. There are separate seniority lists for the two programs, due in part to the different methods by which permanent status is achieved in each program under the Education Code. In addition, the CBA between the District and SCTA addresses Hourly Adult Education Teachers (CBA, section 5.12.10), and specifies that "Employees with permanent status in the K-12 program of the District who become eligible for permanent status in adult education shall at the time of becoming eligible for permanent status in adult education elect as to whether they shall have permanent status in the K-12 program or in the adult education program. Permanent status may not be attained in both programs." (CBA, section 5.12.10.2.7.) The CBA is consistent with Education Code section 44929.26, which provides that an employee who obtains permanent classification in the evening program and later becomes eligible for permanent classification in the day school, "he or she shall be given his or her choice as to which he or she shall take." Furthermore, service in one program shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee in the other program, unless the district has directed or specifically requested that the employee provide service in the other program.

73. Education Code section 44865, subdivision (b), provides that an individual teaching in the K-12 program may be assigned to teach classes organized primarily for adults "only with the consent of the teacher," further supporting the separation between the two programs.

74. Seniority defines the relationship of teachers to each other, and teachers with greater seniority generally have more secure rights to employment. However, if employees must choose between attaining permanent status in either the Adult Education program of the K-12 program, then the seniority attained in one program cannot be transferred to the other. Thus, certificated employees in the K-12 program are not entitled to displace an adult education teacher, because they would have no seniority in the Adult Education program. The claims of respondents Fred Jackson, Pauline Tracey, and Cassandra Fine, to positions in the Adult Education program, are rejected.

## **Application of District's Tiebreaker Criteria – Generally**

75. The analysts applied the tiebreaker criteria set forth in Resolution #2550 based on past District practice. They were provided information in a spreadsheet format for each category of PKS in which the tiebreaking criteria needed to be applied. Under Category I of the tiebreaker criteria, employees who lacked ELL certifications or were not NCLB-compliant were slated for layoff.

76. The analysts determined the order of seniority based on points awarded under the tiebreaking criteria. Where individual employees had the same number of points after application of all other criteria, the analysts conducted a lottery within each PKS category to determine which employee(s) would be subject to layoff.

### **Tiebreaker Issue Due to Retention of Valerie Willover**

77. The District rescinded the layoff notice to Valerie Willover (11/1/04), a school social worker who received a double notice as a temporary employee, when she was in fact a permanent employee.

78. The District acknowledged that one senior school social worker should be retained due to its retention of Ms. Willover. The following full-time school social workers have greater seniority than Ms. Willover: Benito Aleman (1/12/98); Janet Love (2/16/99); Ellen Sorkin (8/26/02); James Downing (4/28/03); Rachel Webb (8/18/03); Carol Lambert (8/18/03); and Olivia Alvarado (8/18/03). The District shall rescind the layoff notice of the most senior school social worker who is a respondent in this proceeding. Ms. Webb, Ms. Alvarado, and Ms. Lambert have the same seniority date. If it becomes necessary in order to retain the most senior school social worker, the District is directed to apply the tiebreaking criteria to determine their seniority relative to one another.

### **Music Layoff**

79. Resolution #2549 identified a total of 21.1 FTE reduction in music teachers in the District, including 5.1 FTE Elementary Special Subjects Music; 2.0 FTE Secondary Music; and 14.0 Music Teachers. Respondents objected to the identification of elementary special subjects music teachers as part of the PKS reduction under Category II (due to the reduction of elementary classroom teachers under Category I) while at the same time considering them for purposes of the reduction in music teachers under Category III. Elett Ricks-Chambers (9/4/80) is an Elementary Special Subjects teacher. She contended that application of the reduction was arbitrary, in that more junior Elementary Special Subjects teachers (in subjects other than music) are being retained while she is being laid off.

80. As a consequence of the application of the PKS reduction, only 3 music teachers will remain for 47,000 students of the District. However, it is clear from Resolution #2549 that the Board identified music as a subject to be reduced. The method of

identification of Elementary Special Subjects teachers and Music teachers for layoff was within the District's discretion and was not arbitrary.

### **“Padding”**

81. According to the analysts, three subject areas were identified in which it was determined that additional certificated employees should receive layoff notices: English, Science, and Mathematics. Layoff notices were sent to the following individuals as a precaution, in the event it was determined during the hearing that individuals who had been identified for layoff had bumping rights into one of these subjects: Scott Embrey-Stine (9/2/08) (English); Jon Dresser (9/2/08) (Math); and Nicole Toussaint (9/2/08) (Science).<sup>9</sup> The District did not establish a need to lay off these individuals on the basis of a reduction in PKS. Therefore, notices to these employees shall be rescinded, and they shall be retained by the District; however, if any of the listed individuals is “tied” with another certificated employee with the same or equivalent credential and seniority date, the District shall apply the tiebreaking criteria to determine the most senior employee to be retained.

### **Individual Respondents**

82. *Marjorie Methven* (10/2/89)

Ms. Methven is listed on the District's layoff/bumping matrix as occupying a 0.6 FTE position as a middle school librarian. However, Ms. Methven is actually a full-time employee who has requested reasonable accommodation under the Americans with Disabilities Act (ADA) due to a worker's compensation injury that happened in the classroom in October of 2004. She returned to work in September of 2007 at 0.6 FTE. She hopes eventually to return to full-time status, but does not have a medical release to return to full duty. She is on a 0.4 FTE medical leave of absence at this time.

Ms. Methven holds a Library Media Teacher Services credential, as well as a M/S credential and a Single Subject Art credential. She is NCLB-compliant in both M/S and Art. She is senior to the following teachers who did not receive notices of layoff: Jennifer Sparks (9/4/01) 1.0 FTE high school art; Russell Wadsworth (9/6/94) 1.0 FTE high school art; Jane Thompson (9/2/03) 0.4 FTE Elementary Special Subjects Art Prep; and Kimberly Freeman (9/2/97) 1.0 FTE Elementary Special Subjects Art Prep.

Despite her NCLB-qualifications in M/S and Art, Ms. Methven was not permitted to bump a less senior employee due to the District's belief that she was a part-time employee, and the District was not obligated to “carve out” a part-time position for her, under the rationale of *Hildebrandt v. St. Helena Unified School District*, *supra*, 172 Cal.App.4th 334.

---

<sup>9</sup> On the District's Layoff/Bumping Matrix (Exhibit 10), the names of these employees were highlighted in yellow, with the notation “Needed for ‘Padding.’”

The District has retained certificated employees junior to Ms. Methven who are performing services that she is certificated and competent to render. The District shall rescind the notice of layoff to Ms. Methven, and shall retain her to provide services consistent with her credentials and qualifications.

83. *Jennifer Ellerman (10/27/08)*

Ms. Ellerman was offered employment by the District on October 7, 2008; however, due to delays in obtaining fingerprint clearance, she did not begin paid employment with the District until October 27, 2008. She requested a seniority date of October 10, 2008, as a result of “prejudicial delay” by the District in processing her fingerprint clearance. Ms. Ellerman’s argument is not persuasive. Education Code section 44845 specifies that an individual’s seniority date is the date upon which he or she first rendered paid service in a probationary position. That date was October 27, 2008.

84. *Katherine Erickson (9/7/04)*

Ms. Erickson is an elementary classroom teacher with a M/S credential. She contends she should have received an extra point for her minor in the tiebreaker that was applied to K-6 employees with the seniority date of September 7, 2004. The tiebreaking criteria was applied to her to assign her relative position on the seniority list for purposes of layoff. Under the criteria, she was given points for her major in liberal studies, but was not given any points for her minor in psychology. She believes the coursework for her minor does relate to her duties as an elementary teacher

Analyst Terri Lauzon applied the tiebreaker criteria to Ms. Erickson. She awarded three points for her M/S credential; two points for her major in liberal studies, because it pertained to the multiple subjects she teaches as an elementary school teacher; and one-half point for her master’s degree in Education, for a total of five and one-half points. She did not award any points for Ms. Erickson’s minor in psychology, because it did not pertain to the multiple subjects she teaches as an elementary school teacher. Ms. Lauzon used the same analysis of employee qualifications and interpretation of the tiebreaker criteria to assign points to all individuals subject to the tiebreaker. The District’s application of the tiebreaker criteria was within its discretion and was not arbitrary. Ms. Erickson’s contention is not sustained.

85. Except as specifically addressed above, the arguments of the individual respondents were considered but were not persuasive.

### **Additional Arguments Raised by Respondents**

#### *Minimum Mandated Services*

86. Resolution # 2549 included reductions of 27.0 FTE school nurse/health services; 38.7 FTE school counselors; 19.6 FTE school psychologists; and 8.875 FTE school

social workers. Respondents contend that the District failed to establish that it will be able to provide the minimum level of mandated services required by statute and regulation if these reductions are put into effect.

87. Respondent Dawn Warrington (9/2/97) is a school nurse. Currently there are 36 full-time and part-time school nurses employed by the District. Ms. Warrington testified that, to her knowledge, only three nurses did not receive layoff notices. Respondents Nancie Kenton (9/11/97) and Nicole Milevsky (8/20/01) are school psychologists. All three respondents testified about mandated services provided by school nurses and school psychologists, particularly as they relate to special education assessments.<sup>10</sup> They eloquently described the many services they and their peers provide to the students of the District.

88. Ms. Stephen testified that required services by school nurses, counselors, social workers, and psychologists could be provided with reduced staff, but not at current levels. According to Ms. Stephen, mandated services will be provided, but “just done differently.” She was unable to provide specific information because the funding is uncertain.

89. The District acknowledged that it must continue to provide legally mandated health and psychological services. However, the District argued that the Education Code does not mandate that all the services which the District’s school nurses and psychologists are currently providing must be provided by salaried certificated personnel. The District’s argument was persuasive.

90. School districts “shall give diligent care to the health and physical development of pupils, and *may* employ properly certified persons for the work.” (Ed. Code, § 49400. Italics added.) School districts must also “maintain fundamental school health services at a level that is adequate to accomplish all the following: [¶] (1) Preserve pupils’ ability to learn. [¶] (2) Fulfill existing state requirements and policies regarding pupils’ health. [¶] (3) Contain health care costs through preventive programs and education.”

91. The Education Code requires school districts to conduct sight and hearing screening (Ed. Code, § 49452), and scoliosis screening (Ed. Code, § 49452.5). The Education Code also contains provisions governing the administration of medication and epinephrine to students (Ed. Code, 49423), and the delivery of specialized physical health care services, including catheterization, gastric tube feeding, suctioning, and other services that require medically related training (Ed. Code, § 49423.5.) These statutory provisions do not, however, require that certificated school nurses must provide the described health care services. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571.) In addition, the District is not required to utilize certificated school nurses, psychologists and/or counselors to provide many of the non-mandated services currently provided by these employees.

---

<sup>10</sup> See Education Code sections 56320 and 56324, concerning the conduct of psychological assessments of pupils by a credentialed school psychologist, and health assessments by a credentialed school nurses or physician.

92. The District will be required to have a plan in place for the provision of nursing, counseling, and psychological services for the 2009-2010 school year, but it does not have to have a finalized plan in place at the time that it opts to reduce or eliminate such services and give notice to affected certificated employees. It must be presumed, absent evidence to the contrary, that the District will comply with its legally mandated obligations (Ev. Code, § 664, *Degener v. Governing Board* (1977) 67 Cal. App.689, 696.) The District has discretion to determine how and in what manner mandated services are to be provided. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal. App.3d 796, 811; *Gallup v. Board of Trustees, supra*, 41 Cal.App.4th at pp. 1582-1590.) Changing the way in which a service is to be performed constitutes a reduction in a particular kind of service, as does having fewer employees available to perform the service. (*Rutherford v. Board of Trustees* (1976) 64 Cal. App.3d 167, 179; *Campbell Elementary Teachers Assn. v. Abbott, supra*, 76 Cal.App.3d at p. 811.) The evidence did not establish that the District would not be able to provide all legally mandated services to students if it reduces its certificated staff by the levels set forth in Resolution #2549.

### **Welfare of the District and Its Students**

93. Other than that set forth particularly above, the Associate Superintendent's analysts correctly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, unless skipped, as set forth above.

### **LEGAL CONCLUSIONS**

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met.

2. 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."<sup>11</sup> The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee.<sup>12</sup>

3. Legal cause exists to reduce or eliminate 382.775 FTE of particular kinds of services offered by the District as set forth in detail in the Factual Findings. Cause for the

---

<sup>11</sup> *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.

<sup>12</sup> *Campbell Elementary Teachers Association v. Abbott, supra*, 76 Cal.App.3d at pp. 807-808

reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils, within the meaning of Education Code section 44949.

4. Legal cause also exists to accordingly reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Cause exists to retain six teachers who are currently occupying positions in which BCLAD credentials are required, as set forth in Resolution #2549, regardless of seniority, and as set forth in Findings 7, 41, 42, and 43.

### **Hearing Issues**

5. As set forth in Finding 16, the preliminary notices of layoff issued to Christina Allison, Jerome Butler, Claudia Coletta, Patricia Engman, Patricia Kerns, Marguerite Parker, and Valerie Willover, are rescinded, and the above-named teachers shall be retained for the 2009-10 school year.

6. As set forth in Finding 36, the employment classifications of the following employees has been changed to "permanent:" Jerome Butler (9/4/07); Yoko Kato (9/2/08); and Antonia Slagle (9/2/08).

7. As set forth in Finding 37, Debra Sanchez's correct seniority date is September 26, 2005; Elizabeth Ridzick's correct seniority date is October 23, 2007; and Tom Sisterson's correct seniority date is March 7, 2007.

8. As set forth in Findings 38-40, the seniority dates of Carol Lambert, Olivia Alvarado, and Rachel Webb are changed to August 18, 2003.

9. As set forth in Findings 60-65, the District shall conduct interviews with school psychologists to whom layoff notices have been issued, including but not limited to Sheila Buckey (9/21/93); Nancie Kenton (9/11/97); Judy Miller (8/20/01); Joanne Abbott (8/23/99); Sandra Natale (9/22/99); Nicole Milevsky (8/20/01), and Holly Jaeger (7/1/05), and shall retain the four most senior school psychologists who are able to establish their experience and training to serve as behavior intervention specialists, so long as they have more seniority than the certificated employees currently serving in those positions.

10. As set forth in Finding 78, the District shall rescind the layoff notice of the most senior school social worker who is a respondent in this proceeding. Rachel Webb, Olivia Alvarado, and Carol Lambert have the same seniority date (8/18/03). If it becomes necessary in order to retain the most senior school social worker, the District is directed to apply the tiebreaking criteria to determine their seniority relative to one another.

11. As set forth in Finding 81, the District did not establish a need to lay off Scott Embrey-Stine (9/2/08) (English); Jon Dresser (9/2/08) (Math); and Nicole Toussaint (9/2/08) (Science) on the basis of a reduction in PKS. Therefore, notices to these employees shall be rescinded, and they shall be retained by the District; however, if any of the listed individuals

is “tied” with another certificated employee with the same or equivalent credential and seniority date, the District shall apply the tiebreaking criteria to determine the most senior employee to be retained for the 2009-10 school year.

12. As set forth in Finding 82, the District shall rescind the notice of layoff issued to Marjorie Methven, and shall retain her to provide services consistent with her credentials and qualifications, as a 1.0 FTE employee with a 0.4 FTE medical leave of absence.

13. Other than the foregoing, no employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render. Except as set forth above, the Board may give the remaining respondents whose preliminary notices have not been rescinded final notice before May 15, 2009, that their services will not be required for the ensuing school year, 2009-10.

#### ORDER

1. The District shall comply with Legal Conclusions 5 through 12.

2. Except as noted above, notices shall be given to respondents identified in attached Exhibit A that their services will not be required for the 2009-10 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

3. All other contentions and claims not specifically mentioned were considered and are DENIED.

DATED: May 6, 2009

---

CATHERINE B. FRINK  
Administrative Law Judge  
Office of Administrative Hearings

EXHIBIT A

LIST OF RESPONDENTS

LAST	FIRST
1. Abbott	Joanna
2. Acquisito	Yvette
3. Acton	Chris
4. Ainslie	Thomas
5. Akaba-McCumber	Chery
6. Akerland	Marianne
7. Aleman	Benito
8. Allison	Christina
9. Alvarado	Olivia
10. Andresen*	Adinda
11. Anderson	Teresa
12. Angove	Amy
13. Angove	Phillip
14. Auchterlonie	Suzanne
15. Avis	Heidi
16. Bacsafra	Jennifer
17. Bair	Ariane
18. Ballante	Anne
19. Bautista	Cristina-Angelita
20. Bautista	Larisa
21. Bayley	Krystyna
22. Beal	Martin
23. Beltran-Rodriguez*	Maria
24. Beutler	Carolyn
25. Beyer	Doreen
26. Bishop	Thomas
27. Blake	Randi
28. Boakye-Donkor	Toneiya
29. Boettner	Julie
30. Borgman*	Christina
31. Boswell	David
32. Bourgeois	Mary Ann
33. Bowman	Jennifer
34. Bovert	Justin
35. Brandow*	Shellie

36. Breton	Nina
37. Brown	Amy
38. Brown	Anne
39. Brown	James
40. Brown	Merri
41. Bruce	Michael
42. Buckey	Sheila
43. Budge	Peter
44. Bujalski	Lisa
45. Butler	Jerome
46. Cabanlit	Ma. Lanie
47. Calvert-Jones	Hillary
48. Campos	Ramon
49. Cannady	Will
50. Carr	Victoria
51. Carson	Leon
52. Catlett	Emily
53. Cazal-Mayo	Michelle
54. Cerezo	Diana
55. Cha	Mary
56. Choy	David
57. Clovis	Brandi
58. Cluff	Kristen
59. Cole	Whitney
60. Coletta	Claudia S.R.
61. Collins	Cliff
62. Cooper	Rhonda
63. Corona	Alejandro
64. Crumbley	Jane
65. Cruz	Christel
66. Cunningham	Alan
67. Damaso	Nathalie
68. De Jesus	Evelyn
69. Del Agua	Julie
70. Dempsey	Jennifer
71. Diamond	Cynthia
72. DiSantis	Staci
73. Dopkins	Douglas
74. Downing	James

75. Dresser	Jon Michael
76. Duong	Allie
77. Dyer	Monica
78. Eisner	Adam
79. Elhai	Laurisa
80. Ellerman	Jennifer
81. Engman	Patricia
82. Erickson	Katherine
83. Feliciano	April
84. Fernald	Ryan
85. Fine	Cassandra
86. Finegan	Sean
87. Flores	Mia
88. Frank	Toby
89. Fox	Teresa
90. Frazier	Steven
91. Gallardo Martinez	Leticia
92. Galarza	Maria
93. Galvan	Katrina
94. Garrett	Sarah
95. Gennuso	Holly
96. Gill	Monica
97. Gillispie	Gabrielle
98. Goetz	Kristin
99. Goodwin	Michelle
100. Gray	Elzora
101. Greco	Ruth
102. Griffin	Janene
103. Grisez	Marianne
104. Hack	Brandy
105. Hanafee	Jennifer
106. Hardin	Onisha
107. Hatler	Danielle
108. Havey	Jennifer
109. Herzog Kruse	Joy
110. Hill	Megan
111. Howard	Patricia
112. Hughes	Kimberly
113. Hunt	Pamela
114. Issaka	Casandra
115. Jackson	Adriane
116. Jackson	Fred James

117. Jaeger	Holly
118. James	Jessica
119. Jarvis	Lisa
120. Jett	Elizabeth
121. Johnson	Audrey
122. Johnson	Deborah
123. Kamilos	Audrey
124. Kato	Yoko
125. Keating	Nancy
126. Kenton	Nancie
127. Kerns	Patricia
128. Kingston	Kesha
129. Kirk	Aundra
130. Koren	Alexis
131. Kuhlman	Paula Ruud
132. Kuroda	Stephanie
133. Lam	Christina
134. Lambert	Carol
135. Lambert	Tawney
136. Lawson	Debi
137. Ledgerwood	Michelle
138. Lee	Mary
139. Le-Hinds	Nho
140. LeSieur	Stephanie
141. Lim	Jade
142. Lindahl	Ruth
143. Liu	Evelyn
144. Liuzzi	Joanie
145. Lofton	Louise
146. Lopez	Nancy
147. Lor	Mary
148. Love	Janet
149. Luong	Amie
150. Main	Davin
151. Manning- Taormina	Saralyn
152. Mar	Kimberly
153. Marshall	Audrey
154. Martin*	Danielle
155. Mashinini-Nigl	Siphiwe
156. Matolo	Hazel
157. McCord	Yvonne
158. McCrory	Allyson

159. McGee	Jim
160. Methven	Marjorie
161. Miles	George
162. Milevsky	Nicole
163. Miller	Judy
164. Miller	Kristie
165. Mills	Jacob
166. Mitchell	Ekin
167. Moua	Houa
168. Moua	Si
169. Moua-Yang	Mai P.
170. Murchison	Barbara
171. Natale	Sandra
172. Navarette	Raymond
173. Navarro	Llelenia
174. Nelson	Denise
175. Ngo	Lily
176. Nguyen	Kim
177. Nguyen	Phuong
178. Nguyen	Xuan
179. Noma	Lisa
180. Norman	Neil
181. Ochoa	Emily
182. Ogilbee	Lyssa
183. Parker	Marguerite
184. Pedley	Sandra
185. Perez*	Mirna
186. Perry	Deborah
187. Phillips	Katherine
188. Pickering Pick	Sara
189. Power	Deborah
190. Price	Lauren
191. Pullano	Jacquelyn
192. Reeder-Esparza	Pamela
193. Redfield*	Loralee
194. Reinke	Jennie
195. Ricks-Chambers	Elett
196. Ridzik	Elizabeth
197. Roberts	Steven
198. Rocha	Araceli
199. Romanini-Heisler	Judi
200. Romero	Robert

201. Ross	Jodie
202. Rule	Daniel
203. Ryan	Kelly
204. Saechao	Koy
205. Saechin	Nai
206. Sakakihara	Robyn
207. Saldana	Juanita
208. Salk	Heidi
209. Sanchez	Debra
210. Sandoval	Evelyn
211. Schlager	Matthew
212. Schlenker	Michelle
213. Schlages	Coleen
214. Schon	Julie
215. Sevier	Kacey
216. Shaw II	Robert
217. Simonson-Greenberg	Nicole
218. Sisterson	Tom
219. Slagle	Antonia
220. Smith	Diana
221. Solis	Sylvia
222. Sorkin	Ellen
223. Starnes*	Tracy
224. Stepanchuk	Svetlana
225. Stewart	Elizabeth
226. Stutz	Theresa
227. Tamanaha	Fumi
228. Teweles	Benjamin
229. Thao	Dione
230. Thao	Sia
231. Thao	Shoua
232. Thompson	Ena
233. Tracey	Pauline
234. Tran	Linda
235. Tran	Nhu
236. Triche	David
237. Tung	Tan
238. Turner	Juliette
239. Udell	Bertha
240. Vander Klay	Beth
241. Vang	Ching
242. Vang	Kenneth

243. Vang*	Neng
244. Vang	Pang
245. Vang-Her	Yee
246. Vecchio	Dana
247. Vick	Linda
248. Victa	Joycelyn
249. Vidovich	Peter
250. Viggiano	Linda
251. Villegas	Laura
252. Wagers*	Heather
253. Wagner	Sarah
254. Warrington	Dawn
255. Watkins	Christopher
256. Webb	Rachel
257. Wehner	Oriana
258. Wells-Artman	Christie
259. Wenell	Nital
260. White-Andrews	Rhiannon
261. Willover*	Valerie
262. Wilmer	Robin
263. Wilson-Singh	Maria
264. Xiong	Ia
265. Xiong	Nhia
266. Yaangh	Stacy
267. Yang	Julia
268. Yang	Ka
269. Yates	Christy
270. Yip Tek	Chanh

Employees marked with an asterisk (\*)  
received notice as temporary employee

