

BEFORE THE
GOVERNING BOARD OF THE
VACAVILLE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of:

CERTAIN NAMED CERTIFICATED EMPLOYEES
REPRESENTING 81.4 FULL TIME EQUIVALENT
POSITIONS OF THE VACAVILLE UNIFIED
SCHOOL DISTRICT,

Respondents.

OAH No. 2009030060

PROPOSED DECISION

On April 16, and April 17, 2009, in Vacaville, Solano County, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter.

Terry Filliman, Attorney at Law, and Pablo A. Tagre, Attorney at Law, of Atkinson, Andelson, Loya, Ruud and Romo, 2485 Natomas Park Drive, Suite 240, Sacramento, California 95833, represented Burton Crinklaw, Assistant Superintendent-Human Resources, Vacaville Unified School District.

Costa Kerestenzis, Attorney at Law, and Christina Y. Medina, Attorney at Law, of Beeson, Tayer and Bodine, 520 Capitol Mall, Suite 300, Sacramento, California 95814, represented Respondents herein.

The record was held open to afford opportunities to the parties to file with OAH written closing arguments, and, if necessary, reply briefs. On April 24, 2009, OAH received, via telefacsimile transmission (telefax), from Respondents' attorney a document titled "Respondents' Post-Hearing Brief," which was marked as exhibit "E" and received as argument. Also, on April 24, 2009, OAH received, by telefax, from the Assistant Superintendent's attorneys a written argument titled "District's Post-Hearing Brief," which was marked as exhibit "33," and received as argument. On April 29, 2009, OAH received, via telefax, "Respondents' Post-Hearing Rebuttal Brief," which was marked as exhibit "F," and received as argument. And, on April 29, 2009, OAH received, via telefax, a closing argument titled "District's Reply Brief," which was marked as exhibit "34" and was received as argument.

On April 29, 2009, the parties were deemed to have submitted the matter and the record closed.

FACTUAL FINDINGS

1. On March 23, 2009, Burton Crinklaw, Assistant Superintendent-Human Resources (the Assistant Superintendent) for the Vacaville Unified School District (the District), in his official capacity, made and filed the accusations against Respondents.

2. Respondents, whose names appear on Attachment A, are either probationary or permanent certificated employees of the District.

3. On or before March 9, 2009, the Assistant Superintendent presented the District's Governing Board a recommendation¹ in the form of written memorandum that the District give notice that particular kinds of services, then offered through the District, be eliminated by the District for the ensuing school year (that is, the term of 2009-2010). The memorandum included an attachment that listed the names of the certificated employees who would be affected by the Board's decision to reduce or discontinue certain certificated services.

4. On March 5, 2009, with six affirmative votes² and one Board member absent³, the District's Governing Board adopted Resolution No. 34, 2008-2009. The resolution recites that it has become necessary for the District to reduce or to discontinue, no later than the beginning of the 2009-2010 school year, particular kinds of services in 26 categories for a total of 81.4 FTE (full time equivalent) certificated positions as follows:

Elementary Teaching Services:

1. Grade K-6 Classroom Teachers	27.0 FTE
2. Structured English Immersion (Elementary)	1.0 FTE
3. Elementary Preparation Teachers (all subjects including music)	5.0 FTE

Secondary Teaching Services:

1. English	7.2 FTE
2. Math	5.8 FTE
3. Science (Life)	1.0 FTE
4. Foreign Language (Spanish)	.4 FTE
5. Foreign Language (French)	.2 FTE
6. Social Sciences	1.4 FTE
7. Home Arts (Middle School)	.6 FTE
8. Business Math	.2 FTE
9. Physical Education	1.2 FTE
10. Health	.4 FTE

¹ The letter, titled "Implementation of Board Resolution No. 34 Regarding Certificated Layoffs."

² Buck, Hausler, Kitzes, Mazzuca, Sogge, and Yerkes.

³ Brannon.

11. AVID	.4 FTE
12. Art	1.2 FTE
13. English Language Development (ELD)	1.2 FTE
14. Work Experience (OWE)	.4 FTE
15. Home Economics (High School)	.4 FTE

Music Teaching Services

1. Music Teachers (Elementary and Secondary)	5.0 FTE
---	---------

Certificated Support Services

1. Content Area Specialist (Literacy) (Elementary)	10.5 FTE
2. Content Area Specialist (Literacy) (Secondary)	1.0 FTE
3. Grade 7-12 Counseling (Secondary) (all job classes considered as one class)	1.5 FTE
4. Nurses	3.0 FTE
5. Librarian	1.0 FTE
6. Content Area Specialist (Math) (Secondary)	.4 FTE
7. Language Intervention (Elementary)	<u>4.0 FTE</u>

Total 81.4 FTE

5. By individual letters, dated March 11, 2009, the Assistant Superintendent’s designee delivered, by personal service, preliminary notices⁴ to a number of FTE position holders, including each Respondent, who had status as a permanent or probationary employee. The letter stated that the District’s Board had an intention to reduce or to discontinue the particular service provided by each person who received the notice. Hence, due to the prospective reduction or elimination of the particular kind of service now rendered to the District, each of the recipient Respondents learned the District would not reemploy the named individuals in the certificated positions each had worked.

The letter, dated March 11, 2009, which had attached to it the District’s resolution and other pertinent documents⁵, also conveyed to each Respondent that no certificated employee of the District having less seniority than each respective Respondent would be retained for the 2009-2010 school year to render a service that each Respondent was then credentialed and competent to render to students under the District’s competency criteria.

6. The written preliminary notices to each Respondent, as issued by the Assistant Superintendent, along with the Board’s resolution set out legally sufficient reasons of the

⁴ “Notice of Recommendation That Certificated Services Will Not be Required.”

⁵ Request for Hearing form, Proof of Service document, and copies of Education Code sections 44949 and 44955.

Board's intent to eliminate the positions occupied by each affected Respondent for the school year of 2009-2010.

7. Each Respondent timely requested in writing a hearing to determine whether or not cause exists for not reemploying each Respondent for the ensuing school year.

8. The District's Assistant Superintendent-Human Resources, Burton Crinklaw, caused to be timely served upon each Respondent a respective accusation, dated March 23, 2009, and related documents.

Each Respondent, except Respondent Karen Guy, filed a timely notice of defense.

9. Respondent Karen Guy offered testimonial evidence at the hearing of this matter regarding her effort to timely file a notice of defense. Respondent used a defective telefacsimile machine in an attempt send to the Assistant Superintendent's designee her duly signed notice of defense. Only after a holiday break did she learn that the duly signed notice of defense form had not reached the intended office. Respondent Karen Guy failed to file a notice of defense form because of her mistake, inadvertence or excusable neglect.⁶ Accordingly, she is relieved of a determination that she is in default. Hence, she is allowed to participate as a Respondent in the subject administrative adjudication proceeding.

10. All pre-hearing jurisdictional requirements were met.

11. At the hearing of this matter or shortly thereafter, the District rescinded the notice of layoff action, and thereby withdrew the resultant accusations filed, against sixteen Respondents. Those individuals, along with the FTE positions held by Respondents, are:

<i>Certificated Employees Who Had Accusations Withdrawn</i>	<i>FTE Position Held</i>
Breanne Burbey	Elementary
Jolynda Carrasco	Alt. Education (Ind. Study)
Karen Guy	Elementary
Julianne Kopriva	Secondary (Math)
Judith MacDonald	Alt Education (Ind. Study)
Stephanie Munzinger	Elementary
Timothy Patezick	Secondary (Math)
Robert Perkins	Elementary
Danielle Scheper	Elementary
Heidi Studer	Elementary
Diane Tomovick	Alt. Education
Rogelio Torres	Secondary (Spanish)

⁶ Government Code section 11520, subdivision (c)(2).

Sarah Vanbuskirk	Elementary
Patricia Wasielewski	Elementary
Julia Wilson	Alt. Education (Spec. Ed.)
Pam McGovney	Nurse

By its rescission of the layoff notices and its withdrawal of the accusations, the District will retain the services of Breanne Burbey, Jolynda Carrasco, Karen Guy, Julianne Kopriva, Judith MacDonald, Stephanie Munzinger, Timothy Patezick, Robert Perkins, Danielle Scheper, Heidi Studer, Diane Tomovick, Rogelio Torres, Sarah Vanbuskirk, Patricia Wasielewski, Julia Wilson, and Pam McGovney.

Respondents' Contentions

12. Respondents, collectively, contend that the District's proposed layoff action, as contemplated by the accusations filed against each Respondent, should be dismissed. Respondents aver that the Assistant Superintendent, through his designees, improperly "over-noticed" individual certificated employees for prospective layoff action for the ensuing school because the noticed individuals occupy more than the number of FTEs that were specified by the Board in its Resolution No. 34.

Further, Respondents contend that the Assistant Superintendent, through his designees, neither attributed certain Respondents' proper placement on the District's Seniority List nor correctly noted tenure credit for some Respondents. And in concert with this matter, Respondents advance that the Assistant Superintendent failed to reassign or grant "bumping" rights to certain teachers as prescribed by Education Code section 44955.

Respondents argue that the District is obligated to "tack" time for the time spent by current teachers when those individuals previously served the District as temporary, part-time employees worked less than four days per week. Under Respondents' argument, by using a pro-rated method for accruing the number of days of service as a part-time, temporary employee (such as when three days equals more than 75 percent of a work week) the respondent could gain sufficient credit so that now when such person is a probationary teacher the affected individual should be given an additional year of probationary service. Under Respondents' view, there is an entitlement for part-time, temporary teachers to gain an earlier seniority date as prescribed by Education Code section 44918.

Also, Respondents contend that the District's layoff action will result in a critical school program, namely school nurse services, not being in compliance with state and federal law on the matter of the provision of statutorily mandated services for students of the District. Respondents argue that the proposed District layoff action may result in impermissible cuts in District nurse personnel that are arbitrary and illegal. Respondents contend that the District's administration has made assumptions regarding the provision of nursing services that are erroneous and that the proposed layoff action will thrust the District below state mandated levels for staffing ratios of nurses to students for the effective delivery of necessary nursing services.

Individual Respondents advanced contentions of particularized import as follows:

i. Respondent Karen Rivera makes two challenges to the proposed layoff. First, she advances that as an individual who once resigned a permanent teacher status position with District, upon her rehire by the District she was entitled to permanent status rather than the probationary first-year status that she now holds. Additionally, she argues that her position on the District's Seniority List should be corrected to reflect a revised first date of paid service to the District of August 21, 2006.

ii. Respondent Danelle Kannellis contends that her position on the District's Seniority List should reflect the service, as a temporary teacher, she rendered for days that predate her currently recorded first date of paid service to the District. She argues that rather than August 14, 2008, her first date of paid service should be recorded as August 13, 2007.

iii. Respondents Kimberly Gunn and Shannon Bechtel aver that each spent several days in a training program before the school year commenced and, thus, the District should grant them the right to back date their respective first day of paid service to the District.

iv. Respondent Sarah VanBurskirk contends that the District's proposed layoff action is unlawful as against her because she should have been granted "bumping rights" into an English course held by a junior certificated employee.

v. Respondent Kathy McBride, a counselor, argues that the layoff notice against her should be rescinded, and the accusation withdrawn, because an individual counselor, who though having more seniority than Respondent McBride, has an expired credential as of April 2009 and therefore his position must be viewed as vacant. In addition, Respondent McBride argues another counselor position is vacant according to District records so that the District should retain Respondent McBride as a school counselor.

Respondents' various and respective contentions are without merit and are rejected.

Claims of Individual Certificated Employees at the Hearing of this Matter

a. Mr. Robert Perkins

16. Although the notice of layoff was withdrawn as to Robert Perkins, he insisted that he be afforded the opportunity to offer testimony regarding a supposed irregularity in the treatment that was visited upon him by the Assistant Superintendent's designee. Respondent Perkins was not persuasive when he impuned the professionalism of Ms. Mary Hughes regarding her alleged act of exerting undue pressure upon him to sign a consent form that would enable the District to assign him to an Alternative Education classroom.

Ms. Mary Hughes, the Assistant Superintendent's Administrative Assistant and a District Credential Analyst, offered testimony under oath at the hearing of this matter. By her demeanor while testifying, by her attitude towards the proceedings, and by the consistency in providing a compelling account of her observations and interactions with Respondent Perkins on the day he filed at her office a notice of defense and delivered an executed form that showed his election to be placed as a teacher in the District's alternative education program, Ms. Hughes demonstrated that she was a credible⁷ and forthright witness at the hearing. Ms. Hughes did not instruct Respondent Perkins in completing the form whereby he elected to take on a teaching position in the District's alternative education program.

Also Ms. Hughes refuted the mistaken impression of Respondent McBride regarding the availability of a high school counselor position due to the supposed expiration of a credential held by Ms. Alison Adcock. Ms. Hughes established that Ms. Adcock renewed an intern credential (counseling) as of April 1, 2009. Ms. Adcock has a first date of paid service to the District of August 22, 2007. Ms. Adcock has experience that the District seeks to retain for the ensuing year. Ms. Adcock has greater seniority than Respondent McBride.

b. Respondent Danelle Kanellis

14. Respondent Kanellis is a third-grade teacher with the District. She has a first date of paid service to the District of August 14, 2008. She is a first-year probationary (Prob 1) certificated employee.

During the 2007-2008 school year, Respondent Kanellis worked as a classroom elementary school teacher under a temporary credential. She worked 20 percent as a kindergarten teacher and she worked 40 percent in a third-grade and fourth-grade combination class. Respondent Kanellis attended "new teacher" training whereby the District paid her a stipend. However, Respondent Kanellis was not persuasive that she worked for more than 75 percent of the 2007-2008 school year. Evidence offered by the Assistant Superintendent shows that Respondent Kanellis worked 109 days for that year, which was less than 75 percent of the 184 days in the regular school year.

Although for the 2008-2009 school year, Respondent Kanellis was scheduled to attend the new teacher training beginning on August 14, 2008, she avoided the training to go directly to her assigned classroom for the start of the school year. On behalf of the District, the Assistant Superintendent adjusted the first day of paid service to the District by Respondent Kanellis as August 14, 2008. Although the Seniority List now shows her to have a seniority date of August 18, 2008, the change in the seniority date does not affect her layoff order.

Respondent Kanellis provided no competent evidence that the District has retained any teacher junior to her to perform services for which Ms. Kanellis possesses a credential

⁷ California Government Code section 11425.50, subdivision (b), third sentence.

and is currently competent to provide. Nor did Respondent Kanellis establish that the Assistant Superintendent committed a procedural error in the execution of the layoff action that adversely affects her teacher position with the District.

c. Respondent Nikki Etchieson

15. Respondent Nikki Etchieson is a sixth-grade teacher at Callison Elementary School. She has a first date of paid service to the District of August 16, 2007. She is a second year (Prob 2) certificated employee.

Respondent Etchieson was a day-to-day substitute teacher during the 2005-2006 school year. She assumed that she worked more than 75 percent of the school year. For 2006-2007, Respondent engaged in student teaching for the District, but the time was more limited than for the preceding year. Also during the 2006-2007 school year, Respondent Etchieson worked for another school district, namely the Travis Unified School District.

Respondent Etchieson provided no competent evidence that the District has retained any teacher junior to her to perform services for which Ms. Etchieson possesses a credential and is currently competent to provide. Nor did Respondent Etchieson establish that the Assistant Superintendent committed any procedural error in the execution of the layoff action that adversely affects her employment position with the District.

d. Respondent Kimberly Gunn

16. Respondent Kimberly Gunn is a language arts teacher at Fairmont Elementary School. She has a first date of paid service to the District of August 16, 2007. Respondent Gunn is a second-year probationary (Prob 2) teacher. She occupies a full (1.0) FTE classroom teacher position.

The District paid Respondent Gunn a daily stipend to attend a five-day training program with the Houghton Mifflin Language Arts program from August 13 to 17, 2007. And in July 2007, Respondent Gunn received District training along with “year-round” teachers. But the July 2007 training was not a mandatory program. And the language arts training program in August 2007 was a voluntary program course of instruction.

Respondent Gunn’s attendance at training programs before the beginning of the school year (August 17, 2007) does not change her first date of paid service to the District.

The District’s contract with Respondent Gunn specifies that her contract work year commenced on Thursday, August 16, 2007.

Respondent Gunn provided no competent evidence that the District has retained any teacher junior to her to perform services for which Ms. Gunn possesses a credential and is currently competent to provide. Nor did Respondent Gunn establish that the Assistant

Superintendent committed a procedural error in the initiation in the initiation of the layoff action that adversely affects her employment position with the District.

e. Respondent Karen Rivera

17. Respondent Karen Rivera is a third-grade teacher at Orchard Elementary School. The District shows her to have a first day of paid service to the District of August 18, 2008. She is a first-year probationary certificated employee of the District. Respondent Rivera holds a full-time (1.0) FTE position and occupies position number 724 on the District's Seniority List.

From December 11, 1996, until June 3, 2003, the District employed Respondent Rivera as a reading specialist. She took a leave of absence during the 2003-2004 school year, and then she resigned in June 2004 from her full-time elementary school (reading) teacher position with the District.

The District again employed Respondent Rivera for the 2006-2007, but under a temporary, substitute teacher contract, which specified that she was to occupy a 20 percent position for a teacher (Christine O'Connor) who was participating in the Willie Brown Reduced Workload law. (Because Ms. O'Connor had been a full-time employee, she had a right to end her participation in the reduced work-load program and to return to a full-time position at her discretion.) That year Respondent Rivera also worked as a reading intervention teacher with an assignment with first-grade teachers.

During the next school year (2007-2008), Respondent Rivera worked under two discrete temporary contracts that resulted in her providing services previously offered by two teachers who also enjoyed reduced workloads in accordance with the Willie Brown Reduced Workload law. She worked 20 percent of one teacher's assignment, and 20 percent of another teacher's work schedule that were respectively in the first-grade and second-grade. In addition she taught reading intervention, over two separate periods of either six weeks or eight weeks that consisted of 30-minute sessions for four days each week.

Respondent Rivera contends that the District erred in failing to provide her with a seniority date that credits her with the time she worked for the District before August 18, 2008. But as noted below, the Assistant Superintendent provided compelling evidence that shows Respondent Rivera to be mistaken about her seniority date with the District.

Respondent Rivera provided no competent evidence that the District has retained any teacher junior to her to perform services for which Ms. Rivera possesses a credential and is currently competent to provide. Nor did Respondent Rivera establish that the Assistant Superintendent committed a procedural error in executing the layoff action that adversely affects her employment position with the District.

f. School Counselor - Respondent Kathy McBride

18. During the current school year, Respondent Kathy McBride has worked for the District as an alternative school counselor at the Community Day School. She has a first day of paid service to the District of September 29, 2008. Respondent McBride is a first-year probationary (Prob 1) certificated employee. She occupies a 0.5 FTE position with the District, and she holds position 730 on the District's Seniority List. Respondent McBride does not hold a counselor's credential.

Respondent McBride points to no statutory or regulatory authority that requires the District to provide counseling services at the optimum level argued by Respondents. No authority is offered to show that the governing board's decision to eliminate conflict resolution services at the high school level violates a requirement for mandated services to students.

Respondent McBride offers no competent evidence that the District will be unable to provide statutorily mandated counseling services for the ensuing school year after reducing 1.5 full time equivalent positions for high school counselors for the coming school year.

As set out below, the Assistant Superintendent's Credential Analyst, Ms. Mary Hughes, offered evidence to refute the impression of Respondent McBride's attorney that a District intern, who has greater seniority than Respondent McBride, has a lapsed or expired credential. The evidence shows otherwise so that the District may retain the counselor intern who has special experience and skills which the District requires.

Moreover, Respondent McBride provides no competent evidence that the District has retained any faculty member junior to her to perform services for which Ms. McBride possesses a credential and is competent to provide.

g. School Nurses

19. No Respondent school nurse established that such individual possesses the training, skill and experience to offer reliable and trustworthy evidence regarding the extent and scope of the District's prospective delivery of nurse or medical-oriented services to district students. Nor, did any school nurse, who is subject to the layoff action, show that she possesses an ability to offer competent evidence regarding arguments that the District's contemplated layoff action may violate state or federal law for the provision of mandated health care services to students of the District.

Moreover, no Respondent school nurse offered competent evidence that the District has retained any nurse junior to such individual to perform services for which the Respondent school nurse possesses a credential and is competent to provide nurse services to the District's students.

Respondents for Whom Stipulations Were Made

20. The parties stipulated to certain facts regarding the following Respondents:

i. Respondent Shannon Bechtel

Respondent Shannon Bechtel attended a week-long training program called the Houghton Mifflin training during the week of August 14, 2006. The District paid her a flat rate daily stipend for the days that she attended the training.

Also Respondent Bechtel has an emergency CLAD certificate which she is “in the process of clearing up.” The District agrees to recognize the intention of Respondent Bechtel to have the credential in order by July 2009.

ii. Respondent Kimberly Gunn

Respondent Kimberly Gunn participated in a two-day new teacher training program beginning on July 27, 2007, along with “Year-Round” teachers. Also Respondent Gunn attended a five-day Houghton Mifflin training beginning on August 13, 2007.

Dispositive Findings Regarding the Respondents for Whom Stipulation Were Made

21. Respondent Shannon Bechtel has a first date of paid service to the District of August 21, 2006. She is a permanent (tenured) teacher and she works as an elementary classroom teacher in a 0.4 FTE position at the Callison School. Respondent Bechtel occupies position number 613 on the District’s Seniority List.

The Houghton Mifflin training, which Respondent Bechtel attended beginning August 14, 2006, was a staff development training that occurred before the contract work year commenced for classroom school teachers. The training was voluntary and was not required by the District as part of the terms and conditions of the contract between Respondent Bechtel and the District.

Even though she may be in the process of securing a CLAD certificate, which she anticipates to secure by July 2009, Respondent Bechtel did not possess the certificate as of the date the Board adopted the resolutions that pertain to the current layoff action.

Respondent Bechtel’s seniority date with the District remains August 21, 2006.

As to the tie-breaking issue raised by Respondent Bechtel, she offered insufficient evidence to overcome the persuasive testimony offered by the Assistant Superintendent. The District adopted a rationale and lawful tie-breaking criteria that was used in the case of Respondent Bechtel. Respondent Bechtel was involved in a tie-breaking analysis among three other certificated employees with the same first date of paid service to the District of August 21, 2006. The District correctly credited zero points onto Respondent Bechtel’s

record that resulted in her placing last in the tie-breaking ranking among certificated employees in her discipline that had the same first day of paid service to the District. The Assistant Superintendent was credible when he noted that the tie-breaking criteria did not recognize an emergency CLAD certificate as qualifying for points as a duly issued CLAD certification, even though the District may assign an emergency CLAD holder to teach English Language Learners for a limited period of time. Furthermore, the evidence showed that an emergency CLAD expires while a duly granted CLAD does not expire.

Respondent Bechtel provided no competent evidence that the District has retained any teacher junior to her to perform services for which Ms. Bechtel possesses a credential and is currently competent to provide. Nor did Respondent Bechtel establish that the Superintendent committed a procedural error in the execution of the layoff action that adversely affects her employment position with the District.

22. Respondent Kimberly Gunn has a first date of paid service to the District as August 17, 2007. She is a second-year probationary (Prob 2) teacher and she works as an elementary classroom teacher in a 1.0 FTE position at the Fairmont School. She occupies position number 650 on the District's Seniority List.

Respondent Gunn provided no competent evidence that the District has retained any teacher junior to her to perform services for which Ms. Gunn possesses a credential and is currently competent to provide. Nor did Respondent Gunn establish that the Assistant Superintendent committed a procedural error in the execution of the layoff action that adversely affects her employment position with the District.

Respondents generally

23. Respondents did not offer competent evidence that the District has failed to treat Respondents fairly. No evidence was offered to support Respondents' general argument that the District failed to engage in an intelligent and rational process in deciding which employees to retain and which employees to discharge. No competent evidence shows the District knowingly set out to distort data or statistical information to reach the preliminary decision in this matter. The District's Assistant Superintendent's findings and determinations are not so inaccurate as to render this layoff action fatally flawed.

The District's Reasonable Basis to Proceed

24. District Assistant Superintendent-Human Resources (Assistant Superintendent) appeared at the hearing of this matter to provide credible and persuasive evidence.

The Assistant Superintendent is responsible for advising the District's Board on pertinent aspects of the District's practices and procedures for personnel issues, hiring procedures, credentialing considerations, and the status of employees in certificated positions. The Assistant Superintendent is charged by the Board with contract management

for the certificated units. In addition to the foregoing, the Assistant Superintendent is vested with knowledge, expertise, and experience to offer competent and reliable evidence regarding the basis for the proposed layoff action that will take effect for the ensuing school term.

25. The Assistant Superintendent persuasively expressed that the determination to initiate the layoff action arose as a result of a reduction in funding from the State of California, as well as due to general budgetary issues confronted by the District. The uncertainty of ballot propositions, which is set for the voters' consideration at the May 19, 2009, special election, adds more uncertainty regarding the condition of state funding for the ensuing school year.

26. Upon learning that the District was required to initiate layoff proceedings for teacher employees of the District, the Assistant Superintendent and other employees of the District took reasonable and lawful steps to develop the District's seniority list for the District's teachers.

The Assistant Superintendent studied and set forth on the District's seniority list for probationary and permanent employees, the dates that established first day of paid service to the District by the permanent and probationary employees, who have standing under Education Code sections 44949 and 44955.

The Assistant Superintendent in his official capacity was reasonable in his exercise of discretion in executing the procedures associated with the layoff action as required by the Board's resolution. The Assistant Superintendent was not arbitrary, capricious nor fraudulent in carrying out the District's Resolution No 34.

27. The Assistant Superintendent refuted Respondents' contention for a pro-rated form of "tacking" so as to acquire, through a generous reading of Education Code section 44918, a determination that when a former part-time, temporary employee has worked 75 percent of the certain days in a school year, such persons have an entitlement to another year's credit as a probationary employee. Hence such teachers, who are not probationary teachers, seek to gain earlier seniority dates. The Assistant Superintendent was reasonable in expressing that the District goes not adopt Respondent's idea of "tacking" as a part-time, temporary teacher under a pro rated calculation as proposed by Respondents. The subject respondent who make this argument did not service such time that actually amounted to 75 percent of the subject school year in question.

28. The District's Board has determined to exempt from elimination or reduction the following classes of teachers:

- i. Special Education Teachers who are currently assigned to special education assignments; and

- ii. Certificated teachers holding Bilingual, Cross-cultural, Language and Academic Development (BCLAD) authorization, who are currently assigned to a class that requires a BCLAD (SPICE).

29. The matter of skipping is an issue. The District skipped three teachers (Belia Chavez, Dana Ix, and Georgina Llamas-Cruz). Each is assigned to the elementary school Dual Immersion Program (SPICE Program). Each holds a BCLAD authorization.

The Assistant Superintendent was credible in advancing that the California State Commission on Teacher Credentialing does not authorize a teacher who holds only a CLAD to teach in a dual immersion program. He established that only 25 individuals of the 733 certificated employees in the District currently hold a BCLAD authorization.

The District's exercise of discretion to skip Ms. Chavez, Ms. Ix and Ms. Llamas-Cruz is reasonable notwithstanding the objection of Respondents who have greater seniority on the District's Seniority List.

30. The Assistant Superintendent offered persuasive evidence to refute the claim of Respondent Karen Rivera.

Respondent Rivera resigned her permanent position with the District in June 2004. For both the 2006-2007 and 2007-2008, the District employed Respondent Rivera under temporary, substitute teacher contracts so as to enable her to replace certificated employees who were on part-time leave of absence, under a reduced workload law. She did not work 75 percent of the days for the 2007-2008 school year under the temporary, substitute contract. For next year she worked under two 20 percent FTE temporary contracts, which amounted to her working 40 percent of the work days of the school year.

When she was hired into a full-time teacher position with the District in August 2008, more than 39 months had elapsed between the break in previous service to the District.

Respondent Rivera has a correct seniority date of August 18, 2008, with the District.

Respondent Rivera provided no competent evidence that the District has retained any teacher junior to her to provide services for which Ms. Rivera possesses a credential and is currently competent to provide. Nor did Respondent Rivera establish that the Assistant Superintendent committed a procedural error in the execution of the layoff action that adversely affects her employment position with the District.

Nurse Services

31. Ms. Shereene D. Wilkerson, the District's Assistant Superintendent for Learning Support, offered credible, compelling and persuasive evidence at the hearing.

In addition to other divisions of the District for which she provides supervisory direction, Assistant Superintendent Wilkerson manages or supervises the District's school nurse program and its personnel

The District's layoff action contemplates the reduction from the current 7.2 FTE nurse position to 3.0 FTE positions for the ensuing school year. Thus, the District will retain 4.2 FTE nurse positions for the coming school year.

The only services, as mandated by law, that the District must provide through by a school nurse involve: (i) the supervision of individual health care plans developed for students under Section 504 of the Rehabilitation Act of 1973, (ii) patient assistance with regard to providing insulin to diabetic students, and (iii) performing or supervising the performance of specialized health care services for (special education) students identified with exceptional needs under the Individuals with Disabilities Education Act (IDEA) by contributing health profiles for IEP assessments.

A school nurses is one class of authorized providers for the provision of other health care services that the District is required by law to provide for services such as: vision and hearing testing, scoliosis screening, and assistance with administering students' prescribed medications. But those services may be contracted to non-District health care providers

All other services that have been provided by the District's nurses or could be provided by the nurses are delivered solely at the District's discretion, and the District may exercise its discretion to eliminate those services or not provide them at all. Those discretionary services, include, but are not limited to:

- Conducting immunization programs and ensure that every pupil's immunization status is in compliance with the law. (Ed. Code § 49425);
- Assessing and evaluate the health and developmental status of pupils to identify specific physical disorders and other factors relating to the learning process, communicate with the primary care provider. (Ed. Code § 49425);
- Designing and implementing a health maintenance plan to meet the individual health needs of the students. (Ed. Code § 49425);
- Referring the pupil and his or her parent or guardian to appropriate community resources for necessary services. (Ed. Code § 49425);
- Maintaining communication with parents and all involved community practitioners and agencies to promote needed treatment. (Ed. Code § 49425);
- Interpreting medical and nursing findings appropriate to the student's individual educational plan and make recommendations to professional personnel. (Ed. Code § 49425);
- Consulting with, conduct in-service training to, and serve as a resource person to teachers and administrators. (Ed. Code § 49425);
- Counseling pupils and parents. (Ed. Code § 49425);

- Providing dental health programs for students. (See Health & Saf. Code § 104775);
- Providing sexual health education instruction. (Ed. Code § 51933);
- Providing CPR training to employees and/or students. (Ed. Code § 49413);
- Providing emergency epinephrine auto-injectors to trained personnel who may use them to provide emergency medical aid to persons suffering from an anaphylactic reaction. (Ed. Code § 49414); and,
- In the absence of a credentialed school nurse, providing school personnel with voluntary emergency medical training or provide emergency medical assistance to pupils with diabetes suffering from severe hypoglycemia, (Ed. Code § 49414.5).

32. Regardless of the inherent value of the nurse services offered to some of the District's students, the discretionary services are not mandated by law. The District's delivers the bulk of the nurses' services for its students at its discretion; so the District may eliminate or reduce such services so long as plans or provisions are crafted that prescribe the delivery by others of such health care services, which were previously offered through the work of registered nurses.

33. Although the District based its calculations of the amount of nursing time that will be needed by reducing or eliminating particular services on information provided by to Assistant Superintendent Wilkerson from the District Acting Head Nurse, discrepancies exist between the District's estimates and Respondents' concerns regarding the inadequate provision of services. Neither a resolution of these discrepancies or a credible determination about this evidence is necessary to conclude that the District may reduce or eliminate nursing services and still provide the minimum level of mandated services with the remaining 4.2 FTE nurse positions because the District has established that, if necessary, it may eliminate a service provided by nurses that is not mandated to be provided by nurses. At the bare-bones level, 4.2 FTE nurses will be able to perform the minimum mandated services, as well as offer discretionary services that the District may choose to have them provide.

34. Again Respondents contend that the District plans will fail the threshold of providing mandated nursing services from the certificated nurses. But no competent evidence exists to establish that the District has devised a plan that may be susceptible to failing the needs of District students. In response to Respondents' assertions, Assistant Superintendent Wilkerson presented credible evidence that, when measured against the scope of tasks currently performed by school nurses, very little time is actually devoted to providing nurse care for services that are mandated by federal or state law. Assistant Superintendent Wilkerson persuasively noted that many mandated services do not require specific involvement of a nurse, but rather such needs have been contracted out to qualified professional health care providers or delegated to appropriately-trained non-nurse staff personnel.

Assistant Superintendent Wilkerson observed that the District has a pupil population of 13,000 individuals. But the vast majority of those students never interact with a school nurse. Approximately 435 students do require a health-care trained District staff person to administer medication, but not necessarily through the service of a Registered Nurse. But approximately 212 students do require a nurse to administer insulin. Also nurses do provide input in mandated services to special education students of the District; however, nurses attended only 65 Individual Education Placement (IEP) meeting for the past year.

Currently the District has emergency procedures at each school when a nurse is not on site. The District has a reasonable forecast that it will refine its emergency procedures next year in the event the District has only 4.2 FTE nurse positions.

35. The proposed layoff action that will result in 4.2 FTE nurse positions for the ensuing year is not arbitrary. Mandated nurse services will not be unlawfully compromised with the District retaining 4.2 FTE nurse position.

36. Nor did Respondents call any expert witness to offer evidence in support of the contentions with regarding disrupting the layoff action of 3.0 FTE school nurse positions. No Respondent, who is a school nurse, provided competent evidence that the District has retained any school nurse junior to her for a position which a retained nurse possesses a credential and is currently competent to provide. Nor did a nurse who is subject to the layoff process establish that the Superintendent committed a procedural error in the initiation of the layoff action that adversely affects her certificated nurse position with the District.

Ultimate Findings

37. The recommendation of the District's Superintendent and the Board's preliminary decision to eliminate or discontinue 81.4 FTE positions, including the positions held by each Respondent, were neither arbitrary nor capricious. Rather, the superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion.

38. The District's proposed elimination or discontinuation of the prescribed FTE positions, including the positions held by Respondents, for the ensuing school year is related to the welfare of the District and its overall student population.

39. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers, counselors and nurses before the beginning of the next academic year. The Board lawfully directed the notification to Respondents of the elimination of the certificated positions held by each Respondent.

40. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by Respondents herein, the District will retain any certificated employee who is junior to such Respondents to perform

services for which Respondents have been certificated or found to be competent to provide in such FTE positions for the next school year.

LEGAL CONCLUSIONS

Motions by Respondents for Dismissal All Accusations

1. Respondents made a motion for dismissal of the accusations as against all affected certificated employees alleging the Superintendent's designee has "over-noticed" a large number of credentialed employees who hold many more full-time equivalent positions than prescribed in the Board resolution. Also, Respondents seek dismissal of the accusations because of a purported fatal defect with the entire process because of wholesale miscalculation of bumping rights. For the reasons noted immediately below, Respondents are mistaken.

a. Claim of "Over-noticing"

Respondents demand the dismissal of the entire layoff action be granted because the Superintendent's designee sent accusations to 88 individuals holding certificated positions with the District when the Board's resolution prescribed an elimination of 81.4 FTEs.

Evidence at the hearing showed that to properly account for the bumping rights of certificated employees into teacher positions for the ensuing years, current junior certificated teachers were given layoff notices that resulted in a number of teachers being subject to layoff that exceeded 81.4 FTE elimination as set out in the Board's resolution.

The District is not required to match exactly the FTE positions with those persons receiving the notice of layoff. Only an average daily attendance reduction action requires a "corresponding percentage" of certificated employees to be identified in such a reduction of staff. A governing board's decision to reduce or eliminate particular kinds of services need not be tied to any statistical computation, such as a projected decline in the number of students in the affected district. The number of terminations by a PKS reduction of certificated employees depends entirely on a district's governing board's decision regarding how many, or which, services to reduce or to eliminate. It is wholly within the Board's discretion to determine the numbers by which the District will reduce a particular service. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

Further *Hilderbrant v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, supports the proposition that the District is not compelled to split an existing full-time FTE position into parts so as to accommodate certificated employees who are subject to a layoff action.

b. *As to Respondent Nurses*

The District may eliminate entirely some services provided by nurses and eliminate or reduce other particular kinds of services by changing the method by which it provides nurse services. A particular kind of service may be eliminated or reduced even though a service continues to be performed or provided in a different manner. The California Supreme Court established this principle in 1935. *Davis v. Berkeley School District*⁸ held that a school district could lay off traveling art teachers, and instead assign regular classroom teachers to teach art to students. (See also *Fuller v. Berkeley School District* (1935) 2 Cal.2d 152, 159.)

This principle has been repeatedly reaffirmed by courts over the years. For example, *Campbell Elementary Teachers Association v. Abbott*⁹ upheld the district's layoff of nurses, counselors, psychologists, and other specialists, explaining:

... a district may not dismiss an employee... and yet continue the identical kind of service and position held by the terminated employee. [Citation omitted.] But the *particular kind* of service of the employee may be eliminated even though a service continues to be performed or provided in a different manner by the district. [Citing *Davis, supra, Fuller, supra*, and other cases.] ... Where, as here, the district apparently contemplated a change in the method of teaching or in the particular kind of service in teaching a subject, there was a discontinuance of the former particular kind of service.¹⁰

Even though a service must continue to be performed in a school district, the particular kind of service provided by the employees may be eliminated.

Rutherford v. Board of Trustees (1976) 64 Cal.App.3d 167, 177, upheld a school district's decision to reduce nursing services, stating, "even though a service must continue to be performed in a school district, the particular kind of service of the employee may be eliminated."¹¹ The court explained that districts may reduce services by eliminating the service entirely, or, "may 'reduce services' by determining that preferred services shall be reduced in extent because fewer employees are made available to deal with the pupils involved."¹²

⁸ *Davis v. Berkeley School District* (1935) 2 Cal.2d 770.

⁹ *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796.

¹⁰ *Campbell Elementary Teachers Association, Inc. v. Abbott, supra; and Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853, 120 Cal.Rptr.2d 615.

¹¹ *Rutherford v. Board of Trustees supra* 64 Cal.App.3d 167, 177

¹² *Id.*, 64 Cal.App.3d at pp. 178-179.

The District plans to reduce the substantial amount of services currently provided by nurses, and also the District contemplates a change in the method and manner in which it provides the remaining services, for example, assigning a nurse to work from a central office rather than serving in offices within particular school sites. But the District's planned elimination and changed methods of providing services are reasonable and were clearly summarized by Assistant Superintendent Shereene Wilkerson.

Respondent nurses are not persuasive when they allude to Education Code Section 49400 to support an argument that the District cannot reduce nursing services. Section 49400 states, in its entirety: “[t]he governing board of any school district shall give diligent care to the health and physical development of pupils, and may employ properly certified persons to do the work.” This language or substantially similar language has been in California law since approximately 1907.¹³ In the nearly 100 years of its existence, this statutory language apparently has been cited in only two school district cases and a few Attorney General opinions. In all but one instance, this language was cited solely as a source of authority for a school district governing board to take some action not specifically authorized elsewhere in statutes.¹⁴ Respondents have not and cannot point to any case interpreting Section 49400 as defining a particular level of required “diligent care to the health” of pupils. On its face, Section 49400 neither requires or recommends any specific services a school district should or may provide to “give diligent care to the health and physical development of pupils.” More specific and more recent statutes provide the only framework for defining the health care services a school district is required to provide for students and the additional levels of health care a school district may choose, solely in its discretion, to provide.

Respondents may believe that nurses represent that they are obligated to comply with Nursing Practices Act¹⁵ standards that sometimes conflict with Education Code standards. The Nursing Practices Act does provide, among other things, a code of ethics for nurses. But the Nursing Practices Act does not address mandated student health care services, or the responsibilities of school districts in any way, and there are no provisions in the Act that even remotely address the responsibilities of school districts and school nurses. Consequently, the Nursing Practices Act does not restrict the District's ability to reduce or eliminate discretionary services and services that the District is not required to provide through school nurses.

¹³ See discussion of precursor of this statute in *Beard v. Webb* (1917) 35 Cal.App. 332.

¹⁴ *Beard v. Webb, supra* (authority to employ and pay an optometrist); *Kern County Union School District v. McDonald* (1919) 180 Cal. 7 (authority to condemn land and build a gymnasium); 31 Ops.Atty.Gen 27 (1958) (authority to approve and pay for preventive inoculations for employees or pupils); 62 Ops.Atty.Gen. 344 (1979) (authority to require random drug tests for student athletes); and 67 Ops.Atty.Gen. 55 (1984) (basis for determining that leased facilities meet the Field Act test of being used “for elementary or secondary school purposes”).

¹⁵ Business and Professions Code Section 2700, et seq.

Ruling on Motion to Dismiss Accusations

As indicated by the factual findings above, the proposed reductions of teachers because of an elimination of particular kinds of service are for the welfare of the District and its students. Accordingly, the motion for dismissal is denied.

Individual Respondents

2. The law supports the Assistant Superintendent's determination with regard to Respondent Karen Rivera.

When a permanent teacher resigns and is then re-employed by the same school district into a regular (non-substitute or temporary) teacher position within 39 months of the original resignation date, the law views that no break in service has occurred. Hence the certificated employee is restored to a "permanent" classification and to all rights of a permanent employee (including, for example, the same salary schedule rating, and accrued sick leave). (Ed. Code § 44931; *Dixon v. Bd.* (1989) 216 Cal.App.3d 1269.)

Education Code section 44848 provides that any certificated employee who is reemployed after resigning is given a new seniority date effective as of the date of reemployment. In *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 644, the appellate court addressed both section 44848 and section 44931, as, "we hold that section 44931 provides that the break in service shall be disregarded as to individual rights, burdens and benefits, but not as to seniority rights which affect other employees." As a result of the two decisions of *Dixon* and *San Jose Teachers (Allen)*, a permanent employee who is rehired into a regular position within 39 months after resigning would be reinstated to permanent status; but, such teacher would have a new seniority date. Such employee would be placed on the seniority list below other permanent certificated employees but above all probationary employees irrespective of such employees first date of providing service to the subject district.

Respondent Rivera has been correctly designated by the District as being a first-year probationary (Prob 1) teacher who has a first date of paid service to the District of August 18, 2008.

Tacking Time and Education Code section 44918

3. Education Code section 44918, subdivision (a), provides

Any employee classified as a substitute or temporary employee, who 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.

As set out in the factual findings, the District has “tacked” the seniority date back one year for temporary service for eligible certificated employees; however, that practice occurs only when a certificated employee has worked seventy five percent of the days of the prior school year. Although a part-time employee might qualify for “tacking” by working part-time over four or five days per week for 75 percent or more of an actual school year, the District does not pro-rate the number rendered by part-timers to qualify for tacking, for example, when three days worked during a week amounts to about 75 percent of such week. Respondent are mistaken when they construe 75 percent of the number of days of the school year to mean 75 percent of a part-time employee’s own work days. Respondent offered no appellate court decision that interprets Education Code section 44918, subdivision (a), in the manner advanced by Respondents.

Lawful Basis for the Reduction or Elimination of Particular Kinds of Services

4. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

5. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 10, inclusive.

6. Judgments entered by a tribunal on the stipulation of the parties have the same effect as acts tried on the merits. (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.) The District stipulated to rescind the layoff notices and to withdraw the accusations against the certificated employees named in Factual Finding 11. The stipulation is binding on the parties.

7. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non reemployment of Respondents.

8. Board Resolution No. 34, as adopted on March 4, 2009, stated that it was the Board’s determination that it was necessary to reduce or eliminate particular kinds of services for the 2009-2010 school year.

Education Code section 44949, subdivision (a), requires that no later than March 15 an employee is given notice that his or her services will not be required for the ensuing year, the governing board and the employee will be given notice by the superintendent that it has

been recommended that preliminary notices be given to employees and the reason for that recommendation.

The preliminary notice is intended to assure that affected employees are informed of the facts upon which they can reasonably assess the probability that they will not be reemployed. The preliminary notice must state the reasons for the recommendation. (*Karbach v. Board of Education* (1974) 39 Cal.App.3d 355.) That goal was attained by the Superintendent's designees.

A governing board's decision to reduce or eliminate particular kinds of services need not be tied to any statistical computation, such as a projected decline in the number of students in the affected district. The number of terminations by a PKS reduction of certificated employees depends entirely on the district's governing board's decision regarding how many, or which, services to reduce or to eliminate. It is wholly within the Board's discretion to determine the numbers by which the District will reduce a particular service. (*San Jose Teachers Assn. v. Allen*, (1983), 144 Cal.App.3d 627.)

The Vacaville Unified School District Governing Board's decision to eliminate 81.4 FTE positions for the 2009-2010 school was a discretionary decision that constituted a valid basis for reduction in particular kinds of services under the Education Code.

Ultimate Determinations

9. Pursuant to Education Code sections 44949 and 44955 cause exists for the District to eliminate or reduce particular kinds of services for the ensuing year where such services are now offered in District schools. And cause exists to give certain Respondents notice that for the ensuing school year they will not be reemployed to provide services now rendered by such Respondents. These determinations are made by reason of the matters set out in Factual Findings 24 through 37, inclusive, 39 and 40.

7. The discontinuation of the subject particular kinds of service provided by each Respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955.

18. The District's layoff action is necessary. The District's proposed action is consistent with the law. And, the District's contemplated layoff action is reasonable in its execution.

RECOMMENDED ORDER

1. The accusations served on Respondents, whose names appear on the Attachment hereto, are sustained, except that the layoff notices are rescinded and the resultant accusations are dismissed as to Respondents Breanne Burbey, Jolynda Carrasco, Karen Guy, Julianne Kopriva, Judith MacDonald, Stephanie Munzinger, Timothy Patezick,

Robert Perkins, Danielle Scheper, Heidi Studer, Diane Tomovick, Rogelio Torres, Sarah Vanbuskirk, Patricia Wasielewski, Julia Wilson, and Pam McGovney.

2. Except as to the individuals specifically named immediately above, notice may be given to Respondents whose named appear on the Attachment hereto that their services will not be required for the 2009-2010 school year because of the reduction or discontinuance of particular kinds of services as indicated in Resolution No. 34, 2008-2009.

DATED: May 6, 2009

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings