

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

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE FOLSOM
CORDOVA UNIFIED SCHOOL
DISTRICT,

OAH No. 2009030500

Respondents.

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Folsom, California on April 15 and 16, 2009.

Kim Kingsley Bogard, Attorney at Law, and James R. Teaber, Attorney at Law, of Kingsley, Bogard, Thompson, L.L.P., Attorneys at Law, represented the Folsom Cordova Unified School District (District).

Andrea Price, Attorney at Law, of Langenkamp and Curtis, L.L.P., represented most but not all the respondents.

Unrepresented certificated employees of the District receiving a preliminary notice of layoff were identified as Bernadette Cramer, Patricia Hamilton, Bret Hamden, Kimberly Keck, Donita London, Sylvia Long, Susan Nason, Gary Saldotti, Tim Shockley, Joan Trotta and Adam Webb.

None of the unrepresented respondents appeared.

Evidence was presented on April 15 and 16, 2009, but several issues remained contested and in need of additional evidence in support and opposition. In addition, the record remained open for the receipt of written closing arguments and points and authorities addressing the legal disputes. There was also an outstanding question regarding whether additional testimony was to be taken, but the parties resolved the need for additional testimony by jointly filing a series of written stipulations and declarations on May 4, 2009. Respondents' closing brief and points and authorities were filed May 4, 2009. Respondents

also filed a Declaration of Jennifer Galvin (with attachments of emails) and a Declaration of Andrea Price, with two attachments, also on May 4, 2009.

The District's closing argument and points and authorities were filed on May 5, 2009.

The matter appeared to be submitted on May 5, 2009. However, an additional stipulation was submitted on May 12, 2009, regarding a matter that was heard confidentially, and remained an outstanding issue, regarding the status of employee C.O. The record was reopened to receive the additional stipulation. The record was closed and the matter was finally submitted for decision on May 12, 2009.

The parties stipulated that the statutory deadlines for the preparation of the Proposed Decision and for the Board's consideration and action on the Decision would be extended in order to receive the additional evidence and argument, as provided in Education Code sections 44949 and 44955. The statutes provide for an extension of time for the preparation and presentation of the Proposed Decision to the Board, and for the Board to act upon the Proposed Decision, for a period that is equal to the days between the date the hearing ended and the matter would have been submitted, had the dates not been extended for the briefs, stipulations and points and authorities, to the statutory deadlines of May 7 and May 15. This period of time is 21 days (April 16-last day of hearing to May 7).

It initially appeared the record would be closed and the matter submitted on May 5, 2009, the date the parties' written briefs, stipulations and points and authorities were filed. If the record was closed on May 5, the Proposed Decision would be due to the Governing Board on or before May 26, 2009, and the Board would have to act on the Proposed Decision on or before June 2, 2009.

However, the parties submitted an additional stipulation that resolved one of the remaining issues on May 12, 2009. The record was reopened to receive the stipulation the same date. Reopening the record resets the due dates periods.

The record was closed and the matter finally submitted on May 12, 2009. Therefore, the Proposed Decision is now due to the Board on or before June 2, 2009. The Board must act on the Proposed Decision on or before June 9, 2009.

FACTUAL FINDINGS

1. Patrick Godwin, (Superintendent) made and filed the Accusation in his official capacity as Superintendent, Folsom Cordova Unified School District (District).
2. Respondents are and at all times relevant to this Decision were certificated employees of the District.

3. On or just before March 5, 2009, in accordance with Education Code section 44949 and 44955, the Superintendent notified the Governing Board of the District (Board) in writing of the Superintendent's recommendation that certain particular kinds of services would have to be reduced or eliminated for the upcoming school year. The Superintendent's notice specified the particular kinds of services to be reduced or eliminated, as set forth below. The Superintendent also notified the Board that a corresponding number of certificated employees of the District, in this instance, 58.60 full time equivalents (FTE) would have to be laid off to effectuate the reduction or elimination of the particular kinds of services. The Superintendent notified the Board that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. The recommendation that respondents' services for the District would not be required for the upcoming school year was not related to their skills, abilities or competencies as teachers.

Reductions/Eliminations Of Particular Kinds Of Services

4. In separate proceedings, the Board approved the Superintendent's decision to give notice of nonreelection for the upcoming school year to one probationary certificated teacher working in the District.

5. The Governing Board also adopted Resolution 16-030509 (Tie Breaker Resolution) on March 5, 2009, regarding the adoption of criteria for breaking ties in the event two or more certificated employees have the same first date of paid service.

6. The Superintendent caused each of the respondents to be served with a written Notice of Intention to Dismiss (preliminary notice) on March 10, 2009. The written preliminary notices advised respondents of the Superintendent's recommendation to the Board that their services would not be required for the upcoming school year. The preliminary notice set forth the reasons for the recommendation.

7. However, in "an abundance of caution," the probationary teacher not reelected were also each given a preliminary notice of layoff. As nearly as could be ascertained from some rather vague testimony, this employee was given a preliminary notices of layoff to provide the District the ability to still lay her off, in the event that she was determined in these proceedings to have status in the District that might place her into a position to displace another teacher.

Waiver For Failure To Request Hearings

8. Preliminary notices of layoff were timely served on respondents Bernadette Cramer, Patricia Hamilton, Bret Hamden, Sylvia Long, Susan Nason, Trisha Ruscioletti, Gary Saldoti, Tim Shockley, Katrina Smithson, Joan Trotta, and Adam Webb. Ms. Ruscioletti was not served an Accusation because she failed to timely file a Request for Hearing. Nevertheless, she filed a Notice of Defense. None of these named respondents receiving preliminary notices of layoff timely filed written requests for a hearing to

determine if there was cause for not reemploying them for the ensuing year. The named employees who failed to timely file a request for hearing in response to receipt of a preliminary notice were found on the record to have waived their right to a hearing.¹

Default For Failure To File Notice Of Defense

9. The District timely served Accusations on each respondent who timely filed a Request for a Hearing. Respondents Kimberly Keck and Donita London failed to timely file a Notice of Defense to the Accusations they received. The matter proceeded as a default with respect to these two respondents.² All other named respondents who were served an Accusation timely filed a Notice of Defense to the Accusation. All prehearing jurisdictional requirements were met with respect to the remaining respondents.

Stipulated Withdrawals Of Requests For Hearing

10. Respondents Rebecca Osgood and Jennifer Smith withdrew their Requests for Hearing. The matter proceeded as a default with respect to these two withdrawing respondents.

Charter School Issue

11. Respondents contend that there are three teachers teaching at the District's Charter School who should be assigned seniority dates, and that if these persons have seniority dates, they will be junior to some respondents who have received preliminary notices of layoff. It was not disputed that the District is the "exclusive public school employer" of the teachers working at the Charter School, within the meaning of Education Code section 47610. It was not disputed that the District has not entered into any agreement with the Charter School employees establishing a tenure system at the Charter School. Respondents contend the teachers at the Charter School must be assigned seniority dates and tenure status because Education Code section 44924 provides that tenure and seniority are nonwaivable rights appurtenant to all certificated employees of all public school employers. Respondents reason that since the teachers working at the Charter School are District employees, by virtue of the fact that the District is the "exclusive public school employer" of the teachers working at the Charter School, within the meaning of Education Code section 47610, that therefore these teachers must be assigned seniority dates and tenure status as factually appropriate. The contentions lack legal merit and it was so ruled on the record, removing the issue from further consideration.

STIPULATIONS

12. The District and the represented respondents entered into stipulations on May 4, 2009. The stipulations and its Attachments, Attachment A, Attachment B and its subparts,

¹ Education Code section 44949, subdivision (b).

² Government Code section 11520.

and Attachment C, are attached to this Decision and are incorporated by reference as though set forth in full. The District and respondents stipulations are contained in Paragraphs 12.1- as follows:

12.1. The Governing Board adopted Resolution No. 03-05-09-20 on March 5, 2009. This Resolution reduced or discontinued the particular kinds of services set forth in Attachment A to the stipulation at the end of the 2008/2009 school year for the upcoming school year 2009/2010. The PKS Resolution and the specific services to be reduced and/or eliminated are set forth below:

Service	Grade Level	Full Time Equivalent
<i>District</i>		
Site Administration		3.0
Elementary		
Elementary Education	K-6	26.0
Secondary		
Art		2.3
AVID		0.4
Business		.5
Computer Applications		1.0
English		5.0
Drama		0.2
Home Economics		1.8
Math		2.8
Media Productions		0.2
Music		2.4
Physical Education		3.3
Physics		0.2
Science, Chemistry		0.4
Science, Earth		0.2
Science, Life		0.7

Science, Physical		0.5
Science, Environmental		0.2
Social Science		4.5
Work Experience		1.2
District Total		56.80

12.2. Counsel for the represented respondents represented each person listed on Attachments B-1 and B-2.

12.3. All persons listed on Attachment B were timely served Notices of Recommendation that Services Will Not Be Required in the Upcoming School Year (preliminary notice of layoff) by the Assistant Superintendent.

12.4. All respondents represented by counsel listed on Attachment B who received preliminary notices of layoff timely filed Requests for Hearing. Each represented respondent receiving a preliminary notice of layoff was timely served an Accusation by the District's representative. Also as set forth in Attachment B, each represented respondent receiving an Accusation timely filed a Notice of Defense.

12.5. Before the execution of the Stipulations, no Requests for Hearing were withdrawn.

12.6. Before the execution of the Stipulations, the District had not rescinded any preliminary notice of layoff or Accusation.

12.7. These proceedings are based solely on the grounds set forth in Education Code sections 44949 and 44955, and in no way relate to any respondent's ability or performance.

12.8. All respondents listed in Attachment B are proper subjects of this proceeding.

12.9. Upon the adoption of this Proposed Decision by the Governing Board as the Board's Final Decision, the District shall:

a. Rescind preliminary notices of layoff issued to respondents listed in Attachment C to the Stipulations noted as "Rescinds." Attachment C is a partial seniority list dealing only with the portion of District certificated employees subject to these proceedings. Although District employees Kari Bjork (8/10/2004), Don Isbell (8/10/2004) and Jessica Hardy (6/5/2005) appear on Attachment C, they are not subject to these proceedings, and are listed only to show relative seniority dates to those rescinded.

b. Issue Final Notices of Layoff to those employees listed on Attachment C as “Layoffs.”

12.10. Respondents subject to this action are entitled to employment status and seniority dates as set forth on Attachment C, with same dates of first paid service to the District ties broken as reflected by the order in which the names of those employees appear on Attachment C.

a. The rationale employed by the District in the making of any adjustment to any seniority date of any employee listed on Attachment C is individual to this action, shall not be deemed by any person as precedent setting and shall not bind the District with regard to establishing appropriate seniority dates for any other certificated employee.

b. Consistent with the request of FCEA/CTA, is a change in an employee’s seniority date resulted in a same-date-of-hire tie, all employees in that tie were re-ranked and re-lotted in accordance with the Resolution on tie-breaking criteria.

c. The parties agreed that same-date-of-hire ties were properly broken and applied, as reflected on Attachment C.

12.11. The parties agreed that special skills, training and qualifications are required to staff the following educational assignments/coursework assignments in the District:

a. FLES³

b. STARBASE⁴

c. ACE/AP⁵

d. Mather Youth Academy⁶

e. Therefore, the following certificated employees serving in the District in one of these assignments were properly “skipped” for the purposes of issuing preliminary notices of layoff: Each of the named persons below served the District in one of the special assignments set forth just above, and are expected to serve the District in the same capacity in the upcoming school year:

Barajas, Flavia
Borruso, Melia

³ Foreign Language in Elementary Schools

⁴ Acronym not defined and did not become material to these proceedings.

⁵ Advanced Placement programs

⁶ A boot camp type program for last chance youth working their way into or out of the juvenile criminal system.

Bright, Colleen
Chicca, Gloria
Cooper, Cole
Curtan, Kelly
Edwards, Amorina
Hardy, Jessica
Isbell, Don
Leslie, Vanessa
Olson, Martin
Perez, Pedro
Stroeve, Yoly
Tippett, Robert
Treviso, Carmen

12.12. Four individuals listed on Attachment C shall be classified as probationary. Each of these employees made claims pursuant to the *Kavanaugh* decision.⁷ These four employees will be counted against the 58.6 FTE reduction or elimination of particular kinds of services. These individuals are:

Humphrey, Robert
Long, Michael Preston
Schaubmayer, Brian
Schultz, Heidi

a. The parties agree that the corresponding FTE for employee Humphrey is .73 and employee Schultz is .50, as reflected on Attachment C.

12.13. The parties agree that with respect to those individuals who attended a “Buy Back” day in 2005, the individuals who attended, as reflected on the sign-in sheet in evidence in this matter, were compensated for their attendance, as shown on the exemplar pay stub also in evidence, and believed they needed to attend, as stipulated on the record during the proceedings. In addition, with respect to certain employees who attended a FLES training day on June 4, 2007 (Gloria Chicca, Melia Lindi Borruso, and Flavia Barajas), the parties agree this training day was outside of these employees’ contracts of employment and regular contract years, that these individuals attended and were compensated for attending and believed they needed to attend.

12.14. The parties further agreed that laid-off employees shall be entitled to all the protections set forth in Education Code sections 44956 and 44957. During the twenty-four (24) month or thirty-six (36) month re-employment period, as applicable:

⁷ *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal. 4th 911.

a. Provided a laid-off employee is credentialed and competent to render the service, the District shall offer any vacant probationary or permanent position to laid-off employee in order of seniority per Attachment C; and

1. Should any laid-off employee be reappointed, any period of absence attributable to this lay-off shall not be considered a break in service; and

2. The laid-off employee shall retain the classification and order of employment he/she had when his/her services were terminated, as provided for in Education Code sections 44956 and 44957.

b. The District shall offer any substitute positions of employment (provided the laid-off employee is certificated and competent to take the position and render the service) to laid-off certificated employees in order of classification and original hire date (most senior permanent employee first, etc.)

13. The parties submitted the following issues still disputed to the ALJ for decision:

1. Whether those employees classified as temporary for the 2008/2009 school year were properly classified as temporary;

2. Whether an individual temporary employee (C.O.) was properly released/non-reelected, which would result in her removal from the reemployment list (due to her layoff in the 2007/2008 school year).

3. The correct first day of paid service as probationary for certain employees who attended a “buy-back day” in 2007. These employees are now designated as 08/09/2005.

4. Whether employee Thomas Edwards should be reclassified from temporary to probationary as the result of his attendance at a “buy-back day” in 2007; and

5. Whether three FLES teachers who attended a FLES Training Day on June 4, 2007, are entitled to have that day counted as their first day of paid service to the District.

14. The parties reserved and clarified the fact that the stipulations were based upon the assumption that the ALJ will rule that the District correctly designated employment status and seniority dates for those employees still at issue in this matter, and that should any ruling be made to the contrary, that the final order of termination and the individuals receiving final notices of layoff could vary from these assumptions.

Post Submission Stipulation Removing C.O.'S Claim (Issue Number 2 Above Submitted To ALJ)

15. Following the first submission of the case, the parties submitted an additional stipulation. The parties stipulated to remove temporary employee C.O.'s claim. The parties agreed C.O. was correctly classified as a temporary employee in the past school year, and that she was properly released from her employment as a temporary employee.

Classification Of Teachers In The District As Temporary Generally

16. Certain respondents who were classified as temporary teachers in the District during school year 2008-2009 were given precautionary preliminary notices of layoff. It was not disputed that each of these respondents was teaching pursuant to a temporary employment contract with the District. No credible claim was made by any of these respondents that any respondent was not aware that they were teaching pursuant to a temporary employment contract.

17. Each of the affected employees testified, either themselves or via proxies through another employee with an identical issue. Each employee who testified confirmed that they had signed a contract clearly designating their employment status in the District as temporary. Each employee, excepting perhaps Ms. Galvin, confirmed that, although they hoped to have their status changed as the year progressed, they were nevertheless well aware of their status as temporary employees, either at the time of signing the temporary contract, or shortly thereafter.

18. Second chair counsel for the District repeatedly complained during the evidentiary hearing that these temporary employees had no right to an evidentiary hearing as a matter of law, and repeatedly sought to have the ALJ summarily dismiss these employees from participation in the evidentiary hearing. This counsel also complained that these employees testified in the narrative, and that they offered what amounted to parol evidence in an effort to impeach the written contract each employee agreed they had signed. These objections were given the weight to which they were entitled during the evidentiary hearing and were dispatched. Nevertheless, the objections are raised again in closing and must again be addressed. The objections, then as now, are disingenuous and self-contradictory. Had the District not served each of these employees with a preliminary notice of layoff, none of these respondents would have been entitled to access this forum and an evidentiary hearing, nor would there have been jurisdiction in these proceedings to decide their joint and several claims. None of the employees would have testified in the narrative and none would have offered parol evidence. Each such respondent could have been dismissed via service of a notice of nonreemployment, terminating the temporary contract. These employees only were given a hearing, able to testify in the narrative⁸ and provided an opportunity to state their

⁸ (Page 7, lines 6-19, District's Closing Brief) Each of these temporary employees had conflicts with one another for this particular portion of the hearing, counsel withdrew from representing them collectively for this portion of the hearing only, and each was thus required to appear, for this portion of the hearing, in pro per. No one suggested

claims because the District invited them to do so and invested them with the right to participate in the hearing through serving them with precautionary notices of layoff.

19. Despite several invitations throughout the evidentiary hearing to withdraw the precautionary notices and remove the claims of these employees from these proceedings, the District declined to do so. Yet the District contended at the same time that these employees were not entitled to a hearing as a matter of law, and that the ALJ should so rule and exclude them. These positions are contradictory.

20. The District alone controls the exclusive mechanism that grants or precludes the right to a due process hearing in the event of a PKS layoff, and, more important, who is entitled to participate. If the District does not serve an employee with a preliminary or precautionary notice of layoff before March 15, that employee has no right to participate in the evidentiary hearing, regardless of the relevance, importance or materiality of any issue that employee could bring to the hearing, and no matter how adversely that employee's rights could be affected by the process. The employee not receiving notice is barred. It is also the District's exclusive obligation to correctly classify its employees. With that obligation comes the corollary obligation to assure that its classification of each employee is correct, and, if facts arise that show the classification is in error, to correct the employee's classification to reflect the employee's correct status. The District's duty to correctly classify its employees is non-delegable. The District did indeed faithfully discharge this duty throughout the hearing, reclassifying several employees.

21. If the District serves an employee, regardless of status, with a preliminary or precautionary notice of layoff and an accusation, and the employee requests a hearing, the employee is entitled to participate in the evidentiary hearing unless the District withdraws the notice. If the District declines to withdraw the notice, the employee is entitled to participate in the hearing and the District must deal with the issues the employee(s) bring to the matter. The District retained exclusive control of the notice and withdrawal mechanism throughout these proceedings. The precautionary notice is a procedural device that has arisen in very recent years as a result of certain judicial decisions trying to fill gaps between statutes regarding temporary employees and certain types of probationary employees.⁹

these employees should be required to ask themselves questions, and it was not possible to delay the proceedings and require each to retain individual counsel. Under these circumstances, objecting that these employees appearing in pro per and that they were permitted to state their claims in the narrative appears to be an additional effort to hamper or prevent these employees from being able to have their day in court, after the District invited them to do so by serving them with precautionary notices.

⁹ Most notable of several are *California Teacher's Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal. App. 4th 369, (Golden Valley), and *Bakersfield Elementary Teacher's Association v. Bakersfield City School District* (2006) 145 Cal. App. 4th 1260, (Bakersfield). Faced with the uncertainty of this judicial environment and the potential of more appellate rulings attempting to clarify the nature and extent of temporary employment in school districts piecemeal by the use of decisions, and in the absence of clarifying legislation, districts have defended against the uncertainty by serving groups of employees precautionary notices, to widen the net and make certain that if some employees are found to be probationary and not temporary, based on one of these decisions, the District is still able to regroup and lay off enough persons to correspond to the PKS being reduced or eliminated and still make their budget projections. The employees receiving such precautionary notices hang "in limbo" until the dust settles during and after the hearing, because these decisions have injected so much

22. The District cannot have it both ways. The District cannot grant hearings to these employees and then object to their right to make factual presentations that raise challenges to the legitimacy of their classification. If the District gives the notice and declines to withdraw it, the District is stuck with what the employee presents to challenge their status. These employees received precautionary notices investing them with due process rights, and then had to face the District trying to strip away those rights in the hearing process. If the District lacks the confidence that their classification decisions regarding these employees is correct, the District must provide these employees notices and an opportunity to make a case that the District's classification decision is incorrect. If the District is certain its classification decisions are correct, the District should withdraw the employees' notices. But the District may not duck behind a legal claim that seeks, in essence, to shift the burden and responsibility of making the determination regarding the correct status of these employees away from itself.

Claims Regarding The Temporary Contracts Themselves

23. None of the temporary contracts at issue specify or identify any particular assignment or replacement of a permanent or probationary teacher for which the temporary employee is to take or is associated or identified. The District does not identify any particular position a temporary employee hired is to replace, and does not designate what type of temporary employee the temporary employee is, such as replacing a person on leave, filling in for a person taking a categorically funded assignment and so forth. The contract the District uses for temporary employees is generic for all types of temporary employees the District employs, regardless of the assignment the temporary employee takes. The District determines the gross number of "temporary entitlements"¹⁰ the District has during the school year, and employs temporary employees in a number not greater than that entitlement, using the same contract for all.

24. Respondent temporary employees contend that the District is legally obligated to advise the temporary employee at the time of employment and in the temporary employment contract which provision of the Education Code applies to the employee's temporary employment. Respondents contend that, for example, a temporary employee is employed to replace a person on leave, that temporary employee is entitled to be advised in the temporary contract that the employee is serving under Education Code section 44920. Respondents argue that failure to designate the type of temporary employment undertaken in the contract violates the requirement set forth in the *Kavanaugh* decision that the

uncertainty into the process that no one really knows what these employees' rights, status and futures might be until the decision is finished, and even then, the very real risk remains that an appellate court may wade into the fray after the fact, as did *Bakersfield*, and create yet another unanticipated change or limitation after the fact. This now hopelessly oblique area of law, made much more muddled by the piecemeal appellate decisions, cries out for a Legislative clarification and a clear expression of the will of the Legislature regarding how and under what circumstances school districts may employ temporary teachers.

¹⁰ The concept of temporary entitlements is also a creature of Education Code section 44920 and, as further defined in the *Santa Barbara Federation of Teachers v. Santa Barbara High School District* (1977) 76 Cal.App. 3d. 223 and *Paulus v. Board of Trustees* (1976) 64 Cal.App. 3d 59, 62, these decisions provide that the District may not employ more temporary teachers in the District that it has permanent employees on leave.

employment contract must clearly designate the temporary nature of the employment.¹¹ The respondents contend the District is also under a statutory duty to inform the temporary employee of the “specific nature” of the temporary employment. Respondents fail to identify which statute requires this designation and specificity.

25. These contentions lack merit and are an invitation to tack additional requirements not required by current law on to temporary employment. It is not disputed that the Legislature has granted school districts the right to employ teachers in temporary capacities to meet the needs of the districts for flexibility in staffing and to resolve on-going short term problems without the need to employ and undertake the salary and benefit burdens of additional permanent staff.¹² Respondents’ contentions seek to limit that flexibility by enacting a new and heretofore not required limitation on temporary employment, to wit, that each temporary employee must have a one to one correspondence with a particular employee in the District that is on leave or an employee that is serving in or back-filling for an employee serving in a categorically funded position. The contention misconstrues the word “nature” in *Kavanaugh*, in order to reach its conclusion. *Kavanaugh* requires only that the employee be informed that the nature of his or her employment is temporary and terminable at will, as opposed to tenure track, not, as respondents suggest, that the employee be informed both that he or she is a temporary employee and of the specific nature of the temporary employment. Such a change in the requirements for temporary employment and temporary contracts as advocated and sought by respondents is the exclusive province of the Legislature. The District’s temporary employment contracts and temporary employment relationships with respondents during the past school year met all statutory requirements and the test of *Kavanaugh*, in that all employees serving under temporary contracts in the District received clear notice that their status was temporary and their contracts clearly informed them of that status.

Temporary Entitlements

26. It is not disputed that the District may employ temporary employees in the District up to and including the number of District permanent and probationary employees on leave or experiencing a long term illness. Education Code section 44920 so states, and the *Santa Barbara* and *Paulus* decisions affirm. *Paulus* states that the entitlement is a gross number, and does not require any one to one correspondence between any particular employee teaching under a temporary contract in the District and any particular employee on leave or experiencing a long term illness and thus unable to serve.

27. Before the commencement of these proceedings, it appears the District had more employees teaching under temporary contracts than it had employees on leave or experiencing long term illness and unable to serve. During the course of the proceedings, the District made several adjustments to the list of persons on leave and to the status of certain employees who had claims to a status other than temporary, as follows:

¹¹ *Kavanaugh*, at p. 920.

¹² *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal. App. 4th 848, 851.

a. The District removed one person (1.0 FTE) from the list of teachers on leave in the District because it was informed and confirmed that her name was on the list in error;

b. The District converted six teachers (each teaching 1.0 FTE) each of whom were teaching in the FLES, to probationary status, thus removing them from the ranks of temporary teachers. The conversions were retroactive to each employees' first day of paid service to the District in this current school year;

c. The District converted four other persons making *Kavanaugh* claims to probationary status, again retroactive to their first days of paid service to the District in the current school year. These four employees occupy a total of 2.83 FTE.

28. The net change was to remove nine employees teaching a total of 8.83 FTE from the ranks of the temporary teachers and add them to the District's permanent and probationary staff.

29. According to Exhibit 19, the District had 58 employees teaching a total of 30.62 FTE (after removing the one employee on the list in error) on leaves of absence in the District in the current school year. According to Exhibit 18, before the District's adjustments set forth above, the District had 48 temporary employees during the current school year serving in 39.49 FTE¹³. After the adjustments, there were 39 temporary employees serving in the District, occupying 30.66 FTE. The District's temporary teacher entitlement pursuant to Education Code section 44920 for just teachers on leaves of absence was 58 persons or 30.62 FTE, depending on whether the assessment is based on the older case, *Paulus*, that appeared to focus the comparison on the number of FTEs on leave and on temporary status, or the more recent case of *Santa Barbara*, which focused on the number of persons in each relative category. Analyzing by the *Santa Barbara* standard, the District is clearly within its entitlement, with 58 on leave and 39 temporaries after the adjustments. Analyzing by *Paulus*, it is a push. However, the potentially significant differences between these two analytical standards is a conflict the Legislature should resolve quickly.

30. In something of a surprising contention that reveals the inherent conflicts of interests between similarly situated employees represented by the same counsel, respondent temporary employees contend the District has violated the law by reclassifying the employees above to probationary to push down the District's number of temporary employees to correspond to its entitlement. It is a certainty that those employees who were

¹³ The District stipulated on April 15 during the evidentiary hearing that Exhibit 18 contains a math error, and the total number of temporary employees' FTEs were 39.49, not 38.49, as reflected on the exhibit. The ALJ's own calculation of the FTEs listed on the exhibit reveals the 39.49 stipulation is correct. Unfortunately, the District's closing argument and brief makes its arguments based on the incorrect lower number (page 6, lines 24-25). A similar math error that was not corrected in the District's Closing Brief appears in Exhibit 20, the list of those in categorically funded positions.

reclassified to probationary as a result of the District carefully reexamining their statuses and reclassifying them do not feel their reclassification was either a violation of law or the product of the nefarious misdeeds the other respondents suggest provided the motivation for the reclassifications. The contention forces upon the District a Gordian knot-leaving them damned if they reclassify some employees, bringing the District into its entitlement and damned if they do not, to the detriment of those reclassified but to the potential benefit of the others who can claim the District was over its entitlement. This is an ironic claim, because the best possible outcome for those respondents having this claim sustained would likely be only the reclassification of those the District made probationary as part of this process to bring the entitlement and those on leave back into balance. In sum, there was nothing illegal, immoral, nefarious or inappropriate about the District deciding that the employees it reclassified were entitled to that status. Since the reclassifications are retroactive to the beginning of the school year, respondent's claims that the District has been out of compliance with its entitlement throughout the year and up to these proceedings lacks substance. Further, since the District was not over its entitlement, as that is calculated by the *Santa Barbara* standard, the contention has no merit.

Additional Entitlements For Temporary Teachers Filling In For Those In Categorically Funded Positions

31. The District contends it is legally entitled to additional temporary teachers because it is legally authorized to enter into temporary contracts with teachers to teach in categorically funded positions or to replace (back-fill) for permanent or probationary teachers teaching in categorically funded positions. The District contends its entitlement to a total number of temporary teachers is the aggregate of the number of persons on leave plus those staffing or replacing those serving in categorically funded positions.

32. The District contends that reading Education Code section 44909, together with section 44918, which is specifically referred to in section 44909 as governing such an employee so hired, makes it clear that such an employee is in the nature of temporary.

33. Education Code section 44909 provides as follows:

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.¹⁴ 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

¹⁴ The statute identifies two types of employees subject to its provisions. The first is the new employee to the district hired to fill a categorically funded position. The second is the new employee hired to back fill for a regular employee of the district with probationary or permanent status who staffs a categorically funded position, leaving a temporary vacancy in the district'

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 44918.¹⁵

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.

34. Education Code section 44918 provides, as follows:

(a) 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.

(b) Any such employee 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.

(c) If an employee was released pursuant to subdivision (b) of Section 44954 and has nevertheless been retained as a temporary or substitute employee by the district for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has performed the duties normally required of a certificated employee of the school district, that employee shall receive

¹⁵ The statute identifies two types of employees serving in categorically funded positions, a new employee who is hired to serve in a categorically funded position directly, and a new employee who is hired to fill in behind a regular employee of the district who takes the categorically funded position, vacating that employee's other position.

first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.

(d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.

(e) Permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section.

[¶] ... [¶]

35. There is no dispute in decisions construing section 44909 that the status held by the occupants of such positions who are not already permanent or probationary teachers in the district is in the nature of temporary.¹⁶ “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).”¹⁷

36. There was some suggestion that the District’s claim to count categorical employees as temporary employees toward its aggregate entitlement was limited or precluded by the ruling in the *Bakersfield* decision. The key portion of the holding in *Bakersfield* is as follows:

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.¹⁸ Here, so far as the record discloses, none of the programs to which the 19 laid-off employees were assigned had expired.

¹⁶ *Bakersfield*, supra, at p. 1286, citing *Zalac* at pages 842-846 and *Schnee v. Alameda County Unified School District* (2004) 125 Cal.App.4th 555, 560-565.

¹⁷ *Id.*

¹⁸ *Bakersfield* at p. 1287, citing *Hart Federation of Teachers v. William S.Hart Union High School District (Hart)* (1977) 73 Cal.App. 3d 211, 215-216.

37. The *Bakersfield* court's holding does not limit or preclude the District's claim. *Bakersfield* did not find that the 19 employees staffing the categorically funded positions were probationary. It merely found that these employees, who are in essence temporary employees per *Zalac* and *Schnee*, may not be terminated without notice and a hearing, such as is provided to permanent and probationary employees. All the temporary employees claiming status here were in fact provided the notice and evidentiary hearing required by *Bakersfield*, and that notice and hearing given them did not differ from that provided to the permanent and probationary employees.

38. Thus, there is no legal impediment to counting these additional employees toward the District's aggregate allotment of temporary employees. According to Exhibit 20, the District had 67 employees occupying 27.688 FTE (after removing six teachers who are serving in lead teacher capacities) serving in categorically funded positions in the current year. Exhibit 20 does not distinguish which employees teaching in categorically funded positions are regular employees filling those positions that required a temporary employee to backfill for them for the whole or portion of a FTE that is categorically funded, or whether the employee is a new employee hired specifically to staff the categorically funded position. For the purposes of this evaluation, the distinction is irrelevant. There are 27.668 such categorically funded FTEs in the District, and those FTEs may be added to those persons who are temporary filling in for those on leave to reach the aggregate entitlement in the District. The District did not exceed its entitlement to temporary employees during the current school year, whether the categorically funded positions are included or not. But whether the District may aggregate its temporary and in the nature of temporary positions to reach an aggregate entitlement number is an on-going issue.

First Day Of Paid Service Issues

Buy-Back Days

39. The District has a Memorandum of Understanding (MOU) with its certificated employees. The MOU calls for a contract work year of 182 teaching days and two paid in-service days. The MOU provisions are incorporated into and become a part of each certificated employee's contract with the District.

40. The District also offered paid "Buy-Back" days to its employees in 2007 and 2008. It was not entirely clear what occurred at Buy-Back days other than some general references to presentations regarding best practices and tips for new teachers. Employees were encouraged to attend and were paid if they did attend, but were not required to do so. Several employees testified that it was their understanding that they were required to attend these Buy back days. The subjective understanding of the employee is irrelevant to determining whether attendance was indeed mandatory. Funding for the pay and programs at the Buy Back days did not come from District funds, so the District was precluded by law from making Buy Back days part of any employee's contract and from requiring attendance of its employees. Thus, the payment of compensation to any District employee who attended a Buy Back day in 2007 or 2008 was paid in the nature of a stipend, and not as part of that

employee's regular contract. Thus, attendance at a Buy Back day cannot constitute a first day of paid service to the District, as the employee's contract does not commence until the first day of actual teaching service or the first day of paid in-service, whichever occurs first.¹⁹ Attendance at a Buy Back day not required by the employee's contract and entirely voluntary, even though compensated, did not constitute paid service to the District within the meaning of section 44845.

RESPONDENT EDWARDS

41. Mr. Edwards is a music teacher the District classifies as temporary. Mr. Edwards signed a temporary employment contract with the District for 2007-2008 and acknowledged he understood what he was undertaking. He signed his contract on August 7, 2007.

42. Mr. Edwards attended a New Teacher Curriculum Day on August 6, 2007. Mr. Edwards was paid for the day. Mr. Edwards believed he was told his attendance at the Curriculum day was mandatory. An agenda for the New Curriculum Day program reflects the program spanned three days, August 6-8, 2007. The agenda provided all attendees at the New Curriculum Days makes a general note of the program and advises no one in particular that "you must plan on attending." Mr. Edwards understandably believed he should attend and he was paid for the days. But District pay records in evidence show the August 6-8, 2007 program were Buy Back days. Although Mr. Edwards understandably believed he was required to attend, and prudently did so, the pay records show the compensation was a stipend and not part of an employment contract.

43. As set forth above, Mr. Edward's subjective belief the New Curriculum days were mandatory and part of his contract do not control. Although he prudently attended, he did not acquire any status nor did he become a probationary employee because he attended one day before he signed his temporary contract. Since his attendance at the New Curriculum Days (Buy Back days) cannot constitute a first day of paid service that occurred before he entered into his temporary employment contract with the District, the *Kavanaugh* decision does not apply to Mr. Edwards.

44. Mr. Edwards presented as an earnest and committed professional. The claim advanced by respondents through his individual circumstances reveals what appears to be an unintended consequence of the ruling in *Kavanaugh*. The decision in *Kavanaugh* was ameliorative and designed to remedy a particular abuse, where an employee embarks upon service to a district thinking he is a probationary employee because he has not been told differently, and then, after several weeks or months, is presented with a temporary contract retroactive to the first day he worked, depriving him of the status he thought he had for the intervening period and the rest of the year. Such a delay deprives the employee of a timely opportunity to reject the temporary contract if such status is not acceptable. *Kavanaugh* sought to curb the abuse that resulted from districts dragging their feet about confirming an

¹⁹ Education Code section 44845.

employee's status and contract rights for significant periods of time, to the employee's detriment. There is no language to indicate in the opinion that the remedy *Kavanaugh* created was ever intended to create a race between the employee getting to the classroom and starting work before a district can draft a contract and have the employee sign it, or vice versa. Yet this is just what seems to be happening, where an employee such as Mr. Edwards, who was never misled about his status and there was no appreciable delay between him attending the Buy Back days (only assuming arguendo that this could be his first work day) and signing his contract. The delay of less than one day is inconsequential but is now advanced as creating a right to a status neither party intended at the time, and without evidence of the abuse *Kavanaugh* sought ameliorate. Without some indication of a district engaging in prejudicial delay in advising the employee of his or her status and entering into the contract, the remedy prescribed by the *Kavanaugh* decision should not be applied.

Temporary Teachers With Individual Or Group Claims

Ms. Galvin

45. Ms. Galvin testified for herself and for Ms. Groshong and Ms. Quintrall. Ms. Galvin has been employed by the District for three years. She was a first year probationary teacher in school year 2006-07, and a second year probationary in 2007-2008, at the end of which she was laid off. All three employees were similarly situated, and all three believed their first day back to work with the District would make them permanent employees. This belief would have been correct if the District had offered them permanent positions. The District had no permanent or probationary positions available at the time, so these three were offered temporary contracts. Each accepted and each indisputably signed a temporary contract that clearly spelled out each employee's status as temporary. Ms. Galvin was called in August 2008, and offered a temporary position by Mr. Baumann, the Assistant Superintendent for Human Resources. Ms. Galvin, as were her colleagues, was quite concerned about her right to tenure, her status and rehire rights and she discussed those matters with Mr. Baumann at some length. No one disputes that Mr. Baumann said there were a lot of changes going on in the District, and that her status "could change" as early as October. Ms. Galvin adamantly insists she was promised that her status would change and that she would be tenured as early as October. No such promise was made. Ms. Galvin acknowledged such herself in her declaration, where she admitted Mr. Baumann did not say for sure that her status would change. Ms. Galvin did tell Mr. Baumann that she would be permanent on her first day back to work. It is difficult to tell whether this comment was just a frustrated declaration or an effort to get Mr. Baumann to agree with her, which he did not. In fact, emails between the two during September 2008, confirm Ms. Galvin was aware she was teaching under a temporary contract and had not been hired back in a position where her first day of service would make her permanent. The contentions of these three employees that they are permanent employees of the District thus have no merit.

Ms. Sandfort

46. Ms. Sandfort was a probationary first year teacher in 2007-2008 and was laid off at the end of that school year. She was hired as a long term substitute. She was told she was replacing a first grade teacher who was out on leave for illness. The teacher out on leave for illness did not return to work as expected. Ms. Sandfort was offered a temporary position to complete the school year. She signed a temporary employment contract on December 11, 2008. The temporary contract covered the remainder of the school year. The first grade teacher Ms. Sandfort was replacing retired later in the year. Ms. Sandfort contends she should be classified as a second year probationary teacher because she was hired specifically to replace a teacher who eventually retired. The claim lacks merit.

47. Counsel for Ms. Sandfort acknowledged the applicability of the *Paulus* decision to Ms. Sandfort's claim, but contends *Paulus* does not bar Ms. Sandfort's claim because even though *Paulus* does not require the District to designate a one to one correspondence between employees on leave and temporary employees filling in for them, she reasons that when the District does make such a one to one correspondence, *Paulus* no longer applies and the replacement temporary teacher is entitled to status as a regular employee. There is no sound legal basis supporting this claim. The unsuccessful employee in *Paulus* actually has an even more persuasive claim than does Ms. Sandfort here, for the employee *Paulus* replaced had died, so there was never any question whether that particular position would be vacant. The vacancy created by either the deceased employee in *Paulus* or the retirement here is not an entitlement to the person hired to fill the spot until the end of the school year. That right is to be determined among the many more senior employees such as Ms. Galvin, Ms. Groshong and Ms. Quintrall²⁰, all of who have rehire rights superior to Ms. Sandfort and were also displaced by the 2007-2008 layoff. Ms. Sandfort's claim is essentially an effort to push herself ahead of many of her peers who have superior rehire rights in the event of a vacancy.

Ms. Lamb, Ms. Dalton, Ms. Weske And Ms. Atwood

48. Ms. Lamb and Ms. Dalton testified on behalf of this group of employees. Each of these employees teaches self-contained elementary school classes. Each was probationary during school year 2007-2008 and were laid off due to the PKS reduction in force the District undertook in that school year. Each was rehired as a temporary teacher in 2008-2009 to staff self-contained elementary classrooms that were added to the District's program when enrollment increased at certain schools unexpectedly. Each signed a temporary employment contract and each was aware of the temporary nature of their employment.

49. Each of these employees contends that the District actually reestablished classes it had reduced during the 2007-2008 PKS reductions due to the increased enrollment. As such, the District reversed its PKS reduction of these classes, creating entitlements in

²⁰ Assuming one of these or one of the many others similarly situated but with more seniority than Ms. Sandfort have the credentials and competencies required to take the vacancy.

each of these employees to these positions. Essentially, the contention is that subsequent events nullified the layoff. Even if the previous reduction of these four elementary classes was nullified by the subsequent increase in enrollment, creating the need for four employees to staff the positions, none of this created a right in any of these employees to those vacancies. As with Ms. Sandfort, if these four positions are indeed legitimate vacancies and the classes are intended to continue indefinitely, there is no evidence these four have a superior entitlement to these positions than do their more senior colleagues on the same layoff and rehire list as they are. This group, like Ms. Sandfort, are in effect seeking to displace their more senior colleagues from superior positions on the District rehire list by claiming individual entitlement to these vacancies (if they are truly vacancies, which was not persuasively proved). There is no legal or factual basis to support such claims.

50. These four respondents also contend that since they were not hired to replace anyone on leave of absence or to serve in a categorically funded position, they are entitled to be classified as regular employees and cannot be temporary. The contention again disregards the settled law that the District need not engage in a one to one match up between the employees on leave and in categorically funded positions and those hired under temporary contracts. The District did not violate its aggregate entitlement for temporary employees. That ends the inquiry. The fact that the position was not a fill in for an illness or leave of absence or was categorically funded is irrelevant. Thus this portion of the claim also lacks merit.

51. Ms. Dalton added an individual twist, that of her personal understanding of the nature of the employment relationship she was undertaking. Ms. Dalton, speaking for herself and two others, testified that it was her understanding that due to the fact that she was on the rehire list, she was required to take the first position the District offered, and that if she was rehired to any position in the District within 24 months of her original layoff, she would again be probationary.

52. Ms. Dalton's personal perceptions of her legal status and the nature of her employment relationship are irrelevant. Her temporary contract, which she acknowledged signing and understanding, is the entire agreement between the parties. Her personal (and incorrect) perceptions of the legal effect of her taking the position have no force or effect. Her perception that she "had" to take the position is equally irrelevant. Although repeatedly turning down District offers of employment, even if temporary contracts, is a good way to not get called again, nevertheless there is no legal significance or implications to this claim.

Ms. Phillips, Ms. Van Winkle, And Ms. Seiber

53. The claims of Ms. Phillips, Ms. Van Winkle and Ms. Seiber are almost identical to those of Ms. Lamb, Ms. Dalton, Ms. Weske and Ms. Atwood, with the exception that each was a second year probationary teacher when laid off in 2007-2008, and each was rehired as a temporary teacher in 2008-2009 to staff the same assignments in the same classrooms they had during the previous school year when they were probationary year two employees. When rehired as temporary employees, each was told by the former Assistant

Superintendent told each that they could have their old jobs back, just as temporary employees. Each signed a temporary contract and acknowledged they understood the nature of the contract they had signed.

54. Although on its face this arrangement appears to be an abuse of the temporary contracting authorization to defeat the rights of probationary and permanent employees, and could be argued that it is an end run around being required to rehire probationary or permanent employees to staff classes that were never reduced or eliminated, the argument again requires an assumption that the one to one match of employee with particular position governs the inquiry. It does not. These employees' claims fail for the same reasons their colleagues Lamb, Dalton, Weske and Atwood's fail. If these positions are available as vacancies that can and should be filled by a permanent or probationary employee, the positions will go to the most senior credentialed and competent teachers to fill the vacancies on the District's rehire list, and not necessarily these three employees.

Mr. Jones And Mr. Piecynski

55. Mr. Jones and Mr. Piecynski claim that they cannot be classified as temporary employees because the District so classified them due to deficiencies in their credentials. They contend the *Bakersfield* decision specifically precludes classification as temporary due to credentials deficiencies.

56. Mr. Jones testified that he was hired as a temporary employee in 2007-2008 and 2008-2009. He testified that he was told he received a temporary notice of layoff because he did not have his CLAD certification that would permit him to teach English language learners. Mr. Jones also acknowledged that he was told at the time of his hiring that he was being hired as temporary because he did not have his CLAD and thus could not be placed into an assignment that required a CLAD certification.

57. Mr. Piecynski has a multiple subject credential. He also has taught in the District under two consecutive temporary contracts. Mr. Piecynski had not met the standards required by the No Child Left Behind Act (NCLB) because he did not have a mathematics authorization. He was told he could only be offered a temporary position because he did not have the necessary authorization. Mr. Piecynski spoke to the former Assistant Superintendent about taking and passing the three part math authorization examination. As school year 2008-2009 passed, Mr. Piecynski took and evidently passed the examinations.

58. Both Mr. Jones and Mr. Piecynski were offered temporary positions because they did not have the necessary qualifications and certifications required to be hired into a probationary position vacancy within the District. This is an entirely different matter than that condemned in *Bakersfield*, that of classifying an existing employee as temporary solely because the employee has provisional or lacks full credentials. *Bakersfield* holds that the District may not *solely* classify an employee as temporary because the employee lacks the requisite credentials. There was no issue in *Bakersfield* that the affected employees had the qualifications to take the positions they held. Here the employees were not qualified to take

a vacancy and were offered temporary positions while they were working on completing the qualifications necessary to staff a regular position. Once those qualifications are completed, as they evidently are for both, those employees are now eligible to be hired as probationary employees, should a vacancy exist.

59. There is another critical distinction between this District and that which existed in the *Bakersfield* district. There was no evidence that in *Bakersfield* that the district had an entitlement that permitted employment of employees such as Mr. Jones, Mr. Piecynski, Ms. Phillips and Mr. Mejia as temporaries, regardless of the status of their credentials and certifications. *Bakersfield* precludes classification of an employee with defective or incomplete credentials as temporary only if the defects and deficiencies are the only reason for the temporary status. In this instance, there are a number of fully credentialed and competent employees in the District that are also teaching under temporary contracts because that is all there is available in the District, there are many on the rehire list ahead of them who also have complete credentials and certifications, there are no permanent and probationary vacancies in the District, regardless of credentials and qualifications, and there are enough permanent and temporary employees on leaves or in categorically funded positions that these persons fall within the District's aggregate entitlement for temporary teachers. Thus, Mr. Jones, Mr. Piecynski, Ms. Phillips and Mr. Mejia are not classified as temporary solely due to their credentials and certifications problems, but because there are no available probationary or permanent positions, there are many ahead of them in seniority on the rehire list who are entitled to such vacancies before them, and the District declines to hire anyone for the few vacancies that may come open from time to time with incomplete credentials or certifications.

Ms. Phillips And Mr. Mejia

60. Ms. Phillips is a part-time Title 1 teacher who occupies a categorically funded position. She was originally hired as a temporary kindergarten teacher in 2006-2007. She was rehired as a temporary teacher in 2007-2008, but was made a probationary teacher during that school year. She too was laid off at the end of 2007-2008 due to the District's PKS reduction action that year. She was rehired as a temporary teacher and signed a temporary employment contract in September 2008.

61. Mr. Mejia is a counselor who is also occupying a categorically funded position. He was initially hired as a temporary employee in June 2007. He served throughout the 2007-2008 school year as a temporary employee and then was released at part of the District's PKS reduction.

62. Both employees' claims to probationary status are based upon a misreading of the holdings in *Bakersfield* and *Vallejo*. There respondents claim that *Bakersfield* holds that persons occupying categorically funded positions are not temporary employees "unless and until the funding for their program ends." Both of these employees are described in the first paragraph of section 44909, new employees to the District who were hired specifically to staff a categorically funded position. As set forth above, these employees are treated as if

they are temporary, as per *Zalac*, and acquire no rights until they are hired as probationary and complete one full year of probationary service per section 44918. The only rights *Bakersfield* arguably provides these employees is notice of layoff and an opportunity to participate in a hearing to determine if there is cause for the layoff, as opposed to a summary dismissal. Each of these employees received notice of layoff and a full evidentiary hearing. The due process concerns expressed in *Bakersfield* were more than satisfied. These employees are not entitled to status as probationary and are not entitled to rehire rights as if they were.

Ms. Cagney

63. Ms. Cagney's testimony was poignant and a sad commentary on the seniority system, and how that system operated to create unfairness and difficult to explain anomalies. Ms. Cagney is a seven year employee of the District who took an extended maternity leave and then leave for illness. The leaves extended beyond the 39 month limit, which terminated her seniority and status rights in the District. She returned to work in her old position teaching middle school art. She found herself subject to this layoff because she was bumped by employees with three years or less experience, and sat in the audience with another employee similarly situated to her that she taught in her earlier service to the District. She complained that the structure of the system is unfair and fails to give appropriate credit to those with more experience but who encountered a break in service. Although there were few who heard her testimony who disagreed with Ms. Cagney's complaints, nevertheless, she did not raise any factually or legally recognizable claim.

64. The District is facing financial pressure necessitating the reduction or elimination of the particular kinds of services set forth in the Resolution.

65. The Assistant Superintendent, on behalf of the District, considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

66. There was no evidence that the District proposes to eliminate any services that are State or federally mandated.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondent is factually and legally appropriate.²¹

²¹ Education Code section 44944.

2. The services the District seeks to eliminate in this matter are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not demonstrated to be arbitrary or capricious, but constituted a proper exercise of discretion.

3. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The District is facing a projected deficit in the upcoming school year, necessitating the reduction or elimination of certain services now offered in the District. The reduction in particular kinds of services proposed is necessary to avert the District operating in a deficit in the upcoming school year.

4. Education Code section 44955 requires layoffs to take place in inverse order of seniority, with some notable exceptions. “Thus, the statute provides that seniority determines the order of dismissals, and that as between employees with the same first date of paid service, the order of termination is determined on the basis of the needs of the district and its students. Senior employees are given "bumping" rights in that they will not be terminated if there are junior employees retained who are rendering services which the senior employee is certificated and competent to render. Conversely, as in this case, a district may move upward from the bottom of the seniority list, "skipping" over and retaining junior employees who are certificated and competent to render services which more senior employees are not.”²²

5. There was no evidence any person receiving a preliminary notice of layoff is being laid off in favor of a junior employee being skipped, or that any employee being laid off is entitled to bump into a position held by a more junior employee where the employee being laid off has the credentials and competence to take the position of the more junior employee being retained. There was no evidence that any certificated employee of the District is being retained to provide a service any of the respondents are certificated and competent to render.

6. Legal cause exists pursuant to Education Code section 44949 and 44955 for the Folsom-Cordova Unified School District to reduce or discontinue 56.80 FTE of particular kinds of services, as set forth in the District’s Resolution No. 03-05-09-20. The cause for the reduction or discontinuation of particular kinds of services relates solely to the welfare of the schools and the pupils thereof. Legal cause therefore exists to sustain the Accusation. The Board may give respondents final notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority.

²² *Alexander v. Board of Trustees of the Delano Unified School District* (1983) 139 Cal. App. 3d 567, 571-2, *Moreland Teacher’s Association v. Kurze* (1980) 109 Cal.App.3d 648, 655.

